NEW YORK: THE MEDIA AND MEDIA LAW CAPITAL

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"It was so easy living day by day
Out of touch with the rhythm and blues
But now I need a little give and take
The New York Times, The Daily News
It comes down to reality
And it's fine with me 'cause I've let it slide
…
I'm in a New York state of mind"[1]

INTRODUCTION

New York, widely considered the media capital of the world, is not only home to many of the country's and the world's largest, most influential media outlets, but is also home to some of the most media-friendly law in the country. Largely vested in the First Amendment and the New York Constitution's analogous protections under New York Constitution, Article 1, Section 8, the legislature and the courts for more than a century have provided media with a broad range of protections to facilitate the free flow of information and foster one of the freest press environments in the country.

A broad interpretation of this argument could trace origins of a hospitable press-friendly judicial system all the way back to New York printer John Peter Zenger's landmark, but not precedent-setting,

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1. BILLY JOEL, *New York State of Mind*, *on* TURNSTILES (Columbia 1976).

courtroom victory in 1735, fending off an historic seditious libel prosecution.[2] Even three centuries later, Zenger remains a prominent figure in press rights; with at least one prominent press freedom award named in his honor.

As aspirational as a free press is, the real test for the extent of these freedoms must be judged in the judicial system. These protections are found in both New York procedural rules, body of statutory law and, of course, judicial opinions.

This article draws on more than a decade of legal research for the *Survey of New York Law*.[3] The annual review has helped the author identify trends and standards to support the argument that New York law is extremely protective of media which encompasses freedom of the press, freedom of speech, the free flow of information.[4]

Most basically, the CPLR established a one-year statute of limitations for the tort of defamation.[5] This means potential libel and slander plaintiffs have one year to sue to recover damages if they believe their reputation has been harmed by a publication, broadcast or posting. Though other states have similar short statutes of limitations, some also have longer windows. Because media organizations are often the defendants in these tort actions, the short window means that media organizations cannot be hit with lawsuits long after the initial publication.[6]

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2. *See* JEAN FOLKERTS & DWIGHT L. TEETER, JR., VOICES OF A NATION: A HISTORY OF MEDIA IN THE UNITED STATES 42–45 (1989); *see also* ROBERT H. PHELPS & E. DOUGLAS HAMILTON, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 97 (1966) ("Governments used to suppress the critical press with criminal prosecution for seditious libel. But the trial of John Peter Zenger in New York in 1735 closed the door to this method of prior restraint before it ever took hold in the Colonies."); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 30 (1992) ("The confidence that Zenger's victory was an adequate bulwark against oppression of speech, however, was overplayed. Zenger was a local hero persecuted by an obnoxious politician, and his plea of truth before a jury of fellow citizens fell on sympathetic ears.")

3. The author has written an annual survey article on New York Media Law every year since 2007. *See* Roy S. Gutterman, *2007–08 Survey of New York Law: Media Law*, 58 SYRACUSE L. REV. 1075 (2008).

4. *See* Roy S. Gutterman, *New Voices, New Rights, New York: A Case Study and a Call for Student Journalist Protections in New York*, 83 ALBANY L. REV. 1115, 1143–45 (2020). In this article calling for creation of the Student Journalist Free Speech Act in New York, the author argues that the state's tradition of press-friendly law dates back to the colonial era playing out over the centuries in caselaw and statutes. *See id.*

5. *See* N.Y. C.P.L.R. 215 (McKinney 2024).

6. *See* Reich v. Hale, No. 156787/2016, 2017 N.Y. Slip Op. 30197(U), at 3–4 (Sup. Ct. N.Y. Cnty. Jan. 20, 2017) (citing Arvanitakis v. Lester, 44 N.Y.S.3d 71, 72 (App. Div. 2016)); Martin v. Daily News, L.P, 951 N.Y.S.2d 87, 87 (Sup. Ct.

It is also important to note that the statute begins to run immediately with publication, not when the plaintiff happened to discover the content they believed defamed them. New York courts in recent years have rejected the discovery argument in some modern media cases involving online databases or online media, years after initial publication, rejecting arguments that every new internet search should satisfy as a new publication, initiating a new statute of limitations.[7]

From a statutory standpoint, several areas also stand out as press-friendly, including New York's reporter's shield law, which applies an absolute privilege to confidential information given to reporters,[8] and a broad interpretation of the judicial privilege under Section 74.[9]

As much as this article can fill page upon page with an expansive recitation of caselaw on the aforementioned issues, this article will focus on two distinct areas of media law: first, New York's formulation of invasion of privacy under both statutory and caselaw; and second, defamation and the gross irresponsibility standard for certain plaintiffs.

I. A (VERY) BRIEF AND CURSORY HISTORY OF MEDIA IN NEW YORK

The title, "Media Capital of the World," did not happen overnight, but rather started a long, long time ago.[10] New York has always had a history for having a large media presence, even going back to the colonial era to the Civil War and all the way through the penny press,[11] the Hearst-Pulitzer "Yellow Journalism Era,"[12] and into the

N.Y. Cnty. 2012) (citing Lehrman v. Discovery Commc'ns, Inc., 332 F. Supp. 2d 534, 537 (E.D.N.Y. 2004)).

7. *See* Firth v. State, 775 N.E.2d 463, 466 (N.Y. 2002).

8. *See* N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2025).

9. *See* N.Y. CIV. RIGHTS LAW § 74 (McKinney 2025).

10. *See* Maury Klein, *When New York Became the U.S. Media Capital*, CITY JOURNAL, Summer 1996, at 1.

11. *See id.* ("The news revolution—and it was truly a revolution, with momentous consequences—had its roots squarely in New York with the rise of the penny papers during the 1830s.")

12. *See id.*; *see also* EDWIN EMERY & MICHAEL EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 282 (5th ed. 1984) ("The man who more than anyone else brought about the era of yellow journalism was watching with sharp interest while Pulitzer was setting New York journalism on its ear in the mid-1880s. He was William Randolph Hearst, who was to become the most controversial figure in modern journalism before his 64-year publishing career was ended. The youthful Hearst was a calculating witness to Pulitzer's climb to glory [] when he eventually invaded New York to challenge the supremacy of the *World* . . . .").

radical press and "New Journalism" in the 1960s.[13] In 1930, New York's seventy-nine daily and nineteen Sunday newspapers gave the state more papers than any other state.[14] This was mirrored into the 1950s, when New York had more daily newspaper readers than anyplace in the country, with an obvious concentration in New York City.[15] Even into the 1990s, New York was home to five of the highest circulation newspapers in the country.[16]

Similarly, many of the historic and iconic names in journalism history passed through New York, including Zenger, Benjamin Day, Horace Greeley, Hearst, Pulitzer, Sulzberger, Gannett, Newhouse, and Murdoch, just to name a few.[17]

The Associate Press, the world's largest news service, has its global headquarters in New York City and countless magazines and their parent companies are based in New York. Even Gannett, which has become the largest newspaper chain in the country had its origins in Rochester and had several newspapers throughout the state.[18]

As both media and technology changed and developed, new media, mainly radio and television, grew in New York, particularly New York City. All three original national television and news networks—ABC, CBS and NBC—have been based in New York City since their founding with their roots in radio.[19] Later news and television networks such as Fox and Univision were based in New York City. And as the modern media consolidated with the entertainment industry, many entertainment/media companies are headquartered in New York, as well as California, including the parent companies of the networks, Comcast/ Universal (NBC), Disney (ABC) and Paramount (CBS), not to mention numerous cable networks, film and music companies.[20] A host of digital only media entities such as Buzzfeed and Vice as well as satellite radio giant SiriusXM are all based in New York.

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13. *See* EMERY & EMERY, *supra* note 12, at 238; *see also* KEVIN MICHAEL MCAULIFFE, THE GREAT AMERICAN NEWSPAPER: THE RISE AND FALL OF THE VILLAGE VOICE (1978).

14. EDITOR & PUBLISHER INT'L YEARBOOK OF 1930, 150–51 (1930).

15. EDITOR & PUBLISHER INT'L YEARBOOK OF 1954. (1954).

16. EDITOR & PUBLISHER INT'L YEARBOOK OF 1992 (1992).

17. *See* EMERY & EMERY, *supra* note 12, at 284–86, 570, 571, 682.

18. *See id.* at 682.

19. *See* Steven Thomas, *New York's Broadcasting History*, TOPVIEW, available at https://www.topviewtix.com/new-york/new-yorks-broadcasting-history?srsltid=AfmBOoqePxY1SmNp5Rye-HFDA-YbYaPr77QnuhdJO0c1X90kwt7hR6E7 (last visited Feb. 2, 2025).

20. *See id.*

One New York travel writer aptly summarized:

> The role that broadcasting has played within New York is monumental and has helped to propel the city forward. From humble beginnings in AM and FM radio to modern-day digital media, both radio and TV broadcasting in the Big Apple have been an integral part of its development and cultural prowess. A hub to many major networks, New York City continues to play a major part in broadcasting for both radio and television. Today, it's the largest radio market in the United States. Networks like NBC are headquartered there, and huge events are broadcast live in the city and around the world. From sporting events to talk shows, radio and television broadcasting in New York is still an important part of our cultural landscape.[21]

Thus, if New York can wear the crown as the media capital of the United States and the world, the law within the state relating to newsgathering and dissemination should reflect some deference to this important industry. Though the Supreme Court has held that the press has no special immunities or any greater rights than anyone else, at least when it comes to complying with a subpoena before a federal grand jury,[22] the First Amendment[23] and New York's Constitution[24] do offer some additional protections for the free press and those behind it, and New York often fully embraces those protections as a reflection of the state's legal, societal and civil liberties values.

II. INVASION OF PRIVACY: A NARROW VISION

While the common law tort of invasion of privacy affords plaintiffs opportunities to recover damages for commercial appropriation of one's image or likeness, false light, intrusion and publication of private and embarrassing information, New York only recognizes only one of these.[25] In New York, aggrieved plaintiffs who feel their

21. *Id.*

22. *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

23. U.S. CONST. amend. I.

24. N.Y. CONST. art. 1, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.").

25. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2024).

privacy has been invaded, often by aggressive or unscrupulous media, have only one cause of action for recovery of damages: appropriation of image or likeness without consent for commercial or advertising purposes.[26]

New York's invasion of privacy statute, New York Civil Rights Law Sections 50–51 sets out the elements of the tort and courts have applied the statute quite narrowly, with a tight definition of what constitutes commercial or advertising.[27] Further, as a defense, largely in cases involving the media, the courts have also adopted a broad definition of newsworthiness.[28]

In *Howell v. New York Post Co.*, Judge Kaye offered a thorough explanation for the law, noting its narrow definitions for advertising and trade purposes while broadly construing newsworthiness.[29] More importantly, she wrote: "This is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press."[30]

New York's narrow definition of the concept of invasion of privacy has also been a reflection of the state's reverence for the media; perhaps at the expense of some potentially aggrieved plaintiffs.[31]

The statute, New York Civil Rights Law Sections 50–51, ignores the common law torts of invasion of privacy by excluding intrusion, publication of private and embarrassing information and false light.[32] Instead, New York recognizes only a plaintiff's right to privacy with

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26. *See id.*; *see also* Howell v. N.Y. Post Co., 612 N.E.2d 699, 703 (N.Y. 1993).

27. *See* Arrington v. New York Times Co., 434 N.E.2d 1319, 1322 (N.Y. 1982).

28. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 552 (N.Y. 2000).

29. *See Howell*, 612 N.E.2d at 702 (citing Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 90 (N.Y. 1983)); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 60–61 (5th ed., 1984).

30. *Howell*, 612 N.E.2d at 703 (citing Stephano v. News Grp. Publ'ns, 474 N.E.2d 580, 584–85 (N.Y. 1984); *Arrington*, 434 N.E.2d at 1322).

31. Some critics believe that this narrowness comes at the expense of legitimate plaintiffs buffeted or abused by a miscreant media, much in the vein of the seminal Brandeis-Warren law review article which is credited with creating the right to privacy. *See* Michael C. Hartmere, *Defining New York's Statutory Right of Privacy: A Case Comment on* Messenger v. Gruner + Jahr Printing and Publishing, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 905, 931 (2000); Laura M. Murray Richards, Comment, Arrington v. New York Times Company*: A Missed Opportunity to Recognize a Constitutional Right to Privacy of Personality,* 26 HOW. L.J. 1579, 1608 (1983).

32. *See* CIV. RIGHTS §§ 50–51; *see also Howell*, 612 N.E.2d at 703 (citing *Stephano*, 474 N.E.2d at 585; *Arrington*, 434 N.E.2d at 1322; Cohen v. Hallmark Cards, Inc., 382 N.E.2d 1145, 1146 n.2 (N.Y. 1978); Flores v. Mosler Safe Co., 164 N.E.2d 853, 854–55 (N.Y. 1959)).

regard to the unauthorized use of their image or likeness for commercial purposes.[33]

To understand the statute, which is still applicable today, a look back is required.

The law was passed in 1903, the year after the New York Court of Appeals declined to set precedent that would import a then-novel cause of action in *Roberson v. Rochester Folding Box Co.*[34] *Roberson* was one of the country's first high court opinions on the new right of privacy.[35] Here, the plaintiff, Abigail Roberson, a Rochester teenager, somehow found herself at the center of a controversy when her portrait photograph became the face of Franklin Mills Co. flour.[36] Her profile portrait appeared on more than 25,000 boxes of flour "conspicuously displayed" throughout the area in stores, warehouses and public places, including saloons.[37] She unwittingly became the face of the flour company with the promotional slogan, "Flour of the Family."[38] She had posed for the photograph in a studio but did not consent to distribution on the flour boxes or any other marketing venue.[39]

This publicity, which poor Abigail did not consent to, resulted in mockery and jeers, leading to embarrassment, humiliation, "severe nervous shock," and emotional distress requiring medical treatment and bed rest.[40] She was awarded $15,000 in the Monroe County trial court and later the appellate division.[41] However, the Court of Appeals was not eager to establish new torts under the guise of equity, despite shreds of precedent going back to England and the now-legendary *Harvard Law Review* article written by future United States Supreme Court Justice Louis Brandeis and his Boston law partner Samuel Warren, *The Right of Privacy*.[42]

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33. *See Howell*, 612 N.E.2d at 704.

34. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 448 (N.Y. 1902).

35. See JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 22 (2018) (noting that the first state high court privacy opinion was also a New York case, *Schuyler v. Curtis*, 2 N.E. 22 (N.Y. 1891) which involved an unauthorized statue of a society woman at the Chicago World's Fair, but did not explicitly rule on the matter of privacy).

36. *See Roberson*, 64 N.E at 442.

37. *See id.*

38. *See id.*

39. *See* ROTHMAN, *supra* note 35, at 22–24.

40. *See Roberson*, 64 N.E. at 442.

41. *See* Roberson v. Rochester Folding Box Co., 71 N.Y.S. 876, 877, 884 (App. Div. 1901).

42. *See Roberson*, 64 N.E. at 443 (citing Louis Brandeis & Samuel Warren, *The Right of Privacy*, 4 HARV. L. REV. 193, 193 (1890)).

Despite the lower court rulings, the Court of Appeals was sympathetic to the facts but reluctant to create a new cause of action and legal liability which could apply to legitimate publications like newspapers as well as unscrupulous advertisers, as we saw in this case.[43]

The court wrote:

> If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right and with many persons would more seriously would the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply.[44]

Judge Gray's dissent calls for the right to collect on the unauthorized commercial use of someone's image or likeness, which legal scholar and right of publicity authority Jennifer E. Rothman credits with influencing the New York legislature's development of the Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade, the precursor to New York's first privacy statute.[45]

Soon after this decision, the New York legislature adopted New York Civil Rights Law Sections 50–51, the nation's first invasion of

43. *See id.*

44. *Id.*

45. *See id.* at 450 (Gray, J., dissenting); ROTHMAN, *supra* note 35, at 24–25 (noting that Virginia followed the New York statute and later the Georgia Supreme Court held that the right of privacy did exist).

privacy statute.[46] *Howell* describes other common law invasion of privacy torts, as described by Prosser and Keeton.[47]

Early treatment of the statute embraced its language, purpose, and constitutionality. In its first review of the new statute, the New York Court of Appeals in 1908 found that the statute was constitutional and that the requirement of written consent to use a photograph or image for commercial purposes was well within the legislature's interest.[48]

In *Rhodes v. Sperry & Hutchinson Co.*, the court wrote:

> The statute merely recognizes and enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned. This right of control in the person whose name or picture is sought to be used for such purposes is not limited by the statute.[49]

In another early case, the New York Court of Appeals found that a film's use of the plaintiff's picture and likeness did constitute an illegal business or commercial use under the statute in *Binns v. Vitagraph Co. of America*.[50]

The court wrote:

> So construed, and also construed in connection with the history of chapter 132, Laws of 1903, which was enacted at the first session of the legislature after the decision in the *Roberson* case, it does not prohibit every use of the name, portrait or picture of a living person. It would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper. It is not necessary now to attempt to define what is or is not within its prohibitive provisions.[51]

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46. *See Howell*, 612 N.E.2d at 703; *see also* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1354 (1992) (stating California passed a similar privacy law in 1899); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 90 (2020) ("The underlying difficulty with the right of publicity is that it prohibits conduct without specifying the particular harm the tort seeks to address.").

47. *See Howell*, 612 N.E.2d at 703.

48. *See* Rhodes v. Sperry & Hutchinson Co., 85 N.E. 1097, 1099 (N.Y. 1908).

49. *Id.*

50. *See* Binns v. Vitagraph Co. of Am., 103 N.E. 1108, 1110–11 (N.Y. 1913).

51. *Id.* at 1110.

Over the past century, Sections 50–51 cases make it into the courts every year. But a handful of important cases involving media reinforce and highlight the law's protection of the press.

The Court of Appeals, in one of the more prominent modern media cases, provided a full-throated endorsement of both 50 and 51's narrowness for application and the broad meaning of newsworthiness in *Messenger v. Gruner + Jahr Printing & Publishing*.[52] In this case, a teen model sued the magazine *Young and Modern* because a photo that she posed for was used without her permission as illustration artwork for a story about teen alcoholism and sex abuse.[53]

The Court of Appeals reiterated that New York does not recognize the common law tort of invasion of privacy, with the opinion explicitly referencing false light invasion of privacy, which this case and others attempt to shoehorn into Sections 50–51 claims.[54]

The most notable part of the pro-media analysis in *Messenger*, though, is how the court views matters of public interest and newsworthiness. This expansive rule distinguishes between a truly commercial endeavor or an advertisement and a news outlet, such as a magazine, newspaper or television news operation, which is a profit-making business.[55] Even if editorial decisions are aimed at boosting circulation, readers, or viewers, thus increasing revenues, that is still not commercial under the statute or caselaw, the court held.[56]

The court wrote:

> Significantly, the fact that a publication may have used a person's name or likeness "solely or primarily to increase the circulation" of a newsworthy article—and thus to increase profits—does not mean that the name or likeness has been used for trade purposes within the meaning of the statute. Indeed, "most publications seek to increase their circulation and also their profits." Whether an item is newsworthy depends solely on "the

52. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 552 (N.Y. 2000). The case was initially brought in federal court, but the Second Circuit sent it to the New York Court of Appeals for certification on the substantive issues. *See id.* at 551.

53. *See id.* at 550.

54. *See id.* at 551, 553, 556. This is a litigation tactic that was evident before the *Messenger* case and continues from time to time.

55. *See id.* at 552.

56. *See id.*

> content of the article"—not the publisher's "motive to increase circulation."[57]

The court goes on to provide nearly a page of examples of newsworthiness from nearly a dozen cases—beyond the "hard news" arena—with cases involving nude beaches, traditional African clothing, a bomber jacket, and stories about award-winning television commercials.[58]

The court added:

> Consistent with the statutory—and constitutional—value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise.[59]

The New York standard has found support in other jurisdictions as well, with an appellate court in New Jersey referencing the broad newsworthy exception in dismissing a highly publicized defamation case by Donald Trump in 2008,[60] while also lending guidance in Rhode Island to help a trial court clarify the meaning of advertising and commercial while dismissing a claim against a true crime book author.[61]

In *WJLA-TV v. Levin*, the Virginia Supreme Court noted its state's similarity to New York in reversing a misappropriation claim against a television station which used an unauthorized photo of the plaintiff in a commercial promoting a news story about the doctor and alleged misconduct.[62]

The Virginia court wrote:

> Virginia is among the few states, including New York, that have limited the application of the common law privacy torts by statute. We further recognized that

57. *Messenger*, 727 N.E.2d at 552 (quoting Stephano v. News Grp. Publ'ns, 474 N.E.2d 580, 585 (N.Y. 1984)).

58. *See id.* at 552–53.

59. *Id.* at 553 (citing Howell v. N.Y. Post Co., 612 N.E.2d 699, 704 (N.Y. 1993); Finger v. Omni Publ'ns Int'l, 556 N.E.2d 141, 144 (N.Y. 1990); Arrington v. N.Y. Times Co., 434 N.E.2d 1319, 1321 (N.Y. 1982); Murray v. N.Y. Mag. Co., 267 N.E.2d 256, 258 (N.Y. 1971)).

60. *See* Trump v. O'Brien, 958 A.2d 85, 96–97 (N.J. Super. Ct. App. Div. 2008).

61. *See* Day v. Pingitore, No. PC-2010-2030, 2011 R.I. Super. LEXIS 78, at *10–15 (N.J. Super. Ct. May 26, 2011).

62. *See* WJLA-TV v. Levin, 564 S.E.2d 383, 395 (Va. 2002).

> under certain circumstances we may "look to New York courts for guidance" by considering the construction given by that state's courts to the similar statutory right of privacy enacted by its legislature.[63]

The strength of New York's privacy definitions was also an integral part of the United States Supreme Court's decision in *Time, Inc. v. Hill*, one of two false light invasion of privacy media cases the Court has decided.[64] The Court rejected the plaintiff's false light claim relating to a *Life* magazine article linking a novel and Broadway play back years earlier to when the plaintiff and his family were held captive by three escaped convicts.[65] The Court did so with a view of how narrowly New York defined invasion of privacy under both the statute and common law.[66]

Even in these false light cases, truth is an ultimate and important defense, but so is actual malice and prepublication knowledge of falsity or reckless disregard for the truth, the Court held.[67] And, quoting from *Spahn v. Julian Messner, Inc.*,[68] the Court acknowledged that the New York statute "affords 'little protection' to the 'privacy' of a newsworthy person, 'whether he be such by choice or involuntarily.'"[69]

Most importantly, the Court wrote:

> The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a

63. *Id.* (quoting Town & Country Props. v. Riggins, 457 S.E.2d 356, 362 (Va. 1995)).

64. *See* Time, Inc. v. Hill, 385 U.S. 374, 397 (1967). The other false light case was *Cantrell v. Forest City Publishing*, 419 U.S. 245, 254 (1974) (holding an Ohio newspaper could be liable for a reporter's fabrications under the false light tort).

65. *See Time, Inc.*, 385 U.S. at 377–80.

66. *See id.* at 381–82.

67. *See id.* at 384.

68. *See* Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 545 (N.Y. 1966) (upholding the award of damages and an injunction under sections 50–51 in favor of a baseball player, a famous left-handed pitcher, who was the subject of an unauthorized biography which included numerous fictitious accounts and false details).

69. *Time, Inc.*, 385 U.S. at 384 (quoting *Spahn*, 221 N.E.2d at 545).

> finding of knowing or reckless falsity in the publication of the Life article.[70]

The *Spahn* decision, which involved an unauthorized biography of a famous left-handed major league baseball pitcher, hinged on multiple fictitious elements in the book.[71] The Court of Appeals wrote: "[E]ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."[72] However, the fictitious accounts undercut the publisher's argument, the court held.[73]

Court rulings on more recent cases have also applied New York's narrow application of commercial or trade purposes to modern media including video games, rejecting appropriation claims by celebrities who believed video games used their images or likenesses without their consent.[74] Even models' lawsuits against adult entertainment venues that used their photos without permission for promotional materials were not an automatic win for the plaintiffs, though mostly because of procedural issues.[75]

The breadth of New York's conception of newsworthiness has also staved off many lawsuits over the years. Nearly a century ago, in *Lahiri v. Daily Mirror, Inc.*, one trial court described newsworthiness as freely defined.[76] Here, a newspaper-defendant, which was known for its use of photographs, was not held liable for using a photograph to accompany a story.[77]

The court analyzed the statute in relation to news photography:

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70. *Id.* at 397.

71. *See Spahn*, 221 N.E.2d at 545.

72. *Id.* at 544–45.

73. *See id.* at 546 ("The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.").

74. *See, e.g.*, Gravano v. Take-Two Interactive Software, Inc., 97 N.E.3d 396, 396 (N.Y. 2018); Lohan v. Take-Two Interactive Software, Inc., 97 N.E.3d 389, 391 (N.Y. 2018).

75. *See* Souza v. Exotic Island Enters., 68 F.4th 99, 105, 123 (2d Cir. 2023) (denied mostly on procedural grounds); Electra v. 59 Murray Enters., 987 F.3d 233, 238–39 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 563 (2021); *cf.* Gibson v. SCE Grp., Inc., No. 15 Civ. 8168, 2022 LEXIS 54935, at *20 (S.D.N.Y. Mar. 25, 2022).

76. *See* Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 388 (N.Y. Sup. Ct. Mar. 31, 1937).

77. *See id.* at 389 ("It would be far-fetched to hold in this case that the picture was not used in an illustrative sense, but merely to promote the sale of the paper.").

> The evil sought to be remedied by the enactment of sections 50 and 51 of the Civil Rights Law was the unjustified use of one's photograph for advertising purposes or to promote trade. The picture here used was a professional photograph and it was published only once as part of the Sunday magazine section of the defendant's newspaper. There is nothing to warrant a finding that it was used to increase the commercial value of the newspaper. The history of the enactment of the "right of privacy" statute and the judicial interpretations thereof preclude a determination that a statutory cause of action exists in this case. I find that the use of the photograph was not for trade purposes and that the plaintiff has failed to bring himself within the provisions of the statute.[78]

In more contemporary cases, the courts have found newsworthiness and news value for a wide range of photos accompanying a wide range of news stories on issues ranging from fertility treatments,[79] to the Black middle class,[80] to the fashion sense of bomber jackets.[81] Even random, candid photos of people in Times Square[82] and the unauthorized use of confidential documents in a divorce case, which were considered both newsworthy and non-commercial. [83] Most

78. *Id.* at 389–90.

79. *See* Finger v. Omni Publ'ns Int'l, 566 N.E.2d 141, 144–45 (N.Y. 1990) (holding a photograph accompanying a story about a new fertilization technique did not violate N.Y. CIV. RIGHTS LAW §§ 50–51 because the photo was both newsworthy and not commercial).

80. *See* Arrington v. New York Times Co., 434 N.E.2d 1319, 1321 (N.Y. 1982) (holding a New York Times Magazine photo about the Black middle class featuring plaintiff, who was unaware he was being photographed was newsworthy and not actionable against the newspaper, though some of the agents and the photographer were held liable).

81. *See* Stephano v. News Grp. Publ'ns, 474 N.E.2d 580, 581 (N.Y. 1984) (holding that a New York magazine article about "bomber jackets" which used a photo of a model without his permission was not a violation of the statute).

82. *See* Nussenzweig v. diCorcia, 878 N.E.2d 589, 590 (N.Y. 2007) (dismissing a complaint that an art photographer's candid photos of people in Times Square and a subsequent book violates the statute and/or the individuals' privacy rights due to the complaint being filed after the statute of limitations had expired.)

83. *See* Freihofer v. Hearst Corp., 480 N.E.2d 349, 353 (N.Y. 1985) (holding that newspaper articles based on unauthorized access to divorce records did not violate N.Y. CIV. RIGHTS LAW §§ 50–51).

recently, an HBO documentary which used a model's photo was newsworthy and non-commercial.[84]

One critic, Australian Supreme Court barrister and solicitor, Paul Czarnota, noted that New York (and California) the entertainment and media "capitals of the world" provide many media defendants with a "free ride" on peoples' image and likeness, often under the newsworthiness banner. [85]

Perhaps one recent case illustrates New York's independence in the privacy arena: *Foster v. Svenson*.[86] This case tested the boundaries of invasion of privacy and the notion of appropriation.[87] Here, a New York art photographer used a high-power telephoto lens to take pictures of his New York City neighbors.[88] The photos included people sleeping, doing daily chores and a semi-nude girl in a tiara.[89] The artist used the photos in a gallery exhibit where the photos were up for sale.[90] He also produced and sold a high-end art book, The Neighbors.[91]

The trial court denied the order to show cause as well as the plaintiffs' substantive claims.[92] According to the trial court, the plaintiffs learned that they and their children had been photographed by reading about it in a news story and the defendant-artist's other media

84. *See* Khozissova v. Ralph Lauren Corp*.,* 214 N.Y.S.3d 331, 333 (App. Div. 1st Dep't 2024) (holding that an HBO documentary film was sufficiently newsworthy and did not violate a model's statutory rights).

85. Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 515 (2012) ("New York law occupies a 'unique and special case in the history of the common law right of publicity' . . . ."); *see also* Madeline Kessler, Note, *In the Privacy of One's Own Home: Does New York State Law Prevent Invasions of Privacy in the Home?*, 36 CARDOZO ARTS & ENT. L.J. 481, 490 (2018) ("New York's trend favoring speech over privacy stands in sharp contrast to decisions made by other states, specifically Utah and California.").

86. *See* Foster v. Svenson, 7 N.Y.S.3d 96, 97 (App. Div. 1st Dep't 2015).

87. *See* Roy S. Gutterman, *2015–16 Survey of New York Law: Media Law*, 66 SYRACUSE L. REV. 1075, 1090 (2016).

88. *See Svenson*, 7 N.Y.S.3d at 97.

89. *See id.*

90. *See id.*

91. *See id*. at 98; *see also* Foster v. Svenson, No. 651826/2013, 2013 N.Y. Misc. LEXIS 3425, at *1 (Sup. Ct. N.Y. Cnty. Aug. 1, 2013); *see also* Amanda DeFeo, *Humans of New York, Shut Your Blinds*, 33 TOURO L. REV. 957, 961 (2017); Kessler, *supra* note 85, at 489 ("Although New York may have been at the forefront of privacy law when it was the first state to codify it, recently it has fallen behind other states. Civil Rights Law section 51 protects ordinary persons from having their name, image, or voice used without their permission, but only in situations that exactly meet the definitions of 'for commercial or trade purposes.'").

92. *See Svenson*, 2013 N.Y. Misc. LEXIS 3425, at *10.

appearances.[93] The plaintiffs argued that their children's safety, security and privacy was compromised by the photography and distribution.[94]

Both the trial court and the appellate division refused to provide relief for the plaintiffs and found the artbook was sufficiently newsworthy and artistic, though the court was somewhat muted on the extent to which art is protected under the law.[95]

The appellate division introduced:

> Concerns over privacy and the loss thereof have plagued the public for over a hundred years. Undoubtedly, such privacy concerns have intensified for obvious reasons. New technologies can track thought, movement, and intimacies, and expose them to the general public, often in an instant. This public apprehension over new technologies invading one's privacy became a reality for plaintiffs and their neighbors when a photographer, using a high powered camera lens inside his own apartment, took photographs through the window into the interior of apartments in a neighboring building.[96]

In addition to the privacy lawsuit, plaintiffs also included an emotional distress claim and a request for an injunction to take down the semi-nude child photos from the exhibition and the book.[97] The trial court rejected the claims and the injunctive relief, finding the photographs were protected under the First Amendment.[98]

Ultimately, the appellate court's rationale was almost apologetic, noting what it described as "limitations under the law," writing:

> This case highlights the limitations of New York's statutory privacy tort as a means of redressing harm that may be caused by this type of technological home invasion and exposure of private life. We are constrained to find that the invasion of privacy of one's home that

93. *See id*. at *1–2 ("Images of their children appeared in the paper, and an article attributed the following explanation to Defendant: 'The Neighbors don't know they are being photographed; I carefully shoot from the shadows of my home into theirs.' More particularly, a photograph of one of the Foster children, shows the child's face, and is 'clearly identifiable.'").

94. *See id*. at *2.

95. *See id*. at *9–10; Foster v. Svenson, 7 N.Y.S.3d 96, 103 (App. Div. 1st Dep't 2015).

96. Svenson, 7 N.Y.S.3d at 97–98.

97. *See id.* at 99.

98. *See id*.

> took place here is not actionable as a statutory tort of invasion of privacy pursuant to sections 50 and 51 of the Civil Rights Law, because defendant's use of the images in question constituted art work and, thus is not deemed "use for advertising or trade purposes," within the meaning of the statute.[99]

Though the newsworthy and public interest standard is broad, the courts will not grant an absolute privilege when the newsworthiness is tangential or incidental to a commercial use.[100]

Again, almost grudgingly, the court held:

> Accepting, as we must, plaintiffs' allegations as true, they do not sufficiently allege that defendant used the photographs in question for the purpose of advertising or for the purpose of trade within the meaning of the privacy statute. Defendant's used of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art. While a plaintiff may be able to raise questions as to whether a particular item should be considered a work of art, no such question is presented here. Indeed, plaintiffs concede on appeal that defendant, a renowned fine arts photographer, assembled the photographs into an exhibit that was shown in a public forum, an art gallery. Since the images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with the promotion of the art work was permitted. Thus, under any reasonable view of the allegations, it cannot be inferred that plaintiffs' images were used "for the purpose of advertising" or "for the purpose of trade" within the meaning of the privacy statute.[101]

To conclude this discussion, the New York Court of Appeals in *Howell v. New York Post Co.*, explained the tensions between the law, ethical journalistic standards and news value.[102] In this case, a tabloid newspaper photographer trespassed at a psychiatric hospital and used a telephoto lens to photograph the plaintiff who was walking with another patient, Hedda Nussbaum, who was the subject of intense New York media coverage in a shocking domestic abuse case that involved

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99. *Id*. at 98.

100. *See id*. at 103.

101. *Id*. at 160 (citing Nonnon v. City of New York, 874 N.E.2d 720 (N.Y. 2007)).

102. *See* Howell v. N.Y. Post Co., 612 N.E.2d 699, 700 (N.Y. 1993).

the murder of her adopted six-year-old girl.[103] This was not a viable cause of action for invasion of privacy, commercial appropriation and intentional infliction of emotional distress, an attempted work-around of the statute.[104]

The court described how New York breaks from other states in its definition of invasion of privacy.[105] The bulk of the rationale focused on the appended intentional infliction of emotional distress claim, which was more or less, shoehorned in by plaintiff to circumvent both the narrow statutory standards and the First Amendment.[106] Within the journalistic realm, the court was "reluctant to intrude upon reasonable news judgment."[107]

The court summarized:

> The statutory right to privacy is not transgressed unless defendants used plaintiff's photograph in connection with trade or advertising. Accordingly, if plaintiff's picture accompanied a newspaper article on a matter of public interest, to succeed she must demonstrate that the picture bore no real relationship to the article, or that the article was an advertisement in disguise.[108]

III. DEFAMATION AND THE GROSS IRRESPONSIBILITY STANDARD

The tort of defamation, mostly libel as used against media defendants, is not an easy cause of action for plaintiffs in New York. Aside from the rigorous constitutional standards set forth in the landmark *New York Times Co. v. Sullivan*,[109] New York state courts apply a broad range of doctrines that some could easily view as press or media friendly.

First and foremost, New York has a strong anti-SLAPP law, which not only affords media defendants with a dismissal of a frivolous libel claim intended to stifle the press but also an award of

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103. *See id.*

104. *See id*. at 701–02.

105. *See id*. ("Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature, which in fact has rejected proposed bills to expand New York law to cover all four categories of privacy protection.") (citing Arrington v. N.Y. Times Co., 434 N.E.2d 1319, 1322 (1982)).

106. *Id*. at 704.

107. *Howell*, 612 N.E.2d at 124 (citing Finger v. Omni Publ'ns Int'l, 556 N.E.2d 141, 143 (N.Y. 1990)).

108. *Id.* (citing Stephano v. News Grp. Publ'ns, 474 N.E.2d 580, 586 (N.Y. 1984)).

109. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

attorneys' fees.[110] Other requirements in defamation cases include requiring the plaintiff must plead with specificity in the complaint the exact defamatory words.[111]

New York is particularly unwelcoming for out-of-state defamation plaintiffs, both domestic and foreign. New York's long-arm statute makes it difficult for out-of-state plaintiffs to find a hospitable home for their defamation lawsuits in New York.[112] Also on this point, New York's Libel Tourism statute, the first in the country, makes it nearly impossible for foreign libel judgments to be enforced in the state against New York defendants.[113]

Additionally, New York employs the group libel doctrine to prevent large groups from suing,[114] and the libel-proof plaintiff standard for certain plaintiffs whose reputations are already tarnished by a wealth of true and disparaging information.[115] And, if a plaintiff is seeking punitive damages, that plaintiff will have to prove the statements were published with actual malice, the rigorous constitutional standard from *New York Times Co. v. Sullivan*.[116] Procedurally, New York employs a liberal interpretation of the fair and accurate report privilege attached to drawn from public records or government meetings under Section 74.[117]

But nothing in the defamation arena sets New York apart from other states more than the gross irresponsibility standard required for some defamation plaintiffs.

The tort of defamation requires plaintiffs to prove that false statements were published about them by the defendant and their reputation suffered harm and damages.[118] Under *New York Times Co. v.*

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110. *See* N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2020).

111. *See* N.Y. C.P.L.R. 3016(a) (McKinney 2022).

112. *See* N.Y. C.P.L.R. 302 (McKinney 2025).

113. *See id.* § 302(d); *see also* Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 834, 835 (N.Y. 2007).

114. *See* Lazore v. NYP Holdings, Inc., 876 N.Y.S.2d 59, 60 (App. Div. 2009) (citing *Sullivan*, 376 U.S. at 292).

115. *See* Guccione v. Hustler Mag., Inc., 800 F.2d 298, 303 (2d Cir. 1986), *cert. denied* 479 U.S. 1091 (1987); *see also* Dykstra v. St. Martin's Press, No. 153676/2019, 2020 N.Y. Misc. LEXIS 2659, at *20 (Sup. Ct. N.Y. Cnty. May 29, 2020).

116. *See* Strader v. Ashley, 877 N.Y.S.2d 747, 750–51 (App. Div. 2009) (citing Minasian v. Lubow, 856 N.Y.S.2d 255, 256–57 (App. Div. 2008)).

117. *See* N.Y. CIV. RIGHTS LAW § 74 (McKinney 2025).

118. In one famous case, *Kimmerle v. New York Evening Journal, Inc*., from a bygone era and a long-defunct newspaper, the court lays out a practical vocabulary lesson for defamatory harm: "Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely,

Sullivan,[119] and *Gertz v. Robert Welch*, the standard of fault and proof for the plaintiff will vary on status: public officials and public figures have to prove actual malice while private figures have to prove negligence.[120]

When it comes to liability for defamation, New York has adopted a third legal standard for some plaintiffs to prove: gross irresponsibility. With gross irresponsibility, Judge Sack, in his authoritative treatise on defamation, wrote, the New York Court of Appeals "has chosen to follow a path of its own."[121] This standard "falls somewhere between actual malice and negligence, probably closer to the former insofar as difficulty of proof is concerned."[122]

Since 1964, under the landmark *New York Times Co. v. Sullivan* case, which constitutionalized defamation law with the actual malice standard, states have applied the more rigorous standard requiring public officials and public figures suing for defamation to prove that the statements were published either with known falsity or reckless disregard for the truth.

The actual malice standard, also known as the constitutional privilege or the Sullivan Rule, has made it more difficult to successfully sue the media for libel. Private figure plaintiffs still have an easier standard with negligence.[123] But in the middle of these two standards rests New York's gross irresponsibility standard, which was established by the New York Court of Appeals in *Chapadeau v. Utica Observer-Dispatch*.[124]

Chapadeau involved a libel claim by a public school teacher who was arrested for possession of heroin and a hypodermic instrument, fourth degree felonies.[125] The newspaper wrote a news story about his arrest and mistakenly referred to Chapadeau as part of a trio arrested.[126] Building on the matters of public interest standard from the

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odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. N.Y. Evening J., Inc, 186 N.E. 217, 217–18 (N.Y. 1933) (citing Sydney v. MacFadden Newspaper Publ'g Corp., 151 N.E. 209, 210 (N.Y. 1926)).

119. *See Sullivan*, 376 U.S. at 292.

120. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

121. ROBERT SACK, SACK ON DEFAMATION, 6–14 (PLI 2012).

122. *Id*. at 6–16.

123. *See Gertz*, 418 U.S. at 350.

124. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975).

125. *Id*. at 569.

126. *Id*. at 569–70.

split plurality of *Rosenbloom v. Metromedia* as well as *Gertz*, the appellate division held that there did not need to be a trial because malice could not be shown.[127]

The court wrote that "[w]e agree with the appellant that liability for publishing matters of public interest should be governed by some sort of fault standard, nevertheless, we conclude that in this case summary judgment was proper."[128]

The overriding standard here was that libelous statements about private figures would require proof of actual malice if they were involved in matters of public concern.[129] The reverence to matters of public interest mirrors the standards and rationales applied in appropriation claims under 50–51, but with this different and ancient tort of libel.

The court held:

> We now hold that within the limits imposed by the Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.[130]

In *Chapadeau*, the underlying facts, a local teacher arrested on drug charges, was a substantial enough matter of public interest because of the role and influence of teachers.[131] Equally important was how the court viewed the newspaper's reporting, fact-checking and editing, which included interviewing multiple police sources who later confirmed that Chapadeau was not involved with the others who were arrested and named in the story.[132]

127. *See id.* at 570 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 (1971)).

128. *Id*.

129. *See Chapadeau*, 341 N.E.2d at 571.

130. *See id.*

131. *See id.*

132. *See id.* at 571–72.

The reporting and editing process fell short of gross irresponsibility, even though the newspaper's staff failed to catch the error before publication, the court held.[133]

The court wrote:

> On the contrary they prove the opposite. The instant article was written only after two authoritative sources had been consulted and it was not published until it had been checked by at least two persons other than the writer. This is hardly indicative of gross irresponsibility. Rather it appears that the publisher exercised reasonable methods to insure accuracy.[134]

The *Chapadeau* ruling adds a layer of protection for the media less rigorous than actual malice but still more exacting than negligence, allowing for innocent mistakes to still avert liability for defamation.

In an article for the *Albany Law Review*, New York Times general counsel, David McGraw, described *Chapadeau* as "revolutionary" and "workmanlike," "sure-handed," and a "tree with[out] roots."[135] McGraw credits *Chapadeau* as a seminal case that created the gross irresponsibility standard without drawing on existing precedent, and further immunizing the press from liability for minor, bogus or frivolous libel claims.[136]

Chapadeau's legs, however, have not ventured beyond New York, either, McGraw wrote, noting that one California opinion described the precedent as "unique."[137] McGraw wrote:

> *Chapadeau v. Utica Observer-Dispatch* stands as one in a line of Court of Appeals post-*New York Times Co. v. Sullivan* decisions in which the Court has decisively shifted the balance away from libel plaintiffs and toward defendants and, in so doing, broadly promoted vigorous press coverage in New York. Lawyers for New York media organizations recently reported that

133. *See id.*

134. *Chapadeau*, 341 N.E.2d at 571–72.

135. David E. McGraw, *Press Freedom and Private People: The Life and Times (and Future) of* Chapadeau v. Utica Observer-Dispatch, 74 ALB. L. REV. 841, 843, 848 (2011).

136. *Id.* at 848.

137. *Id.* (citing Brown v. Kelly Broad. Co., 771 P.2d 406, 425 n.30 (Cal. 1989) (holding defamation claims by private figures were not always necessarily privileged as matters of public interest. The court declined following *Chapadeau*, though referred to New York which "adopted the unique standard of gross irresponsibility.")).

> the number of libel cases brought against their organizations has dwindled, and one reason for this is undoubtedly the number of strong defenses that have emerged out of the Court of Appeals libel jurisprudence over the past forty-five years.[138]

McGraw traced the Court of Appeals' subsequent interpretations of the *Chapadeau* standard in five cases between 1975 and 2011 with the court ruling for the media defendants in three cases and a fourth ruling on procedural grounds.[139]

In the years since McGraw's study, the New York Court of Appeals has only cited *Chapadeau* in one case, *Posner v. Lewis*.[140] This was a non-media case involving assertions of prima facie tort with allegations of extortion and blackmail which the court declared were not protected by the First Amendment.[141] In his concurrence, Judge Smith discussed Chapadeau's "broader" protections, which were not entirely applicable in this case.[142]

Since 2011, at the Appellate Division, *Chapadeau* featured in the eighteen reported decisions; some with non-media defendants, such as a state assemblyman in *Verdi v. Dinowitz* who published comments critical of a school administrator, which were both protected opinion and not published with gross irresponsibility.[143] Another non-media case garnered attention because the defendant was the singer Ke$ha, but the courts denied the higher burden defendants sought because the matters involved private parties.[144]

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138. *Id*. at 844.

139. *See id.* at 851 (discussing Gaeta v. N.Y. News Inc., 465 N.E.2d 802 (N.Y. 1984); Robart v. Post-Standard, 418 N.E.2d 664 (N.Y. 1981); Grobe v. Three Vill. Herald, 40 N.E.2d 291 (N.Y. 1980)).

140. *See* Posner v. Lewis, 965 N.E.2d 949, 955 (N.Y. 2012).

141. *See id.* at 950–51, 953.

142. *Id.* at 955 (Smith, J., concurring) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992))

143. *See* Verdi v. Dinowitz, 218 N.Y.S.3d 6, 17 (App. Div. 2024) (holding that a New York State Assemblyman's published comments and critique of a school administrator was protected opinion, and was not published with either actual malice or gross irresponsibility) (citing Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975); *see also* Partridge v. State of New York, 100 N.Y.S.3d 730, 739 (App. Div. 2019) (affirming non-media defendants liability for defaming plaintiff who was identified as a child sex offender).

144. *See* Gottwald v. Sebert, 148 N.Y.S.3d 37, 45 (App. Div. 2021) ("Plaintiffs are not required and, even assuming this were a matter of public concern would not be required, to show that Kesha acted in a 'grossly irresponsible' manner, since Kesha is not a media publication, broadcaster or journalist responsible for observing 'the standards of information gathering and dissemination ordinarily followed by responsible parties.'") (quoting *Chapadeau*, 341 N.E.2d at 571).

However, the cases involving media defendants were almost always defeated on a range of grounds including, truth, protected opinion, and the *Chapadeau* standards requiring plaintiffs, who were almost all involved in matters of public interest to prove that the statements were false and published with gross irresponsibility. Appellate courts ruled in favor of newspapers,[145] magazines,[146] television stations[147] and other media defendants involved in matters of public

145. *See* Hayt v. Newsday, LLC, 108 N.Y.S.3d 204, 205 (App. Div. 2019) ("Moreover, even if the privilege of Civil Rights Law § 74 was not applicable here, the defendant could only be held liable for libel if it acted in a grossly irresponsible manner, without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. This is because the plaintiff is a private figure and the article, regarding criminal activity in the community, was within the sphere of legitimate public concern. The standard of gross irresponsibility demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy.") (citing *Chapadeau*, 341 N.E.2d at 571); *see also* Udell v. NYP Holdings, Inc., 94 N.Y.S.3d 314, 317 (App Div. 2019) (affirming dismissal of libel claim by a lawyer because even though he was a private figure, the New York Post stories were about a legitimate public interest and lacked gross irresponsibility); Stepanov v. Dow Jones & Co., Inc., 987 N.Y.S.2d 37, 44 (App. Div. 2014) (affirming dismissal of defamation claim by Russian businessman because the newspaper articles were factual and substantially true); Baker v. Galusha, 981 N.Y.S.2d 198, 199–200 (App. Div. 2014) (holding plaintiff as a public figure under *Chapadeau* and unable to prove statements in political advertisements in local newspapers were made with actual malice) (citing *Chapadeau*, 341 N.E.2d at 571); *see also* Matovcik v. Times Beacon Rec. Newspapers, 968 N.Y.S.2d 559, 561 (App. Div. 2013) (holding that despite some errors in the reporting, the newspapers covered matters of public interest and did not engage in gross irresponsibility).

146. *See* Shuman v. N.Y. Mag., 179 N.Y.S.3d 651, 652 (App. Div. 2022) ("The content of the magazine articles at issue is well within the sphere of legitimate public concern, and plaintiffs did not adequately allege facts to show defendants acted in a grossly irresponsible manner in writing and publishing them.") (citing Huggins v. Moore, 726 N.E.2d 456, 459–61 (N.Y. 1991)).

147. *See* Park v. Yoon Young Park, 174 N.Y.S.3d 470, 471 (App. Div. 2022). Here a lawyer unsuccessfully sued a Korean TV Channel. The court found "TKC could only be held liable for defamation if it acted in a grossly irresponsible manner, without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. This is because the plaintiff is a private figure, and it is undisputed that the broadcast, which concerned pre-settlement loans offered to plaintiffs in personal injury lawsuits, was within the sphere of legitimate public concern." *Id.* (citing Stone v. Bloomberg L.P., 83 N.Y.S.3d 78, 79 (App. Div. 2018)). *See also* Rainbow v WPIX, Inc., 117 N.Y.S.3d 51, 52 (App. Div. 2020) (concerning a TV report about school bullying); Reddy v WSYR NewsChannel 9, 85 N.Y.S.3d 809, 809 (App. Div. 2018) (affirming summary judgment for local TV station because there was no gross irresponsibility); Gordon v. Lin Tv Corp., 933 N.Y.S.2d 466, 467 (App. Div. 2011) (affirming dismissal of defamation case because "defendants met their burden of establishing their entitlement to judgment as a matter of law inasmuch as they did not act 'in a grossly irresponsible manner without due consideration for the standards of information gathering and

interest.[148] There was one outlier where the court refused to find a matter of public interest in photographs taken of a minor.[149]

One of the most recent appellate division cases, *Isaly v. Garde*, aptly summarizes the *Chapadeau* standard and application to media defendants.[150] This case involved a news article detailing a wide range of accusations involving sexual harassment and other abusive behavior in the plaintiff's workplace.[151] The reporting involved numerous interviews, including some sources who were quoted, but not named, in the story.[152]

The court wrote:

> Given the extensive corroboration Garde obtained the court properly concluded that Garde used appropriate methods of verification that were reasonably calculated to verify the truthfulness of Burke's statements. We reject plaintiff's contention that Garde was required to request every email that Burke had forwarded to herself to discharge his journalistic duty. . . . The gross irresponsibility standard "demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy' and does

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dissemination ordinarily followed by responsible parties.'") (quoting *Chapadeau*, 341 N.E.2d at 571).

148. *See* Griffith v. Daily Beast, 188 N.Y.S.3d 481, 484 (App. Div. 2023) ("We also reject plaintiff's efforts to show gross irresponsibility based on defendants' failure to retract or correct the article based on information allegedly furnished to them post-publication. The *Chapadeau* standard, namely the requirement that plaintiff allege facts to show that defendants acted with gross irresponsibility, does not impose a duty to correct previously acquired information.") (citing *Rainbow*, 117 N.Y.S.3d at 53); *see also Stone*, 83 N.Y.S.3d at 80 ("[W]here the plaintiff is a private person, but the content of the article is arguably within the sphere of legitimate public concern, the publisher of the alleged defamatory statements cannot be held liable unless it 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties'") (quoting *Chapadeau*, 341 N.E.2d at 571); Cohen v. Broad Green Pictures LLC, 75 N.Y.S.3d 37, 38 (App. Div. 2018) (holding that defendants failed to establish plaintiff, a magazine writer's ex-husband, was a public figure and had to prove actual malice or was involved in a matter of public interest); Farber v Jefferys, 959 N.Y.S.2d 486, 488 (App. Div. 2013) (holding summary judgment appropriate in matters of public interest involving public figures).

149. *See* Knutt v. Metro Int'l, S.A., 938 N.Y.S.2d 134, 136 (App. Div. 2012) (reversing dismissal of defamation claim by a family of a minor misidentified through a photograph published in a newspaper).

150. *See* Isaly v. Garde, 190 N.Y.S.3d 321, 323 (App. Div. 2023).

151. *See id.*; *see also* Isaly v. Garde, No. 160699/2018, 2022 N.Y. Misc. LEXIS 10434, at *1 (Sup. Ct. N.Y. Cnty. July 14, 2022).

152. *See Isaly*, 190 N.Y.S.3d at 323.

> not require 'exhaustive research nor painstaking judgments."[153]

Isaly is representative of how the courts view the gross irresponsibility standard and weigh it against both the veracity of the facts and the journalistic standards and practices employed in the case.

CONCLUSION

No matter the jurisdiction, media lawyers and members of the media will never feel like they have enough protections under the First Amendment and appropriate state constitutional provisions, such as New York's Constitution. And, despite all the statutes and caselaw out there supporting free press and free speech rights, there will always be plaintiffs with both valid and frivolous grievances against the press. Conversely, people who feel aggrieved by media, either purportedly invading their privacy or publishing false, not necessarily negative, accounts about them, will feel that the First Amendment rights of media outweighs their privacy and reputational rights.

Despite the high bar for plaintiffs, the law does provide recourse in appropriate situations. Using someone's image or likeness without their consent for commercial purposes is by and large easy to identify and litigate. In the defamation arena, gross irresponsibility or the more rigorous actual malice requires proof of knowledge of falsity or journalistic standards that are so egregious plaintiffs deserve recovery. Either way, the high bar staves off many potential plaintiffs while allowing for innocent mistakes in media coverage of public issues and public figures and officials without fear of liability.

New York might stand at the top of, or at least as close to the top, of the free press and free speech mountain, but there is always room for more protections. New York's invasion of privacy and gross irresponsibility standards are somewhat unique in the media law world. But there is always room to grow and expand media protections.[154]

153. *Id.* at 323 (quoting *Shuman*, 179 N.Y.S.3d at 652).

154. For example, New York still does not have a student journalist protection law. *See Gutterman*, *supra* note 4 (arguing for student press protections).