

October 2015

# Appellate Court Affirms Limited Nature of New York's Right of Publicity Statute

PUBLISHED IN: [MediaLawLetter September 2015](#)

TOPICS: [Right of Publicity](#)

*Use of Video Clip in Comedy Segment Not for "Advertising or Trade"*

By **Rachel Strom**

A New York appellate court recently affirmed the dismissal an action against Jimmy Kimmel and ABC, Inc. arising out of the use of a video of plaintiff during a segment of the Jimmy Kimmel Live! show. [Sondik v. Kimmel](#), 2013-07373 (2d Dep't. Sept. 9, 2015).

The court rejected plaintiff's attempts to apply California law to his claims, although the segment was prepared in California. Under New York law, the court found, plaintiff could not state a claim for the unauthorized use of his likeness as the use of his image in a comedy segment was not used for "advertising or trade purposes" and, in any event, the use fell within the "public interest" exception to Sections 50 and 51 of the New York Civil Rights Law.

## Background

Plaintiff Daniel Sondik, a Brooklyn resident, who refers to himself as the "Flying Rabbi," became a minor Internet sensation through numerous YouTube videos depicting him antically singing, chanting and proselytizing to people on the streets of Brooklyn. Among the videos of plaintiff on YouTube is one showing him looking into the camera through the window of a car while he animatedly sings, chants and gesticulates alongside the car.

In August 2010, it was widely reported that basketball star LeBron James had hired a rabbi who spoke only in Hebrew, Yishayahu Yosef Pinto, to provide business advice in connection with a merchandising deal. On August 11, Jimmy Kimmel Live! spoofed this news item in a short segment. Kimmel told some jokes about LeBron James and his meeting with the rabbi finding it humorous that the Rabbi spoke "only Hebrew" and James spoke "only not Hebrew," and then set up a video spoof by saying facetiously that "[a]t one time, I actually consulted with the rabbi myself."

What followed was a just over 30-second video portraying a supposed meeting at which Kimmel, sitting in a car, drolly received "business" advice from a rabbi he too could not understand – the YouTube clip of Sondik, who is shown alongside the car as seen through the car window. As a result of the editing the two clips together, Kimmel appears to be listening to Sondik's singing and chanting, and interacting with him by making comments such as "yeah that's true" and "yeah, I think you're right. Thanks, man."

The plaintiff brought suit, contending that defendants' video made use of his image without permission and made him "look foolish." His complaint alleged causes of action for unauthorized use of his likeness in violation of Section 51 of the New York Civil Rights Law, California Civil Code Section 3344, and under California common law, and claims for unjust enrichment and breach of the YouTube terms of use.

Defendants moved to dismiss all claims, contending that plaintiff had failed to state a valid claim because his likeness had not been used for advertising or purposes of trade within the meaning of Section 51, California law was inapplicable (and defendants did not in any event violate California law), the unjust enrichment claim was preempted by Section 51, and plaintiff lacked standing to assert a violation of YouTube's terms of use. The trial court granted the motion and dismissed the action, finding that under either New York or California law, Plaintiff's claims failed a matter of law. Plaintiff appealed the dismissal of all claims, except for the breach of the YouTube terms of service.

**Choice of Law**

At the appellate level, plaintiff argued that California law should apply to his claims because the segment was edited and produced in California. He also argued that his place of domicile should not control because he was so simple minded he could not fully comprehend how his image was used and his reputation tarnished. He argued that like little children, the law should offer him extra protection because he was not able to comprehend what the defendants had done to him.

Defendants argued that the choice of law analysis was rather straight forward: right of publicity or right of privacy claims are governed by the law of the domicile of the person claiming the right—in this case, New York.

The court agreed, explaining that “New York uses an interest analysis, [u]nder which ‘the law of the jurisdiction having the greatest interest in resolving the particular issue’ is given controlling effect.” When laws regulate conduct,” the law of the place of the tort ‘almost invariably obtains’ because ‘that jurisdiction has the greatest interest in regulating behavior within its borders.’” (citation omitted). Where as here, the plaintiff and defendant are domiciled in different states, “the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury.” Following these principles, the court reasoned “the law of New York, where the alleged injury or damage occurred, applies. Although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff’s alleged injury occurred in New York, where he is domiciled and resides. Moreover, New York is the state with the greater interest in protecting the plaintiff, its citizen and resident.”

### **Right of Publicity Claim**

Once the court reasoned that New York law applied, it easily determined that plaintiff did not have any viable claim.

In support of his claim for violation of Section 51 of the Civil Rights Law, plaintiff alleged that defendants used his image and “took words that [he] had spoken in one context, and turned them into the butt of a joke in another context,” and did this without consent. Plaintiff also bemoaned that Mr. Kimmel’s lead-in to the video wrongly identified him as Rabbi Pinto. He argued that the law should not allow Mr. Kimmel to callously make fun of someone who was clearly feeble minded.

The court rejected all of these contentions, finding that the Sections 50 and 51 claims failed because plaintiff’s image “was not used for advertising or trade purposes.” In any event, the Court found that the use would fall into the “public interest” or newsworthy exception to Section 50 and 51.

### **Other Claims**

The court similarly gave short shrift to plaintiff’s remaining claims, finding that because Sections 50 and 51 displace any common-law privacy right or other non-statutory claims relating to the unauthorized use of a person’s likeness, plaintiff had no cause of action for unjust enrichment.

*Jimmy Kimmel, American Broadcasting Companies, Inc. and ABC, Inc. were represented by Robert Penchina and Rachel Strom of the New York office of Levine Sullivan Koch & Schulz, LLP and by Michael Beylkin of the Colorado office of Levine Sullivan Koch & Schulz, LLP. Plaintiff was represented by Robert Tolchin of The Berkman Law Office, Brooklyn, NY.*

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