Privacy Law in New Mexico

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Invasion of Privacy -- Topics

- Overview
- Intrusion Upon Seclusion
- False Light
- Public Disclosure of Private Facts
- Appropriation of Name or Likeness
- Related Rights of Publicity and Copyright
Overview (1)

• Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), proposes “right to be let alone” as separate tort

• Many states now recognize tort

• Also read into “penumbras” of Bill of Rights and “concept of liberty” guaranteed by the Fourteenth Amendment by the Court in *Roe v. Wade*, 410 U.S. 113 (1973)
Overview (2)

- Person’s right of privacy violated by:
  - (1) Intrusion upon seclusion;
  - (2) Placing person in a false light;
  - (3) Public disclosure of private facts; or
  - (4) Appropriating name or likeness for benefit.
- Restatement (Second) of Torts § 652A (1977)

- Right is personal; does not survive death
- Person may license a privacy right
Overview (3)

• Damages Available
• Compensatory - Emotional Distress
  – Anxiety, embarrassment, humiliation, depression, and anguish due to violation
  – Presumably, any bodily injury due to distress
• Punitive - Usually Available
• Attorney’s Fees - Usually Not Available
Intrusion Upon Seclusion (1)

- Restatement (Second) of Torts § 652B
- Occurs when a person intentionally intrudes into a place or into the affairs of another person in which that person has an expectation of privacy and when such intrusion is highly offensive to a person of ordinary sensibilities
Intrusion Upon Seclusion (2)

- Physically intruding into secluded place
- Overseeing or eavesdropping on private affairs of another
- Investigating into a person’s private concerns
- NOT by taking photograph in public place
- Information need not be published
False Light (1)

- Restatement (Second) of Torts § 652(E)
- Occurs when false or misleading representation or imputation published which places the person in a false light which would be highly offensive to a reasonable person
False Light (2)

- Person’s picture placed in conjunction with offensive story having no relation to person
- Generally NOT when publisher edits a factually accurate video tape and only displays selected portions
- Constitutional limitations on defamation claims generally apply
Public Disclosure of Private Facts (1)

- Restatement (Second) of Torts § 652D
- Violated when private facts about a person are publicly disclosed, being highly offensive to ordinary person
Public Disclosure of Private Facts (2)

- Nude pictures
- Certain medical procedures (mastectomy)
- Certain afflictions (e.g., AIDS)
- NOT photo taken in public place
- NOT if business interest/limited disclosure
- Regarding public figures or matters of public concern, greater leeway
Appropriation of Name or Likeness (1)

- Restatement (Second) of Torts § 652C
- Occurs when one’s name or likeness is appropriated for another’s benefit
- Dispute as to whether benefit must be commercial
  - Blends into Right of Publicity if so
  - Restatement (Second) of Torts § 652C comment d supports commercial requirement
Appropriation of Name or Likeness (2)

- Sub-tort sometimes called simply “Appropriation” or “Misappropriation”
- Relationship to right of publicity
  - Some courts treat identically
  - Some distinguish on damages available (commercial value of persona v. mental injury)
  - Others point to non-commercial benefits may be covered by appropriation tort
Related Right of Publicity (1)

- Involves control over legal right to exploit name, image, or character traits of a living (and in some states, dead) person
- Prevents unauthorized commercial use of:
  - name;
  - likeness (including lookalikes (Vanna White));
  - voice (soundalikes (Bette Midler)); or
  - other identifying feature (“Here’s Johnny!”).
Related Right of Publicity (2)

- Varies widely between jurisdictions
- Usually a matter of state common law (NM)
- Some states have statutes of varying scopes (e.g., CA, FL, IL, IN, KY, MA, NB, NV, NY, OH, OK, PA, RI, TN, TX, UT, VA, WA, WI)
- OK to have incidental use in content (e.g., panning crowd in public places)
- But best to get waiver, if possible
Related Right of Publicity (3)

• Usually joined with right of privacy claim

• Advertising v. Protected Uses
  – Advertising is per se commercial use
  – Reporting of news considered not and is protected by First Amendment
  – Multitude of gray areas
Related Right of Publicity (4)

• Gray Area Questionnaire
  – Magazine cover showing parade  OK
  – News account placed in movie  OK
  – Likeness of Ali in Playgirl cartoon  BAD
  – Statistical information on athlete used in board game  BAD
Related Right of Publicity (5)

• **Survival**
  - Some states, expires like privacy rights at death (e.g., New York and Ohio) (NM??)
  - Others, continues after death
    • Common law, NJ (Elvis Presley)
    • Statute, CA (50 years), FL (40 years), TN (10 years)

• **Transferability**
  - Usually freely assignable and licenseable
Related Right to Copyrights

- Title 17 of the United States Code
- For certain “works of authorship”, grants exclusive rights to the author to make and distribute copies of the work
- Limited “Fair Use” exception provided for extracts -- issue often boils down to effects of copying on market for original work
- NOT extracts of unpublished Ford letters
New Mexico

- Essentially all common law
- No Uniform Jury Instructions (UJIs)
- Only single cause of action for tort founded on single publication or exhibition or utterance -- NMSA § 41-7-1
- Eleven cases on privacy and publicity rights next discussed in chronological order
New Mexico Cases (1)

- *Gruschus v. Curtis Pub. Co.*, 342 F.2d 775 (10th Cir. 1965)
  - Article giving false impression that plaintiff’s deceased father bribed public officials
  - Invasion of privacy claim did not survive death of father
New Mexico Cases (2)

  - Verbatim publication of brief juvenile court record involving minor sexual assault of another minor
  - Law at time made such records public; therefore publication privileged
  - First reported case in U.S. of privacy invasion by victim of sexual assault against media?
New Mexico Cases (3)

  - Article reconstructing in detail events around murder of plaintiff’s husband
  - What is newsworthy within article is question of fact, so summary judgment was improper
New Mexico Cases (4) - Part 1

  - Follows Restatement of Torts § 867
  - Sketch based on photograph of healthy Navajo child associated with article on cerebral palsy
New Mexico Cases (4) - Part 2

  
  - “We cannot equate an offense to persons holding a traditional belief with an offense to persons of ordinary sensibilities” in that tort relates to customs of New Mexico
  
  - Defendant must realize offensiveness
New Mexico Cases (5)

  
  – Publication of officers’ addresses newsworthy as necessary to properly identify individuals part of newsworthy event

  – Favorably cites four-part definition of right of privacy of *Prosser on Torts* § 117 (4th ed. 1971)
New Mexico Cases (6)

  - Publication of minor’s name as victim of attempted criminal sexual act held privileged as appearing in public record
  - Followed *Hubbard* despite subsequent passage of Children’s Code, as noted by Judge Sutin in special concurrence
New Mexico Cases (7) - Part 1

  - Navajo photo taken with permission published without permission
  - Invasion of Privacy is “not one tort, but a complex of four”, per Prosser § 117 (4th ed. 1971)
New Mexico Cases (7) - Part 2

  - Misappropriation of likeness is an action for injury to property for statute of limitations purposes
  - Further, Only applies to a commercial use, citing Restatement (Second) of Torts § 652C comment d
New Mexico Cases (7) - Part 3

  - No public disclosure of private fact because photograph exposed no more to public eye than exposed to one encountering plaintiffs in public; also followed *Blount*
  - Further, subjective knowledge of offensiveness irrelevant, distinguishing *Bitsie* as based on Restatement of Torts § 867
New Mexico Cases (8)

  - Follows Restatement (Second) of Torts
  - Factually correct notice regarding employee actions corrected after termination
  - Summary judgment reversed for false light despite absence of express false statements
New Mexico Cases (9)

  - False light close cousin of defamation
  - Public figures involved in matters of public concern protected by same constitutional limitations as with defamation
  - Report to IRS not “publicity” as required for false light sub-tort
New Mexico Cases (10)

  - “[L]ike defamation, false light invasion of privacy requires proof of a false statement of fact”, contradicting *Moore*

- 1970’s interviews regarding gender change operation withdrew same from being a private fact
New Mexico Cases (11)

  - Mailing of letter to Secretary of State regarding informal admonition of attorney was not a public disclosure
  - Plaintiff had no “special relationship” with Secretary of State’s office despite having a friend who worked there
Internet Privacy Law -- Topics

- Privacy Related Computer Crimes
- Threats to Privacy
- Defamation On-Line
- Trade Secrets
- Jurisdiction
Privacy Related Computer Crimes (1)

• State
  – Computer Abuse -- NMSA § 30-45-4
    • Willfully and without authorization altering, changing, damaging, disrupting, or destroying any computer, network, software, database, . . .
  – Dissemination of material harmful to minor by computer -- NMSA § 30-37-3.2
    • Knowingly and intentionally engaging in communication with a minor depicting nudity, sexual intercourse or “any other sexual conduct”
Privacy Related Computer Crimes (2)

• Federal - Miscellaneous
  – Wire Fraud, 18 U.S.C. § 1343
    • Scheme or artifice to defraud
  – Obscenity, 18 U.S.C. § 1465
    • What is the applicable community standard?
  – Copyright Infringement, 17 U.S.C. § 506
    • Willful infringement, retail value above $1,000
    • Must be for purpose of “commercial advantage” or “private financial gain”
Privacy Related Computer Crimes (3)

  – Electronic Communications Privacy Act (ECPA)
  – Intentional access without authorization a facility through which an electronic communication service is provided; or
  – Exceeds authorization and obtains, alters, or prevents authorized access to e-mail
  – Civil Action, may receive attorney’s fees and punitive damages, 18 U.S.C. § 2707
Threats to Privacy (1)

- Unsolicited Email (Spam)
  - No different than junk mail? No, because source of viruses, spyware, phishing attacks. Use filters . . .
- Computer Hacking
- Ease of Copying Materials
- Access of Web Sites recorded
  - Assume you are identifiable
  - Use http://www.anonymizer.com
Threats to Privacy (2)

- Countermeasures
  - Encryption: Digital Certificates; Pretty Good Privacy (http://www.pgp.com)
  - Baseline Computer Security: Hardware firewall + security software suite + ?
  - Windows Secrets Newsletter (http://www.windowssecrets.com)
  - Electronic Privacy Information Center (http://www.epic.org), re privacy rights issues
Defamation On-Line

- In short, rules not really any different (same with copyright law)
- E-mail like private snail mail
- Newsgroups and blogs are public forums
  - http://groups.google.com
  - http://www.blogger.com
- Web sites like poster on wall, may be mix of advertising, news, and combo items
Trade Secrets

• Trade secrets protected by state and federal statute and common law
• In short, anything held secret which grants a competitive advantage over competitors
• Technological processes, formulas, customer and supplier lists, etc.
• Watch for accidental exposure over Internet via Web Site or security glitch
Jurisdiction

• Early cases suggested that having a website available everywhere makes one subject to personal jurisdiction everywhere.

• Newer cases seem to be focusing on whether commercial activity invited interactively.
Printed Sources


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- Electronic Privacy Information Center (http://www.epic.org) (good bibliography)
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