



Our initial comments on the draft official comments which were included in the most recent redraft of CRUDIIA:

Comments to Section 2

a) The quotation from Virgil v. Time is really not directly relevant to the issue. It is dictum in a case where the plaintiff voluntarily spoke to a Sports Illustrated reporter doing a story, and then attempted to revoke the previously granted implied consent to quote or paraphrase his statements when he learned that the article would not be complimentary.

b) Since "paintings, drawings or other figurative representations" are excluded, we do not understand what is an image which is "virtually indistinguishable from such actual visual representations."

Comments to Section 3

a) The first paragraph of the Comment posits two levels of intent. We believe second of the levels is really a question of knowledge, rather than intent. The Comment states that the Act applies a negligence standard to both. We see no such standard set forth in the Act itself for either intent or knowledge, leaving this as a strict liability statute.

The example given of negligence - not having a password protected cellphone - is most troubling. In such a case, presumably the cellphone owner could be liable under the Act even if he or she never forwarded the image to anyone but instead it was forwarded by a thief.

b) In the second paragraph, we presume the hypothetical was meant to say that C, not B, is potentially liable.

If the Comment's reading of Barrett v. Rosenthal is correct (and it should be noted that that Court's opinion is not the law in all states), then one of the ostensible purposes of CRUDIIA - to punish multiple disseminations of the image - is ephemeral since every dissemination after C's receipt would be exempt under §230 as long as the disseminators remain online. It would also result in the curious result that C would not be liable if he or she posted or emailed the image, but would be liable if he or she handed a hard copy of the image to D. If it is the position of the Committee that, under Barrett, subsequent online disseminators are shielded by §230, the draft act should be clarified to exclude them. And subsequent non-online dissemination should also be excluded, because treating them differently raises constitutional problems, as well as making no sense.

c) We do not think one can seek guidance as to what constitutes "public interest", particularly with its First Amendment impact, from Restatement (Second) of Torts §652D, codified 40 years ago. A "Special Note" at the head of that section states:

"The Section provides for tort liability involving a judgment for damages for publicity given to true statements of fact. It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment....Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current (i.e., 1977) state of the common law of privacy and the constitutional restrictions on that law that have been recognized as applying."

The law has developed since that time.

We should note that the tort in §652D is focused on information that is legally obtained by engaging in illegal surveillance, theft or abusing the legal system. If is content-neutral and the tort is the invasion of privacy, not the publication of the information.

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