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# Data Protection & Privacy 2026

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**Chambers and Partners**

165 Fleet Street

London

EC4A 2AE

**Tel** +44 20 7606 8844

**Fax** +44 20 7831 5662

**Web** [www.chambers.com](http://www.chambers.com)

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## Trends and Developments

Contributed by:

Alan Behr

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## Author



Alan Behr is a senior partner at Phillips Nizer LLP who concentrates his practice on intellectual property, technology, fashion and the arts. He has long served as a leader within the International Trademark Association,

working in a variety of prominent committee roles that reflect his prominence in the global trade mark community. A widely recognised thought leader, Alan has written and spoken extensively on trade mark, copyright and business relationship issues, and has edited or contributed to six scholarly books on intellectual property law and related topics. He is also a fine-art photographer, with images in the permanent collections of four major museums as well as in corporate and private collections.

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## Phillips Nizer LLP

485 Lexington Avenue, 14th Floor  
New York, New York 10017  
USA

Tel: +1 212 841 0552  
Fax: +1 212 262 5152  
Email: [abehr@phillipsnizer.com](mailto:abehr@phillipsnizer.com)  
Web: [www.phillipsnizer.com](http://www.phillipsnizer.com)



## Time Exposure: the Evolution of Privacy in New York Photography Cases

The United States of America is unique in its approach to privacy in key ways. Because of its federal system, whatever elements of the law are not expressly made national by the Constitution or by constitutionally permitted federal pre-emption will remain the subject solely of the states and territories. The second component is cultural – a question that itself can be divided for convenience into two parts: the first is the American passion for individual liberty, something that again is embedded in the Constitution and, indeed, in the very Declaration of Independence (1776) by which the nascent country sought to define itself as an autonomous nation; the other leg of that cultural background is, sometimes paradoxically, the American embrace of consumerism. Just as the libertarian ideals of the foundation of the American republic work to guard against governmental authorities knowing too much about the citizenry, the citizens will voluntarily give away personally identifiable information to a high degree in exchange for desired commercial goods and services.

The American approach to privacy therefore requires an understanding of:

- who is asking for it;
- what might be in it for the person making the disclosure, to agree to hand it over; and
- did someone or could someone make money from what happened?

Unlike many legal systems that recognise privacy as a general personal right, in the United States the domain of privacy law is uniquely fragmented, with privacy protections mainly developed by the states, often with statutes drawn for restricted purposes and under narrowly decided case precedent. That becomes particularly apparent when reviewing the rights and responsibilities of parties seeking to publish, display and commercially exploit images bearing presentations of individuals. Rather than granting the subjects of photographs broad control over how their images are captured or disseminated, state laws are typically crafted to protect privacy in clearly defined circumstances – most notably, in recent years, in the collec-

tion and use of information provided by the users of online facilities.

If a core concept had to be gleaned from this, it is the overriding notion (or the “umbrella concept”) as to whether the person in a photograph who claims an invasion of privacy had, in the moment of the asserted intrusion, a “reasonable expectation of privacy”. That is, would the individual fairly believe that a setting sufficiently sequestered a person from the eyes and ears of others as to take comfort that whatever happened in that setting would not be perceived and transmitted, published or displayed? If a man should move through the living room of his home, for instance, would he have a reasonable expectation that a neighbour would not have recorded that with a telephoto lens on a camera aimed through the window of the building opposite? If he should be photographed walking through a public square, would he have a case against the display of a print in the name of fine art? More on both of those examples follows below.

New York State was the first jurisdiction to initiate what could be called the contemporary law of privacy. There was a renowned intellectual predicate, as happens every once in a while in American law. It appeared in an 1890 article by Samuel D Warren and Louis D Brandeis (the future associate justice of the United States Supreme Court) entitled “The Right to Privacy”. The timing was fortuitous, with the article being published shortly after the Kodak company launched the first true consumer camera (from New York State, in fact) with the famous marketing slogan “You Press the Button, We Do the Rest”, and six years before *The New York Times* published its first photograph. It was also the period of “yellow journalism” – scandal-mongering prose published by journalists to boost circulation, all too often at the expense of reputations and even the truth. The authors described privacy as a protection of the “inviolate personality” and famously framed it as the “right to be let alone”. Their conception of privacy emphasised emotional well-being rather than redress for economic damage. They argued that existing legal doctrines, such as property and contract law (both being grounded in commercial law, of course), were inadequate to address the potential personal harms caused by the publication of personal images and information.

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## *Roberson v Rochester Folding Box Co*

The origins of the approach of New York State to privacy can be traced to a case decided a mere dozen years after the publication of that article. In *Roberson v Rochester Folding Box Co*, the New York Court of Appeals (the highest court in the state) refused – following a lengthy analysis – to recognise a common-law right to privacy. The plaintiff was a young woman; a photographic portrait of her was used on the box for Franklin Mills Flour and in an advertisement for the product, along with the slogan “Flour of the Family”. The plaintiff claimed that the use of her likeness to sell goods caused her humiliation and distress. The court expressed concern that recognising such a right would lead to “limitless liability, and that the adoption of such a right would result in a vast amount of litigation, that would border upon the absurd”.

The decision in *Roberson* proved controversial, and was an impetus for the passage by the New York State Legislature during the following year of the first law in the United States enacted to prevent the unauthorised use of an individual’s name or image for commercial purposes. The legislation remains on the books as Civil Rights Law Sections 50 and 51, which jointly created a statutory right of privacy that prohibits the unauthorised commercial use of a person’s name or likeness under certain conditions. It remains at the core of all privacy inquiries in New York State, with there still being no common-law right of privacy recognised by the courts.

## *Murray v New York Magazine Co*

The most important question, perhaps, is how this might affect the use of photographs in reporting the news, which enjoys strong protections under the First Amendment to the Constitution. The news photography case of *Murray v New York Magazine Co* went to the state’s highest court on the basis of a complaint pursuant to Section 51 of the Civil Rights Law. The plaintiff was a man who was not of Irish descent but who liked to dress so characteristically Irish (to witness the New York City St Patrick’s Day parade) that a photograph taken of him without his knowledge was used one year later on a magazine cover to illustrate an article in the New York Magazine entitled “The Last of the Irish Immigrants”, by no less a journalistic talent than the inimitable Jimmy Breslin. The plaintiff had to

concede that the Breslin piece concerned an event of public interest that his photograph was used to illustrate, and the court granted summary judgment to the defendant.

## *Arrington v New York Times Co*

In *Arrington v New York Times Co* (1982), the plaintiff claimed that his image was made the most prominent illustration in an article published in *The New York Times Magazine* entitled “The Black Middle Class: Making it”. He sued under the Civil Rights Act, notably because he objected to being cast as an “exemplar” of a social class and because he did not agree with ideas expressed in the story. The Court of Appeals held that New York courts should not avoid parsing through views on social issues in deciding privacy cases under the Civil Rights Law. Putting that question aside, therefore, it easily applied the “newsworthiness exception” of the *Murray* case to rule in favour of the defendant.

## *Finger v Omni Public Intl*

The case of *Finger v Omni Public Intl* (1990) concerned a photograph of Joseph and Ida Finger and their six children, which had been used to illustrate an article in the magazine *Omni* on the claimed benefits of caffeine in the demanding and still quite uncertain process of conception by in vitro fertilisation. Even though none of the six Finger children had been the result of in vitro fertilisation (caffeinated or otherwise), again due to the newsworthiness of the piece the court affirmed dismissal of the complaint.

## *Messenger v Gruner + Jahr Printing and Publishing*

In 2000, the Court of Appeals helpfully summarised and synthesised its holdings in *Murray*, *Arrington* and *Finger*. The case was *Messenger v Gruner + Jahr Printing and Publishing*. In *Messenger*, the plaintiff suing under the Civil Rights Law was a 14-year-old aspiring model who posed for a series of magazine photographs. Only later did the model discover that her photograph had been used in the magazine *Young and Modern* to illustrate an article entitled “Love Crisis”, which began with a letter to the editor by a different 14-year-old who reported getting drunk at a party and then having sex with her 18-year-old boyfriend and two of his boon companions.

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The court articulated a clear rule:

“Consistent with the statutory – and constitutional – value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff’s picture is used to illustrate an article on a matter of public interest, there can be no liability under Sections 50 and 51 until the picture has no real relationship to the article or the article is advertisement in disguise.”

In simple terms, there is a three-part test applicable to news media. There is no actionable claim under the Civil Rights Act if:

- the photograph illustrated that an article has newsworthiness (which, the court made clear, “is to be broadly construed”);
- there was a real relationship between the image and the story; and
- the writing was not “advertising in disguise” (such as presumably would be advertorial).

A high bar has thereby been set when seeking to assert a claim of privacy against a photograph used as news; however, what if the use is not merely advertising in disguise but advertising presented as such?

### *Cohen v Herbal Concepts Inc*

In 1984, the New York Court of Appeals decided *Cohen v Herbal Concepts Inc* (1984). The facts relied upon by the court in its decision were simple: a young mother, Susan Cohen, and her small daughter were surreptitiously photographed from behind, their faces not visible, while wading nude in a stream on private property. Without consent, the image was later used in an advertisement by Herbal Concepts for a preparation designed to fight cellulite – the commercial message being that the condition clearly did not trouble the woman in the image. Ms Cohen, along with her husband, filed an action under New York Civil Rights Law Section 51, claiming that privacy had been violated through the unauthorised commercial use of their image. The Court ruled that a person can be considered identifiable even if her face is not shown in a photograph. Identifying features could include “their hair, bone structure, body contours and stature and their posture”. Identification of Ms Cohen and her daughter from those features such that a violation of

the Civil Rights Act would follow was a matter for the jury to determine, and so the court allowed the privacy claim to proceed.

However, what if there is no news and the use is not in advertising, but a question arises as to *ars gratia artis* (art for art’s sake)? Art about which the public is aware is nearly always made for display and sale in the art marketplace; does that make an art photograph something in “trade” under the Civil Rights Act?

### *Nussenzweig v diCorcia*

In *Nussenzweig v diCorcia* (2007), the Court of Appeals dismissed a privacy claim arising from candid photographs taken in Times Square and later exhibited in an art gallery. Philip-Lorca diCorcia did what photographers have been doing in earnest on New York City streets since the launch of the first Leica camera over a century ago: snapping images of passersby. While in Times Square, he made multiple images, one of which turned out to be of Erno Nussenzweig, who was caught wearing traditional Hasidic Jewish attire and was shown with his bearded face in view. That photograph became one of 17 by diCorcia displayed in a fine art exhibition at Pace/MacGill Gallery entitled *Heads*. The defendants won on summary judgment because the claim had been time-barred by the one-year statute of limitations that applies to Civil Rights Act claims. It is useful just the same to examine the concurring opinion from the lower appellate court. It reached into the question of the application of the First Amendment, opining that “inclusion of the photograph in a catalog sold in connection with the exhibition of the artist’s work did not render its use commercial pursuant to the privacy statute”, with the expression of the artistic ideas behind the work being protected by the First Amendment.

### *Foster v Svenson*

Similarly, in *Foster v Svenson*, the Appellate Division of the New York County Supreme Court First Department decided that candid art photographs – this time of people in private spaces – fell outside the Civil Rights Act. The defendant, the fine-art photographer Arne Svenson, took candid telephoto pictures through the window of his apartment in a neighbouring building, capturing residents visible to him through the largely glass façade of the building opposite. Included in his

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oeuvre were identifiable images of the Foster family, including young children. These images were then assembled into a series titled *The Neighbors*, exhibited and sold in galleries in Los Angeles and New York City; some were later shown in media coverage about the exhibitions. The people in the photographs may have had no idea they were being observed, let alone photographed, through their windows – but this time art won, with dismissal of the complaint on motion by the defendant.

### Other Key Considerations

There can be other considerations under New York law as well as the Civil Rights Act. In *Perry v Rockmore* (2025), the appearance on commercial websites of before-and-after photographs of the plaintiff's rhinoplasty surgery did not support a claim under Sections 50 and 51 of the Civil Rights Act but did give rise to liability for breach of the fiduciary duty of doctor-patient confidentiality.

Other doctrines of law might also have their say from time to time. In a way that has gone in and out of the national legal system with iterating perplexity, privacy slipped into constitutional law and now kind of rattles around inside it. In 1965, in the case of *Griswold v Connecticut*, the Supreme Court found a right of marital privacy in the “penumbras” of the Constitution, requiring protection from state attempts to restrict contraception. That reasoning was applied again by the Supreme Court in *Roe v Wade*, which recognised a constitutional right to abortion. *Roe* was partially reaffirmed in *Planned Parenthood v Casey*, but both cases were overruled by *Dobbs v Jackson Women's Health Organization*. *Roe* was expressly overruled as to whether having an abortion is a right protected by the Constitution. The constitutional right of privacy recognised in *Griswold* and *Roe* remains formally (however nominally) intact.

It would be remiss not to close this section with a (so far) indirectly related turn in New York law: in 1992, the Court of Appeals ruled in *People v Santorelli* that, as men had been permitted by law since 1937 to be seen shirtless in public, with the limited exception of actions taken in furtherance of commercial purposes, it is perfectly lawful for any New York woman to go about in public naked from the waist up. Custom and usage continue to make that a right largely without practitioners, but it hints at an open-minded approach to what does or does not constitute a state of personal display to which an expectation of privacy attaches within New York State.

Where does that leave us in New York? Virtually everyone now has with them a phone camera capable of taking photographs that can be posted internationally within seconds following completion. If you want to start a (potentially expensive) lawsuit about whatever happens with that, it would be wise to consider whether you have truly good reason to move forward and if less confrontational options for making your feelings known might be available.

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