



paying jobs. She presents America's working poor in a world separated from the educated elite in which it is emotionally and physically draining to earn a meager living on minimum wage and impossible to actually advance in life. However, to clarify, Ehrenreich does not do any of these jobs for a living. She was simply doing a study and in reality she is an author and an academic.

Christianson, on the other hand, is, or at least was, a waitress in Peoria, Illinois. In 1986, a photographer for Magnum Photos approached Christianson and asked her if she and her children were willing to be photo subjects for a Fortune magazine article on single mothers supporting their families on low-wage jobs. Christianson agreed.

The photographer took several photographs. One particular shot is of Christianson, dressed in her uniform as a waitress, standing at the counter of a small restaurant, waiting to pick up an order and looking back over her shoulder. The photo is both gripping and appears to emit all the ideas of hard work, worry and concern that Ehrenreich sought to capture in her book.

The photo eventually made it into Fortune and was part of their May 1986 issue. Christianson only gave her consent for her image to be used in the Fortune article. However, in 2001 Nickel and Dimed was published, and there, right on the cover, was the same photo of Christianson looking over her shoulder.

The book was a New York Times best seller and has gone on to be published throughout the world. There is a play based on the book and it appears that there is a forthcoming movie. Meanwhile, Christianson reared four children as a waitress and has not read a book since the 1970s.

Christianson, however, did not bring her claim for approximately five years from the initial date of publication. On June 23, 2006, Christianson, with her attorney, brought suit for invasion of Christianson's right to privacy. The lawsuit "seeks damages for appropriation of another's name or likeness where the defendants have used plaintiff's image for commercial purposes and benefit without her consent." (Doc. 24 at 2.)

The Defendants responded with a Motion to Dismiss which raises several arguments including the contention that Christianson's claim was barred by the statute of limitations. Christianson was allowed to amend her Complaint several times. Christianson's Proposed Third Amended Complaint adds a claim for violation of Plaintiff's Right of Publicity and alleges that the Defendants violated the Illinois Right of Publicity Act ("IRPA"). 765 ILCS 1075/1. The Court denied Christianson's Motion to file a third amended complaint until the Court has addressed the threshold issue surrounding the statute of limitations.

## LEGAL STANDARD

When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must view the Complaint in the light most favorable to the Plaintiff and the Complaint's well-pled factual allegations must be accepted as true. Williams v. Ramos, 71 F.3d 1246, 1250 (7th Cir. 1995). Therefore, a complaint can only be dismissed if a plaintiff cannot prove any set of facts upon which relief can be granted. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1429-30 (7th Cir. 1996). However, the Court is not bound by a plaintiff's legal conclusions. Baxter by Baxter v. Vigo County School Corp., 26 F.3d 728, 730 (7th Cir. 1994). The province of Rule 12(b)(6) motions is to question the availability of a legal formula justifying relief on the alleged facts, not to test or determine the facts themselves. Maple Lanes, Inc. v. Messer, 196 F.3d 823, 824-25 (7th Cir. 1999).

## ANALYSIS

Defendants primarily argue that Christianson's claim is barred by Illinois' one-year statute of limitations for invasion of privacy actions. 735 ILCS 5/13-201 states that "[a]ctions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued."

However, there are three individual issues which must be discussed to dispose of Defendants' Motion. They will be addressed in the following order: (1) Republication, (2) Copyright Preemption, and (3) First Amendment Preemption.

### **1. Republication**

The primary focus of Defendants' Motion to Dismiss is that the one-year statute of limitations bars Christianson's claim. 735 ILCS 5/13-201 ("Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued"); 740 ILCS 165/1 ("No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience..."). Christianson argues in response that the five-year statute of limitations applied to general tort actions is more applicable in this case, that the Single Publication Rule does not apply, and it would be inequitable to impose the statute of limitations in this case. Rather than address these issues at this stage, the Court will allow Christianson's claim to proceed to discovery because there is one issue which can not be resolved without discovery.

Christianson argues that republication of her likeness can constitute a new cause of action if the publication is altered so as to reach a new audience or promote a different product. If a new cause of action arises, argues Christianson, the statute of limitations is tolled. Here, Christianson relies on Blair v. Nevada Landing Partnership, 859 N.E.2d 1188 (Ill. 2d Dist. 2006). In Blair, the Court addressed a claim from a former employee of a casino. The employee's photo was allegedly being used in various mediums (on the billboard in the casino pavilion, on the website, on the casino restaurant menu). The Court stated that each of these various acts constituted a single overt act of advertising for the casino restaurant and was barred by the statute of limitations. However, the Court noted in dicta that "a republication of the plaintiff's likeness can constitute a new cause of action if the publication is altered so as to reach a new audience or promote a different product." Blair, 859 N.E.2d at 1194. As an example, the Court stated that rebroadcasts of an individual television show were each intended for a different audience. Therefore, rebroadcasts "re-triggered" the applicable statute of limitations. Id.

In this case, Christianson notes that she has alleged in her complaint that the book has been made into a play and there is a forthcoming movie on the subject. If her likeness was used to promote these separate products which are intended for a

separate audience, then part of her claim may not be barred by the statute of limitations. Specifically, Christianson argues that without discovery, there is no way of knowing if her likeness has been used to promote these additional products for a different audience.

While the Illinois Supreme Court has not ruled on the issue of republication, the concept of republication is a generally accepted rule that is applied in other courts. Restatement (Second) of Torts § 577A (1977); Lehman v. Discovery Communications, Inc., 332 F.Supp.2d 534, 539 (E.D.N.Y. 2004); Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH & Co., 150 F.Supp.2d 566, 573 (S.D.N.Y. 2001). As a result, this Court is convinced that this one argument could have merit and warrants discovery. While Defendants' additional arguments concerning the statute of limitations could be dispositive at a later stage, additional discovery is currently necessary.

## **2. Copyright Preemption**

Defendants seek to bar Christianson's claim because the claim is allegedly preempted by federal copyright law. The United States Copyright Act preempts a state law claim if the subject matter of the claim falls within the subject matter of copyright as described in 17 U.S.C §§ 102 and 103 and if the rights asserted under state law are equivalent to the exclusive

rights granted to the copyright holder by 17 U.S.C. § 106. See 17 U.S.C. § 301(a).

Defendants argue that Christianson's claim falls within the subject matter of copyright under 17 U.S.C. § 102 which specifically states that "Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression... from which they can be perceived reproduced, or otherwise communicated... Works of authorship include... pictorial... works." Defendants argue based on Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134, 1137-38 (9th Cir. 2006) that the rights asserted in Christianson's complaint fall within this portion of the statute. In Laws, a singer brought a claim for alleged invasion of privacy and misappropriation for the unauthorized sampling of her vocal recording in a later song that was produced and distributed by the defendants. The Court held that the subject matter was preempted by federal copyright law.

First, the Court notes that Christianson's claim is not synonymous to the claim in Laws. While the plaintiff in Laws was clearly the "author" of the allegedly misappropriated work, Christianson's likeness, is not "authored" even if it is fixed in a tangible medium. See KNB Enterprises v. Matthews, 78 Cal.App.4th 362 (Cal. App. 2nd 2000)(holding that a misappropriation claim asserted by the owner of erotic

photographs was not preempted by federal copyright law because the "personas" taken in the misappropriated images did not constitute "a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution. *A fortiori*, it is not a 'work of authorship' under the Act." citing 1 Nimmer on Copyright, May 1996 § 1.01(B)(1), p. 1-14.).

A case that is more applicable than Law is the recent Seventh Circuit decision in Toney v. L'Oreal, 406 F.3d 905 (7th Cir. 2005). In Toney, a model brought a claim under the IRPA, as Christianson seeks to do in this case. The model alleged that a hair product company had used her image without her consent on the packaging of a hair care product and the defendant alleged that her claim was preempted by federal copyright law. The Court noted that while the photo was in a tangible medium, the model's "identity" was not authored and fixed in a tangible medium of expression. Thus, she would not have a claim under the Copyright Act and her claim was not preempted. Toney, 406 F.3d at 910.

Defendants argue that Toney is factually and legally distinguishable. Specifically, Defendants point out that the Court in Toney emphasized that the models image was being used for commercial purposes whereas, they argue, Christianson's image is not being used for commercial purposes. See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d

663 (7th Cir. 1986). However, the Court fails to see the significance of Defendants' distinction. Christianson may not be involved in the commerce of creating book covers, but her image could still be seen as part of the commerce of selling the book. Based on the complaint, Christianson's image as a hard working waitress, struggling to survive on a meager wage encompasses all the ideas that Ehrenreich sought to convey in her book.<sup>1</sup> Her personal story is not the subject of the material, but a jury could conclude that her image is intended to catch the eye, resonate with a shopper, and encourage the sale of the book. The fact the she is not in the business of modeling or marketing the commercial value of her identity for book covers could go to an assessment of damages, but it does not mean that Christianson's claim for misappropriation of her likeness falls under the Copyright Act, nor does it pigeon hole her claim into one that is preempted by federal copyright law. Accordingly, based on the ruling in Toney, Christianson's claim is not preempted by the federal Copyright Act.

### **3. First Amendment Protection**

Defendants argue that Nickel and Dimed concerns a matter that is of legitimate public interest. As a matter of legitimate public interest, the book is protected under the

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<sup>1</sup> Defendants even state in their brief that the cover art of the book reflects the plight of the working poor in America. (Doc. 39 at p. 9.)

First Amendment. And, a plaintiff cannot sustain a claim against material which is protected under the First Amendment.

Various circuits have wrestled with balancing an individual's right of publicity against First Amendment concerns. See White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993)(Vanna White brought a claim against producer of an advertisement in which a robot turned letters in what appeared to be the "Wheel of Fortune" game show set; the Court held that Vanna White's right of publicity claim was not barred by the First Amendment); Cardtoons, L.C. v. Major League Baseball Players Assoc., 95 F.3d 959 (10th Cir. 1996)(Baseball players brought a right to publicity claim against manufacturer of baseball cards which had cartoon drawing mocking the players instead of photos; the Court held that the claim was barred by the First Amendment); ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915 (6th Cir. 2003)(Tiger Woods brought a right to publicity claim against a painter who produced prints of Tiger Woods winning the 1997 Master Tournament with drawings of other famous golfers looking on in the background; the Court held that the claim was barred by the First Amendment).

The Defendants cite several cases in which a photo has accompanied a news or magazine article and a plaintiff brought a claim for misappropriation. In each of these cases, the claim was denied. Berkos v. National Broadcasting Co., Inc., 515

N.E.2d 668 (Ill. App. 1st 1987); Buzinski v. DoAll Co., 175 N.E.2d 577 (Ill. App. 1961); Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. 1952). The basic point which Defendant makes is that "in the vast majority of cases, the courts permit the unauthorized use of a person's picture to illustrate a news article or story even where the person was not personally involved in the events discussed in the story, so long as the picture bears a 'real relationship' to the subject matter of the story." J. Thomas McCarthy, 1 Rights of Publicity and Privacy § 6:87 (2d ed.)(March 2006).

However, these cases are distinguishable because Christianson's image is on the cover of the book rather than part of an article. In this case, the cover of a book carries with it more of a commercial purpose than a photo that is simply attached to an article. While the cover may be designed to reflect the message of the book, it is definitely designed to catch the eye of a potential customer. Like it or not, customers judge a book by its cover and covers are often among the main reasons that today's reader purchases a book.

Christina Z. Ranon, Honor Among Thieves: Copyright Infringement in Internet Fandom, 8 Vand. J. Ent. & Tech. L. 421, 443 (2006).

While a photo accompanying an article may serve the message of

protected speech, the cover of a book serves the sale of the protected speech.<sup>2</sup>

This commercial purpose warrants less protection under the First Amendment. Goodman v. Illinois Dept. of Financial and Professional Regulation, 430 F.3d 432 (7th Cir. 2005) (“[C]ommercial speech is not automatically protected speech.”); Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guarantee expression.”). After all, the protected speech inside the book can still be freely given. However, there are no shortcuts in the packaging of that free speech - the author or publisher can not simply take someone’s image for the purpose of selling the protected speech. Instead, the author must proceed through all the steps that every other author and publisher must take when designing and printing a book cover. See Ned Drew, Paul Sternberger, By Its Cover: Modern American Book Cover Design, Princeton Architectural Press (2005). Accordingly, Christianson’s claim is not barred by the First Amendment.

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<sup>2</sup>If Nickel and Dimed was a book about Christianson’s life, her photo was only within the book as an example of the working poor or her photo was part of a larger photograph which encompassed the subject matter of the book, then she might not be able to bring this claim. See Dallesandro v. Henry Holt & Co., 4 A.D.2d 470 (N.Y. App. Div. 1957).

#### 4. Remaining Issues

This Court previously denied Christianson's Motion for Leave to File a Third Amended Complaint which was denied until the Court had addressed the threshold issue concerning the statute of limitations. The Court stated at the time that "if Plaintiff's claim survives after that ruling, Plaintiff will be allowed to file a third amended complaint." (Doc. 46, Order by Magistrate Judge John A. Gorman.) Now that the threshold issue has been addressed, Christianson is granted leave to file her Third Amended Complaint.

#### CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss [Doc. 38] is DENIED. Plaintiff's is GRANTED LEAVE to file her Third Amended Complaint.

ENTERED this 20th day of March, 2007.

s/Joe Billy McDade  
Joe Billy McDade  
United States District Judge