Brothers in Law: A Photographer's Artistic Freedom v. an Individual's Rights to Privacy

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(Keziban Barry)

Our teenage friend Jay is a renowned amateur birder whose feathers aren't easily ruffled. Still, he was dismayed to spot an unflattering picture of himself taken without his parents' permission and posted online by a fledgling rival. Worse, other birders were flocking to the rival's website to purchase posters of the offending photo. Our young pal had cried foul, and his mother, Robin, was itching to sue. She phoned us to see if they had a case.

"Doesn't New York's privacy law prohibit the sale of these posters?" cried Robin over the squawk box.

"In a case like this," we answered, "a court would balance the right of privacy against the photographer's strong First Amendment right of free expression."

Robin had done some basic research to get her ducks in order. "The New York privacy statute doesn't allow images of individuals to be used for advertising or trade purposes," she reminded us, "and here the photographer is actually selling nasty posters of my son."

We brooded on this for a moment before replying. "Just because they're posters doesn't mean they're not fine art. And if memory serves, fine art is exempted from privacy constraints under the plain wording of New York law."

We double-checked the statute—but ended up eating crow. We were wrong about the law. The privacy statute—Sections 50 and 51 of the New York Civil Rights Law—does not explicitly protect fine art, but a recent court case interpreting the statute did.

In the 2015 case *Foster v. Svenson*, the photographer Arne Svenson used a telephoto lens to take pictures, without permission, of adults and children living in apartments across from his in the Tribeca neighborhood of New York City. He was sued by his neighbors, the Fosters, for invasion of privacy and intentional infliction of emotional distress after they learned that Svenson's photos of Mrs. Foster and her children, ages 1 and 3, were being exhibited at New York's Julie Saul Gallery as part of a 2013 show called "The Neighbors" and were being sold through Artsy's website. The photos included Mrs. Foster's son in a diaper and her daughter in a bathing suit.

Both a lower court and the New York appellate court unanimously ruled in favor of the photographer, holding that because the photos were published as fine art, there was no invasion of privacy under the law. Specifically, the Foster court found that while the New York law prohibits the use of a person's name, portrait, or picture for advertising or trade purposes, the creation, sale, and marketing of the photographer's pictures did not constitute advertising or trade sufficient to trigger the law. The court also observed that "works of art fall outside the prohibitions of the privacy statute under the newsworthy and public concerns exemption. As indicated, under this exemption, the press is given broad leeway. This is because the informational value of the ideas conveyed by the artwork is seen as a matter of public interest. We recognize that the public, as a whole, has an equally strong interest in the dissemination of images, aesthetic values, and symbols contained in the artwork. In our view, artistic expression in the form of artwork must therefore be given the same leeway extended to the press under the newsworthy and public concern exemption to the statutory tort of invasion of privacy."

We thought that, to be safe, the photographer should have first asked for the Fosters' consent—and would ideally have had them sign appearance releases drafted by a lawyer. Of course, given the Fosters' views, this might have been a wild goose chase.

"The Foster decision is cuckoo," fumed Robin. "The issue isn't whether the picture could or should be shown as artwork, but rather how it was taken—secretly, without our consent."

"On the other hand," we observed, "the photograph was taken of Jay in a public place, so was there really any expectation of privacy? Remember that the Foster case involved photos taken while the subjects were in the privacy of their own home, and the court still sided with the photographer."

"But doesn't the fact that Jay is just a child expand our right of privacy?" Robin persisted.

"Not necessarily," we replied. "In Foster, some of the photos were of young kids—including a half-naked girl dancing in a tiara. But the court still held for the photographer, reasoning that 'the depiction of children, by itself, does not create special circumstances which should make a privacy claim more readily available.'"

We did some more legal research and confirmed that, rather than being an outlier, the Foster case was actually consistent with a string of precedents—including the 2003 New York case of *Altbach v. Kulon* and the 2002 federal case of *Hoepker v. Kruger*.

The first concerned an artist's publication of a photograph of a town justice together with a caricature of him as a devil with a tail and horns. The court ruled that the photograph was a constitutionally protected work of art.

The second case involved the famous collage artist Barbara Kruger, who copied, enlarged, and cropped a photograph of Charlotte Dabney created by photographer Thomas Hoepker, superimposing the words "It's a small world but not if you have to clean it." Kruger exhibited her new photograph at the Museum of Contemporary Art, Los Angeles, and sold it in the museum's gift shop and in various forms, including as magnets and postcards. Hoepker and Dabney sued Kruger for invasion of privacy and copyright infringement. But the court held for the artist on the grounds that her photograph "should be shielded from [the plaintiff's] right of privacy claim by the First Amendment. [It] is pure First Amendment speech in the form of artistic expression… and deserves full protection."

Robin was surprised to learn that the Kruger court had held for the artist. "I've read that California has strong privacy laws," she said.

Robin was right. In 2011 California passed a statute making it easier to prosecute paparazzi, and just last year several new privacy laws went into effect there that raised the penalties for stalking and for using drones to record the private activities of others.

Even still, we observed that advances in technology, whether they be computer imaging or better photographic equipment, have outrun existing laws protecting rights of privacy. In fact, the Foster court had a similar observation—and in its decision made an unusual plea to legislators: "Needless to say, as illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the Legislature to revisit this important issue, as we are constrained to apply the law as it exists."

Reacting to Foster, the New York Legislature did recently propose an amendment to the law prohibiting "the recording of visual images of a person having a reasonable expectation of privacy while within a dwelling, when such images are recorded by another person outside the dwelling." As yet, this amendment has not been enacted into law.

In Jay's case, we ultimately dissuaded Robin from initiating what we believed would be an expensive and drawn-out lawsuit, and instead we sent a strongly worded letter to her son's rival.

Happily, this did the trick, and we heard the website was shut down. At least that's what Jay tweeted.

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