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Case Comment: Messenger V. Grunner + Jahr Printing and Publishing

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CASE COMMENT: *MESSENGER V. GRUNER + JAHR PRINTING AND PUBLISHING*

I. INTRODUCTION

Since the age of twelve, she had been groomed, plucked, dyed and waxed in an attempt to sculpt her into a picture-perfect model, the envy of all teenage American girls.[1] She endured countless castings for fresh faces, affectionately referred to in the industry as "cattle-calls." Each casting call filled with anxious pre-teens clinching their portfolios. Finally, she received her big break: a photo spread with a national magazine. After several days of primping and posing she would wait months before she could see the fruits of her labor. When the issue reached the newsstands, she was first in line — eager to flip the glossy pages and see her own image staring back. Page 86, page 87, page. . . her heart stopped as she realized that it was her image, but not representing the latest style or the hottest fad. Instead, the picture was illustrating an advice column and overlapped with the caption: "I got drunk and slept with three guys. . .".

If *a picture is worth a thousand words,* then a picture that creates a fictionalized implication is as damaging as a thousand words to the same effect. The holding in *Messenger v. Gruner + Jahr Printing and Publishing,*[2] however, allows publishers to do with pictures what they are forbidden to do with words.

Under New York's statutory right of privacy, publishers are prohibited from the unauthorized use of a person's picture or name for advertising or trade purposes.[3] However, the publication of "newsworthy" items is privileged and therefore exempt from the statute.[4] Because of the competing interests of an individual's right of privacy and freedom of the press, New York courts have placed limitations on the "newsworthy" exception to the right of privacy statute.[5] In order for the item to be "newsworthy" it must concern a matter of public interest[6]; cannot be an advertisement in disguise;[7] the use of the

1. This introduction is a fictional account, although loosely based on the young girl in *Messenger*, it is not necessarily reflective of her actual experience.
2. Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436 (2000).
3. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2001).
4. Stephano v. News Group Publications, Inc., 64 N.Y.2d 174 (1984).
5. Delan v CBS, Inc., 458 N.Y.S.2d 608 (1983).
6. *Id.*

individual's name or photograph must bear a real relationship to the newsworthy issue;[8] and its use cannot create a substantially fictionalized implication.[9]

The holding in *Messenger* creates a distinction between the use of an individual's photograph to illustrate a newsworthy article and the use of an individual's name within a newsworthy article. The holding protects those who generate fictionalized implications through the use of photographs by permitting them to hide behind the shield of the "newsworthy" exception. This case comment argues that the intentional creation of such fictions should automatically defeat such a shield and expose those responsible to liability under New York Civil Rights Law §§ 50 and 51 ("CRL 50-51").

Part II of this case comment examines the facts and procedural history of *Messenger*. It also provides a background of the right of privacy in New York and explains how the newsworthy exception limits that right. Part III analyzes the court's decision in *Messenger*. Part IV calls for the application of the substantial fictionalization exception to all published works, including photographs, to remedy such violations of privacy.

II. BACKGROUND

A. *Right of Privacy in New York*

There is no common-law right of privacy in New York.[10] In 1902,

7. Griffen v. Med. Soc'y of N.Y., 11 N.Y.S.2d 109 (1939).
8. Thompson v. Close-up, Inc., 98 N.Y.S.2d 300 (1950).
9. Finger v. Omni Publ'n Int'l., 77 N.Y.2d 138 (1990).
10. *See* Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902); Wojtowicz v. Delacorte Press, 43 N.Y. 2d 858, 860 (1978). For a general discussion of the common law right of privacy, *see* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis stated that "[I]n very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. . .Gradually, the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession – intangible, as well as tangible." In 1960, Dean Prosser furthered the idea of a common law right of privacy when he categorized the four types of invasions of personal privacy which were later adopted by Restatement (Second) of Torts § 652A-E. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). The Restatement (Second) of Torts defines those categories as the unreasonable intrusion upon the seclusion of another; the appropriation of the other's name or likeness; unreasonable publicity given to the other's private life; and publicity that unreasonably places the other in a false light before the public. This tort action for invasion of pri-

in *Roberson v. Rochester Folding Box Co.*[11], a company that manufactured and sold flour used a photograph of a little girl on their advertisements without her (or her parents') permission.[12] The New York Court of Appeals held that it could not award the young plaintiff the injunction she requested due to the lack of a common law right of privacy, but invited the legislature to create a statutory cause of action for future plaintiffs who may find themselves similarly situated.[13]

In 1909, the New York Legislature responded with CRL 50-51,[14] which create a limited statutory right of privacy.[15] CRL 50-51 makes it a misdemeanor to use a person's name, portrait or picture for "the purpose of trade or advertising" without first obtaining his/her consent.[16]

B. Newsworthy Exception

CRL 50-51 is not applicable to "newsworthy" articles because the courts do not interpret the publication of such articles as being for the "purpose of trade."[17] In *Delan v CBS*,[18] the defendant aired a news

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vacy is currently recognized in Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas and West Virginia. RESTATEMENT (SECOND) OF TORTS § 625A (Reporter's Notes 1974).

11. 171 N.Y. 538 (1902).

12. *Id.*

13. *Id.* at 546 ("The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.").

14. N.Y. CIV RIGHTS LAW §§ 50-51 (McKinney 2001).

15. *Id.* at § 50: A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, his or her parent or guardian, is guilty of a misdemeanor.

§ 51: Action for injunction and for damages: Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against. . .[them]. . .to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.

16. *Id.* Oklahoma and Virginia also have statutes covering invasion of privacy, dealing with appropriation of the other's name or likeness. *See also* VA. CODE ANN. § 8.01-40 (2002); 21 OKLA. STAT. tit. 21, § 839.1 (2002).

17. *See Stephano*, 64 N.Y.2d at 181.

18. Delan by Delan v. CBS, Inc., 458 N.Y.S.2d 608 (N.Y. App. Div. 1983).

segment on the institutionalization of the mentally disabled. The broadcast included the plaintiff's name and image.[19] The appellate division refused to hold the defendant liable under CRL 50-51 because it did not consider the broadcast of the plaintiff's name and image to be for the "purposes of trade." The *Delan* court explained that New York courts, fearful of curtailing the First Amendment rights of free press, consider reports concerning matters of public interest to be privileged and therefore "not within the ambit of the terms 'purpose of trade.'"[20]

In *Stephano v. News Group Publications*,[21] a professional model sued a publisher for using his photographs without his permission. The model had posed for a fashion spread to appear in the September issue of *New York Magazine*.[22] The magazine printed photographs from that shoot in the August *and* September issues. The model sued the magazine for invasion of privacy on the theory that the photos, as they appeared in the August issue, had been used for advertising purposes without his consent.[23] The court found for the defendant publisher and held that even if a publisher uses a person's name or likeness with the intent to increase circulation of its publication, the person's name or likeness has not necessarily been used for trade purposes within the meaning of CRL 50-51.[24] "It is the content of the article and not the defendant's motive or primary motive to increase circulation which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law."[25] The court concluded that the availability of the jacket the plaintiff modeled was a matter of sufficient public interest and therefore the article was newsworthy and subject to privilege.[26]

1. What is Newsworthy?

New York courts have defined the term "newsworthy" very broadly. Descriptions of actual events, such as weddings[27] and halftime shows at

19. *Id.*
20. *Id.* at 613.
21. *Stephano*, 64 N.Y.2d 174.
22. *Id.* at 179.
23. *Id.*
24. *Id.* at 184-85.
25. *Id.* at 185.
26. *Id.*
27. Freihofer v. Hearst Corp., 65 N.Y.2d 135 (1985).

sporting events[28] are considered newsworthy. Generally, articles about any subject of public interest fall within the newsworthy category.[29] From descriptions of fashion trends[30] to guides to nude beaches,[31] a wide variety of subjects have been deemed newsworthy by the courts.

2. Limitations on the Newsworthy Exception

There are limitations to the newsworthy exception. First, use of the name, photograph, or picture must have a real relationship with the article with which it was used in conjunction.[32] Second, the article cannot be an advertisement in disguise.[33] Third, the use cannot be overly infected with substantial fictionalization or falsification.[34]

a. Real Relationship Limitation

When a court determines that there is no real relationship between the use of the plaintiff's name or picture and the article it is used to illustrate, the defendant cannot use the newsworthy exception as a defense. In *Thompson v. Close-Up, Inc.*,[35] the defendant published the plaintiff's photograph in conjunction with an article entitled "Dealers in Dope".[36] The caption read: "Mary Pennochio: Her husband had been a partner of Lucky Luciano. When he was taken out of circulation, she carried on his work."[37] The court found that the plaintiff in the photograph was neither Mary Pennochio, nor had she ever been involved in drug deals.[38] Because the photograph had no real relation

28. Gautier v. Pro-Football Inc., 304 N.Y. 354 (1952).

29. Beverly v. Choices Women's Med. Ctr., 78 N.Y.2d 745, 751(1991); *Stephano*, 64 N.Y.2d 174 .

30. *See Stephano*, 64 N.Y.2d 174; Abdelrazig v. Essence Communications, 639 N.Y.S.2d 811 (N.Y. App. Div. 1996).

31. Creel v. Crown Publishers, Inc., 496 N.Y.S.2d 219 (App. Div. 1985).

32. *See* Murray v. New York Magazine Co., 27 N.Y.2d 406, 409 (1971); Thompson v. Close-up, Inc., 98 N.Y.S.2d 300 (App. Div. 1950).

33. *Murray*, 27 N.Y.2d at 409.

34. *See* Fils-Aime v. Enlightenment Press, Inc., 507 N.Y.S.2d 947 (1986); Davis v. High Soc'y Mag, Inc., 457 N.Y.S.2d 308 (1982); Pagan v New York Herald Tribune, Inc., 301 N.Y.S.2d 120, 122 (1969); Lerman v Flynt Distrib. Co., 745 F.2d 123 (1984); Spahn v. Messner, Inc., 18 N.Y.2d 324 (1966).

35. Thompson v. Close-Up, Inc., 99 N.Y.S.2d 864 (Sup.Ct. 1950), *aff'd*, 98 N.Y.S.2d 300 (1950).

36. *Id.* at 865.

37. *Id.*

38. *Id.*

to the article, the court held that the defendant was liable under the right of privacy statute.[39]

Despite Mary Pennochio's success in establishing a lack of a real relationship between the article and her photograph, the New York courts seem to accept a broad array of "real relationships". In the *Finger,*[40] *Arrington,*[41] and *Murray*[42] line of cases, the New York Court of Appeals showed how little it took to fulfill the relationship requirement.

In *Finger,* a magazine article entitled "Caffeine and Fast Sperm" was illustrated with a photograph of the plaintiff's family.[43] The plaintiff argued that although the article was "newsworthy", their photograph bore no real relationship to the article because their children had not been conceived by "in vitro fertilization or any other artificial means, and that they never participated in the caffeine-enhanced reproduction research" described in the article.[44] The New York Court of Appeals found a real relationship existed because "[t]he theme of fertility is reasonably reflect in the . . . images used – six healthy and attractive children with their parents."[45]

Arrington dealt with the nonconsensual publication of the plaintiff's photograph to illustrate a New York Times Article entitled "The Black Middle Class: Making It."[46] The plaintiff did not contest that "by external and objective criteria" he may be perceived to be a member of "the black middle class."[47] Instead, he contended that he did not associate himself with the "black middle class" depicted by the article (as he read it) as "materialistic, status-conscious and frivolous individuals without any sense of moral obligation to those of their race who are economically less fortunate."[48] The New York Court of Appeals, concluded that the plaintiff's asserted lack of a real relationship amounted "to his conviction that his views are not consonant with those of the

39. *Id.*
40. Finger v. Omni Publ'n Int'l, 77 N.Y.2d 138 (1990).
41. Arrington v. The New York Times Co., 55 N.Y.2d 433 (1982).
42. *Murray,* 27 N.Y.2d 406.
43. *Finger,* 77 N.Y.2d 138.
44. *Id.* at 142.
45. *Id.*
46. *Arrington,* 55 N.Y.2d at 435.
47. *Id.* at 440.
48. *Id.*

author."[49] The court held this was not enough to defeat the newsworthy exception to CRL 50-51.[50]

In *Murray*, the plaintiff was photographed wearing an "Irish" hat, a green bow tie and a green pin while watching the St. Patrick's Day Parade in Manhattan.[51] The picture was used to illustrate an article in *New York Magazine* entitled "The Last of the Irish Immigrants." The court held that it could not be said that the plaintiff's photograph was not related to the subject matter of the article which "dealt with the contemporary attitudes of Irish-Americans in New York City, referred to the gaiety of the St. Patrick's Day festivities and included comments about the parade."[52]

b. Advertisement in Disguise Limitation

Despite appearing as an otherwise newsworthy piece, a court may determine that an article is in fact an advertisement in disguise. In *Griffin v. Medical Society of New York*,[53] the defendant published a photograph of the plaintiff in its medical magazine. The photograph illustrated an article by defendant doctors on a condition known as saddle nose.[54] Defendants' contention that the photograph was solely used for scientific purposes was not enough to sustain a motion to dismiss. The court found that it could be inferred from the complaint that the doctors used the photo to advertise their handiwork and therefore violated CRL 50-51.[55] The court found that the article, although in a scientific publication, may in fact be merely an advertisement in disguise.[56]

c. Substantial Fictionalization Limitation

Courts have found that use of a plaintiff's name or picture may be so infected with fiction as to defeat the newsworthy exception to CRL 50-51. In *Binns v. Vitagraph Company of America*,[57] the defendant produced a film that depicted the real life event involving the plaintiff's rescue of hundreds of people. The plaintiff complained that the de-

49. *Id.*
50. *Id.*
51. *Murray*, 27 N.Y.2d at 407.
52. *Id.* at 409.
53. Griffin v. Medical Soc'y of State of N.Y., 11 N.Y.S.2d 109 (1939).
54. *Id.*
55. *Id.*
56. *Id.*
57. 210 N.Y. 51 (1913).

fendant had used his name and likeness for the purposes of trade and advertising without his permission. The court found that, even though the film depicted an actual event, it was so inaccurate that its purpose could only be construed as one of entertainment, not of education.[58] Therefore, the court held that Binns' likeness had been used for the purposes of trade.[59]

Similarly, in *Spahn v. Julian Messner*, the New York Court of Appeals held that the defendant's children's book about the plaintiff was so "infected with material and substantial falsification" as to be actionable under CRL 50-51.[60] The book included dialogue fabricated by the author as well as fictional incidents in the plaintiff's life.[61]

C. *Background of Messenger v. Gruner + Jahr Printing and Publishing*

1. Facts

Jamie Messenger, a 14-year-old aspiring model living in Florida, posed for a photo spread to appear in *Young and Modern (YM)* magazine.[62] YM magazine, published by the Defendant Gruner + Jahr, targets teen-aged girls with articles and advice columns on topics such as beauty and romance.[63] Messenger consented to be photographed, but her parents did not sign a written consent form.[64] Messenger claimed that the defendant "induced her to pose for photographs under the false pretense that they would be published in a 'nice little story' about 'couples.'"[65]

Three full-color photographs of Messenger were published in the June/July 1995 issue and illustrated the "Love Crisis" column.[66] The column featured a letter from a 14-year-old who identified herself as

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58. *Id.* at 58.
59. *Id.*
60. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127 (1967).
61. *Id.* at 129.
62. *Messenger*, 94 N.Y.2d at 437.
63. YM magazine was launched in 1954 and its circulation for 2000 was 2,276,939. The publisher's website gives the following description of YM: "Over nine million teenager [sic] turn to YM every month for cutting-edge editorial, inspirational ideas and honest advice they can't get anywhere else on the topics that concern them the most. From their looks to their love lives, YM gives them the facts they need to make the best choices – for now, and for the future." *See* http://www.guj.de/english/products/magazines/3ym_eng.html.
64. *Messenger*, 94 N.Y.2d at 446.
65. Brief for Respondent at 12; *Messenger*, 94 N.Y.2d 436 (No. 98-7767).
66. *Messenger*, 94 N.Y.2d at 437.

"Mortified."[67] "Mortified" confessed that she had sexual intercourse with her 18-year-old boyfriend and his friends after she got drunk at a party.[68] A pull-out quotation appearing above the column in bold type stated "I got trashed and had sex with three guys."[69]

The first picture is of Messenger sitting curled up on a couch with her head resting in her hand. The caption reads, "Wake up and face the facts: You made a pretty big mistake."[70] The second picture shows a humiliated looking Messenger turning away from a group of teenage boys. The caption reads, "Don't try to hide-just ditch him and his buds."[71] Finally, a close-up of Messenger with a worried expression carries the caption, "Afraid you're pregnant? See a doctor."[72] In all three photographs, Messenger's face is easily identifiable.

2. Procedural History

Messenger initiated her action in the United States District Court for the Southern District of New York.[73] She claimed defamation, negligence, libel, negligent and intentional infliction of emotional distress as well as violation of §§ 50-51 of the New York Civil Rights law. The court applied Florida law to Messenger's claims of defamation, negligence, libel, negligent and intentional infliction of emotional distress after determining that Florida had a more significant relationship to the dispute with respect to those causes of action.[74] Florida law provides a single publication or single cause of action rule which restricts a plaintiff in bringing only one cause of action when the defendant's alleged wrongdoing was a single action of tortious conduct.[75] Thus, the court dismissed all of the claims except for the defamation claim,

67. Sally Lee, *Love Crises*, YOUNG AND MODERN, June/July 1995, at 22.

68. The entire text of the letter reads, "Dear Sally, I'm 14 and I started sleeping with my 18-year-old boyfriend about four months ago. Recently he invited me over to his house for a party, but when I got there it turned out that the "party" was just him and two of his friends. They kept giving me beers, and I ended up getting really drunk and having sex with all of them! Even worse, I heard them laughing about it at school the next day. I feel so dirty and ashamed. How could I have been so stupid? – Mortified".

69. *See* Lee, *supra* note 67, at 22.

70. *Id.*

71. *Id.*

72. *Id.*

73. Messenger v. Gruner + Jahr Printing & Publ'g, No. 97 Civ. 0136 (S.D.N.Y. Jan. 21, 1998).

74. *Id.*

75. *Id.*

which it found to be the plaintiff's principle cause of action and the right of privacy claim, which the court found deserved separate attention.[76] The court then dismissed her defamation action because Messenger did not give proper notice to Gruner + Jahr of her intention to file suit as required by Florida's defamation statute.[77]

As to Messenger's remaining CRL 50-51 claim, the defendant moved for summary judgment on two grounds.[78] First, despite the fact that both parties to the suit briefed and argued the motion on the assumption that New York law governed the alleged commercial or trade use of the plaintiff's photographs, the defendant argued that the court should *sua sponte* apply Florida law and find that the single publication or single cause of action rule precluded plaintiff from bringing the CRL 50-51 claim as well.[79] The court ultimately rejected the defendant's invitation to apply Florida law and further held that the single publication/single cause of action rule did not bar Messenger from bringing this commercial misappropriation claim. The court found that the privacy claim went "well beyond the injury to reputation that lies at the heart of her defamation claim" and therefore, allowing her to bring it did not defeat the rule's purpose of "prevent[ing] plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several different causes of action all meant to compensate for the same harm."[80]

Second, the defendant argued for summary judgment on the ground that the fictionalization exception no longer exists under New York law.[81] Although the court acknowledged that the defendant had a debatable point,[82] the court denied the defendant's motion.[83]

The jury found for Messenger on the CRL 50-51 claim, and awarded her $100,000 in compensatory damages.[84] The defendant moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b)[85] or in the alternative, for a new trial pursuant

76. *Id.*
77. *See* FLA. STAT. ch. 770.01 (1996).
78. Messenger by Messenger v. Gruner + Jahr USA Publ'g, 994 F. Supp. 525, 528 (S.D.N.Y. 1998).
79. *Id.* at 529.
80. *Id.* at 531.
81. *Id.*
82. *Messenger*, 994 F.Supp. at 529.
83. *Id.* at 532.
84. Messenger by Messenger v Gruner + Jahr Printing & Publ'g, 175 F.3d 262, 263 (2d Cir. 1999).
85. *Id.*

to Federal Rule of Civil Procedure 59.[86] In an unpublished opinion, the trial court denied both of the motions.[87]

The defendant appealed the verdict to the United States Court of Appeals for the Second Circuit.[88] The Court of Appeals determined that the law in New York was unsettled with respect to "whether a plaintiff can recover under New York's statutory right of privacy when a publisher uses the plaintiff's image in a substantially fictionalized way to illustrate a newsworthy piece."[89] The court decided to certify the following questions to the New York Court of Appeals:

> 1. May a plaintiff recover under New York Civil Rights Law §§ 50 and 51 where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use of the image was in conjunction with a newsworthy column?
> 2. If so, are there any additional limitations on such a cause of action that might preclude the instant case?[90]

The certification of the questions was accepted by the New York Court of Appeals on June 8, 1999.[91] On February 17, 2000, the New York court answered the first question in the negative and therefore did not consider the second question.[92]

Accordingly, the United States Court of Appeals for the Second Circuit vacated the District Court's judgment and remanded the case.[93] Messenger's writ of certiorari to the United States Supreme Court was denied on October 2, 2000.[94]

III. The Court of Appeals Decision in Messenger

The New York Court of Appeals began its analysis in Messenger by restarting several basic principles it believed governed interpretation of CRL 50-51.[95] First, courts should narrowly construe the statute and

86. *Id.* at 263-64.
87. *Id.* at 64.
88. *Id.*
89. *Id.*
90. *Id.* at 266.
91. Messenger v Gruner + Jahr Printing & Publ'g, 93 N.Y. 2d 948 (1999).
92. *Messenger*, 94 N.Y.2d at 436.
93. Messenger v. Gruner + Jahr Printing & Publ'g, 208 F.3d 122 (2d Cir. 2000).
94. Messenger v Gruner + Jahr Printing & Publ'g, 531 U.S. 818 (2000).
95. *Messenger*, 94 N.Y.2d at 441.

strictly limit its application to "nonconsensual commercial appropriations of the name, portrait or picture of a living person."[96] Second, courts must recognize the newsworthy exception to the statute.[97] Finally, the courts have traditionally construed the definition of "newsworthy" very broadly.[98]

The New York Court of Appeals articulated a broad three-part test for evaluating whether the use of a photograph fits under the newsworthy exception.[99] First, the photographs must illustrate a newsworthy article.[100] Second, there must be a real relationship between the photographs and the article.[101] Third, the article cannot be an advertisement in disguise.[102]

Messenger conceded that the article in fact met the elements of this limited test.[103] First, the *Love Crisis* column in YM was, in fact, newsworthy because it is "informative and educational regarding teenage sex, alcohol abuse and pregnancy—plainly matters of public concern."[104] Second, Messenger conceded that the pictures bore a real relationship to the article.[105] Finally, Messenger did not allege that the article was merely an advertisement in disguise.[106]

Messenger argued that the substantial fictionalization limitation on the newsworthy exception, as articulated in *Binns*[107] and *Spahn*,[108] applied in this case. Messenger argued that because the photographs, juxtaposed with the article, created a substantially fictionalized implica-

96. *Id.* (quoting Finger v. Omni Publs Intl., 77 N.Y.2d 138, 141).
97. *Messenger*, 94 N.Y.2d at 441.
98. *Id.*
99. *Id.* at 446.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 444.
104. *Id.*
105. *Id.* It is unclear to this author why the plaintiff conceded this point. The Court of Appeals opinion does not provide any detail into what the "real relationship" between the photograph and the article was. The plaintiff's brief to the New York Court of Appeals conceded that the real relationship test "[was] not immediately at issue in this case." However, the brief contained the following footnote: "We do note, however, that there is at least a credible argument that can be advanced that Jamie's pictures do not bear a "real relationship" to the article in issue. . .In the case at bar the only similarity that Jamie has with the theme of the article –teenage sex and drug abuse – was that she was a teenager. Otherwise she was unfairly and falsely induced to pose. . ." Brief for Respondent at 9, *Messenger*, 94 N.Y.2d 436 (No. 98-7767).
106. *Messenger*, 94 N.Y.2d at 444.
107. Binns v. Vitagraph Co. of America, 210 N.Y. 51 (1913).
108. 21 N.Y.2d 124 (1967).

tion, the defendant was not entitled to the protection of the newsworthy exception.[109] However, the court held that because the defendant's use of Messenger's photographs met the court's three-part test, she could not recover under CRL 50-51, "regardless of any false implication that might be reasonably drawn from the use of her photographs to illustrate the article."[110]

In its holding, the court eliminated the fictionalization limitation on the newsworthy exception to the right of privacy statute in cases where an individual's photographs are used to illustrate articles. The court recognized a clear distinction between cases interpreting CRL 50-51 that dealt with photographs used to illustrate newsworthy articles and those cases dealing with other types of publications.[111]

The majority acknowledged that ". . .an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception."[112] The court found that cases such as *Binns*[113] and *Spahn*,[114] were clearly distinguishable in that they were "nothing more that attempts to trade on the person of Warren Spahn or John Binns."[115] *Binns*[116] and *Spahn*[117] involved defendants who "invented biographies of plaintiffs' lives", whereas, the column in YM was newsworthy, as conceded by the Plaintiff.[118]

The court found that the *Finger*,[119] Arrington,[120] and *Murray*[121] line of cases correctly stated the rule that applied to unauthorized and allegedly false use of an individual's photograph to illustrate a newsworthy article.[122] That rule, as articulated above, does not provide for a substantial fictionalization limitation.

Because of its emphasis on these cases, the court refused to apply the substantial fictionalization limitation to the use of photographs in

109. *Messenger*, 94 N.Y.2d at 444.
110. *Id.*
111. *Id.* at 446.
112. *Id.*
113. *Binns*, 210 N.Y. 51.
114. *Spahn*, 21 N.Y.2d 124.
115. *Messenger*, 94 N.Y.2d at 446.
116. *Binns*, 210 N.Y. 51.
117. *Spahn*, 21 N.Y.2d 124.
118. *Messenger*, 94 N.Y.2d at 446.
119. *Finger*, 77 N.Y.2d 138.
120. *Arrington*, 55 N.Y.2d 433.
121. *Murray*, 27 N.Y.2d 406.
122. *Messenger*, 94 N.Y.2d at 446.

conjunction with an article, even if such use could reasonably be viewed as falsifying or fictionalizing the plaintiff's relation to the article.[123]

The dissent in *Messenger* argued that "New York law supports a more nuanced and generous approach to the applicability of this now largely immobilized statute that is functionally realistically foreclosed by [this] ruling."[124] The dissent argued that the newsworthy exception was being stretched too far when it protected a publisher, such as the defendant, that "soldered together and dramatized" the link between the plaintiff and the content of the article.[125]

IV. Doing Through Pictures What Cannot be Done Through Words

The holding in *Messenger* effectively defeats an integral purpose of CRL 50-51 by inventing a legal distinction, for the purposes of liability, between the unauthorized use of a person's photograph and the unauthorized use of a person's name. In effect, the court found that the substantial fictionalization limitation applied to the use of an individual's name but not to the use of an individual's photograph; thus, the court effectively held that a publisher could do through pictures what it could not do through words. The language of the statute and the practical effect of such a distinction both support the equal protection of an individual's name and photograph.

The court saw "no inherent tension between the *Finger-Arrington-Murray* line and *Binns-Spahn* line."[126] The court distinguished *Finger*,[127] *Arrington*,[128] and *Murray*[129] which all dealt with "the unauthorized and allegedly false and damaging use of plaintiff's photographs to illustrate newsworthy articles" from *Binns*[130] and *Spahn*[131] which involved the "invent[ion] [of] biographies of plaintiffs' lives."[132]

Due to this distinction, the court concluded that a plaintiff whose picture is used to illustrate a newsworthy article cannot recover under

123. *Id.* at 443.
124. *Id.* at 456.
125. *Id.*
126. *Id.* at 446.
127. *Finger*, 77 N.Y.2d 138 .
128. *Arrington*, 55 N.Y.2d 433.
129. *Murray*, 27 N.Y.2d 406.
130. *Binns*, 210 N.Y. 51.
131. *Spahn*, 21 N.Y.2d 124.
132. *Messenger*, 94 N.Y.2d at 446.

CRL 50-51 so long as the picture bears a real relationship to the article and "the article is not an advertisement in disguise."[133] The court added that this is true "even where a plaintiff's photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff's relation to the article."[134] In contrast, "under *Binns* and *Spahn* an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception."[135]

Despite the court's exercise in line-drawing, CRL 50-51 makes no distinction between the use of an individual's name and the use of her picture or portrait. To the contrary, it forbids the use of "the name, portrait or picture of any living person" without that person's consent.[136] An individual's name and photograph are not given separate attention but instead grouped together for the purposes of defining what is protected by CRL 50-51.

Furthermore, damage created through words may be no greater than that created through pictures. Consider the following. If, instead of using her picture to illustrate the column, *YM* magazine used Jamie Messenger's name in the article, she could have recovered under CRL 50-51. Perhaps the article would read something like, "Jamie Messenger, a 14-year-old high-school student at Washington High School recently got drunk and had sex with three guys at the same time. Now she is worried that she is pregnant." The subject of the article would be the same as in the actual *Messenger* case, namely teenage sex, alcohol abuse and pregnancy, and therefore "newsworthy." The "real relationship" between the use of Messenger's name and the subject of the article would again exist in the same respect as it did in the actual case involving her photographs. However, Jamie Messenger would arguably be able to recover under CRL 50-51 in this hypothetical because the use of her name in this manner would make the article "so infected with fiction. . .that it cannot be said to fulfill the purpose of the newsworthiness exception."[137]

The jury at the trial level in the *Messenger* case found that the juxtaposition of Messenger's pictures with the article created the substantially fictionalized implication that Jamie Messenger was in fact the

133. *Id.* at 447, n.3.
134. *Id.* at 443.
135. *Id.* at 446.
136. N.Y. CIV RIGHTS LAW § 50 (McKinney 2001).
137. *Messenger*, 94 N.Y.2d at 446.

young girl writing to the advice column.[138] Therefore, the above example of using her actual name in the article would create the same damage that was in fact created by using her photograph. It is illogical to draw a distinction between the two mediums when considering CRL 50-51 when they both in fact result in the same injury.

V. The Fictionalization Exception Should Apply to All Published Photographs

The use of photographs in conjunction with "newsworthy" articles to create substantially fictionalized implications in effect negates the relationship between the photograph and the article and destroys the "newsworthy" aspect of the article itself. In order to protect privacy rights and preserve the creditworthiness of the press, the substantial fictionalization exception should apply to all published photographs. The exception should not be used to provide publishers with a free pass to in effect create falsifications.

Because New York only recognizes rights of privacy established by statute, the legislature must step forward to protect individuals from the unauthorized use of their photographs in a manner that creates falsifications that are not permitted to be created by words.

VI. Conclusion

The holding in *Messenger* permits a publisher to do through pictures what it cannot do through words, namely create a substantially fictionalized implication without consequences. Under *Messenger*, a publisher can use photographs to create false implications to be reasonably drawn from their juxtaposition to an article as long as the printed article itself did not state the false implication as fact. The court's decision to apply different tests to the use of one's name and the use of one's photograph ignores the language of CRL 50-51 and the damage caused to an individual due to the unauthorized use of her photograph in a way that creates a substantially fictionalized implication about her. *Messenger's* holding effectively allows publishers to do through pictures what they are forbidden to do through words.

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138. *Id.* at 456.