



LOSS PREVENTION

AXIS PRO's
Media Law 101

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INTRODUCTION

Should you publish, can you publish, and – most important – will you be sued? Defamation, privacy, copyright, and trademark law are complicated and dangerous areas for publishers, journalists, ISPs, and advertisers, particularly in an evolving media marketplace saturated by blogs and other web based publications. This booklet is meant to give a brief overview of these areas of the law for the layperson, and to identify specific claim examples as illustrations of the risks. Of course, there is no substitute for hands-on legal advice, as every situation is different, and each jurisdiction has its own set of rules. When in doubt, ask a lawyer. We hope this booklet will give you a better idea of the questions to ask.

DEFAMATION:

Defamation is the legal term for speech that tends to expose a person to public hatred, contempt or ridicule or to injure him in his business or occupation. Speech can consist of words, but it can also be art, cartoons, or other forms of expression. Some courts use

the term “libel” for injurious speech that is printed or broadcast, and the term “slander” for injurious words that are spoken. This distinction, however, is becoming obscure, and we will refer to both libel and slander as “defamation.”

DEFAMATION: Elements

In general, to establish a cause of action for defamation, a plaintiff must plead and prove that the speech at issue: (1) was published, (2) identifies him, (3) is false, (4) damages his reputation; (5) is made with fault; (6) and without any applicable privilege.

The first element of a defamation claim is **publication**. Defamation can only occur when somebody besides the writer and the subject has read the words at issue. A plaintiff can satisfy the element of publication as soon as the words are read or heard by a third party. Authors and publishers can obviously be held liable for the material they distribute. Publication may be harder to prove, however, if the insured is an Internet Service Provider. A federal statute – the Communications Decency Act – protects Internet Service Providers from liability for the publication of defamatory material posted on or sent through their technology. In addition courts normally will not find bookstores and newsstands liable for defamation unless they knew, or had reason to know, that the material they sold was defamatory.

Publication also includes the “republication” of a defamatory statement. For example, a newspaper is not immune from a defamation lawsuit if the newspaper publishes a letter to the editor that falsely accuses someone else of a crime. In other words, an insured can be liable for defamation if it publishes a defamatory statement made by others. Various exceptions apply to this general rule, however, and are discussed below.

The second element of a libel claim is **identification**. To satisfy this element, a plaintiff must prove that the allegedly defamatory statement was “of and concerning” the plaintiff. In other words, the plaintiff must be able to prove that a third party would understand the allegedly defamatory statement as referring to the plaintiff. In general, this is not difficult to do, and can be accomplished even where the plaintiff is not named or seen, as long as the information provided about the plaintiff is specific enough to identify him to some third party. A plaintiff cannot prove identification, however, if the statement in question identifies a large group or class of people. Thus, it is impossible to defame “all Royals fans,” or “all Republicans.”

DEFAMATION: Elements - cont'd

The third element of a defamation claim is **falsity**. To determine whether the statement in question is false, courts will look at the words in their plain and ordinary meaning. Courts will also look at the article as a whole. A common misperception of the falsity requirement is that opinions cannot be false and therefore are not defamatory. While opinion is generally protected, the United States Supreme Court has held that an opinion can state an implied fact that could be libelous. For example, saying that "It is my opinion that Scott is a crook," is not protected opinion. The "opinion" implies a factual statement about Scott (i.e., that he is a crook) that could be false and therefore defamatory. Whether an "opinion" implies a factual statement is a question that can usually be resolved, in the first instance, by the court.

The fourth element of a libel claim is proof of **damages**. In general, the allegedly libelous statement must cause a provable actual injury. Actual injury could be in the form of out-of-pocket expenses, loss of reputation, mental suffering, etc. The key is that the plaintiff must be able to prove some sort of actual injury. However, many courts allow juries to "presume" that a plaintiff has been damaged if a statement is found to have injured a plaintiff's reputation, and to award damages that the jury thinks fairly compensates the plaintiff for that injury.

The fifth element of a libel claim is **fault**. This element is usually the most crucial element because the burden of proof will change based on the plaintiff's status – i.e., whether the plaintiff is a public figure, public official

or a private individual. In general, "public" people need to show a higher standard of fault than "private" people. In *New York Times Co. v. Sullivan*, the United States Supreme Court held that a public official cannot prevail in a defamation claim unless the public official can prove that the libelous statement was published with "actual malice." To prove actual malice, a plaintiff must prove that the defamatory material was published with actual knowledge of its falsity or with reckless disregard for the truth. The court must look at the state of mind of the publisher at the time of publication. Whether the defendant might have done some further investigation, or later learned that the statement was false is irrelevant.

The actual malice requirement applies to both public officials (that is any person involved in the government who has, or appears to have, substantial responsibility or control over public affairs) and public figures (generally, a person who has put herself into the limelight either in general or in the context of a particular public dispute). A person can be an "involuntary" public figure if he is drawn into some controversy despite his desire to remain private (as long as it is not the defendant's action that draws him into the controversy by publishing, for example, defamatory material about him).

In contrast to public officials and public figures, the private figure plaintiff does not need to prove the publisher acted with actual malice. The United States Supreme Court has left it to the various states to define the burden of proof for private figure plaintiffs.

Most have determined negligence is the standard that must be met. In other words, the plaintiff must prove the publisher should have known, using ordinary standards of care, that the statement at issue was false or could create a false impression.

As one would expect, this fifth element is the true battleground in a majority of libel

cases. If the plaintiff must prove actual malice, the plaintiff must overcome a substantial burden of proof. If a reporter is not purposefully avoiding the truth when she pursues a story – even if she misses a crucial fact – the reporter will likely not be acting with actual malice.

DEFAMATION: Defense

In a defamation action, truth is an absolute defense. In general, a defendant need not prove that the statement at issue is literally true in every respect – only that it is substantially true, or that the “gist” or “sting” of the statement is accurate. The burden of proving falsity, however, always rests with the plaintiff.

Certain privileges may also insulate an insured from liability. For example, most state laws allow a conditional privilege to report fairly and accurately on judicial or legislative proceedings. If defamatory statements

are made during those proceedings (by the participants in the proceeding), the publisher will not be held liable for those statements; however, the publisher must have accurately reported on the proceedings. This privilege may also apply to quasi-judicial proceedings and public records. This is commonly referred to as the Fair Report Privilege.

While it may help mitigate damages, a retraction is not a defense to libel and not grounds for dismissal of a libel suit.

DEFAMATION: Claims Example

In 2005, a former girlfriend of rock legend Gene Simmons filed a defamation lawsuit based on a VH1 documentary on Simmons and his band KISS. The documentary, entitled “When KISS Ruled the World,” repeatedly showed a picture of the plaintiff during a segment about Simmons’s repeated casual sexual encounters. The plaintiff, Georgeann Walsh Ward, alleged she had been in a monogamous relationship with Simmons that pre-dated the formation of KISS. Shortly after the relationship with Simmons ended, the plaintiff met her current husband.

At the beginning of the segment in which Simmons details his sexual promiscuity, the plaintiff’s picture follows the on-screen caption “24 Hour Whore.” Simmons then says “I was a 24 hour whore. All I ever thought about was sex.” He then goes on to detail some of his encounters.

Plaintiff brought a defamation action, and defendant moved to dismiss. The court denied defendant’s motion, and held that the “juxtaposition of plaintiff’s photographs alongside commentary by Simmons and others recounting Simmons’s repeated casual sexual encounters with various female strangers is reasonably susceptible of a defamatory meaning.” The court went on to reason that a reasonable viewer could “conclude that plaintiff was a woman who would regularly make herself available to Simmons, at his beck and call, for casual sexual encounters.”

The court rejected the defendant’s argument that Simmons was simply describing his own conduct and not that of plaintiff. Primarily, the court rejected the argument because of the inference, created by the photographs and the commentary, that the plaintiff participated in the same activities.

INVASION OF PRIVACY:

There are four general invasion of privacy torts. They are: (1) False Light; (2) Commercial Misappropriation; (3) Intrusion Upon Seclusion; and (4) Publication of Private Facts.

INVASION OF PRIVACY:

False Light

To cast a person in a false light is to give publicity to a person in a manner that would be highly offensive to a reasonable person. False light is similar to defamation, and often pleaded in conjunction with a defamation claim. The primary difference between the two is that false light is designed to compensate for hurt feelings rather than reputation.

INVASION OF PRIVACY:

False Light: Elements

The elements of a false light claim are similar to a libel claim. First, the statement at issue must be published. Because false light claims focus on the subjective privacy of the individual, and seeks damages for alleged mental and emotional suffering, false light requires more publicity than libel. At least a significant portion of the general public must have been exposed to the communication.

The second element of a false light claim is that the information must be made about the plaintiff. The third element of a false light claim is that the statements at issue must be false. The false statements must be reasonably understood to state or imply facts about the plaintiff. Lastly, most jurisdictions require that the matter communicated to the public be

highly offensive to a reasonable person. The publication will be deemed offensive when the defendant knows that a reasonable man would feel seriously offended and aggrieved by the publicity. If the false information would not be seriously offensive, the plaintiff will not be able to establish a false light claim.

Finally, if the statements concern a matter of legitimate public interest, the information must have been published with actual malice before the plaintiff can recover for false light. In general, whether or not the plaintiff is a public official is immaterial for this analysis. Some states, however, will apply the actual malice test only when the plaintiff is a public figure.

INVASION OF PRIVACY:

False Light: Defenses

Despite the subtle differences between a false light claim and a libel claim, the defenses are primarily the same. Most important is the “lack of actual malice” defense described above. Newsworthiness and the Fair Report privilege is also a defense to the false light tort.

INVASION OF PRIVACY:

Commercial Misappropriation

The tort of commercial misappropriation is in constant flux with different courts charting different courses in this area of law. Generally, however, when an insured uses the name or likeness of another for the insured’s own commercial benefit, the insured can be held liable for commercial misappropriation.

INVASION OF PRIVACY:

Commercial Misappropriation: Elements

There are two key state statutes that are particularly relevant to this area of the law. In New York, the use of plaintiff’s name, portrait, picture, or voice is prohibited for advertising or trade purposes, unless there is written consent. In California, state law prohibits the use of a person’s identity or persona for the defendant’s advantage, commercial or otherwise, unless consent is obtained from the plaintiff. To show “use or benefit for the defendant,” a plaintiff must show that the defendant knowingly used the likeness of the plaintiff for the purposes of advertising or solicitation. The plaintiff must also show a direct connection between the use and the defendant’s commercial purpose.

INVASION OF PRIVACY: Commercial Misappropriation: Defenses

The most common defense to a commercial misappropriation claim is newsworthiness. Generally, the unauthorized use of a person's name or likeness in matters of public interest is permissible, provided that the person's likeness bears a real relationship to the subject matter of the publication, and is not an advertisement in disguise.

The boundary between newsgathering and commercial exploitation, however, can be a

fine one. For example, if a newspaper were to advertise its Sunday sports edition with a full length photograph of a football player, the athlete might have a claim for commercial misappropriation depending on whether the advertisement was viewed by the court as more similar to a poster (a commercial use) or simply an announcement for a story about the football player's outstanding game (a protected use).

INVASION OF PRIVACY: Intrusion Upon Seclusion

Intrusion Upon Seclusion is a cause of action designed to protect the plaintiff from the intentional, highly offensive intrusion into the plaintiff's solitude or seclusion or her private affairs or concerns. Unlike the other invasion of privacy torts, no publication is necessary to give rise to this claim.

INVASION OF PRIVACY: Intrusion Upon Seclusion: Elements

Any type of breaking and entering, hidden surveillance, or unauthorized presence in a private space constitutes an intrusion upon seclusion. To sustain a cause of action, the intrusion does not need to be a physical intrusion – it could be by electronic or photographic means. Moreover, publication is not necessary for the plaintiff to sustain his cause

of action. The mere act of intrusion gives rise to the claim.

The intrusion, however, must be an intrusion into a matter the defendant has a right to keep private. Moreover, the intrusion must be by use of a method that is objectionable to a reasonable person.

INVASION OF PRIVACY: Intrusion Upon Seclusion: Defenses

A common defense to an Intrusion Upon Seclusion claim is the defense of consent. The right to privacy can be waived either expressly or through implied consent. For example, a court found a woman gave her implicit consent when she came home and did not complain about a cameraman on her property. In the intrusion context, acting in a manner inconsistent with a reasonable expectation of privacy may often be construed as giving implicit consent to having one's privacy invaded.

Another common defense is newsworthiness. Although courts will weigh the newsworthiness against the offensiveness of the intrusion, a legitimate public interest in a matter may often outweigh any claimed privacy interest a plaintiff may have. In that respect, public figures and officials such as celebrities and politicians may have a difficult time bringing an intrusion claim because of the public interest in their lives.

INVASION OF PRIVACY: Publication of Private Facts

The publication of true, but private, facts about an individual can give rise to a cause of action for publication of private facts if the matter publicized is: (a) highly offensive to a reasonable person and (b) not of legitimate concern to the public.

INVASION OF PRIVACY: Publication of Private Facts: Elements

First, a plaintiff must prove disclosure to the public in general, or to a large number of people. There is no magic number for how many people constitute a large enough group. Disclosure of an item to a small number of people, with reasonable certainty that they will spread it to others, has been held to be a "public" disclosure. Disclosure to a select group of people, such as employees, bosses, creditors, etc. may also be enough to satisfy the publicity element of the tort.

Second, the disclosure must identify the plaintiff. The question here is whether the

plaintiff would reasonably be understood by recipients of the offending communication to be the person to whom it relates.

Third, the facts disclosed must be private, not public. A plaintiff cannot claim a right of privacy if the facts have already been made public. Anything that happens in a public place (e.g., a park or stadium) will usually not be considered private.

Finally, the matter made public must be one that would be offensive and objectionable to a reasonable person under ordinary circum-

stances. The mere fact that a person may not want certain things publicized is not enough – on its own – to satisfy this element of the

tort. Typically, a court will find offensiveness in conduct that it finds unconscionable.

INVASION OF PRIVACY:

Publication of Private Facts: Defenses

As one would expect, truth is not a defense for this claim. Consent, however, is a defense to claims for publication of private facts. A person can give either his express consent or his implied consent for the release of private facts. A 911 call to the police is a good example of implied consent. Newsworthiness is the other common defense to claims for publication of private facts. Even if the media discloses a private fact about a person that

a reasonable person would find offensive, if the matter is newsworthy there can be no claim for publication of private facts. The line is drawn where the publication goes from newsworthiness to mere sensationalistic prying. Thus, as with the intrusion claim, public figures and public officials will have a difficult time making out a right to privacy claim.

INVASION OF PRIVACY:

Claim Example

On November 17, 2000, WJRT-TV in Flint, Mich., was filming a paramedic unit as part of the documentary “A Brush With Death, a Night in the E.R.” That night, Jessica Stratton and a friend were involved in a car accident while driving home from a bar. Stratton, who was driving the first car, had consumed alcohol and marijuana. She was also taking the medication Prozac at the time. After Stratton was taken to the hospital she refused to sign a release form allowing WJRT-TV to use her name and likeness. Without the release, WJRT-TV chose to alter the footage to obscure Stratton’s face. During the events on tape, a doctor refers to Stratton as “Jessie” and can later be heard saying “No allergies, on Prozac.”

infliction of emotional distress, intrusion upon seclusion, disclosure of embarrassing private facts, and false light. In 2003, the trial court granted WJRT-TV’s motion for summary judgment.

In 2005, the Michigan Court of Appeals overturned the trial court’s decision as to Stratton’s causes of action for intrusion upon seclusion and disclosure of private facts. The court ruled that the fact that Stratton was taking Prozac may not have been of legitimate public interest. Moreover, the court found that WJRT-TV’s decision to keep filming Stratton after she explicitly refused to sign a release could be objectionable to a reasonable person.

Among her numerous causes of action, Stratton sued for defamation, intentional

TRADEMARK INFRINGEMENT:

A trademark is a distinctive work, logo, design, or some combination by a manufacturer used to identify its goods and distinguish them from others. A trademark identifies the source of the goods and assures purchasers of a certain degree of uniformity and quality.

TRADEMARK INFRINGEMENT: Elements

Trademarks are protected under both state and federal law (by statute and by the common law). Generally speaking, a successful trademark claimant must prove the defendant used or imitated its trademark on goods in such a manner that the purchasers of the goods were deceived or are liable to be deceived, and will be induced into believing that the infringing goods were manufactured and sold by the owner of the trademark.

Federal protection for a trademark is provided under the Lanham Act. This provides nation-wide protection of trademarks. To bring a claim under the Lanham Act, the owner of the trademark must show: (a) a valid mark entitled to protection, and (b) actions

by the infringer likely to cause customer confusion. The owner of the mark need only demonstrate a likelihood of confusion, not actual confusion. If the products are unrelated, there is less of a chance of a possibility of customer confusion, even if the trademarks look very similar.

Courts use the following factors that help to determine whether there exists a likelihood of confusion: (a) The degree of similarity between the marks; (b) the intent of the alleged infringer in adopting its mark; (c) evidence of actual confusion; (d) the degree of care likely to be exercised by purchasers; (e) the strength or weakness of the marks; and (f) the quality of the defendant's product.

TRADEMARK INFRINGEMENT: Defenses

There are four general defenses to a trademark claim. The first is fair use. The fair use defense is available, however, only in actions involving descriptive terms. One party's exclusive right to use a trademark will not prevent others from using that word in good faith and its descriptive sense. A common

example of this is comparative advertising ("Pepsi drinkers prefer Coke!").

A second general defense is the good faith or innocent infringement defense. If the trademark was adopted without knowledge of the registrant's prior use and has been

continuously used, the defendant's good faith can be a defense. To prevail on this defense, the defendant should have performed a trademark search before using the mark, relied on advice of counsel, or have a trademark that reflects the product's characteristics.

Third, the defendant can assert that the plaintiff has acquiesced to other uses of the mark. The defendant must prove that the trademark holder actively represented that it would not pursue a claim against the defendant, that the delay between this representation and its subsequent assertion of rights was not excusable, and that the delay by the

plaintiff caused the defendant undue prejudice. This defense, if successful, deprives the trademark users of a remedy for infringing uses by others.

Finally, the defendant can assert the defense of laches. This defense requires a delay in asserting trademark rights, a lack of excuse for the delay, and undue prejudice caused by the delay. The laches defense applies only when the original user knowingly allows the trademark to be used for an extended period of time. The length of time begins when the plaintiff knew or should have known about the infringement.

TRADEMARK INFRINGEMENT: Claim Example

Since 1992, Bosley Medical Institute has offered hair replacement therapy. In 2001, it obtained a trademark for "Bosley Medical." In 2000, however, a dissatisfied customer purchased the Internet domain name www.BosleyMedical.com. The dissatisfied customer, Michael Kremer, began posting information on his website about a 1996 investigation by the Los Angeles County District Attorney in Bosley Medical. He also posted information that was highly critical of Bosley Medical. Kremer, however, earned no revenue from the site and sold no goods or services. Bosley Medical sued Kremer, alleging trademark infringement, dilution, unfair competition, various state-law claims, and libel.

After the trial court entered summary judgment on behalf of Kremer, Bosley Medical filed an appeal. As to the trademark claim,

the court of appeals ruled that Kremer's use "simply cannot mislead consumers into buying a competing product – no customer will mistakenly purchase a hair replacement service from Kremer under the belief that the service is being offered by Bosley. Neither is Kremer capitalizing on the good will Bosley has created in the mark. Any harm to Bosley arises not from a competitor's sale of a similar product under Bosley's mark, but from Kremer's criticism of their services."

With respect to the Bosley Medical Institute's "anti-cybersquatting" claim, however, the court of appeals overturned the summary judgment ruling. The court said it remained to be seen whether Bosley Medical Institute could establish Kremer had registered the domain name with a bad-faith intent to profit from the name.

COPYRIGHT INFRINGEMENT:

A copyright is the protection of an original creative work. Under copyright law, the creator has the exclusive right to display the work, reproduce the work, distribute the reproductions of the work, perform the work publicly, make derivative works, and authorize others to do any of the above. A copyright is obtained as soon as the original work of authorship is fixed in any tangible medium of expression. It does not need to be “registered” or “licensed” in any way. “Original” means that the work was created by the author and contains some minimal degree of creativity. The work is “fixed” when its embodiment is sufficiently permanent or stable to permit it to

be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

It is important to note that facts cannot be copyrighted. For example, the listing of names in a phone book is not copyrightable. Ideas can also not be copyrighted. While the particular means of expression of an idea may be copyrightable, the idea itself cannot.

A copyright infringement is the violation of any one of the copyright holder’s exclusive rights.

COPYRIGHT INFRINGEMENT: Elements

To sustain a cause of action for copyright infringement, a plaintiff must first prove ownership of a valid copyright. Ownership is shown by proof of originality, copyrightability, and compliance with the relevant statutes.

While “ownership” may seem simplistic, numerous legal issues arise in this context. For example, if there is one or more author, they are considered co-owners in a joint work. Both authors must make an original contribution that could stand alone as copyrightable. When material is made within an employment relationship, the person for whom the work was prepared is considered the author – not the person who “created” the work.

If a work is derived from another work, only the derivative work will only qualify for

copyright protection and the author must have made a substantial contribution to the original work such that the derivative work represents an original work of authorship in and of itself. A compilation is a work formed by the collection of preexisting materials. This differs from a derivative work in that a compilation does not involve any change to the underlying works, while a derivative work requires the underlying work to be adapted in some way.

Once ownership is established, the owner has five rights in the work: (1) the right of reproduction; (2) the right to produce derivative works; (3) public distribution; (4) public performance; and (5) public display.

A copyright infringement claim will be sustained if the defendant copied elements

that were original. While there is rarely evidence of direct copying, the plaintiff can prove copying by showing the infringer had access to the copyrighted work. In this case, wide publication of a work could be enough to show access. The plaintiff can also prove copying by demonstrating substantial similarity to the copyrighted work. In determining whether works are “substantially similar,” courts will not look at those elements that are not original to the work, such as scenes a faire, which one court has described as “those elements that follow naturally from the

work’s theme, rather than from the author’s creativity.” Ideas are not copyrightable; however, one can copyright the expression of those ideas. Thus, as Judge Learned Hand famously noted, at some level of abstraction anything could be copyrightable, which is not the intent of the law. In making its determination, a court will consider whether the ordinary observer would recognize the copy as having been appropriated from the copyrighted work, and whether the infringement can be found even if only a small part of the work is copied.

COPYRIGHT INFRINGEMENT: Defenses

The most common defense in a copyright infringement claim is the defense of fair use. For this defense a court will look at, first, the purpose and character of the use. In general, a nonprofit use will weigh more for a defendant than a commercial use. Second, a court will look at the nature of the copyrighted work used. Here, the court will look at the type of the work used and how this work is traditionally treated. Third, a court will look at the amount of the work used in relation to the copyright as a whole. Size, however, does not matter exclusively as a small portion of extreme importance may be enough to satisfy this requirement. Finally, the court will consider the effect of the use upon the potential value of the work – does the use, for example, reduce the market for purchasers of the original work? Courts often consider the last factor the most significant.

The fair use defense applies only to criticism, comment, news reporting, teaching, scholarship, or research. The fair use

defense balances the need to provide an individual sufficient incentive to create public works with the public’s interest in the dissemination of information.

A second common defense is the invalidity of the underlying copyright. A defendant can prove the invalidity of the underlying copyright with evidence of abandonment, lack of originality or false information in application for copyright.

A third common defense is the affirmative defense of independent creation. Here, defendant must prove that the original work was not copied, rebutting the plaintiff’s case. Independent creation can be proved by a showing of lack of access to the plaintiff’s work, lack of knowledge of the plaintiff’s work, or by showing a common source for both products.

Much like a trademark claim, laches is another common defense to a copyright claim. An unreasonable or inexcusable delay in

COPYRIGHT INFRINGEMENT: Defenses - cont'd

enforcing the copyright may result in the claim being thrown out as long as the delay resulted in prejudice to the defendant for relying upon it. The defendant may also show that the plaintiff knew of the defendant's infringing acts, consented through inaction or (express or implied) acquiescence, and the defendant relied on the inaction or acquiescence.

Finally, the statute of limitations is also a common defense. Copyright infringement

has a statute of limitations of three years. No action can be maintained if it commences three years after the claim accrued. Only the last infringing act, however, need be within the three years to permit recovery for all infringing acts. The statute of limitations begins to run only when the plaintiff knew or should have known of the infringement.

COPYRIGHT INFRINGEMENT: Claim Example

In 2006, a California federal court denied the San Jose Mercury News's motion for summary judgment in a copyright claim brought by photographer Christopher Harris. The photograph at issue was included in the book "The Life You Save May Be Your Own: An American Pilgrimage." Harris's agreement with the author of the book specifically prohibited the use of the photo for promotional purposes. Nevertheless, the photograph was included in the publicity package promoting the book.

When the Mercury News reviewed the book, a significantly cropped version of the picture was published with the review. Harris sued the Mercury News for copyright infringement, claiming it had not paid him a license fee, and possibly deprived him of license fees from other newspapers. Despite the Mercury News's argument that use of the picture in the book review had no impact on Harris's future licensing or sale of the picture, and thus was protected by the fair use doctrine, the judge denied the Mercury News's motion for summary judgment.

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