



CELEBRITY JURISPRUDENCE

Jon O. Newman

SERVING FOR 42 YEARS on a federal appellate court in New York City, a world center of so many arts – visual, musical, and literary – I inevitably confronted cases involving celebrities, real and fictional. Although the legal issues were sometimes of minor import, a few cases resulted in rulings of significance to the arts themselves. Together they form a body of celebrity jurisprudence that might be of some legal interest and provide a little entertainment of its own.

GINGER ROGERS

In 1996, Federico Fellini directed a movie called *Ginger and Fred*, which tells the fictional story of Pippo and Amelia, two cabaret dancers who imitated the style of Ginger Rogers and Fred Astaire and became known throughout Italy as “Ginger and Fred.” Ginger Rogers sued the producers of the movie, alleging a violation of the Lanham Act, which prohibits false advertising. She claimed that the movie created the false impression that the film was about her or that she sponsored or endorsed the film.

My opinion affirmed the dismissal of her claim.¹ As I saw it, the appeal presented “a conflict between Rogers’ right to protect her celebrated name and the right of others to express themselves freely in their own artistic work,”² including the selection of a title. The Lanham Act, I wrote,

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¹ *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1994).

² *Id.* at 996.

“should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression,” and that the balance “will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.”³

KURT VONNEGUT

In 1976, the school board of Island Trees, Long Island, decided to remove five books from the high school and junior high school libraries, claiming that some of the language was unsuitable for children. One of the books was *Slaughterhouse Five* by Kurt Vonnegut. Believing that the books had been removed because of their political content, he sued the board for violating his First Amendment right to free expression.

My concurring opinion began, “The use of governmental power to condemn a book touches the central nervous system of the First Amendment.”⁴ I acknowledged that school libraries have virtually unlimited choice of what books to acquire, but that those books, once on the shelves, could not be removed because of their political content.⁵ I thought a trial was needed to determine whether the school board had removed the books because of political content or because of vulgar and sexually explicit language. In a 5-4 decision, the Supreme Court agreed.⁶ No trial was held because the school board put the books back.

Vonnegut wrote me a letter saying that until my ruling, he had always felt that the First Amendment “reads more like a dream than a law.”⁷

J.D. SALINGER

When Ian Hamilton prepared to write his 1986 biography of J.D. Salinger, he visited several university libraries and saw numerous

³ *Id.* at 999.

⁴ *Pico v. Board of Education*, 638 F.2d 404, 432 (2d Cir. 1980) (Newman, J., concurring).

⁵ *Id.*

⁶ *Board of Education v. Pico*, 457 U.S. 853 (1982).

⁷ For my memoir “Benched,” I obtained permission to quote from Vonnegut’s letter.

unpublished letters the novelist had written between 1939 and 1961 to several recipients, including Salinger's New Hampshire neighbor, Judge Learned Hand. Hamilton's quotation from, and close paraphrasing of, portions of 44 of these unpublished letters in the galley proofs of the biography prompted Salinger to sue Hamilton and his prospective publisher, Random House, Inc. Salinger's claim of copyright infringement was met by Hamilton's defense of "fair use."

My opinion rejected the fair use defense, primarily on the ground that the expressive content of unpublished letters is unquestionably entitled to copyright protection and that Hamilton's quotation or paraphrasing of the letters on approximately 40 percent of the book's 192 pages was too extensive to be fair use.⁸ The biography, as published, substantially reduced the number of Salinger's letters quoted or paraphrased, and likely enjoyed somewhat enhanced sales because of the extensive publicity the litigation engendered.

ELVIS PRESLEY

Elvis Presley assigned a Tennessee corporation the right to use his name and likeness for commercial purposes, a right often called a right of publicity. After Presley's death in 1977, the corporation sued in a federal district court in New York to prevent a publisher from selling a Presley poster. The ultimate issue was whether the right of publicity survived a celebrity's death.

Both sides agreed that the issue in a case between companies domiciled in different states was governed by state law and that in this case the law of Tennessee applied. The courts of Tennessee had not decided the post-death issue. So the New York federal court was obliged to predict, in Judge Henry Friendly's felicitous phrase, "what the New York [state] courts would think the [Tennessee] courts would think on an issue about which neither had thought."⁹ Further complicating the case, the federal court of appeals for the Sixth Circuit, which covers Tennessee, had predicted that the Tennessee state courts would rule that the right of publicity did not survive death. So the precise issue in the Presley case was whether a federal court in New

⁸ *Salinger v. Random House, Inc.*, 811 F.2d 90, 97-99 (2d Cir. 1987).

⁹ *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960).

York should predict that the New York state courts (1) would follow what the Sixth Circuit Court of Appeals had predicted the Tennessee courts would rule, or (2) would make their own prediction of how the Tennessee courts would rule. It is difficult to imagine a more esoteric issue.

My opinion ruled that the interests of uniformity would be served by following the prediction made by the Sixth Circuit until the Tennessee courts decided the issue, and our federal court implicitly predicted that the New York Courts, and hopefully all other courts, would make the same prediction.¹⁰ Bottom line: Presley's right of publicity did not survive his death.

GROUCHO MARX

The second half of the 1980 Broadway musical *A Day in Hollywood/A Night in the Ukraine* purported to show how the Marx brothers would have dramatized Chekhov's novel *The Bear*. Groucho's widow and the company to which he had assigned his right of publicity sued the producers and the authors of the musical, claiming that it impaired publicity rights relating to commercialization of the characters of Groucho, Chico, and Harpo (Zeppo was not portrayed). The issues were which state's law applied and, as in the Elvis Presley case, whether the law of the relevant state recognized a right of publicity that survived the celebrity's death.

My opinion first ruled that the applicable law was that of California, where the three brothers lived at the time of their deaths, the plaintiff company was incorporated, and the assignment was executed.¹¹ Unlike Presley's case, however, the California Supreme Court had spoken on whether a right of publicity survives death,¹² but unfortunately its opinion was arguably not clear. So my opinion continued with the conclusion that under California law the right of publicity did not survive death in the circumstances of Groucho's case, either because the right ended at his death or because it survived only as to products or services that a celebrity had promoted before death, and Groucho had not promoted the musical at issue.¹³

¹⁰ *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981).

¹¹ *Groucho Marx Productions, Inc. v. Day and Night Co.*, 689 F.2d 317, 320 (2d Cir. 1982).

¹² *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860 (1979) (suit by Rudolph Valentino's nephew); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979) (suit by Bella Lugosi).

¹³ *Id.* at 323.

TARZAN

In 1912, Edgar Rice Burroughs wrote *Tarzan of the Apes*, the first of several books about the heroic character Tarzan, born to English parents and raised by an ape named Kala. In 1931, after Burroughs assigned the rights in his books to Edgar Rice Burroughs, Inc. (“ERB”), the corporation gave some of its literary rights to the predecessor of Metro-Goldwyn-Mayer, Inc. (“MGM”). MGM acquired the right to create an original story using the character Tarzan, to make a movie based on the story, and to create “remakes” of the first movie “based substantially on the same story” used for the first movie with “no material changes or departures” from that story.

In 1932, MGM produced the movie *Tarzan the Ape Man* based on an original story it had lawfully created. The heroine Jane was played by Maureen O’Sullivan. After a first remake of the movie in 1959, MGM produced a second remake of *Tarzan the Ape Man*. In this remake, Jane was played by Bo Derek, who appeared partially nude in some scenes.

ERB sued MGM, claiming, among other things, violation of the 1931 contract because the 1981 movie was not substantially similar to the story on which the 1932 movie was based. The two other judges assigned to the appeal and I read the screenplays of the 1932 and 1981 movies and then saw them, one after the other, in a private midtown Manhattan screening room. There was no popcorn. We concluded that, that despite minor differences, the movies complied with the 1931 contract’s requirement of being based substantially on the same story with no material changes.¹⁴

Although the contract issue concerned only the substantial similarity of the plots of the movies, I could not resist sending a memo to the other two judges saying, “Only in the quiet confines of the Second Circuit Court of Appeals could three elderly judges see no substantial difference between fully clothed Maureen O’Sullivan and Bo Derek in the nude.”

SUPERMAN

In 1981, the ABC network created a movie and a subsequent TV series called *The Greatest American Hero*, featuring a fictional character named Ralph Hinkley. Clearly calling to mind the comic strip and film character

¹⁴ *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F. 2d 610, 628-31 (2d Cir. 1982).

Superman, Hinkley wears a cape, flies through the air, and chases villains. Viewing himself in a mirror, he says, “It’s a bird . . . it’s a plane . . . it’s Ralph Hinkley.”

Warner Brothers, Inc., the producer of *Superman* movies, and DC Comics, Inc., sued ABC, claiming that the TV series infringed their copyright in the Superman character. My opinion acknowledged that a character, if sufficiently delineated, can be copyrighted,¹⁵ but went on to consider the threshold issue whether any copying had occurred. In addition to some similarities between Hinkley and Superman, there were notable differences. Hinkley “uses his superpowers awkwardly and fearfully. When flying, Hinkley shouts with fright and makes crash-landings, sometimes crumpling in a heap or skidding nearly out of control to a stop. Though protected from bullets by his costume, Hinkley cringes and cowers when shot at by villains.”¹⁶ Ruling that Hinkley only evoked but did not copy the “Man of Steel,” I concluded, “In the genre of superheros, Hinkley follows Superman as, in the genre of detectives, Inspector Clouseau follows Sherlock Holmes.”¹⁷

AMOS ‘N’ ANDY

In 1981, Stephen Silverman began writing a script for a Broadway musical based on the Amos ‘n’ Andy characters in the radio and television shows aired by CBS. The creators of the Amos ‘n’ Andy characters and writers of the programs, Freeman Gosden and Charles Correll, had assigned all their rights to CBS. After Silverman sought and was refused a license from CBS, he sued the network, claiming that, after the expiration of the copyrights, the pre-1948 programs were in the public domain, which, he argued, also placed the characters and their names in the public domain. CBS counter-claimed, alleging, among other things, that Silverman’s script infringed CBS’s acquired copyrights in three post-1948 programs, the characters “Kingfish” Stevens, Madame Queen, and Lightning’, and the phrases “scuse me for protruding,” “splain date,” and “holy Mackral.” CBS also claimed trademark infringement.

¹⁵ *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 240-42 (2d Cir. 1983).

¹⁶ *Id.* at 237.

¹⁷ *Id.* at 243.

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My opinion first rejected the trademark claims on the ground that after CBS took the programs off the air in response to criticism that they were demeaning to Blacks, CBS had not used the marks for the next 21 years, an interval sufficient to show abandonment of the marks.¹⁸ The copyright side of the case was more complicated. The pre-1948 programs had put the characters from those programs into the public domain,¹⁹ but CBS was nevertheless entitled to an opportunity to show that its post-1948 programs had added some increment of delineation to the characters that might be copyrightable and that Silverman's script might infringe. CBS was also entitled to damages for Silverman's infringement of the copyright in the dialogue of the post-1948 scripts.²⁰ That left Silverman free to bring his musical to Broadway, using only material from the pre-1948 programs.²¹ The parties were encouraged to settle the remaining disputes.

CHARLIE CHAPLIN

To honor Charlie Chaplin at the 1972 Academy Awards event, the Academy of Motion Picture Arts and Sciences ("AMPAS") arranged for the preparation of a 13-minute film collecting highlights from several Chaplin movies ("the Compilation"). It was shown during NBC's televising of the Awards event. The next year CBS began preparing a retrospective of Chaplin's life, intended for future use as a film obituary. The CBS retrospective was only a "rough cut" when Chaplin died in 1977. Instead of airing the "rough cut" or finishing it, CBS aired the AMPAS compilation, which it had obtained from NBC.

The owner of the copyrights in Chaplin's films sued CBS, claiming infringement of its statutory rights in the films and its common law rights in the Compilation. CBS defended on various grounds, including a First Amendment argument that film excerpts could be shown as part of a news report of Chaplin's death. CBS also argued that even the particular selection and sequence of film excerpts in the Compilation were protected reporting because of the significance of showing the compilation at the Awards

¹⁸ *Silverman v. CBS, Inc.*, 870 F.2d 40, 45-49 (2d Cir. 1989).

¹⁹ *Id.* at 50.

²⁰ *Id.*

²¹ *Id.*

event, which, CBS claimed, highlighted Chaplin's return from a 20-year exile provoked by Senator Joseph McCarthy's investigations.

My opinion rejected the First Amendment and all other defenses.²² No court had provided an alleged copyright infringer First Amendment protection beyond the fair use defense, and even if some added protection might be available on extreme facts, public domain films were available to report on Chaplin's death and his place in movie history, and the newsworthy event at the Awards ceremony was Chaplin's appearance, not the showing of the compilation.

RICHARD SERRA

The "Tilted Arc" was a curved structure of Cor-ten steel 120 feet long, 12 feet high, and several inches thick, created by the sculptor Richard Serra, well known for his large site-specific works. "Tilted Arc" bisected Federal Plaza in front of a federal office building in lower Manhattan. The General Services Administration ("GSA") had commissioned Serra to construct "Tilted Arc" for a fee of \$175,000. The contract provided that the federal government would own the sculpture and did not restrict its location to Federal Plaza. For four years following installation of "Tilted Arc," government employees and community residents urged its removal because it interfered with their use of the Plaza for outdoor lunch and public events. After public hearings, GSA removed "Tilted Arc."

Serra sued GSA, claiming primarily a violation of his First Amendment right to freedom of expression. My opinion affirmed dismissal of the suit on the ground that the government had virtually unrestricted authority to deal with property that it owned,²³ that Serra could have insisted in his contract that his sculpture remain on Federal Plaza,²⁴ and that there was no evidence to create a triable issue as to whether the government had acted to suppress a political viewpoint, in contrast to the record in the Vonnegut library book removal case discussed above.²⁵

²² *Roy Export Co. v. CBS*, 672 F.2d 1095 (2d Cir. 1982).

²³ *Serra v. U.S. General Services Administration*, 847 F.2d 1045, 1049 (2d Cir. 1988).

²⁴ *Id.* at 1050.

²⁵ *Id.* at 1050-51.

MARTHA GRAHAM

The 1987 death of the choreographer Martha Graham precipitated a lawsuit concerning ownership of the copyrights in 70 dances she created. The plaintiffs were Ronald Protas, the sole beneficiary under her will, and a foundation created to support her dance school; the defendants were the school and her Center of Contemporary Dance. Graham's will left her rights in her "dance works" to Protas. The defendants claimed ownership of copyrights in the dances on the theory, recognized in copyright law under the "work-for-hire" doctrine, that an employer is deemed to be the author of works created by its employee.²⁶

My opinion ruled that Graham's school owned the copyrights in most of the dances as "works-for-hire," that a few were not because in the years of their creation her part-time duties did not include choreography, that one of them belonged to Protas, and that ownership of a small group had to be determined at trial because of issues concerning publication and assignment.²⁷

LESLIE NIELSEN, DEMI MOORE, AND
ANNIE LIEBOVITZ

A movie poster gave rise to a lawsuit involving three celebrities – the actor Leslie Nielsen, the actress Demi Moore, and the photographer Annie Liebovitz. The movie was *Naked Gun 33 1/3*. Nielsen had the starring role. In advance of the movie's March 1994 release, Paramount, the producing studio, created a poster simulating a famous Liebovitz photograph that had appeared on the cover of *Vanity Fair* magazine in 1991. Liebovitz had photographed Moore, nude and visibly pregnant, in a profile pose that evoked Botticelli's famous painting *Birth of Venus*. Paramount commissioned another photographer to take a photo of a nude, pregnant model, in a profile pose identical in minute detail to the Liebovitz photograph of Moore. The movie poster displayed the photo of the model's body, unmistakably resembling Liebovitz's photograph of Moore, with a

²⁶ 17 U.S.C. § 101 (1976 Act); 17 U.S.C. § 24 (1909 Act) (repealed).

²⁷ *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance*, 380 F.3d 624, 647 (2d Cir. 2004).

photo of Nielsen's smirking face replacing the model's face. The poster for the movie was captioned "DUE THIS MARCH."

Liebovitz was not amused and sued Paramount for infringing her copyright in her photograph. Paramount admitted copying, but asserted the defense of fair use. Although the Liebovitz photograph itself was not used in the poster, there was no dispute that Paramount had copied it and that the poster gained its impact primarily from combining the simulation of the photo of Moore's pregnant, nude body with the sly double entendre of the caption.

My opinion upheld the fair use defense, ruling that the poster sufficiently commented on the pretentiousness of the copied photograph to qualify as a protected parody.²⁸ As I wrote, "A photographer posing a well-known actress in a manner that calls to mind a well-known painting must expect, or at least tolerate, a parodist's deflating ridicule."²⁹

"I LOVE NEW YORK"

During New York State's advertising campaign to promote tourism with the song "I Love New York," the NBC television show *Saturday Night Live* spoofed the campaign with a 1977 skit featuring the town fathers of Sodom planning to improve their town's image. The skit ended with their singing "I Love Sodom" to the tune of "I Love New York."

The holder of the copyright in New York's song sued NBC for copyright infringement. NBC asserted the defense of fair use, which in some circumstances protects satires and parodies from claims of copyright infringement. In a short opinion, I upheld the defense, writing that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody."³⁰



²⁸ *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 2011).

²⁹ *Id.* at 114-15.

³⁰ *Elsemere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980). I wrote the brief unsigned "Per Curiam" opinion.

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Looking back on these decisions gave me a few laughs. I hope readers of this law journal might also find humor in these reports of my contributions to celebrity jurisprudence.

