

Tel Aviv University Faculty of Law
Legal English
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Final Exam Moed Bet – Sample Answers

(1)

QUESTION 1

(5) 1) The Defendant DiCorcia, a professional photographer known in the international artistic community, took picture of Plaintiff an Orthodox Hasidic Jew, Nessenzweig, as part of a photographic project that was later presented at ~~the~~ a picture gallery called Pace, which is the other defendant. None of the defendants ever obtained plaintiff's consent to take, use, sell, exhibit or publish plaintiff's photograph. The photographic project ~~was~~ intitled "Heads", ~~is~~ included plaintiff's picture and was exhibited at the ~~the~~ Pace gallery, which sold all ten edition prints of the photograph.

QUESTION 2

(2) (4) The basis of the cause of action is ^{NY} Civil Rights Laws §50 and §51. The relief being sought is Damages (money, compensatory, exemplary) and a permanent injunction.

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QUESTION 3

⑤ ③ A one year statute of limitations applies to actions brought under Civil Rights Laws §§ 50 and 51.

~~Plaintiff argues that the statute of limitations begins to run from~~

Plaintiff argues two arguments in opposition. His first argument is that the statute of limitations begins to run as of the the date of the last offensive publication or, alternatively, from the date of discovery of the wrong.

Defendant argue that the statute of limitation accrues from the first publication of the subject material which was ~~in~~ in 2001, hence ~~4~~ four years prior to ^{plaintiff's} lawsuit.

QUESTION 4

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4) The court concludes that plaintiff's action is barred by the statute of limitations under existing appellate authority.

The court notes that the governing rule on privacy claims under Civil Right Laws in New York State is the "single publication rule" asserting that the statute of limitations on such claims begins to run from the first unauthorized use of subject material. The court opines that deciding whether the accrual date of a particular tort should run from the date of its discovery is a matter for the legislature to determine. The court also notes that judicial ~~exten~~ extensions of date of discovery doctrines are usually rejected and more over, the facts of this case do not provide basis to give the plaintiff an enlarged statute of limitations.

(4)

QUESTION 5

(15)

5) The court ruled in favor of the defendant on the substantive claim regarding violation of privacy under New York Civil Rights Laws §§ 50 and 51, finding the plaintiff failed to state a cause of action.

The court asserted that the right of privacy laws are a ~~direct-foote-need~~ " " marks intended to defend the average person from unwanted public exposure and the potential emotional damage thereby inflicted. Recognizing

the clashing interests arising from such cases, the laws were enacted to establish a balance between the right to privacy and the constitutional right to free speech.

The elements of a privacy claim under Civil Rights Laws §§ 50 and 51 are four: (1) use of plaintiff's name

(5)

QUESTION 5 cont.

portrait, picture or voice, (2) for advertising purposes or for trade,
(3) without consent and (4) within the State of New York.

Since defendants admitted facts which establishes elements

1, 3 and 4 of a privacy cause of action, the issue left

in question was whether the use of plaintiff's photograph

was for commercial purposes. ^{New IP} Defendants claimed that

the photograph was not used for trade or advertising, legally

speaking, but rather that it is "art", and as such, it is

protected by the first amendment of the U.S. Constitution

and therefore cannot fall within protection of New York's

privacy laws. Plaintiff argued the photograph isn't art

but rather a commercial material initially created for

the purpose of trade, and therefore is actionable under

the privacy laws. ~~The court noted that the Court of~~

~~Appeals has repeatedly held that the New York statutory~~

~~right of privacy restricts the use of one's likeness~~

(6) QUESTIONS cont.

(Part A q.5)

The court notes that in recent years, New York court which addressed the issue whether an artistic use of an image is exempted from action under New York State Privacy Laws, have consistently found "art" to be constitutionally protected free

speech and is so exempt. Recognizing former rulings

which held that art can be sold and still retain its artistic character, and holding that defendants have

established a prima facie, the the subjected photograph
how did they establish this. reputation of artist, reviews in art publication
is in fact "art", the court decided that in spite

of plaintiff's distress and notwithstanding it, defend

defendants behaviour is protected by the freedom of

speech and the complaint is to be dismissed.

This, the court upheld, is "the price every person

must be prepared to pay for in a society in

which information and opinion flow freely"

QUESTION 6

(8) Part B
 (a)

Article 50 of New York Civil Right Law defines violation of privacy in a manner as described there as a misdemeanor, ~~which can be punished by~~ ~~seek~~ ~~compensation upon,~~ ~~whereas article 51 constitutes one's~~ ~~possibility to seek a claim for an injunction,~~ which lays in the branch of Criminal Law, whereas article 51 constitutes one's right to file a civil claim for injunction and for damages against the person, firm or corporation which ~~violated~~ performed in the way provided in article 50.

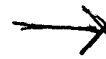
Both articles can be applied to the same incident, while article 50 is performed by state authorities, and article 51 is ~~used~~ ~~by~~ ^{practiced} by a private entity, ~~use~~ ~~is~~ in the area of Civil Law.

QUESTION 7

§50

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7. The liability of the photographer - the 'problematic' element is the 'written consent' of the people who signed the agreement. I believe this question of the law (contract law ~~to be~~) to be fairly simple - the photographer has



QUESTION 7 cont.

falsely represented the purposes to which ^{potential} ~~(possible)~~ plaintiffs gave their consent and thus he did not in fact obtain their consent. ^(the publication is clearly for commercial purposes so did not discuss #)

Dieter's Delight - A more interesting (and far more complicated)

arises here: ^(is) ~~is~~ the element of "written consent" fulfilled

when a third party purchases the pictures ~~for~~ with a promise

they were in fact obtained by consent? we must remember

that the photographer might also be ~~of~~ breaching an implied

stipulation with DD that the photos were obtained in a legal ^{construence} ~~construction~~

legitimate way). This question demands ~~construction~~ of the 3rd

element. Verbal ^{construence} will hold the company liable,

though I ^{am} not sure that ~~set~~ such interpretation will coincide

with the purpose of the law.

§§1 Remedies sought - The photographer has ~~acted~~ knowingly breached §§0 and is therefore liable for damages,

** Another thing worth mentioning is that photographer's actions ^(it is interesting if maybe as a "reformed" over-weighted we don't get to photos - what then?) were for commercial purposes.

* Due to the constraints of time I shall not examine the ~~remaining~~ elements as they are not challenged by the case.

(10)
QUESTION 7 cont.

and exemplary damages [given the fact that he deceit plaintiffs and Juries' discretion these will be fairly high]. Since he does not advertise the photos there is no point talking about an order.

DD - Should the court acknowledge the fulfillment of the 'written consent' element, DD shall be liable under (S51) to damages and an injunction order. Another complicated ~~&~~ question of the law under the said circumstances arises from the 'knowingly' element required for punitive plaintiff's damages. [notice: punitive damages are not limited to injury]

8
The district attorney is likely to ask Mrs. Ows to carefully read section (S50) and notice that the picture published being "of any living ~~was~~ ^{person}" is *sin qua non* in establishing a cause of action. ~~The~~ The district attorney will then

express his deep sorrow from Lennon's ~~&~~ murder and explain to it is her divine punishment Mrs. Ows ~~she deserves~~ for ruining the Beatles.

QUESTION 8

~~Suppose that the district attorney would respond by stating that this law is no good does not apply~~

for Ms. Ono since it clearly states that the right of privacy is a right for "living people"

John Lennon died 26 years ago. His privacy is long gone. ^{Perhaps} Ms. Ono can sue through other laws

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QUESTION 9

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9. The statement that a privacy statute does not apply to "matters of public interest" is ^{authority} mandatory in the ^{the} all lower courts of NY State ~~Supreme courts of N.Y.~~ (which are, oddly enough, a lower tribunal than the court of appeals...). This statement can be used ~~by~~ as a ~~permi~~ permissive authority in the supreme courts of other states (supreme court used in the ordinary sense) ~~as~~, in the Supreme Court of the U.S. and in comparative law.

The difference between a mandatory and a permissive authority is that in the former the court (~~a~~ a lower tribunal in the hierarchy of adjudication) is obliged to follow the ^{binding} precedent set by higher tribunal. In the latter, we are dealing with two courts which are in different adjudicative hierarchies. Therefore, one can appeal to court based on the ~~substantive~~ merit of the argument, ie its substance, but not formal necessity to follow as binding precedent.

QUESTION 10

10 The association would argue the George W. Bush may not may have given a written consent to the brochures, but that he gave his consent by becoming an "official" in his country, exposed to critique. Moreover, the usage of his character is not for commercial reasons or purposes of trade but as political usage which is not prohibited by § 50 § 51.

Protected under 1st A freedom of speech

QUESTION 11

④

11) In Nussenzweig v. DiCercia the court provided for

elements of a privacy claim under the Civil Rights Laws
 Not only court, but explicit language of statute states
 §§ 50 and 51. The fourth element ~~provides~~ determines that the
 use must be "with this state"

wrongful use of one's picture or image will occur within the
 state of New York. ^{OK here you say that}

The law does not demand that either the
 plaintiff or defendant will be from New York or within it,

but rather that the use mentioned above will. In accordance, the
 remedies ~~offered~~ available by article 51, use performed in apply to New

York State. ~~By~~ To sum up, it appears that the team
 can invoke the New York Civil Rights Law for injunction and
 damages accrued only within the territory of the state.

19

In his article 'Artistic Expression or Unfair Exploitation...', Jason D. Sanders (hereinafter referred to as JS) criticizes the current doctrine concerning the "right of publicity".

JS points to the source of the 'entirely unworkable' situation:

"a 'right of publicity' claim does not require to have made any express or implied claim of endorsement", therefore, "its scope can be very expansive. ^{close} Courts, so does JS claim, are

perplexed by scope of the right and therefore construe the requirement for "commercial use" in a broad manner.

The problem thus arising is that the primary indicator to distinguish between "commercial" and "non-commercial" the notorious 'artistic exemption' - a highly vague concept purposes is ~~whether defendant's actions were artistic.~~

JS argues that courts are ~~not~~ incapable

(16) PART C cont.

asserting the artistic merit of defendant's taking (of plaintiff's image) for the subject matter of such determination (art) ^{happens to be} 'highly subjective'.

One by One, the author rejects the parameters used in ⁱⁿ evaluating such evaluation: the 'transformative' test, the aesthetic worth of the work ^{as well as} its degree of ~~expressivity~~, ^{expressivity} ~~expressiveness~~. Courts should not concentrate on the ~~work~~ ^{defendant} of the taker (the ~~plaintiff~~) but rather way in which the identity aspects of plaintiff's personality are being used.

It is precisely in this point where the author starts developing constructive criticism, i.e., he offers a ^{level} ~~level~~ doctrine incorporating his suggestions; a spectrum is ^{drawn} ~~is~~ along which are located the various ~~degrees~~ ^{what risking, a restitutionary or could be referred to as} degrees of 'propriety of means'. On one end-point

we spot ~~the~~ usages of identity which were carried for

wholly promotional purposes - such takings should win no

1st Amendment protection whatsoever. In the middle of

the spectrum, lie the 'Sui Generis' works ~~which~~ ^{that could}

be described as having 'artistic worth' in day-to-day

thinking, but are used for promotional purposes. These,

says JS, should enjoy 'reduced protection'. Finally,

we are left with 'primarily expressive' works - here

the medium is completely irrelevant and plaintiff

shall win full protection.

Shifting the intellectual effort from ~~to~~ the work itself,

to the way in which plaintiff's identity was used

will achieve all desired goals: incentives for art, space

for artistic expression, & following the SC precedent and

fair protection from infringement of privacy to

individuals. FIN.