4. THE LEGAL RIGHT TO PRIVACY

By ARNOLD L. FEIN

IN 1883, Samuel D. Warren, a Boston blue-blood and the law partner of Louis D. Brandeis, married a lady of similar background. They entertained extensively in their exclusive Back Bay home. A local newspaper began to report their social events in sensational detail, much to Warren's annoyance. His discussions with Brandeis resulted in their article "The Right of Privacy" in the *Harvard Law Review* of December 15, 1890. The two great lawyers wrote in professional style for professionals in the law, teachers, students, scholars, practitioners, and legislators. They are said to have added a chapter to the law. Without doubt they provided and furnished the arsenal for the battles to protect the fortress of privacy.

They posed the issue in a portion of the article, phrased as though written for our day:

> The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by invasion upon the domestic circle.

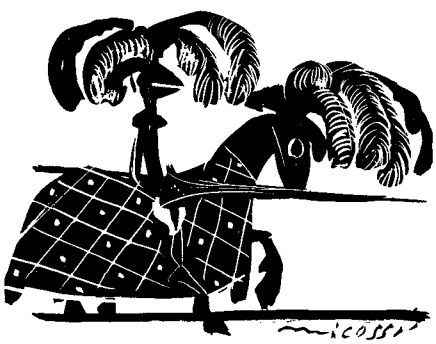
Again, as though writing in 1966, they suggested the need for solitude and privacy in the face of the increasing intensity and complexity of life and the intrusions of modern enterprise and invention. It is not without irony to note that they wrote in the comparatively early days of the camera and before the advent of radio, the movies, television, wire-tapping, and the like. They concluded, after an analysis of the precedents, that the law recognized a right of privacy, the protection of one's private feelings, the right to be let alone—and they sought to define its limits.

The Kennedy-Manchester controversy indicates some of the dimensions of the problem. However, the legal propriety of Manchester's book is at this writing before the courts and is accordingly not an appropriate subject for discussion. Moreover, the issue appears to be in large part dependent on the meaning of the agreements and the communications between the parties.

That the law now recognizes and protects the right of privacy is beyond doubt. Recognition has come by statute in some states and by judicial decision in others. In New York, with which this article is mainly concerned, the basis is New York Civil Rights Law Sections 50 and 51 making it a misdemeanor to use for advertising or trade purposes the name, portrait, or picture of any living person without written consent, and authorizing the issuance of an injunction to restrain such use and the recovery of damages for injuries sustained by reason of such use.

The statute was adopted because of press and public outcry over a 1902 decision of the New York Court of Appeals that there was no right of privacy in New York which would prohibit a flour-milling company from using in its advertising without her consent the picture of a young lady, surrounded by the words "Flour of the Family" and the name of the product and its produce. Claiming she had been humiliated and become ill because of the display of 25,000 such pictures in stores, warehouses, saloons, and elsewhere, she sued for damages and an injunction, both of which were denied.

Strangely enough, *The New York Times* led the editorial onslaught which resulted in adoption of the statute designed to overcome the result of the decision, although shortly before the decision the opposition of the press had defeated a bill that would have accomplished the purpose of the legislation subsequently adopted.



A year or two later, again in New York, a young lady whose picture was taken for her private use found it being displayed for advertising purposes. She was permitted to recover damages against the company so using the picture, the Court of Appeals holding that the statute enacted was not unconstitutional.

Thus far we have dealt only with private persons. What of public officials, politicians, lawyers, writers, actors, singers, prominent business or professional men and women, well-known philanthropists, and others whose activity, calling, or mode of life makes them public figures? And what is meant by trade or advertising?

The Supreme Court of the United States has recently held that a public official may not recover damages in a libel action against a newspaper critical in its columns of his official conduct. The democratic system, with freedom of speech and press, is premised upon a profound commitment to uninhibited, robust, caustic, and wide-open debate. Although this was a libel case, the principle would be equally applicable in a right-of-privacy case. The politician, the candidate, the public official all put their lives upon the line. Such a man's right of privacy is probably limited to those matters that have no conceivable legitimate connection with his public role, office, or candidacy. The conflict is obviously between the public's right to know via freedom of press and speech, and the individual's right of privacy.

"In the public interest, the factual reporting of newsworthy persons and events overrides the right of privacy, statutory or otherwise. The fictional does not." ***—Arnold L. Fein.***

The same principle applies, although perhaps to a lesser degree, to other public figures, whether they be such by choice or involuntarily. The legitimate public interest outbalances the right of privacy. Thus the orchestral conductor Serge Koussevitzky, who was working on his autobiography, could not prevent a prominent music critic from writing an unauthorized biography about him, even though it was alleged to contain some misstatements. Nor could Koussevitzky prevent the use of photographs of himself in the book and its advertisements. Said the court, the great public character

of his own volition dedicates to the public the right of any fair portrayal of himself.

But the portrayal must not be essentially fictional. In the public interest, the factual reporting of newsworthy persons and events overrides the right of privacy, statutory or otherwise. The fictional does not.

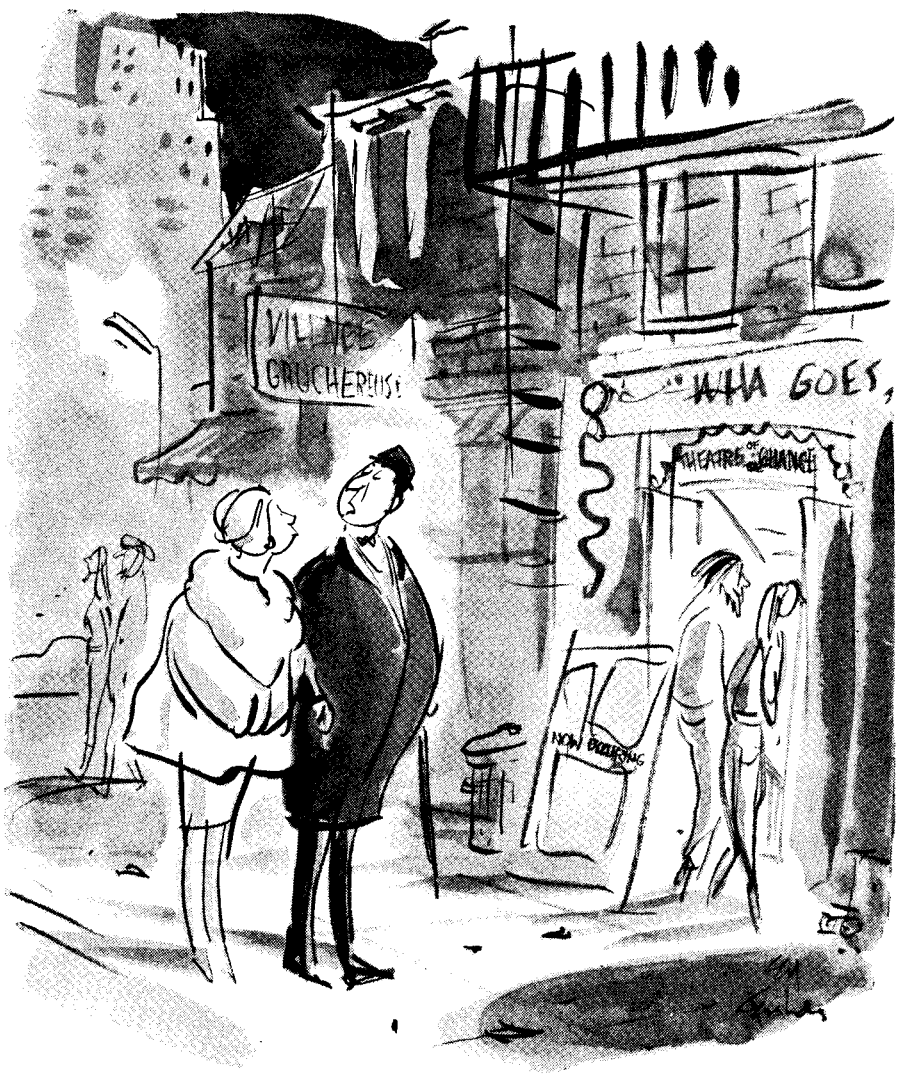
THERE was the older case of *Binns vs. The Vitagraph Co.* Binns was a telegraph operator on the steamship *Republic,* which came into collision with another steamship at sea. His use of the wireless to bring aid to his ship resulted in the saving of hundreds of lives, the first such use of wireless telegraphy. Vitagraph prepared a scenario, built around news reports in the daily press. It prepared stage sets representing the captain's cabin, the wireless room, etc., and assigned various actors to the parts, including the role of Binns. A large number of motion picture films were made on this basis, entitled *John R. Binns the Wireless Operator, Jack Binns and His Good American Smile,* etc. Actual pictures of Binns were utilized at a few places in the series and in the advertising, together with his name. Binns was held entitled to an injunction and damages. Although based on fact, the pictures were essentially fiction purporting to be fact. Binns's name and picture were being used without permission for purposes of trade, violating the statute. This was not the permissible simple and direct news reporting in which Binns was an incidental or even the main character.

Use of one's name or photograph in connection with an article of current news or immediate public interest is not inhibited, unless there is only a tenuous connection and no legitimate relationship to the news item, educational article, or immediate public interest. Publication is also permissible, without consent or even over objection, where there is a genuine public interest involving historic or well-known personages, items of past news, surveys of social conditions, or a man's life.

William James Sidis was a child prodigy of eleven in 1910. His name and achievements were widely publicized in the press. For the next five years he lectured to distinguished mathematicians and others. He was graduated from Harvard College at sixteen, amid considerable public attention. He then dropped from sight, having chosen a career as an insignificant clerk and deliberately sought the obscurity and seclusion of a private citizen. Under the title "Where Are They Now?" and the subtitle "April Fool," Sidis having been born on April 1, *The New Yorker* published an article in 1937 that detailed Sidis's life, character, and habits and concluded with an interview at his current lodgings, "a hall bedroom of Boston's shabby South End." Sidis sued in the federal court, invoking the law of several states in which the magazine was circulated that recognized the right of privacy. The court held he had no remedy, either under the New York statute or the case law of the other states. Although neither a politician, statesman, nor current public figure, he had once been a public figure, a person concerning whom there was legitimate public interest of an intellectual nature. It was a matter of proper public concern, the court held, as to whether this earlier public figure had fulfilled his youthful promise. The article was factual. Sidis was no longer a "voluntary" public figure, but he had earlier been one. This the court found was enough. His desire for obscurity was no bar.

The author of a letter and his legal representatives after his death have the sole right to permit or withhold its publication, except that it may be used by the addressee when required or justified to establish his rights in a lawsuit or to protect himself against aspersions or misrepresentations by the writer. There is a "common-law copyright"—the right of an author or proprietor of an unpublished literary work to first publication or to withhold publication. Does that right protect tape recordings and conversations with others from publication in whole or in part by the other party? The issue is not free from doubt. Nor is the picture clear with respect to private tape recordings of telephone conversations, frequently made without knowledge or consent of the speaker on the other end.

THE right of privacy continues to be delineated. No precise lines can be drawn. The continuing development of easy and swift means of communication changes the nature of the problem almost daily. The conflict between the right of privacy and the right to know is obvious. The resolution of any particular cases of the conflict provides a point of departure for the next. There are no final answers nor can there be. The need to protect both rights is manifest. Marking out the shadowy borderline is one of the prices of a free society.



"When S. Hurok stages a happening, then I'll go see a happening!"

5. THE AUTHOR'S RIGHT TO WRITE

By IRWIN KARP

THE KENNEDY-MANCHESTER dispute raises a fundamental question that should concern authors, publishers, and the public: does the Constitution prohibit the courts from enforcing a right-of-approval contract when author and publisher move to issue the book without obtaining the required consent?

The question does not assume that William Manchester breached his agreement. But if the Constitution bars suits to enforce such a contract, a court would never decide whether a breach had occurred. It would have to dismiss the suit at the outset, breach or no breach. And if the Constitution bars this type of litigation everyone would be better off. Authors and publishers could not be compelled to suppress portions of their work. The "subjects" of future books, forewarned of the consequences, would not give authors intimate details they did not wish exposed to public view, thus effectively protecting their right of privacy. The press would be relieved of its present, painful duty of disclosing the very material a plaintiff sues to keep from being published. And the public's right to have freedom of speech and press kept untrammeled would be preserved.

It is likely that the Supreme Court, following a twenty-year-old precedent, would rule that the First and Fourteenth Amendments bar courts from restraining publication of a book which has not obtained the approval required by a contract and also bar them from awarding damages for violation of the right of approval.

The Court may not deal with the issue for years. But the possibility that the right of free speech may take precedence over private contract rights should be aired before the next suit; in fact, before the next contract is signed. Considering it prospectively, rather than during an emotional litigation, might dissipate the notion that there is something unfair about preserving freedom of speech and press. Some of the "let's have no First Amendment nonsense" editorials reflected that attitude: Mrs. Kennedy would not have disclosed the material she objected to had her legal advisor foreseen that the Constitution might nullify her right of approval; therefore, the First Amendment should not prevent her from enforcing that right.

DESPITE Mr. Manchester's harrowing experience, other authors will sign right-of-approval contracts; and there will be more suits. Mrs. Kennedy's success in compelling *Look* to make deletions will itself induce subjects or sources of future biographies or authorized histories to demand rights of approval. Further stimulus may come from comments by New York's Appellate Division in the suit brought by Warren Spahn, under the state's right of privacy law, against the author and publisher of an unauthorized biography. Affirming an injunction against the book, and an award of damages to Mr. Spahn, the court said: "If the publication . . . by intention, purport or format is neither factual nor historical, the [right of privacy] statute applies and if the subject is a living person his written consent must be obtained." It also said that "the consent . . . can be avoided by writing *strictly factual* biographies."

An unauthorized biography may not be "strictly factual." It may contain honest errors of fact, and there is no rule for determining how many are allowed before it ceases being "strictly factual." The court's comments may impel cautious publishers to seek consents for potentially controversial biographies. Obviously, the subject will demand the right of approval before giving his consent. (Equally obvious: if he doesn't like what he reads, he will sue to enforce that right.) Actually, the *Spahn* case involved considerably more than factual errors or distortions; the court found that the biography was larded with "dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events." But until subsequent opinions make it clear that fictionalization (and not factual inaccuracy) is really what the court held to violate the privacy statute, a nervous publisher may take the court's *dicta* at face value and seek consent for any book that may not be "strictly factual."

Obviously, while it costs nothing to preach that an author should never grant the right of approval, it may be more difficult to follow this advice. Writing is a precarious profession. It is not easy for an author to turn down a book that may have the potential of financial success. The temptation will be harder to resist when it is suggested that the pitfalls of the Kennedy-Manchester memorandum could be avoided by more careful drafting. The memorandum leaves room for improvement, and more protection could be provided for an author.

BUT once an author signs such a contract, no matter how well drawn, he hands the other party a weapon that can be used to suppress his book. It makes no difference that he may have complied, or thought he had complied, with the agreement. If the subject wants material deleted he can commence a suit. Often this will be enough to compel the requested changes. Litigation may threaten costly delays in publication, entail heavy expenses for defense and (unless the First Amendment bars it) create some risk of an injunction or a judgment for damages. Any of these factors may bring sufficient pressure on the author to capitulate, even though he might ultimately win on the merits. As the Supreme Court emphasized in *New York Times Co. vs. Sullivan*, the fear of damage awards in private suits and the costs of defending against them "may be markedly more inhibiting" on free speech than the fear of prosecution under a criminal statute.

It may be asked, why should the First Amendment protect an author or publisher who voluntarily signs a contract giving others the right to determine whether the book should be published? If they choose to surrender their freedom to publish, why should the courts

". . . the possibility that the right of free speech may take precedence over private contract rights should be aired before the next suit; in fact, before the next contract is signed."

—Irwin Karp.

Although Irwin Karp is legal representative for the Authors' League of America, this article expresses only his personal opinion.