NEW YORK LAW SCHOOL

NYLS Law Review

Volume 54
Issue 3 *Fear, Fraud, and the Future of Financial Regulation*

Article 9

January 2010

Nieves v. Home Box Office, Inc.

Andrew Nieh
New York Law School Class of 2010

VOLUME 54 | 2009/10

ANDREW NIEH

Nieves v. Home Box Office, Inc.

ABOUT THE AUTHOR: Andrew Nieh is a 2010 J.D. candidate at New York Law School.

In New York, a person has the statutory right to protect his or her image or likeness from being misappropriated for commercial use in trade or advertising without his or her consent.[1] Although the broad language of New York's "right of privacy" statute suggests that a person has a powerful cause of action when his or her image is used against his or her wishes, New York courts have narrowly construed the statute and limited its application.[2] A long-recognized exception to this right of privacy is granted to the publication of subject matter considered either newsworthy or of public interest.[3] While standard news programs and newspapers easily fit within this exception, the line between a publication that is newsworthy and a publication that constitutes a trade or advertising purpose has become increasingly blurry.

Over the last two decades, an original format of television programming has gradually taken over network and cable stations.[4] Labeled "reality television," this genre has increasingly become one of the most-watched forms of television in the United States, with shows like *American Idol* and *Survivor* consistently ranking at the top of the Nielsen ratings chart.[5] These shows have become so popular on network stations that cable television providers have begun to mass-produce reality-based shows—one

---

1. *See* N.Y. Civ. Rights Law §§ 50–51 (McKinney 2009). Section 51 provides:

   > 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 [provided in § 50] may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article the jury, in its discretion, may award exemplary damages.

   § 51. Section 50 deals with the criminal aspect of the statute and states:

   > 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 of his or her parent or guardian, is guilty of a misdemeanor.

   § 50.

2. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 441 (2000) ("This Court has consistently restated several basic principles concerning the statutory right of privacy. First, recognizing the Legislature's pointed objective in enacting sections 50 and 51, we have underscored that the statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.") (citations omitted) (internal quotation marks omitted).

3. *See id.* ("[W]e have made clear that [sections 50 and 51] do not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect constitutional values in the area of free speech.") (citations omitted) (internal quotation marks omitted).

4. *See* Steve Johnson, *Hold Your Nose, Reality Phenom Is Here to Stay*, Chi. Trib., Feb. 15, 2004, at Arts & Entertainment 1.

5. *See* Robyn-Denise Yourse, *'Idol,' 'Dancing' Final Showdowns a Ratings Duel*, Wash. Times, May 20, 2009, at A1.

need only turn the channel to VH1, for example, to see a cable station once devoted to playing music videos now predominately showcasing reality programs.[6]

The proliferation of reality television has increased the likelihood that people unrelated to a television production will be filmed during shootings of "real life" settings and places. This situation implicates strong privacy concerns and raises the following legal issue: If a person with no connection to a reality show is filmed without his or her consent or knowledge and then his or her image or likeness is used on the program, does that person have a cause of action against the show under New York's right of privacy statute? The answer to this question depends entirely on whether the person's image was used for a trade or advertising purpose[7] and not for a publication that meets the criteria for the newsworthiness exception.[8] The answer with respect to reality programming is unclear.

Reality shows are supposed to be unscripted mediums featuring "real" people in "real life" situations.[9] While the purpose behind reality shows and the reasons people watch them can be entertainment, the social commentary and cultural insights that reality shows offer are arguably of public interest, if not necessarily newsworthy. Thus, it is uncertain whether lawsuits brought under sections 50 and 51 of the New York Civil Rights Law that allege misappropriation of a person's image or likeness in reality programming can prevail. Until this issue is settled, New York's right of privacy law will continue to be a concern for reality television producers and media companies.

In 2006, the New York Appellate Division's First Department decided *Nieves v. Home Box Office, Inc.*, in which the plaintiff alleged that Home Box Office ("HBO") violated her statutory right to privacy by showing footage of her on a reality show without her consent.[10] This case comment contends that by giving insufficient weight to the newsworthiness exception to New York's statutory right of privacy, the First Department incorrectly affirmed the trial court's refusal to dismiss Nieves's section 51 claim in connection with a cable channel reality show. A better decision would have recognized that most reality programming is a matter of public interest under New York courts' broad interpretation and application of the newsworthiness exception to section 51.

In October 2004, HBO televised its third episode of *Family Bonds* to cable subscribers.[11] *Family Bonds* is a reality show about a family of bounty hunters in New

6. *See* VH1 TV Schedule Listings, 2010, http://www.vh1.com/shows/schedule/vh1/daily.jhtml (last visited Mar. 5, 2010).

7. *See* N.Y. Civ. Rights Law § 51 (McKinney 2009).

8. *See supra* note 3.

9. *See* Jonathan Murray, *Forget Polite. People Have Stopped Being Real,* Wash. Post, Nov. 1, 2009, at B05.

10. 817 N.Y.S.2d 227 (1st Dep't 2006).

11. *See* Complaint at 17, Nieves v. Home Box Office, Inc., 2006 N.Y. Misc. LEXIS 365 (Sup. Ct. N.Y. County Jan. 10, 2006) (No. 100966/05).

York.[12] During the filming of the episode, Chanti Nieves had been standing on a street in New York City when cast members saw her and one of them said that looking at her "makes [his] dick hard."[13] Nieves allegedly did not consent to being filmed.[14] The footage made it onto the episode, and after viewing it, Nieves filed a complaint in 2005 against HBO, the cable provider, and the producers of the show. She asserted a single cause of action under sections 50 and 51 of the New York Civil Rights Law for unauthorized use of her likeness by defendants for commercial and trade purposes.[15] Specifically, Nieves claimed damages of $500,000, alleging that the use of her image in *Family Bonds* "ha[d] caused her to be shamed, held up to public disgrace, and ridiculed in the community in which she live[d]" resulting in "intense mental suffering and distress."[16]

HBO moved to dismiss the claim, arguing that the newsworthiness exception to New York's right of privacy barred any potential liability for use of Nieves's image in *Family Bonds*.[17] The trial court denied HBO's motion to dismiss,[18] and the First Department subsequently affirmed the trial court's decision.[19] In deciding whether the plaintiff's allegations stated a section 51 claim, both courts held that an issue of fact remained as to the purpose of HBO's use of Nieves's image.

Barring an assertion of the newsworthiness exception by the defendants, Nieves's claim of defendants' unauthorized use of her likeness for commercial purposes would likely have been enough to state a cause of action under sections 50 and 51.[20] However, Nieves's additional allegations regarding harm to her reputation and emotional injury were wholly irrelevant to liability under section 51.[21] Yet those latter allegations appear to be among the reasons the trial court refused to dismiss Nieves's complaint:

> The defendants' central argument is that their use of plaintiff's likeness was not for advertising or trade purposes under the statute. The court notes that in this case the determination cannot be made as a matter of law because there is a dispute as to the purpose for which plaintiff's likeness was employed. That is, unlike the case of *Arrington v. New York Times Co.* where it was

12. Memorandum of Defendant in Support of Motion to Dismiss at 2–3, *Nieves*, 2006 N.Y. Misc. LEXIS 365 (Sup. Ct. N.Y. County Mar. 16, 2005).

13. Complaint, *supra* note 11, at 15.

14. *Id.* at 16.

15. *Id.* at 19.

16. *Id.*

17. Memorandum of Defendant in Support of Motion to Dismiss, *supra* note 12, at 11–19.

18. Nieves v. Home Box Office, Inc., No. 100966/05, 2006 N.Y. Misc. LEXIS 365 (Sup. Ct. N.Y. County Jan. 10, 2006), *aff'd*, 817 N.Y.S.2d 227 (1st Dep't 2006).

19. *Nieves*, 817 N.Y.S.2d at 227.

20. *See* N.Y. Civ. Rights Law §§ 50–51 (McKinney 2009).

21. *See* Molina v. Phoenix Sound, Inc., 747 N.Y.S.2d 227, 230 (1st Dep't 2002) ("In order to establish liability under New York's Civil Rights Law, plaintiff must demonstrate each of four elements: (i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the State of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's written consent.").

> conceded that the plaintiff's image was being used to demonstratively illustrate the broader editorial message of a newspaper article, in this action the plaintiff alleges that the participants in the program directly commented on her image in a derogatory and degrading manner utilizing what can best be described as scatological terminology.[22]

The trial court's reasoning here was entirely wrong. The only use of a person's image or likeness without consent that violates sections 50 and 51 is a use for advertising or trade purposes.[23] In *Nieves*, the trial court seemed to be saying that commenting on Nieves's image in an offensive manner is actionable under the right of privacy statute. But sections 50 and 51 do not address offensive comments about a person. Furthermore, deciding whether a plaintiff's image or likeness was used for advertising or trade purposes is a legal conclusion that a court must determine as a matter of law—it is not an issue of fact preventing a court from deciding a motion to dismiss.[24] As a result of the First Department's decision in *Nieves*, media producers and companies will now have to either insist that everyone in the filming area sign a consent agreement or be more careful when filming reality shows that include random people on the street without their permission.

New York's right of privacy is statutorily based only—a New Yorker does not have a common law right to protect his or her image from commercial misappropriation.[25] In 1902, the Court of Appeals, in *Roberson v. Rochester Folding Box Co.*, rejected a right of privacy claim resulting from the use of a woman's likeness in a flour advertisement and held that there was no right of privacy in New York.[26]

---

22. *Nieves*, 2006 N.Y. Misc. LEXIS 365 (citation omitted).

23. *See* N.Y. Civ. Rights Law §§ 50–51 (McKinney 2009).

24. *See, e.g.*, Beverley v. Choices Women's Medical Center, Inc., 78 N.Y.2d 745, 751 (1991) (determining that a calendar was clearly used for advertisement purposes as a matter of law in violation of section 51); Finger v. Omni Publ'g Int'l, 77 N.Y.2d 138, 143 (1990) ("We conclude here that it cannot be said, as a matter of law, that there is no 'real relationship' between the content of the article and the photograph of plaintiffs."); Booth v. Curtis Publ'g Co., 223 N.Y.S.2d 737, 745–46 (1st Dep't 1962) ("In this case it is easy enough to determine that the reproduction of the February, 1959 photograph in the June, 1959 advertisements was an incidental and therefore exempt use. Hence, the determination is made as a matter of law. It may well be that a news or periodical publisher is doing more than selling a news medium. Or it may be that there is an issue whether there is involved a genuine news medium. Then a question of fact may be raised whether the advertising is incidental to the dissemination of news. Or it may become clear enough, even as a matter of law, that the use was collateral and only ill-disguised as the advertising of a news medium."); *see also* Lemerond v. Twentieth Century Fox Film Corp., No. 07 Civ. 4635, 2008 U.S. Dist. LEXIS 26947, at *8 (S.D.N.Y. Mar. 31, 2008) (citing *Finger*, 77 N.Y.2d at 143) ("Whether Plaintiff's image bears such a relationship to the movie is also a question of law . . . .").

25. *See* Howell v. N.Y. Post Co., 81 N.Y.2d 115, 123 (1993) ("[I]n this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy.") (citations omitted); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 358 (1952) ("In this State, the right of privacy rests solely in statute.") (citations omitted).

26. 171 N.Y. 538, 556 (1902) ("An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.").

The New York Legislature reacted to the *Roberson* court's decision by enacting sections 50 and 51 as amendments to the New York Civil Rights Law, creating a "limited statutory right of privacy."[27] Thus, any person in New York claiming that his or her right of privacy has been violated can only bring suit before a court under sections 50 and 51.[28]

New York courts have refused to expand the statute, and instead have followed the legislature's intent in confining the statute to advertising and trade purposes only.[29] In accordance with this legislative intent, the courts created an exception to the statute where uses of a person's image within publications that are either newsworthy or of public interest are permitted without consent, and escape any potential liability under sections 50 and 51.[30]

New York courts apply the newsworthiness exception to a broad range of subject matter including "not only descriptions of actual events but also articles concerning political happenings, social trends or any subject of public interest."[31] Furthermore,

27. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 441 (2000); Stephano v. News Group Publ'ns, Inc., 64 N.Y.2d 174, 182 (1984).

28. *See Howell*, 81 N.Y.2d at 123; *Gautier*, 304 N.Y. at 358.

29. *See Messenger*, 94 N.Y.2d at 441; Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 439–40 (1982) ("It is noteworthy, therefore, that, while concern engendered by [*Roberson*] prompted the Legislature to enact sections 50 and 51, these were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy. Nor has the Legislature chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the court's consistent adherence to its position that, as such, in this State there exists no so-called common-law right to privacy.") (internal quotation marks omitted).

30. *See Messenger*, 94 N.Y.2d at 441. This so-called "newsworthiness" exception can be dated to at least 1937. *See* Sarat Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 388–89 (Sup. Ct. N.Y. County 1937) ("The rules applicable to unauthorized publication of photographs in a single issue of a newspaper may be summarized generally as follows . . . . There may be no recovery under the statute for publication of a photograph in connection with an article of current news or immediate public interest."). One of the primary rationales behind this exception was to address the free speech concerns of media defendants and to make sure that their constitutional rights were not being abridged as long as an image was properly being used. *See Messenger*, 94 N.Y.2d at 441 ("[W]e have made clear that [sections 50 and 51] do not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade. Additionally, these principles reflect 'constitutional values in the area of free speech.'" (quoting *Howell*, 81 N.Y.2d at 123)); Delan v. CBS, Inc., 458 N.Y.S.2d 608, 613 (2d Dep't 1983) ("While the very term 'purposes of trade' encompasses use for the purpose of making profits (since most publications perforce are profit making and the subject matter of such publications are designed with a view to being profitable), a literal construction of the statutory provision would violate the constitutional protection of free speech and free press when such publication involves a matter of public interest.") (citations omitted).

31. *Messenger*, 94 N.Y.2d at 441–42 (citations omitted). *See, e.g.*, *Arrington*, 55 N.Y.2d 433 (affirming dismissal of plaintiff's section 51 claim against the *New York Times* under the newsworthiness exception for printing plaintiff's picture in the *New York Times Magazine* to exemplify an article entitled "The Black Middle Class: Making It"); *Gautier*, 304 N.Y. 354 (rejecting a section 51 claim under the newsworthiness exception in connection with a plaintiff's football half-time performance being broadcast without his consent); Bement v. N.Y.P. Holdings, Inc., 760 N.Y.S.2d 133 (1st Dep't 2003) (using the newsworthiness exception to dismiss plaintiff's section 51 claim that her name was used in a

the newsworthiness inquiry does not depend on the "publisher's 'motive to increase circulation,'" but only on "'the content of the article.'"[32] This exception, though, is not without its own limitations. For the newsworthiness exception to bar a section 50 or 51 claim, two requirements must be met: "[F]irst, there must be a real relationship between the article and the photograph, and second, the article cannot be an advertisement in disguise."[33]

One of the most important cases interpreting the newsworthiness exception is *Messenger v. Gruner + Jahr Printing & Publishing*, decided in 2000.[34] In *Messenger*, the plaintiff was a fourteen-year-old model whose photographs appeared alongside a teen magazine's advice column called "Love Crisis."[35] The column dealt with the problems of another fourteen-year-old girl to whom the plaintiff had no connection.[36] The plaintiff claimed that the magazine publisher violated her right of privacy in using her photographs for trade purposes without her consent.[37] The Court of Appeals held that the "Love Crisis" column was newsworthy because it was "informative and educational regarding teenage sex, alcohol abuse and pregnancy—plainly matters of public concern."[38] The court held plaintiff could not recover under sections 50 and 51 "regardless of any false implication that might reasonably be drawn from the use of her photographs to illustrate the article."[39]

Because the plaintiff conceded that her photographs bore a real relationship to the article and that the article was not an advertisement in disguise, the *Messenger* court did not elaborate on the two limitations to the newsworthiness exception.[40] Other New York courts, however, have discussed these two limitations, and have narrowly applied them so that most section 50 and 51 claims are rejected under the newsworthiness exception.

---

newspaper article about her espionage and beauty pageant activities); La Forge v. Fairchild Publ'ns, Inc., 257 N.Y.S.2d 127 (1st Dep't 1965) (finding no violation of sections 50 and 51 from the use of a pictorial article showing plaintiff modeling a certain fashion because it was in the public's interest); *see also* Finger v. Omni Publ'g Int'l, 77 N.Y.2d 138, 143 (1990) ("As we have noted, the 'newsworthiness exception' should be liberally applied. The exception applies not only to reports of political happenings and social trends as in *Arrington*, and to news stories and articles of consumer interest such as developments in the fashion world as in *Stephano* but to matters of scientific and biological interest such as enhanced fertility and *in vitro* fertilization as well. Moreover, questions of 'newsworthiness' are better left to reasonable editorial judgment and discretion . . . .") (citations omitted).

32. *Messenger*, 94 N.Y.2d at 442 (citing *Stephano*, 64 N.Y.2d at 185).

33. *Id.* at 444 (citations omitted).

34. *See id.*

35. *Id.* at 439.

36. *See id.*

37. *Id.*

38. Messenger v. Gruner + Jahr Printing & Pub'g, 94 N.Y.2d 436, 444 (2000).

39. *Id* at 444–45.

40. *See id.*

In *Finger v. Omni Publishing International*, for example, the issue was whether a "photograph of plaintiffs depicting two adults surrounded by six attractive and apparently healthy children" had a real relationship to an article about in vitro fertilization titled "Caffeine and Fast Sperm."[41] The *Finger* court held that "[t]he theme of fertility is reasonably reflected both in the caption beneath the picture . . . and the images used . . . . Clearly then, there is a 'real relationship' between the fertility theme of the article and the large family depicted in the photograph."[42] This holding exemplifies how even tenuous relationships between an image and a publication can satisfy the newsworthiness exception.[43]

Moreover, in *Beverley v. Choices Women's Medical Center, Inc.*, the Court of Appeals held that "[a] name, portrait or picture is used 'for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service."[44] Applying this test, the *Beverley* court determined that because the defendant's calendar featured the photograph and name of the plaintiff doctor, it was an advertisement in disguise.[45] The court emphasized "[t]he pervasive and prominent placement of [defendant's] name, logo, address and telephone number on each page of the calendar, the wide scope of distribution of the calendar and the range and nature of the targeted audiences, and the glowing characterizations and endorsements concerning the services [defendant] provides."[46] More importantly, the court distinguished the case from one in which media defendants publish subject matter that is newsworthy or of public interest.[47] The court stressed that the defendant was not a media enterprise and that "its calendar was an advertisement of its only

41. 77 N.Y.2d 138, 140 (1990).

42. *Id.* at 143.

43. *See id.*; s*ee also* Gaeta v. N.Y. News, Inc., 62 N.Y.2d 340, 349 (1984); Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 439–40 (1982) (finding a real relationship between a picture of a man walking in the street and an article about "the black middle class"); Murray v. N.Y. Magazine Co., 27 N.Y.2d 406, 409 (1971) (finding a real relationship between a photograph of a person of non-Irish descent who was on the cover of a newspaper to spotlight an article about "contemporary attitudes of Irish-Americans in New York City"); McCormack v. County of Westchester, 731 N.Y.S.2d 58, 62 (2d Dep't 2001) ("In the instant case, the subject article was a matter of public interest, as it addressed various health issues that most concerned Westchester County residents, and the varied services and operations of the hospital, including the neonatal section, where the infant was located. The subject photograph is illustrative of the type of services that the defendant WCMC provides, i.e., neonatal care. Even assuming that the article, together with the photograph, implied that the infant and her parents suffered from AIDS, the photograph bears a real relationship to the article. As such, those causes of action which are predicated on Civil Rights Law §§ 50 and 51 must be dismissed as to all of the defendants herein.").

44. 78 N.Y.2d 745, 751 (1991) (citations omitted). The *Beverley* case appears to be the court's seminal case on the "advertisement in disguise" limitation, laying out the framework for determining if a purported newsworthy article is really just an advertisement in disguise. *See id.*

45. *See id.*

46. *Id.* at 751.

47. *Id.*

business—providing medical services; . . . [and] used [plaintiff's] photo, . . . and information in a publication which, *on its face*, was an advertisement."[48]

In *Nieves*, no factual issues remained to determine whether the purpose of HBO's use of the plaintiff's image was for advertising or trade reasons, and this determination should have been made as a matter of law based only on the contents of the publication in its entirety. Additionally, sections 50 and 51 were not enacted to address "derogatory and degrading" comments in connection with the use of an image.[49] Thus, the appellate court should have reversed the trial court's decision that those comments created an issue of fact as to whether Nieves's image was used for advertising or trade purposes.[50]

Indeed, in a strikingly analogous setting, the Fourth Department rejected a plaintiff's section 51 and intentional infliction of emotional distress claims relating to the use of her image during an episode of NBC's *The Tonight Show*. In the "Headlines" segment of the show, in which Jay Leno would make humorous observations about newspaper clippings, Leno displayed and mocked the plaintiff's image without her consent.[51] The court correctly held that "the use of plaintiff's photograph by the NBC defendants was not strictly limited to a commercial appropriation, and thus the use of the photograph does not fall within the ambit of those sections of the Civil Rights Law."[52]

Furthermore, the trial court in *Nieves* found that factual issues remained relating to the "real relationship" limitation to the newsworthiness exception.[53] New York courts rarely find that there is no real relationship between an article and a use of an image when the article is newsworthy or of public interest. Generally, courts defer to a publisher's editorial judgment.[54] The *Nieves* trial court moved away from settled precedent in this area, stating "[e]ven accepting defendants' assertion that the television show here was a 'documentary,' there are still issues of fact regarding whether the use of plaintiff's image and accompanying commentary bears a real relationship to a 'documentary' about a 'bounty-hunting' family."[55] But this line of

48. *Id.* at 752.

49. Nieves v. Home Box Office, Inc., No. 100966/05, 2006 N.Y. Misc. LEXIS 365 (Sup. Ct. N.Y. County Jan. 10, 2006).

50. *See* Finger v. Omni Publ'g Int'l, 77 N.Y.2d 138, 141 (1990) ("[T]he prohibitions of Civil Rights Law §§ 50 and 51 are to be strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person. These statutory provisions prohibit the use of pictures, names or portraits 'for advertising purposes or for the purposes of trade' *only*, and nothing more.") (citations omitted).

51. *See* Walter v. NBC Television Network, Inc., 811 N.Y.S.2d 521, 523 (4th Dep't 2006).

52. *Id.* at 523.

53. *See Nieves*, 2006 N.Y. Misc. LEXIS 365.

54. *See* Howell v. N.Y. Post Co., 81 N.Y.2d 115, 124 (1993) ("We have been reluctant to intrude upon reasonable editorial judgments in determining whether there is a real relationship between an article and photograph.").

55. *Nieves*, 2006 N.Y. Misc. LEXIS 365.

reasoning is flawed because the real relationship limitation is a determination of law, not one of fact.[56]

Given that the *Nieves* court treated *Family Bonds* as a documentary, which necessarily contains subject matter of public interest, the court should have found that there was a real relationship between the use of Nieves's image and the show. Accordingly, Nieves's complaint should have been dismissed under the newsworthiness exception as a matter of law.[57]

Moreover, because *Family Bonds* is an unscripted reality show about real people in real settings, it is hard to argue that images involving the bounty hunters' reaction to and interaction with a passerby on a New York City street are unrelated to the subject matter of the show. After all, the purpose of the show is to give "viewers a window into the dangerous and unexplored world of bounty hunting—*through the eyes* of the most outrageous, fun-loving, and wild (yet somehow functional) *real-life family* on TV."[58] This world encompasses bounty hunters sitting in their parked vehicle, watching people on the street in search of a suspect. Thus, under the broad construction given to the terms "newsworthy" and "of public interest,"[59] the use of Nieves's image was clearly related to the show because the scene demonstrated that bounty hunting, at least as it relates to this particular family, also has its everyday, lighter moments. This provides the viewer with an appropriate contrast to the more serious and dangerous side of the business.

Accordingly, *Family Bonds* is a show of public interest because presumably *Family Bonds*'s viewers would be unaware of what goes on in the world of bounty hunting if a reality series like *Family Bonds* were not aired. But in error, the trial court refused to make this determination on the ground that the cast's "derogatory and degrading" comments about Nieves created a factual dispute as to whether such a use constituted an advertising or trade purpose violative of sections 50 and 51.[60] There was a real relationship between Nieves's image and the show because the show's subject matter entails everything that goes along with the family's bounty hunting exploits, including their interactions with the surrounding neighborhoods, displays of their personality,

56. *See supra* note 24 and accompanying text.

57. *See* Beverley v. Choices Women's Medical Center, Inc., 78 N.Y.2d 745, 752 (1991) ("This newsworthiness/public interest exception evolved out of, and has been applied in, a series of cases in which *media defendants used plaintiffs' photos in connection with periodical or newspaper articles or documentary films concerning newsworthy events or subjects of public interest*, including political events, social trends, scientific news, and stories of consumer interest.") (emphasis added).

58. HBO Shop, Family Bonds DVD, http://store.hbo.com/detail.php?p=100335 (last visited Feb. 26, 2010) (emphasis added).

59. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 441–42 (2000) ("[T]his Court has held that 'newsworthiness' is to be broadly construed. Newsworthiness includes not only descriptions of actual events but also articles concerning political happenings, social trends or *any subject of public interest*. . . . Whether an item is newsworthy depends solely on 'the content of the article'—not the publisher's 'motive to increase circulation. . . .' Applying these principles, courts have held that a wide variety of articles on matters of public interest—including those not readily recognized as 'hard news'—are newsworthy.") (emphasis added) (citations omitted).

60. *See Nieves*, 2006 N.Y. Misc. LEXIS 365.

and occasional forays into their sexual libidos while on a bounty. After all, *Family Bonds* is an unscripted show that is documenting real people. The First Department's affirmation of the trial court's decision creates a troubling precedent for future media defendants that produce reality shows.[61]

Nieves is a departure from the broad newsworthiness exception to New York's right of privacy tort,[62] and taken alone, the decision is an ominous sign that New York courts will not treat reality content as newsworthy or of public interest. Other cases in New York, however, have suggested that the opposite is true and have given substantial protection to the reality genre.

One of the best examples of the newsworthiness exception's application to reality programming developed from the "mockumentary" film *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan* ("*Borat*"),[63] which came out in 2006, the same year *Nieves* was decided, and was a huge box office success.[64] Featuring an actor pretending to be a foreign journalist from Kazakhstan named "Borat," the film set up fake situations (which were patently absurd and offensive) featuring non-actors whose interactions with Borat were filmed under the guise that they were participating in a documentary about America for the "benefit" of Borat's home country.[65] Not surprisingly, when the film was released and the participants in the film saw that they had been duped, lawsuits were brought against the filmmakers and producers under allegations and claims analogous to those in *Nieves*.[66]

In one of the first major lawsuits stemming from *Borat, Lemerond v. Twentieth Century Fox Film Corp.*, the plaintiff complained that his image was used in *Borat* in violation of his right of privacy under sections 50 and 51 of New York Civil Rights Law.[67] The issue was whether *Borat* used plaintiff's image for advertising or trade

---

61. In a relatively terse opinion, the First Department reasoned:

> It is undisputed that plaintiff's image was used during the show and that its use was accompanied by remarks by the show's cast in which the subject of plaintiff's sexual allure was crudely debated. Inasmuch as defendants failed to demonstrate that the use of plaintiff's image in this manner bore a "real relationship" to the subject matter of the show, and that plaintiff was not "singled out and unduly featured merely because [she was] on the scene," the motion to dismiss the complaint was properly denied.

Nieves, 817 N.Y.S.2d at 227 (citations omitted).

62. *See* case cited *supra* note 57.

63. *See* Paul Farhi, *'Borat' Box Office Conquest May Grow*, Wash. Post, Nov. 11, 2006, at C2.

64. *See id.*

65. *See* Borat (Twentieth Century Fox 2006).

66. *See, e.g.,* Amended Complaint and Demand for Jury Trial, Lemerond v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 26947 (S.D.N.Y. June 26, 2007) (No. 07 Civ. 4635); Complaint, Johnston v. One Am. Prods., 2007 U.S. Dist. LEXIS 62029 (N.D. Miss. Mar. 10, 2007) (No. 2:07CV42-P-B).

67. *See Lemerond*, 2008 U.S. Dist. LEXIS 26947, at *1. The claim was based on a thirteen-second clip of Borat greeting New Yorkers on the street, and in one instance, Borat tried to introduce himself to the plaintiff who then ran away. *Id.* at *2. The use was unauthorized and was featured twice in the film and once in the film's trailer. *Id.*

purposes, and specifically, whether the use would fall within the newsworthiness exception.[68] Correctly noting that "newsworthiness is a question of law to be determined by the courts," the United States District Court for the Southern District of New York held that "it is beyond doubt that *Borat* fits squarely within the newsworthiness exception to [section] 51."[69] Thus, unlike the court in *Nieves*, the *Lemerond* court looked past the film's offensive messages to find that *Borat* was "clearly" subject matter in the public's interest even though it was more akin to a feature film than a documentary.[70]

The *Lemerond* court then discussed the "real relationship" limitation and found that as a matter of law there was a connection between *Borat* and the use of the plaintiff's image during the film.[71] Specifically, the court held that the use of the plaintiff's image "emphasize[d] differences between Borat's home village and his American destination . . . . and, in doing so, [bore] a direct relationship to the theme of 'otherness' [in the film]."[72] Accordingly, *Lemerond* falls directly in line with New York precedent regarding the newsworthiness exception.

Other recent New York cases have likewise extended the newsworthiness exception to reality-based content. In *Candelaria v. Spurlock*, for example, the United States District Court for the Eastern District of New York dismissed a section 51 claim relating to the unauthorized use of a plaintiff's image in a documentary film about fast food.[73] The *Candelaria* court specifically held that "[t]he question of whether something is newsworthy is a question of law for the courts to decide."[74] In accordance with this principle, the court found that the documentary was newsworthy because it "aims to educate and address in detail the obesity epidemic and related health risks associated with eating fast food."[75] The court held that the real relationship limitation was satisfied because "[t]he clip of plaintiff, together with others in the sequence, show[ed] that it is difficult for McDonald's patrons to obtain

68. *See id.* at *4.

69. *Id.* at *4–6.

70. *Id.* at *6–7. The court found that "Borat attempts an ironic commentary of 'modern' American culture, contrasting the backwardness of its protagonist with the social ills afflict[ing] supposedly sophisticated society." *Id.*

71. *See id.* at *7–8.

72. *Id.* at *8 (citation omitted).

73. Candelaria v. Spurlock, No. 08 Civ. 1830, 2008 U.S. Dist. LEXIS 51595, at *16 (E.D.N.Y. July 3, 2008). For a description of the incidental use exception, *see infra* note 78.

74. *Candelaria*, 2008 U.S. Dist. LEXIS 51595, at *5 (citations omitted). The documentary film at issue was Super Size Me, in which the defendant, who wrote, directed, and produced the film, only ate at McDonald's for thirty days to see what health effects the fast food would have on his body. *Id.* at *2. The "plaintiff appear[ed] as a McDonald's employee for approximately three to four seconds in a scene discussing the nutritional content of McDonald's offerings and the availability of this information to the public." *Id.* at *2–3.

75. *Id.* at *11.

nutritional information on the food served."[76] This directly related to the movie's theme "that the public lacks knowledge of the detrimental health effects associated with eating [fast food]."[77] Thus, the use of the plaintiff's image in a montage during the film was found not to be a use for "'advertising purposes or for the purposes of trade' within the meaning of [section] 51."[78] Once more, in contrast to *Nieves*, the *Candelaria* case is in line with New York's right of privacy law.

Similarly, in another recently decided case, the Eastern District of New York held that the use of a plaintiff's image appearing in a poster for a documentary about the mafia fell within the newsworthiness exception to section 51 liability.[79] The court found that the "docudrama" was newsworthy because "[t]he activities of organized crime in the United States have long been a matter of public interest, even fascination,"[80] and as the plaintiff's image "illustrat[ed] an event depicted in the film," it bore "'a real relationship' with *Inside the Mafia*."[81]

Although these cases were decided in New York federal courts, they relied heavily on settled New York case law and are consistent with the legislative intent to focus the right of privacy only on protecting against commercial misappropriations. *Nieves*, on the other hand, gave little weight to the newsworthiness exception, particularly failing to find a "real relationship" between the use of Nieves's image and the *Family Bonds* episode, even though more tenuous relationships have been found in other recent New York cases. Because the *Nieves* decision is in direct contrast to New York law, *Nieves* will most likely be limited to its facts.[82]

Although the right of privacy appears to be settled law in New York, new formats of entertainment, such as reality television, present new privacy concerns and new challenges to the reach of sections 50 and 51 of New York Civil Rights Law. While determining whether an article is newsworthy or of public interest is at times difficult,

---

76. *Id.* at *14.

77. *Id.*

78. *Id.* at *4–5. The same conclusion was also reached under the court's application of the incidental use exception:

> [P]laintiff is on camera for a very brief period—three to four seconds. It would be impossible to reasonably characterize plaintiff's time on camera as anything more than 'fleeting.' In fact, her appearance was considerably shorter than the plaintiffs in the other films discussed, and unlike the plaintiff in '[*Borat*],' plaintiff here never spoke and has not alleged that her appearance was ever used in any advertisement/trailer for the movie.

Id. at *14–15.

79. *See* Alfano v. NGHT, Inc., 06 CV 3511, 2009 U.S. Dist. LEXIS 49656, at *12–13 (E.D.N.Y. June 11, 2009). In *Alfano*, the plaintiff's photograph was featured in a poster that advertised a National Geographic documentary called Inside the Mafia. *Id.* at *3–4. The plaintiff had been photographed alongside John Gotti as Gotti was leaving a courthouse, and this photo was used in the poster for the documentary. *Id.* at *2–4.

80. *Id.* at *7–8.

81. *Id.* at *10 n.3.

82. As of February 24, 2010, *Nieves* has yet to be cited in any legal opinions.

the broad construction given to these terms by New York courts suggest that most reality-based programs should be outside the realm of the advertising and trade purposes specifically targeted for liability under the right of privacy statute. However, because New York courts have yet to clarify the scope of sections 50 and 51 in the context of reality programming, television producers and future media defendants still have much to be concerned about in terms of their potential liability when filming in New York.