Special Session II-F

Dying for Fame in the Age of Celebrity: From Neverland Ranch to Paisley Park

Litigation Series

Linda J. Wank
Frankfurt Kurnit Klein & Selz, P.C.
New York, New York

Edward H. Rosenthal
Frankfurt Kurnit Klein & Selz, P.C.
New York, New York

David Sleeman
Winston Art Group Inc
New York, New York

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RIGHTS OF PRIVACY/PUBLICITY

I. Introduction

The right of publicity protects against the unauthorized appropriation of an individual's identity. The specifics of exactly what aspects of one's identity are included under this right (e.g., name, likeness, picture, voice, persona, etc.) vary widely from state to state. Some states have codified the right, while others address it pursuant to common law principles. Some states treat the right of publicity more as an aspect of a right of personal privacy (i.e., the right to be free from commercial appropriation of one's persona) while others treat it more of a property right, descendible and freely transferable.

New York was the first state to protect the right of publicity by statute and is the home to many of the leading cases. In New York, right of publicity protection extends by statute to the unauthorized use of a living person's name, portrait, picture or voice for advertising purposes or for the purposes of trade (which we will refer to as "Commercial" purposes) during a person's lifetime. N.Y. Civil Rights Law §51. California has an expansive right of publicity statute that extends to a person's name, voice, signature, photograph and likeness. Cal. Civ. Code § 3344. And the extent of the right is always limited by the First Amendment, which permits the use of an individual's identity for informational and other protected purposes. Unlike New York, a number of states extend the right post-mortem for a number of years. In California, for example, the right lasts for 70 years after death. Cal. Civ. Code § 3344.1.

II. Is the use for Commercial Purposes?

A critical question is whether the use of an individual's identity is for informational or commercial purposes. The former is fully protected by the First Amendment; the latter may subject the user to the potential of a substantial damage award.

An illustration of the difficulty courts have found in deciding whether a use is or is not commercial can be found in a relatively recent case where Michael Jordan sued Chicago supermarket chain Jewel-Osco, claiming that it had improperly used his identity without authorization. The case stemmed from an advertisement that the supermarket ran in a 2009 Sports Illustrated publication commemorating Jordan's induction into the Basketball Hall of Fame. The ad stated: "Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was 'just around the corner' for so many years," and included the Jewel logo and slogan "Good things are just around the corner." In February 2012, a federal judge ruled that the ad was "noncommercial speech" protected by the First Amendment, because the ad did "not propose any kind of commercial transaction." In his decision, the District Court Judge wrote: "The reader would see the Jewel page for precisely what it is -- a tribute by an established Chicago business to Chicago's most accomplished athlete." He also found that the use of Jewel's slogan in the ad was "simply a play on words." *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102 (N.D. Ill. 2012). But this decision was reversed by the Seventh Circuit, 743 F.3d 509 (7th Cir. 2014), with the court finding that the commercial purpose of the advertisement was readily apparent, as it was used to promote the goodwill of and enhance the Jewel brand. A similar congratulatory advertisement, in which a grocer congratulated Jordan on his Hall of Fame election and offered a two dollar off coupon on a steak, led to a 2015 jury verdict in favor of Jordan in the amount of $8.9 million. *See Jordan v. Dominick's Finer Foods LLC*, Case No 1:10-cv-00407 (N.D. Ill). The *Jewel Food* case then settled.

Other cases that have struggled with the question as to whether a particular use is commercial include the claim by Tiger Woods' licensing company against the seller of a limited edition of artwork (5000 copies) depicting Woods along with other famous golfers. There the court found that the use was not commercial. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

Finally, it is worth noting that the only time the Supreme Court ever has addressed the limits of the Right of Publicity was in *Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562 (1977), where the court held that the First Amendment did not bar a right of publicity claim brought against a television broadcaster which telecast the plaintiff's entire (although short) performance of being shot out of cannonball.

III. Where do Video Games Fit in?

Video games have been accepted by the Supreme Court as expressive works protected by the First Amendment. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). The logical implication of this ruling would be that the use of identifiable people in video games would not constitute a violation of the right of publicity. But the cases have not been turning out that way.

For example, the Third Circuit reversed a grant of summary judgment in favor of a video game distributor in a case brought by a former college football quarterback, holding that the use of the player's likeness was not sufficiently transformative to escape a right of publicity claim. *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), reversing, 808 F. Supp. 2d 757 (D.N.J. 2011); *In re NCAA Student-Athlete Name & Likeness Litigation*, 2013 WL 3928293 (9th Cir. July 31, 2013) (Use of likenesses of college athletes in football video game is not protected by First Amendment).

California courts have looked to see whether the use of a real person is "transformative" in order to determine whether or not a use is commercial. In *Kirby v. Sega of America*, 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607 (2d Dist. 2006), the defendant prevailed because the court found the character in the video game sufficiently transformed a musician's likeness or identity, but in *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 122 Cal. Rptr. 3d 397 (2d Dist. 2011), the court upheld the plaintiff's right of publicity claims where it found the celebrities' avatars were depicted as the celebrities themselves might be. In 2014, in *Noriega v. Activision/Blizzard, Inc.*, a California state court dismissed a right of publicity claim by former Panama leader Manuel Noriega based upon the use of his image and likeness in the video game "Call of Duty: Black Ops II." The court held that Noriega's right of publicity was outweighed by the defendants' First Amendment right to free expression. It found the use of Noriega's likeness to be transformative and therefore not actionable. And as noted above, in the *Hart* case, the Third Circuit held that the use of a college football player's likeness in a video game was not transformative.

Other courts have taken a different approach in determining whether the First Amendment protects the use of a person's identity in an expressive work. For example, in *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989), the Second Circuit held that the First Amendment protects the use of a person's name in the title of a film unless such use is "wholly unrelated" to the film or is simply a disguised advertisement. Still, other courts balance the expressive interests of the purveyor against the economic interests of the claimant. *E.g., C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

In 2016, the Ninth Circuit affirmed the dismissal of Sgt. Jeffrey Sarver's claim that the main character in the acclaimed motion picture *The Hurt Locker* was based on his character and experiences. *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) holding that applying California's right of publicity law would violate the First Amendment.

IV. Will the Supreme Court Weigh in Again?

The Supreme Court was squarely presented with the question "Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic portrayal of a person in an expressive work" in a case involving the depiction of NFL players in the Madden NFL video game. However, on March 21, 2016, the Supreme Court denied EA's petition for a writ of certiorari. *See Davis v. Electronic Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015), *cert. denied*, 2016 WL 1078926. It is quite likely that the question whether the depiction of real people in video games is fully protected by the First Amendment will continue to be litigated, and may at some point reach the Supreme Court.

V. Advertising of the Contents of Protected Expression

Truthful advertising of the content of a publication is protected by the First Amendment, provided that the advertising is a truthful description of the content of the medium. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (6th Dist. 1995) (newspaper's use of a poster of football star permissible as advertising of its content). *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975) (Sports Illustrated subscription advertising could use Joe Namath's picture and name in describing coverage of Namath).

VI. Dead People Have Rights Too

Until the 1980s only Florida, Oklahoma, Utah and Virginia provided a statutory right of publicity that survived death. Recent legislation indicates a trend toward extending rights after death. Many states, including California, recognize a post-mortem right of publicity. Minnesota is considering the issue following the death of Prince and legislation has been proposed in New York that would extend protection after death. Even the states like New York that do not recognize a post-mortem right generally will look to the place of domicile of the claimant in order to determine which state law applies. A leading example of this involved the Estate of Marilyn Monroe, which lost its bid to enforce post-mortem rights when the Ninth Circuit ruled in 2012 that Monroe was legally domiciled in New York at the time of her death and her Estate therefore could not benefit from California's posthumous right of publicity. *Milton H. Greene Archives v. Marilyn Monroe LLC*, 692 F. 3d 983 (9th Cir. 2012).

VII. What About Fantasy Sports?

See C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (finding that baseball players did not have a right of publicity in their names and playing records as used by a fantasy baseball game producer).

Recently a putative class action on behalf of NFL players was filed in Maryland by professional football player Pierre Garçon against fantasy site operator FanDuel, Inc. for using NFL players to promote its products. Case 8:15-cv-03324 (D. Md. filed Oct. 30, 2015). That action was dismissed without prejudice before there were any meaningful developments on the issue.

VIII. Is Only a Person's Current Name and Likeness Protected?

Not necessarily. In the sports context, a former name may also be protected. *Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996) (basketball player formerly known as Lew Alcindor), *amended and superseded on denial of reh'g and reh'g en banc*, 85 F.3d 407 (9th Cir. 1996). *See Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (retouched but identifiable racing car made image of driver in photo recognizable as the race car's owner, even though his facial features were not visible).

Moreover, there are cases that hold that a claim may be brought based on the way a person used to look. *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1977 (photo of movie star taken in 1922 used in 1969). *See also Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998) (genuine issue of material fact existed over depiction of former major league baseball pitcher's distinct windup in a drawing).

IX. What About a Documentary or Infomercial?

The critical question comes down to whether the program really is nothing more than a promotion for a commercial transaction. Most pure documentaries will be considered non-commercial. But where the content can be deemed to be program-length commercial or promotion for a product, the entire program may be deemed commercial, requiring permission to use any person's name, picture or voice in the program. *See Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008).

X. Can an Individual's "Persona" be Protected?

The Ninth Circuit has extended California common law beyond the scope of California's right of privacy statute to include any claim of commercial appropriation of identity of a celebrity, despite the absence of any use of the celebrity's name, picture, likeness, voice or signature. Therefore, there is a significant risk that mere association of a celebrity, even without confusion as to endorsement or participation, may be actionable in California federal courts. *See Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997), *reh'g denied*, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting), *cert. denied*, 531 U.S. 811 (2000) (licensed use of "Cheers" characters as animatronic robots designed to not look like actors who played the roles on television was still actionable by the actors associated with characters).

The Ninth Circuit's extension of the law has been rejected by other circuits. *See, e.g., Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996). *See also Kirby, supra* (video game character, even if based on musician's likeness or identity, was transformative and protected by First Amendment).

XI. What About Television Broadcasts?

There have also been attempt by athletes to claim that the broadcast, or re-broadcast, of coverage of sporting events violates their right of publicity. Thus far, such claims have failed. *E.g., Ray v. ESPN, Inc.*, 783 F.3d 1140 (8th Cir. 2015) (right of publicity claims are pre-empted by the Copyright Act). *Marshall v. ESPN, Inc.*, 2015 WL 3537053 (June 4, 2015) (M.D. Tenn.) (putative class action by current and former NCAA athletes against broadcasters dismissed).

XII. What about the Lanham Act?

The Lanham Acts provides a cause of action arising from an advertisement or other communication that "is likely to cause confusion . . . as to the affiliation, connection, or association of [an advertiser] with another [person, firm or organization], or as to the origin, sponsorship, or approval of [the advertiser's] goods, services, or commercial activities by [the other person, firm or organization]." 15 U.S.C.A. § 1125(a) (1) (A). The Ninth Circuit has suggested that any time a commercial use

implicates the persona of a celebrity, a jury must determine whether there is a likelihood of confusion as to endorsement. *See Abdul-Jabbar*, 85 F.3d at 409, 413 (holding that an Oldsmobile television commercial that aired during a basketball tournament and which posed the question, "Who holds the record for being voted the most outstanding player of this tournament?" and then answered, "Lew Alcindor," arguably attempted to "appropriate the cachet of one product for another") (internal quotation marks and citation omitted). *Accord Facenda, supra* (Third Circuit remanding for Lanham Act claim against National Football League over use of late broadcaster's voice in promotional television program). But *see Brown v. Electronic Arts, Inc.*, 2013 WL 3927736 (9th Cir. July 31 2013) (Use of former football star Jim Brown's likeness in video game does not violate the Lanham Act).