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FUNDAMENTAL ISSUES IN 30 CASES REGARDING THE RIGHT OF PUBLICITY

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ABSTRACT

This article aims to discuss the basic principles and cases of the right of publicity. The first section defines the right of publicity and the right to privacy and demonstrates their relationship. The second section addresses both federal and state laws that conflict with the right of publicity. The third section highlights 30 cases involving the right of publicity. The purpose of this section is to provide an understanding of right of publicity issues. The conclusion observes that the right of publicity could be construed as the fifth intellectual property right, provided that one's self and one's characteristics are intangible and valuable. If so, then the right of publicity could be considered a form of intellectual property.

Keywords: Celebrity Law, Defamation, Lanham Act, Privacy Torts, Right of Publicity, Right to Privacy, Unfair Competition.

INTRODUCTION

This article aims to discuss the basic principles and cases of the right of publicity. The first section defines the right of publicity and the right to privacy and demonstrates their relationship. The second section addresses both federal and state laws that conflict with the right of publicity. The third section highlights 30 cases involving the right of publicity. The purpose of this section is to provide an understanding of right of publicity issues. The conclusion observes that the right of publicity could be construed as the fifth intellectual property right, provided that one's self and one's characteristics are intangible and valuable. If so, then the right of publicity could be considered a form of intellectual property.

RIGHT TO PRIVACY AND THE RIGHT OF PUBLICITY

In this section, the right to privacy and the right of publicity are defined. The elements of the right of publicity are listed, as well as what the right of publicity protects, particularly when commercial value or fame are at issue.

Definitions of Terms

What is the right to privacy? What is the right of publicity? The two terms beg a definition. Warren and Brandeis defined the right to privacy as the right to be let alone.[1] In contrast, the right to publicity is defined as "an individual's right to control and profit from the commercial use of his/her name, likeness and persona."[2] A person's name, likeness, and persona is an individual's identity.[3] The right of publicity protects a person from a commercial loss of value from an unauthorized appropriation of an individual's identity for economic gain.[4]

The definitions listed above do not lend themselves to a straightforward comparison. What does it mean to be let alone? According to Nimmer, to the Brahmins of Beacon Street in Boston, Massachusetts, before the turn of the 20th Century, the right to privacy meant to avoid being the object of the yellow journalism press that dominated the printed media of the time.[5] However, in the Internet age, where one's personal life is a seemingly never-ending display of Facebook postings, this definition of privacy has lost its meaning.[6]

To understand the differences between the right to privacy and the right of publicity, one must appreciate the evolution of the right to privacy. In 1890, when Warren and Brandeis wrote their seminal treatise, many courts and jurists questioned whether the right to privacy existed at all.[7] Fifty years later, Prosser synthesized a hodgepodge of privacy law cases into a meaningful and coherent whole.[8] Instead of creating one tort that dealt exclusively with privacy, Prosser devised the following four privacy torts:

1. Intrusion upon the plaintiff's seclusion or solitude or into his or her private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye; and
4. Appropriation of the plaintiff's name or likeness for the defendant's advantage.[9]

According to Solove and Richards, Prosser's synthesis solidified the tortious rights to privacy while slowing the right to privacy's vigorous evolution to a crawl.[10] Even so, Prosser analyzed his four privacy torts in great detail, noting that the second and third rights depend on

[1]Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harvard Law Review 193 (1890), *available at* https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.
[2]FindLaw Staff, *Right of Publicity*, FindLaw (n.d.), *available at*https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html.
[3]*Id.*
[4]*Id.*
[5]Melville B. Nimmer, The Right of Publicity, 19 *Law and ContemporaryProblems* 203-223 (Spring 1954), *available at* https://scholarship.law.duke.edu/lcp/vol19/iss2/6.
[6]Danial J. Solove& Neil M. Richards, Prosser'sPrivacyLaw: A Mixed Legacy, 98 *CaliforniaLaw. Review* 1887 (2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567693.
[7]William L. Prosser, Privacy, 48 *CaliforniaLawReview* 3 (1960), *available at*https://ezproxy.jmls.edu:2205/HOL/Page?public=true&handle=hein.journals/calr48&div=31&start_page=383&collection=journals&set_as_cursor=0&men_tab=srchresults.
[8]Danial J. Solove& Neil M. Richards,*supra*, note 6.
[9]William L. Prosser,*supra*, note 7.
[10]FindLawStaff,*supra*, note 2.

publicity, while the first and fourth do not. However, from a practical perspective, the fourth right usually involves publicity.[11] Prosser's insight that the privacy torts are integrally related to publicity is significant. Prosser further observed that the third right requires falsity or fiction; the other three do not.[12] Finally, Prosser wrote that the tort of appropriating the plaintiff's name or likeness to a defendant's advantage had been called a "right of publicity."[13] Prosser concluded that tort number four would entitle a plaintiff to enjoin a third person's use of a plaintiff's name or likeness, usually for profit.[14] When comparing Prosser's discussion of appropriation with the definition of the right to publicity, it seems that the right to publicity is integrated into the tort of appropriation.

Nimmer distinguished the right to privacy from the right of publicity, noting that privacy is a personal right, whereas publicity is a property right.[15] Nimmer observed that personal rights and property rights are not assignable.[16] This is a significant distinction between the two rights, for if it is correct, then the right of publicity is not at all a subset, strict or otherwise, of the right to privacy. On the other hand, in Lessig's opinion, privacy is a property right.[17] This means that Lessig believes that privacy is assignable as a property right, indicating that the right of publicity may be subsumed under the right to privacy. In *Carpenter*, Justices Alito, Kennedy, and Thomas, in their separate dissents, affirmed that without property rights, there is no privacy.[18] Given Nimmer's insight, their dissents imply that privacy is assignable, possibly denying the existence of the right to publicity.

After all, the right of publicity may not yet be settled in law. This may be good news for Solove and Richards, who bemoaned that the evolution of privacy had come to a standstill.[19] A fresh examination of the right to privacy may be in order. A new definition of privacy may be necessary to incorporate the right of publicity into the right to privacy. Perhaps American courts and legal scholars should revisit the English tort of confidentiality.[20] Solove and Richards believed that reexamining the tort of confidentiality may be an excellent exercise, given that the current privacy torts have failed to address contemporary problems that have grown as the Internet has matured, it may at the very least be worth a look-see.[21]

Elements of the Right of Publicity

In general, the elements of the right of publicity include (1) the use of an individual's name or likeness, (2) for commercial purposes, and (3) without the plaintiff's consent.[22] The commercial requirement usually limits right of publicity claims to celebrities because most people's names, likenesses, or personas are those of private individuals unknown to the general public.

California has a robust body of case law on the right of publicity due to the number of celebrities who reside there.[23] California recognizes both a statutory and a common-law right of publicity, and both can be pleaded in the same lawsuit.[24] Under California law, the elements of the right of publicity are (1) the defendant's use of the plaintiff's identity, (2) the appropriation of the plaintiff's name or likeness to the defendant's advantage, whether it be commercial or non-commercial, (3) the absence of consent; and (4) a resulting injury.[25]*In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, California's statutory right of publicity demands that a plaintiff prove all the common law elements of the rights of publicity, plus a knowing use by the defendant and a direct link between the alleged use and its commercial purpose.[26]

What Does the Right of Publicity Protect?

In general, the right of publicity is the right of an individual to control and profit from the commercial use of their name, likeness, or persona, otherwise known as a person's identity. The point of the right of publicity is to protect an individual from the loss of commercial value that stems from the unauthorized appropriation of a person's identity for commercial purposes.[27] It should be remembered that the right of publicity is not the same as the right to privacy. The right of publicity gives an individual property rights over their identity. The right to privacy ensures that an individual is protected from emotional suffering caused by the publication of embarrassing or intimate private facts that portray a person in a highly offensive, false light.[28] The right of publicity may also be distinguished from defamation, which involves publishing false or inaccurate information.[29] In contrast, the right of publicity concerns the dissemination of accurate information and the right to limit its propagation for commercial benefit or economic gain.

Commercial Value and Fame

Many state laws stipulate that the right of publicity guards a person's right to determine how to employ his or her identity for business purposes. Typically, a defendant must injure the commercial value of the plaintiff's identity to substantiate the plaintiff's claim, where the defendant's use may not have obtained a profit or benefit.[30] For most states, the amount of harm needed to establish a prima facie case is quite low. Some states require that a person's identity possess commercial value before the individual can instigate legal action.[31] In these states, this fact limits the right of publicity to celebrities, famous people, or individuals who have used their identities to profit commercially.[32] The minority rule in states that recognize the right of publicity after the death of a celebrity or famous individual requires that the person used his or her identity commercially before death. Even so, the majority rule is that the commercial value is either unnecessary or presumed in bringing suit. However, if an identity lacks commercial value, this fact influences the calculation of damages.[33]

[11]William L. Prosser,*supra*, note 7.
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]Melville B. Nimmer, *supra*, note 5.
[16]*Id.*
[17]Lawrence Lessig, *Privacy as Property*,69 Social Research 1 (2002), *available at*https://www.jstor.org/stable/40971547?seq=1#page_scan_tab_contents.
[18] Donald L. Buresh, *The Meaning of Justice Gorsuch's Dissent in Carpenter v. United States*, 43 American Journal of Trial Advocacy 1.
[19]Danial J. Solove& Neil M. Richards, *supra*, note 6.
[20]*Id.*
[21]*Id.*
[22]Enrico Schaeffer, What Is Right of Publicity? Protect Your Name and Likeness, *Traverse Legal* (Feb. 2017), *available at* https://www.traverselegal.com/blog/what-is-right-of-publicity/#:~:text=Generally%2C%20Right%20of%20Publicity%20requires,(3)%20without%20Plaintiff's%20consent.

[23]*Id.*
[24]*Id.*
[25]*Id.*
[26]*In re NCAA Student-Athlete Name &LikenessLicensingLitigation*, 724 F.3d 1268, 1273 n. 4 (9th Cir. 2013), *available at*https://casetext.com/case/in-re-ncaa-studentndashathlete-name-amp-likeness-licensing-litig.
[27]JONATHAN S, JENNINGS, & J. MICHAEL MONAHAN, TRADEMARKS AND UNFAIRCOMPETITION: CRITICAL ISSUES IN THE LAW (New York: Law Journal Press 2014).
[28]*Id.*
[29]*Id.*
[30]*Id.*
[31]*Id.*
[32]*Id.*
[33]*Id.*

The commercial value of identity is integrally related to damages. If there is no commercial value, it is difficult, if not impossible, to calculate damages.[34] Similarly, if identity does not possess at least a modicum of fame, it is, again, difficult, if not impossible, to calculate damages with any degree of precision or accuracy.[35] This means that commercial value and fame are integrally related. One cannot have one without the other.

LAWS THAT CONFLICT WITH THE RIGHT OF PUBLICITY

This section first discusses federal and state laws regarding the right of publicity. The next subsection compares and contrasts the right of publicity versus the right to privacy and defamation. The third and fourth subsections define what a celebrity and a non-celebrity are. The final subsection discusses the right of publicity in relation to the First Amendment.

Federal and State Law

There is no federal law that protects the right of publicity. This means that the right to publicity varies from state to state, where common law or statutory law protects an individual from the unauthorized exploitation of their identity. It should be noted that in some states, the right of publicity applies only to celebrities or public figures, whereas in other states, it applies to any individual. In several states, a person's right of publicity is protected only if the individual's identity has publicity value (i.e., the individual has previously been exploited for their identity). In some states, the right of publicity extends beyond death, but the duration varies by state.

Right of Publicity versus Right to Privacy and Defamation

It should be remembered that the right of publicity and the right to privacy are distinct. The right of publicity gives an individual property rights over his or her identity. The right to privacy ensures that an individual is protected from emotional suffering caused by the publication of embarrassing or intimate private facts that portray a person in a highly offensive, false light. The right of publicity may also be distinguished from defamation, which involves publishing false information. In contrast, the right of publicity concerns the dissemination oftrue information.

What Is a Celebrity?

Most cases involving the right of publicity concern celebrities or other public figures. It should be remembered that the definition of a celebrity is not well-defined. It is operationally understood as a famous or well-known person. Determining whether one is a celebrity usually includes:[36]

- **Timeframe:** If one is recognized as a celebrity, how long does one remain a celebrity?
- **Location**: If a person is considered a celebrity in a particular country, does that mean that the person is also a celebrity in another country? What celebrity status is transferred from state to state?
- **Taste**: If an individual is a celebrity in one field of endeavor, does it mean that the individual is a celebrity in another endeavor (e.g., classical music versus rock music)?
- **Professional or Business specialty**: If one is a professional or business celebrity, one may not be a celebrity under different circumstances.

What Is a Non-Celebrity?

In answering what a non-celebrity is, it should be remembered that the right of publicity is an integral part of the right to privacy. One could think of the right of publicity as a right to privacy geared toward famous or infamous individuals. In the United States, unless specified by statute (e.g., the Americans with Disabilities Act, the Family Educational Rights and Privacy Act, etc.), one has only a reasonable expectation of privacy, which is typically governed by Supreme Court case law.[373839] America does not currently have an equivalent to the General Data Protection Regulation (GDPR) in the European Union (EU), although the California Consumer Privacy Act (CCPA) and other state laws are making inroads toward ensuring that some Americans have a right to privacy.[40]

The right to privacy, like the right of publicity, is about whether identity is a valuable property right. For someone who is not a celebrity, the right to privacy or publicity is not necessarily a precious commodity because most private people do not have the financial resources to protect it.[41] In other words, even if the right to privacy, in theory, adequately protects non-celebrities, most of these people have little practical recourse under the law because of a shortage of financial depth. In contrast, for celebrities, the right of publicity, a subset of the right to privacy, is a valuable asset worth millions of dollars.[42] Celebrities or other famous people wield a great deal of power over government, business, and the private sector. In essence, for some people, identity is indeed a valuable property right. Although technically, everyone enjoys some form of a right to privacy and publicity, it turns out that in many cases, these rights are fiercely guarded by famous and even infamous people.

It should be remembered that the rights to privacy and publicity are indeed valuable. Examples are quite common. Better Midler won $400,000 when Ford Motor Co. misappropriated her voice in a commercial. Johnny Carson prevented a portable toilet company from using "Here's Johnny." Kareem Abdul-Jabbar thwarted the commercial use of his former name, Lew Alcindor, in conjunction with automobile sales.[43]

The right of publicity, considered a subset of the right of privacy, more than adequately protects celebrities. One can theoretically say that the right to privacy, and hence publicity, also protects non-celebrities.[44] However, some states only recognize publicity rights for celebrities. For example, the New York right of publicity law is based on the right-to-privacy law. In contrast, the California right of publicity law is a property right descendible for 70 years after the individual's

[34] *Id.*
[35] *Id.*
[36] *Id.*

[37] *Katz v. United States*, 389 U.S. 347 (1967), *available at*https://supreme.justia.com/cases/federal/us/389/347/#tab-opinion-1946919.
[38] *United States v. Jones*, 565 U.S. 400 (2012), *available at*https://supreme.justia.com/cases/federal/us/565/400/#tab-opinion-1963700.
[39] *Carpenter v. United States*, 585 U.S. 296 (2018), *available at*https://supreme.justia.com/cases/federal/us/585/16-402/#tab-opinion-3919270.
[40] Donald L. Buresh,AComparisonBetween the European and the American Approaches to Privacy, 6 *Indonesian Journal of International and Comparative Law*2, 257-85 (2019), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/indjicl6&div=16&id=&page=.
[41] Jonathan S, Jennings, & J. Michael Monahan,*supra*, note 27.
[42] *Id.*
[43] 2 BARTON BEEBE, TRADEMARKLAW: AN OPEN-SOURCE CASEBOOK (Creative Commons Summer 2019).
[44] *Id.*

death. In California, the right of publicity is freely assignable; in New York, it is not.[45]

The answer to the question appears to depend on whether one's identity has commercial value in the marketplace. Celebrities' identities have a genuine market value, whereas the market value of non-celebrity identities is probably nominal.[46] This means that in practical terms, protection adequacy depends on an identity's market value, a tenuous notion at best.

Right of Publicity versus First Amendment

There is a balance to be struck between a person's right of publicity and free speech regarding one's use of a person's identity. The problem of banking on First Amendment protection is that First Amendment rules are not predictable. The First Amendment possesses a hierarchy of protections based on the newsworthiness of information about an individual's identity and on how that identity is being used. Generally, news has the most protection, while entertainment and fiction have less, and advertising enjoys the least when the depiction of identity is used to sell a product or service. The First Amendment protects newsworthiness when the information is:[47]

- Current news items or past information that is still informative;
- Presented by the media and deals with public issues;
- Factual, educational, or historical; and
- Interesting because it is entertaining or amusing.

The two critical questions that must be answered before information regarding a person's identity is newsworthy are:[48]

- Is the unauthorized use of an individual's identity news that is subject to First Amendment protection? and
- Is there a reasonable connection between using the individual's identity and the news being conveyed?

The unauthorized use of a person's identity demands a reasonable relationship between the individual's identity and the story's subject. When the connection is reasonable, the right of publicity must give way to the First Amendment.[49] A right of publicity claim can be successful only when the person's identity is a vehicle to attract attention to the newsworthy message. The right of publicity cannot be exploited to restrict unwanted discussion or legitimate commentary.

The First Amendment protects a publisher when he or she publishes information of legitimate public concern. Guidelines when balancing the right of publicity with the First Amendment include:[50]

- Is a person's identity implied from the context of the information, particularly when the person's name is not used?
- Is the individual's name, likeness, photograph, or description employed stringently for commercial purposes?
- Is the person a celebrity or a public personality?
- Will the information publisher financially gain from publishing an individual's identity?
- Is the information at issue a matter of public concern?
- Should the publisher obtain a written release or license regarding using an individual's identity?
- Should the publisher have insurance to mitigate the risk of violating a person's right of publicity?
- Finally, should a publisher of such information seek legal counsel?

Note that the right of publicity can conflict with the right to privacy and defamation law. However, the most significant conflict is between the right to privacy and the First Amendment.

FUNDAMENTAL RIGHT OF PUBLICITY CASES

This section briefly outlines 30 cases dealing with the right of publicity. The cases are alphabetized from *Allen v. National Video, Inc.* to *Winter v. DC Comics*. Each case is discussed in turn.

Allen v. National Video, Inc.

The issue in *Allen* was whether the unauthorized use of a person's name or likeness that created a false impression that the person had endorsed a product or service violated the Lanham Act.[51] According to the Lanham Act, the unauthorized use of a person's name or likeness that creates the false impression that the person has endorsed a product or service violates the Lanham Act. The court opined that the value of a celebrity's identity is similar to a trademark right under the Lanham Act, even though a trademark need not be required to demonstrate a violation.[52] Because *Allen* was a false endorsement claim, the court inquired whether the use of the plaintiff's likeness created consumer confusion regarding whether the individual endorsed the product or service.[53] The court employed a likelihood-of-confusion analysis, where the elements were: (1) strength of the mark, (2) similarity of the marks, (3) similarity of the products, (4) evidence of actual confusion, (5) sophistication of purchasers, and (6) whether the defendant acted in good or bad faith.[54]

In this case, Woody Allen's mark, or likeness, was quite strong because of his fame as a comic and director.[55] The marks were similar because it was indisputable that Borof, the defendant, resembled Allen.[56] Although Allen did not rent movies to the public, he was well-known in the movie industry, ensuring that the products were sufficiently similar for the court to rule in his favor.[57] The court observed that Allen did not provide evidence of actual confusion.[58]The court noted that the relevant consumers, National Video and readers of the Video Review, were sufficiently sophisticated about the movie industry but could be confused because of the resemblance between Borof and Allen.[59] Finally, the defendants were well aware that by using Borof in an advertisement, they would invoke Allen's image in the minds of consumers.[60] Thus, the court enjoined National Video from continuing to publish the advertisement containing Borof. The court also ordered Borof to be excluded from any advertisement that creates a likelihood of confusion about whether Allen was associated with the product.

Brill v. Walt Disney Company

The issue in *Brill* was whether a claim for right of publicity invasion of privacy requires a plaintiff to prove that the defendant appropriated

[45] *Id.*
[46] Jonathan S. Jernnings, & J. Michael Monahan,*supra*, note 27.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Allen v. National Video, Inc.*, 610 F.Supp. 612 (S.D. N.Y. 1985), *available at*https://law.justia.com/cases/federal/district-courts/FSupp/610/612/1469523/.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

the plaintiff's name or likeness for the defendant's own use.[61] In this instance, the State of Oklahoma adopted a statute prohibiting the knowing use of another person's name, voice, signature, photograph, or likeness for commercial purposes.[62] Here, Brill claimed that the similarities between his racecar and Lightning McQueen are striking, defying the mere presence of chance. Brill argued that the right of publicity includes an individual's right to use their identity as well as their name and likeness, but not to a person's car.[63] The Oklahoma Court of Appeals concluded that the similarities between Brill's race car and Lightning McQueen were insufficient to establish that the defendants were using Brill's likeness.[64] The trial court's judgment was affirmed.

Browne v. McCain

In the 2008 election year, on behalf of the Republican presidential candidate, Sen. John McCain, the Ohio Republican Party (ORP) produced a web video criticizing and making fun of then-Sen. Barack Obama's energy policy. The video showed scenes of Ohio newscasters talking about high gasoline prices and comparing depictions of the two candidates' energy proposals.[65] The commercial used Browne's song, *Running on Empty*, which played in the background.[66] The video was posted on YouTube and aired on Ohio and Pennsylvania television networks.[67] The defendants did not acquire a license from Browne or receive permission from Browne to use the song in the commercial.[68]

Browne asserted a copy infringement claim. The defendants invoked a fair use defense, a Lanham Act defense based on political speech, and the defense that the commercial was an artistic work under the *artistic relevance test* that balances the plaintiff's interests in avoiding confusion or false endorsement against the defendant's First Amendment rights.[69] The court rejected all of these arguments.[70] On August 04, 2009, a year after the 2008 presidential election, the case was settled for an undisclosed amount.[71]

The McCain campaign's use of Browne's song may have defeated Browne's copyright infringement claim under a parody defense under the First Amendment. The court still would have rejected the McCain campaign's fair use defense and its Lanham Act defense based on political speech. The problem with the parody defense against Browne's copyright infringement claim is that it would have defeated the purpose of using the song to criticize then-Sen. Obama's energy proposal. By invoking a parody defense, the public might conclude that then-Sen. Obama's energy proposal was not as lacking as the McCain campaign purported to be. The parody may have backfired, making Sen. McCain's energy proposal look foolish. The outcome could have been an example of one winning the battle but losing the war. The McCain campaign would have been better served if it had obtained a license to use Browne's song, obtained permission from Browne to include the song in the commercial, or not used it at all. The outcome would probably have been different had the McCain campaign made fun of Browne, but it may have had the opposite effect on public opinion in Ohio and Pennsylvania.

Carson v. Here's Johnny Portable Toilets, Inc.

The plaintiff, Johnny Carson, was the host and star of "The Tonight Show," a popular program aired on NBC at 11:00 pm ET, Monday through Friday.[72] At the show's beginning, Ed McMann, the second banana, would introduce the evening's guests and then boldly proclaim the words, "Here's Johnny," at which time Johnny Carson would walk on the stage.[73] Here's Johnny Portable Toilets, Inc. (HJPT)was engaged in renting and selling portable toilets. Shortly after HJPT entered business in 1976, Carson brought an action for unfair competition, trademark infringement under federal and state law, invasion of privacy, and publicity rights.[74] The court applied Michigan common law for unfair competition based on the likelihood of confusion.[75] The court concluded that Carson's right to privacy was not violated based on the law or the facts.[76] However, the court found that HJPT infringed on Carson's right of publicity for commercial exploitation, regardless of whether Carson's name or likeness was used.[77]

C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.

C.B.C. Distribution and Marketing(CBC) operated fantasy baseball games employing Major League Baseball (MLB) player names and statistics.[78] The firm had license agreements with the Players' Association (PA) until the agreements expired. Upon expiration, Advanced Media obtained rights from PA and denied CBC the right to use the names and statistics of baseball players without a new license.[79] CBC then sought a declaratory judgment supporting its right to employ MLB player names and statistics without a license.

The issue was whether CBC could employ MLB player names and statistics in its fantasy baseball games without a license from Advanced Media or the Players' Association.[80] The other issue is whether such use violates the players' right of publicity or is preempted by the First Amendment or copyright law.[81] The court granted summary judgment favoring CBC. The court opined that the MLB players did not possess a right of publicity in their names and statistics because CBC's fantasy games did not utilize player identities for profit in a manner protected by the law.[82] The court reasoned that player names and statistics were in the public domain, and CBC could use the information under the First Amendment as a form of expression not prevented by copyright law.[83]In other words, the public's interest in information and free expression under the First Amendment overshadowed the player's rights of publicity. The court also noticed that the no-challenge provision and restrictions on CBC's employment of player names and statistics under the previous contract were unenforceable based on a public policy argument.[84]*C.B.C. Distribution and Marketing* clarified the relationship

[61]*Brill v. Walt Disney Company*, 246 P.3d 1099 (Ok. Ct. of App. 2010), *available at* https://casetext.com/case/brill-v-walt-disney-co.
[62]*Id.*
[63]*Id.*
[64]*Id.*
[65]*Browne v. McCain*, 611 F.Supp.2d 1062 (C.D. Cal. 2009), *available at*https://casetext.com/case/browne-v-mccain.
[66]*Id.*
[67]*Id.*
[68]*Id.*
[69]*Id.*
[70]*Id.*
[71] MTLR Staff, Jackson Browne v. John McCain: Copyright LawsuitSettled, Case Dismissed, *Michigan Technology Law Review* (n.d.),*available at* http://mttlr.org/2009/08/jackson-browne-v-john-mccain-copyright-lawsuit-settled-case-dismissed/
[72]*Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983), *available at*https://casetext.com/case/carson-v-heres-johnny-portable-toilets-inc-2.
[73]*Id.*
[74]*Id.*
[75]*Id.*
[76]*Id.*
[77]*Id.*
[78]*C.B.C. Distribution v. Major League Baseball*, 443 F.Supp. 2d 1077 (E.D. Mo. 2006), *available at*https://casetext.com/case/cbc-distribution-marketing-v-major-league-baseball.
[79]*Id.*
[80]*Id.*
[81]*Id.*
[82]*Id.*
[83]*Id.*
[84]*Id.*

between intellectual property rights and the First Amendment regarding fantasy sports.

Doe a/k/a Twist v. TCI Cablevision

In *Twist*, Anthony Twist, a former professional hockey player for the National Hockey League (NHL), sued TCI Cablevision, Inc. (TCI) because TCI created, published, and marketed the comic book *Spawn*, where the villain had the same name as Anthony Twist.[85] A "tough guy" persona characterized both the actual Twist and the fictional character named Twist. The creator of Spawn, Todd MacFarlane, stated that the fictional Twist was based on the real Anthony Twist.[86] Twist sued TCI for misappropriating his name and identity, claiming that his name had market value as a public figure.[87] Twist also claimed damages for the injury, the amount that third parties would be willing to pay him for using his name in product endorsements.[88]

At issue was whether the right of publicity tort required a plaintiff to prove that the defendant intended to use the plaintiff's identity for commercial advantage.[89] In Missouri, where the case was adjudicated, there was no right of publicity statute – only the common law applied.[90] At trial, the court favored Twist, awarding him $24.5 million in damages.[91] However, on appeal, the lower court's ruling was reversed and denied because the jury did not conclusively find that TCI intended to use Twist's image to obtain a commercial advantage.[92]

When the case arrived at the bench of the Missouri Supreme Court, the Court attempted to balance Twist's right to publicity as property against TCI's right to free speech.[93] The Court rightly observed that the right to free speech does not automatically invalidate the right of publicity.[94] The Court also noticed that, in contrast to a defamation suit, malice need not be proven in a right of publicity suit, where the critical issue was whether using Twist's name and identity expressed TCI's beliefs and ideas.[95]

Downing v. Abercrombie & Fitch

In *Downing*, the appellants, George Downing et al., none of whom were celebrities, alleged that Abercrombie misappropriated their names and likenesses, which they claimed violated California's statutory and common law protections against commercial misappropriation and that the publication of a photograph in the catalog violated the Lanham Act.[96] The plaintiff also alleged claims for negligence and defamation. At issue was whether the defendant misappropriated the plaintiff's identity or likeness for commercial advantage without consent, which resulted in damages.[97] The federal district of the Central District of California granted Abercrombie summary judgment, opining that the use of the photograph was proper.[98] After a protracted analysis, the Ninth Circuit disagreed, reversed the summary judgment, and remanded the case for trial.[99]

ETW Corp. v. Jireh Publishing, Inc.

In *ETW Corp.*, the issue was whether depicting a celebrity in a piece of artwork that adds significant expression is protected under the First Amendment against the celebrity's right to publicity.[100] ETW Corp., representing Tiger Woods, a world-class golfer, sued Jireh Publishing, Inc. (Jireh) for his artwork of Tiger Woods. ETW Corp. claimed trademark infringement, dilution, unfair competition, false advertising, and violation of the right to publicity. Jireh was granted summary judgment, and ETW Corp. appealed.[101]

The Sixth Circuit, using a rule previously employed by the Supreme Court of California, held that if an artistic depiction only mirrors the image of a celebrity, then the work violates the celebrity's right of publicity.[102] On the other hand, when an artist adds significant expression to the depiction, the artist is protected under the First Amendment. In other words, the depiction must be more than a literal representation of the celebrity.[103] The court observed that Tiger Woods, his caddy, the golf course, the clubhouse, and various other images were included in the image. These other figures in the work ensured that it was more than just an imitation.[104] The dissent argued that the artwork was similar to the already published work about Tiger Woods. The dissent opined that there was nothing significant about the content of the work and that the motion for summary judgment should have been denied.[105]

Henley v. Dillard Department Stores

Donald Henley was a former member of the rock band The Eagles. Dillard Department Stores (Dillard) advertised "Henley-style" shirts that played on Henley's last name.[106] The advertisement depicted an individual wearing a Henley-style shirt with the caption, "This is Don's Henley."[107] Henley sued Dillard for violating his publicity rights and other claims. At trial, Henley demonstrated survey evidence to the court showing that 15 percent of the respondents believed Henley approved of the shirt.[108] In a deposition, the creator said that the advertisement employed Henley's name to generate an attention-grabbing advertisement. Dillard argued that the words "Don's Henley" were of no commercial value, and the Henley reference was merely incidental.[109] Henley filed a motion for a partial summary judgment on the right of publicity claim.The issue in *Henley* was whether Dillard had violated Henley's right of publicity by using his name and likeness in their advertising withoutpermission for commercial benefit.

Herman Miller v. Palazzetti Imports and Exports, Inc.

Herman Miller, Inc. filed a complaint in federal district court against Palazzetti Imports & Exports, Inc., claiming that Palazzetti produced imitations of a lounge chair that Charles Eames and his wife, Ray,

[85] *Doe a/k/a Twist v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), *available at*https://casetext.com/case/doe-v-tci-cablevision-1.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Jonathan S, Jennings, & J. Michael Monahan, *supra*, note 27.
[91] *Doe a/k/a Twist v. TCI Cablevision*, *supra*, note 85.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), *available at*https://casetext.com/case/downing-v-abercrombie-fitch.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *ETW Corp. v. Jireh Publishing, Inc.*, 99 F.Supp. 2d 829 (N.D. Ohio 2000), *available at*https://law.justia.com/cases/federal/district-courts/FSupp2/99/829/2290907/.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Henley. v. Dillard Department Stores*, 46 F.Supp. 2d 587 (1999), *available at*https://law.justia.com/cases/federal/district-courts/FSupp2/46/587/2488060/.
[107] *Id.*
[108] *Id.*
[109] *Id.*

designed for Herman Miller in 1956.[110] The jury returned a verdict for Herman Miller on its claims for trademark infringement and dilution, unfair competition, and right of publicity.[111] The federal district court dismissed the claims for trade dress infringement and dilution, and false advertising.[112] Both parties appealed the case to the Sixth Circuit. The Sixth Circuit affirmed the judgment in all respects except for:[113]

(1) The dismissal of Herman Miller's trade dress infringement and dilution claims, which was reversed with instructions that the protect ability issue was preserved for trial and the federal district court was required to address Palazzetti's affirmative defense of abandonment; and

(2) The nationwide right of publicity injunction against Palazzetti, which had to be modified to exclude the states that do not recognize a post-mortem right of publicity

Hoffman v. Capital Cities ABC, Inc.

In *Hoffman*, the motion picture actor, Dustin Hoffman, sued the Los Angeles Magazine,owned at the time by the Walt Disney Company, for publishing a software-altered photograph of Hoffman, so that he appeared to be wearing a contemporary silk gown designed by Richard Tyler and high-heeled shoe designed by Ralph Lauren.[114] The defendant had not received permission to use Hoffman's identity in the photograph.[115] At issue was whether the defendant misappropriated Hoffman's identity without his consent, thereby violating Hoffman's right of publicity.[116] The California law is quite specific regarding violations of a person's right of publicity. The court opined that Hoffman was entitled to a $1.5 million judgment against the defendant for compensatory damages.[117]The court also awarded punitive damages.

Hooker v. Columbia Pictures Industries, Inc.

T. J. Hookerwas a professional woodcarver from Woodstock, Illinois. He was a professional wood carver who specialized in carving high-quality ducks that sell for a substantial amount.[118] Hooker's work was widely acclaimed due to the fine workmanship and the extensive promotion of his products. The defendants are Columbia Pictures Industries, Inc., Spelling-Goldberg Productions, and American Broadcasting Companies, Inc. These firms produce a television program about a fictional police officer in California named "T. J. Hooker."[119] Hooker admitted to the court that the selection of the name of the television series was probably a matter of chance. Hooker thought that he had been wronged and wanted the producers to use his name only with permission.[120]

The suit consisted of four counts. The first count is predicated on the common law tort of appropriating the plaintiff's name or likeness for the defendants' benefit.[121] The second count was based on the right to privacy.[122] The third count was centered on a possible violation of the Illinois Deceptive Trade Practices Act. The use of the name "T. J. Hooker" might cause confusion or misunderstanding regarding the association with the defendants' television program.[123] The final count asserted a trademark violation under the Lanham Act, under which the seller is civilly liable if a product or service is falsely designated as originating from a particular source.[124]

For Counts I and II, the court reasoned that under Rule 12(b)(6) of the FederalRules ofCivilProcedure, the plaintiff had failed to state claims where relief could be granted.[125] Count III was dismissed because the allegations did not state a claim under the Illinois Deceptive Trade Practices Act.[126] Finally, Count IV was dismissed because the facts did not permit the court to conclude that consumers were unlikely to be confused about the source or sponsorship of the television program.[127]

Lohan v. Take-Two Interactive Software, Inc.

In this case, Lindsay Lohan, a movie actress, sued Take-Two Interactive Software, Inc. (Take-Two) for allegedly using her image without her consent in Grand Theft Auto V (GTAV), a video game developed and distributed by Take-Two.[128] The game was set in what appeared to be Southern California, where the character "Lacey Jonas" resembled Lohan in appearance and voice. Lohan pointed out in court that two images in the game violated her privacy rights, one when a police officer was frisking a blond woman and shortly after that when the same woman was taking a selfie in a red bikini.[129] According to Lohan, the characters suggested her image and persona without her consent.

The issues were whether an avatar in a video game could represent a portrait under the New York Civil Rights Law and whether the images in GTAV violated Lohan's privacy rights.[130] Although the court held that a computer-generated image can signify a portrait, it opined that the images in GTAV were not recognizable as Lohan, which indicated that Lohan's privacy rights were not violated.[131] The court argued that while the avatars may be graphical representations of people, the images in GTAV were more generic than specific portraits. The court also observed that Lohan's voice was not employed in the game, and the evidence was insufficient to support her privacy claim.[132] Thus, her claims were dismissed.

Lugosi v. Universal Pictures

The issue in *Lugosi* was whether an individual's likeness constituted a personal right that expired upon the individual's death.[133] The holding was that the right to Bela Lugosi's likeness was a personal right that expired when he died. This meant that Lugosi's heirs did not have a claim to the profits generated by Universal Pictures' exploitation of Lugosi's likeness.[134]The holding of the Supreme Court of California was based on the presumption that the exploitation of Lugosi's likeness is a personal right, not a property right. In his dissent, Judge

[110] *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298 (6th Cir. 2001), *available at*https://casetext.com/case/herman-miller-v-palazzetti-imports-exports.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Hoffman v. Capital Cities/ABC, Inc.*, 33 F.Supp.2d 867 (C.D. Cal. 1999), *available at* https://law.justia.com/cases/federal/district-courts/FSupp2/33/867/2518974/.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Hooker v. Columbia Pictures Industries, Inc.*, 551 F.Supp. 1060 (N.D. Ill. 1982), *available at*https://law.justia.com/cases/federal/district-courts/FSupp/551/1060/2365769/.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Lohan v. Take-Two Interactive Software, Inc.*, 73 N.Y.S.3d 780 (N.Y. 2018), *available at*https://law.justia.com/cases/new-york/court-of-appeals/2018/24.html.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Lugosi v. Universal Pictures*, 603 P.2d 425 (Sup. Ct. Calif. 1979), *available at*https://law.justia.com/cases/california/supreme-court/3d/25/813.html.
[134] *Id.*

Bird observed that a person's likeness is a property right and thus fully descendible after death.[135] Judge Bird observed that individual interests threatened by the unauthorized exploitation of one's own likeness are entirely different from personal interests under the traditional right of privacy doctrines.[136] From Nimmer, it should be remembered that privacy rights are personal rights, whereas the right of publicity is a property right, and thus assignment, including to one's heirs.[137] Unfortunately, the majority of the Supreme Court of California opined that the right of publicity is a personal right, not a property right.

McFarland v. Miller

The issue in *McFarland* was whether an individual's likeness is a personal right that expires upon the individual's death under New Jersey law.[138] In New Jersey, the right of publicity is a property right instead of a personal right. According to the Court, George "Spanky" McFarland had minimal interest in the exploitation of his childhood persona because Spanky was a character that McFarland was employed to portray. The question that the Third Circuit was asked to resolve was whether George McFarland and the character Spanky were so intertwined that the public identified McFarland with the character Spanky. [139]

According to the Third Circuit, when Miller appropriated the name Spanky McFarland and McFarland's likeness in pursuing a commercial goal, McFarland became entitled to protection in New Jersey courts.[140] The Court opined that Miller unfairly sought to capitalize on McFarland's name and likeness. The result of the case was that the right of publicity was a property right and that the heirs of George "Spanky" McFarland may have a superior claim to the nickname Spanky.[141] The Court vacated summary judgment in favor of Miller and directed the district court to engage in further proceedings.[142]

Midler v. Ford Motor Co.

In *Midler*, Bette Midler, a singer, sued Ford Motor Company, claiming that the firm employed a Midler impersonator in a series of 1980s commercials.[143] Ford generated an advertising campaign for the Mercury Sable automobile that invoked nostalgic sentiments by using famous 1970s songs by the original artists.[144] If an original artist rejected Ford's offer, the company employed impersonators to sing the original songs for the commercials. In this instance, Midler refused to sing one of her songs for a Ford commercial.[145] The company then hired a Midler voice impersonator because using the song had been approved by the song's copyright holder.[146] Midler's image was not used even though the voice sounded almost exactly like Midler's voice. Midler sued Ford, but the district court found no legal reason to prevent Ford from using a voice impersonator. The court granted Ford summary judgment, and Midler appealed to the Ninth Circuit.[147]

The issue considered by the Ninth Circuit was whether an artist's voice is sufficiently distinctive such that an artist has a controlling interest when it is appropriated.[148] Midler sought damages for using her voice, which she claimed was distinctive rather than copyright infringement of the song employed by Ford, given that the public's recognition of her voice was the distinctive feature of the commercial. The Ninth Circuit opined that the voice of a famous singer was distinctive to an artist and, therefore, a part of her identity.[149] This meant that Ford could not imitate Midler's voice without her permission, implying that Midler's voice was safeguarded against unauthorized use.

Midler was significant because a voice or other features of an individual's identity that cannot be copyrighted are protected against unauthorized use. If a voice is impersonated, permission must be granted by an original artist, whether or not it is copyrighted material.

Motschenbacher v. R. J. Reynolds Tobacco Co.

Lothar Motschenbacker, a professional race car driver, sued R. J. Reynolds Tobacco Company (Reynolds) and William Esty Company (Etsy) for using his race car's image in a television commercial for Winston cigarettes without permission.[150] The commercial changed Motschenbacker's car by changing its number from 11 to 71 and adding a Winston spoiler, an aerodynamic device that disrupts airflow around a moving vehicle. The commercial also added white pinstripes to the red color, the same paint color as Motschenbacker's vehicle.[151] The features of the auto allegedly prompted viewers acquainted with racing to conclude that Motschenbacker endorsed Winston cigarettes.

The issue in Motschenbacker was whether utilizing the idiosyncratic features of Motschenbacker's race car in a commercial misappropriated his persona by violating his right to privacy by implying that he endorsed Winston cigarettes.[152] The district affirmed Motschenbacker's summary judgment, but the Ninth Circuit vacated the ruling in favor of Reynolds and Etsy, and remanded the case for further proceedings, claiming that Motschenbacker was not identified in the commercial.[153] The Ninth Circuit opined that the summary judgment was inappropriate because it did not acknowledge the monetary value of Motschenbacker's identity as signified by the features of his race car.[154] The Court observed that Motschenbacker's face was not present in the commercial and that there was no reasonable inference of his identity based on the colors of his race car that would harm his reputation or brand.[155] The Court categorized the case as one of appropriation, where an individual's identity is used for commercial purposes without permission. However, the Court did state that subtle but distinctive cues linking an advertisement to an individual could violate a person's right to privacy.[156] The case demonstrated that identifying rights in a commercial setting could go beyond facial recognition and other personal attributes that possess commercial value.

Oliveira v. Frito-Lay, Inc.

Astrud Oliveira, a professional singer known for singing "The Girl from Ipanema," filed a lawsuit against Frito-Lay, Inc. (Frito-Lay) for

[135] *Id.*
[136] *Id.*
[137] Melville B. Nimmer, *supra*, note 5.
[138] *McFarland v. Miller*, 14 F.3d 912 (3rd Cir. 99), *available at*https://casetext.com/case/mcfarland-v-miller.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *available at*https://law.justia.com/cases/federal/appellate-courts/F2/849/460/37485/.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), *available at* https://law.justia.com/cases/federal/appellate-courts/F2/498/821/325804/.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*

using her rendition of the songin a television commercial without her consent.[157] Her professional name was Astrud Gilberto. Although she did not compose the music, write the lyrics, or produce the recording, Gilberto asserted that she was acclaimed as the Girl from Ipanema because of the song's success and her many performances.[158] Gilberto argued that the public believed that her recording of the song was a trademark because she sang it. When Frito-Lay used her rendition in a commercial for their potato chips, Gilberto claimed that the firm infringed her trademark right under § 43(a) of the Lanham Act. The complaint claimed that the company violated her right of publicity, unjust enrichment, and unfair competition under New York State law.[159]

The issues were whether Gilberto's performance of "The Girl from Ipanema" in 1964 could act as a trademark under the Lanham Act and whether there was an implied endorsement or otherwise infringed on Gilberto's rights when Frito-Lay used the recording in their commercial.[160] The court dismissed the Lanham Act because Gilberto did not have trademark rights in her performance, even though a musical composition could possibly be a trademark. The Second Circuit also vacated the dismissal of the state law claims, opining that the district court had incorrectly assumed facts against Gilberto.[161] The state law claims were remanded back to the district court, where the dismissal was to be without prejudice, thereby permitting Gilberto to refile her claims in state court.

The problem with Gilberto's claim was that it was not supported by precedent or sufficient evidence. Even though many artists recorded definitive renditions of a song, there were no instances where an artist owned a protected trademark of their recording.[162] The Second Circuit disagreed with the district court's reasoning, observing that Gilberto's complaint never admitted to putting the recording in the public domain or disposing of any rights of her recorded voice, as required by FRCP Rule 12(b)(6).[163] Given that the federal claim was dismissed, the supplemental jurisdiction of the state law claims were inappropriate.

Onassis v. Christian Dior

The issue in *Onassis* was whether the use of a lookalike of a well-known personality for commercial purposes violates the right to privacy, as stated in 50 Civ. Rights and 51 Civ. Rights of the Civil Rights Law for the State of New York.[164] According to the case, the issue can be restated as whether one person can enjoy using someone else's face. Although the New York Civil Rights law states that the issue concerns the right to privacy, the case could be construed as involving the right of publicity.[165] Here, Christian Dior, a corporation that controls the advertising and publicity for 35 licensees that sell a variety of merchandise under the Dior label, created in an advertisement that featured Gene Shalit (television personality), Shari Belafonte (model), Ruth Gordon (actress), and Barbara Reynolds (secretary) attending a Dior wedding.[166] Ms. Reynolds was an unknown person who bore a remarkable resemblance to Jacqueline Onassis, then the current wife of Aristotle Onassis (Greek shipping magnate) and the widow of President John F. Kennedy. According to the court, the point of the advertisement was to imply that Ms. Onassis attended the Dior wedding.[167]

The court observed that Ms. Onassis was an esteemed public figure. She was well-regarded both in the United States and worldwide.[168] The court stated that Ms. Onassis never used her identity to endorse any commercial product. In contrast, Ms. Reynolds was a secretary who was put in the advertisement just because he looked like Ms. Onassis. The object of the advertisement was for the viewing public to infer that by employing a lookalike, Ms. Onassis was promoting Christian Dior products.

The court maintained that all persons, regardless of their position in the world, from world-famous individuals to complete unknowns, are to be protected from unauthorized commercial exploitation.[169] The court also noticed that Ms. Reynolds was perfectly in her legal rights to sell the use of her persona if she so desired, provided that she did not exploit her resemblance to Ms. Onassis. The court concluded that Christian Dior had violated Ms. Onassis' right to privacy and that Dior was enjoined from using the advertisement with Ms. Reynolds seemingly impersonating Ms. Onassis.[170]

Palmer v. Schonhorn Enterprises, Inc.

Schonhorn Enterprises, Inc. (Schonhorn) marketed a golf-themed board game where the cards included the names and publicly available information about 23 professional golfers.[171] The outside box highlighted the profiles and playing charts of these golfers. Arnold Palmer, a famous professional golfer, and three other professional golfers sued Schonhorn for using their names without authorization.[172] The golfers alleged that Schonhorn violated their privacy rights by misappropriating their names, diminishing their ability to engage in licensing agreements with possible commercial partners. Schonhorn confessed that using the golfer's names and biographies gave the game more market appeal and that the golfers made significant income from endorsing commercial activities. Even so, Schonhorn argued that the game did not violate the golfer's privacy rights because it had used only publicly available information and the golfers were not identified by name.[173] The golfers wanted an injunction and damages.

The issue was whether Schonhorn violated the golfers' rights to privacy, where Schonhorn appropriated the golfers' names or likenesses for commercial benefit.[174]The court employed the privacy rule, which states that a person is entitled to relief when their name has been used without their consentto advertise the defendant's product or to enhance the sale of a product. The court opined that even though the publication of biographical data of a public individual is not an invasion of privacy per se, the use of that data to capitalize upon the name in a commercial project does when the dissemination is for something other than news, articles, or a biography.The idea was thatindividuals have the right to profit from their efforts free from unjustified interference. The court felt that even though the names of

[157] *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56 (2nd Cir. 2001), *available at*https://casetext.com/case/oliveira-v-frito-lay-inc#:~:text=Among%20numerous%20claims%2C%20the%20complaint,Frito-Lay's%20baked%20potato%20chips.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Onassis v. Christian Dior*, 122 Misc. 2d 603 (N.Y. Sup. Ct. 1984), *available at*https://casetext.com/case/onassis-v-christian-dior.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Palmer v. SchonhornEnterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967), *available at*https://law.justia.com/cases/new-jersey/appellate-division-published/1967/96-n-j-super-72-0.html.
[172] *Id.*
[173] *Id.*
[174] *Id.*

the golfers were not displayed on the box, the golfers' rights to privacy were still violated.

Parks v. LaFace Records

Rosa Parks was a civil rights icon who, in 1955, was known for not giving up her seat on a segregated bus in Montgomery, Alabama. Parks sued LaFace Records, OutKast, a hip-hop music duo, and other entities for using her name in a song title.[175] Parks alleged this was false advertising under § 43(a) of the Lanham Act because it violated her common law right of publicity under Michigan state law, making LaFace Records et al. liable for defamation and tortious interference with a business relationship. The defendants motioned for a summary judgment, claiming their First Amendment rights. The summary judgment was granted, and Parks appealed.[176]

In *Parks*, the issue was whether using Rosa Parks' name in the title of an OutKast song violated the Lanham Act, Parks' right of publicity, or the First Amendment.[177] The Court of Appeals reversed the summary judgment on the Lanham Act and the right of publicity claims, opining that there was a genuine material dispute regarding whether the song's title had artistic relevance or was misleading.[178] However, the Court agreed with the summary judgment regarding the claims of defamation and tortious interference with a business relationship. The Court believed that using Rosa Parks' name could be perceived as a marketing strategy rather than an artistic expression.[179] The use of Parks' name could violate the Lanham Act by causing confusion or deception and exploiting her name for commercial gain. The Court employed the *Rogers v. Grimaldi* test[180]in balancing LaFace Records'First Amendment rights against the interests protected by the Lanham Act. As for the defamation and tortious interference claims, the Court observed that the elements of the torts were not satisfied.

Pellegrino v. Epic Games, Inc.

Leo Pellegrino was a professional baritone saxophone player and member of the brass house group Too Many Zooz. His externally rotatable feet allowed him to create his Signature Move or dancing style, which he executed in every musical performance. Pellegrino's Signature Move became popular and was inextricably linked to his identity.[181] Epic Games, Inc. (Epic) was a video game developer that created Fortnite Battle Royale (Fortnite), released in September 2017, and became a top-rated video game. Fortnite was a video game that meshes survival, exploration, and scavenging, with the winner being the last person standing.[182] There was no fee to play Fortnite. However, Fortnite sold virtual content that players could use while playing the game, including customized digital avatars known as "emotes" that perform dances or specific movements.[183] These emotes copy dances and movements directly from well-known videos, movies, and television shows without consent. One emote entitled "Phone It In" was identical to Pellegrino's Signature Move. Epic sold the emote for 800 V-Bucks, Fortnite virtual currency, which was worth approximately $8.00. The complaint asserted eight causes of action, of which only the right of publicity and privacy count will be discussed.

Pellegrino's right of publicity claims alleged that Epic misappropriated his likeness by using his Signature Move in Fortnite.[184] Epic maintained that Pellegrino's claims should be dismissed on First Amendment grounds. The issue was whether First Amendment protections outweighed Pellegrino's publicity and privacy rights.[185] The Third Circuit employed the Transformative Use Test in *Hart*.[186] In making the determination, the Third Circuit first considered whether Pellegrino's identity was sufficiently transformed by comparing Pellegrino's identity and his Signature Move with the identity of the Phone It In emote.[187] Secondly, the Court also considered the manner in which Pellegrino's identity was incorporated into Fortnite.[188] Here, the Third Circuit concluded that the Phone It In emote was Epic's own expression of the Signature Move. Because the emote did not resemble Pellegrino and because the various emotes fight a battle royale, there was no reasonable similarity between Pellegrino and the emote.[189] Thus, the Court dismissed Pellegrino's publicity and privacy allegations.

Prima v. Darden Restaurants, Inc.

Prima was a federal lawsuit filed by the wife of singer Louis Prima against Olive Garden's parent company, Darden Restaurants, Inc., over the unauthorized use of a voice imitation of Louis Prima in an Olive Garden commercial.[190] The case mainlyfocused on right-of-publicity and unfair competition claims.[191]

Gia Prima, widow of Louis Prima, was the plaintiff in an action on behalf of his estate. The defendants were Darden Restaurants, Inc., which was the parent company of Olive Garden, and Grey Advertising, Inc. The lawsuit resulted from an Olive Garden commercial that used a voice actor who imitated Louis Prima's voice, singing style, and presentation.[192] The song at issue was "Oh Marie," a song sung by Louis Prima. The causes of action brought by the plaintiff included a violation of Nevada Revised Statutes § 597.790 (unauthorized use of persona), a violation of New Jersey's common law right of publicity, a violation of the Lanham Act (false representation in commerce), interference with prospective economic advantage, and common law unfair competition and unjust enrichment.[193]

Initially, the case focused on choice-of-laws issues, such as which state laws (i.e., Louisiana, Nevada, or New Jersey) governed the rights of publicity and whether such rights existed after Louis Prima's death. The court determined that Louisiana had minuscule interests in the cases because Louis Prima only died in Louisiana after going into a coma, while Nevada and New Jersey had substantial interests, and the laws of the two states were essentially the same. Because Gia Prima lived in New Jersey, the court held that New Jersey applied.

The court opined that the plaintiff had not stated a claim for unjust enrichment under New Jersey law. Also, the count regarding unfair

[175]*Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003), *available at*https://casetext.com/case/parks-v-laface-records.
[176]*Id.*
[177]*Id.*
[178]*Id.*
[179]*Id.*
[180]*Rogers v. Grimaldi*, 875 F.2d 994 (1989), *available at*https://casetext.com/case/rogers-v-grimaldi.
[181]*Pellegrino v. Epic Games, Inc.*, 451 F.Supp. 3d 373 (3rd Cir. 2020), *available at*https://casetext.com/case/pellegrino-v-epic-games-inc.
[182]*Id.*
[183]*Id.*
[184]*Id.*
[185]*Id.*
[186]*Hart v. Electronic Arts, Inc.*, No. 11-3750 (3rd Cir. 2013), *available at*https://law.justia.com/cases/federal/appellate-courts/ca3/11-3750/11-3750-2013-05-21.html.
[187]*Pellegrino v. Epic Games, Inc.*,*supra*, note 181.
[188]*Id.*
[189]*Id.*
[190]*Prima v. Darden Restaurants, Inc.*, 78 F.Supp. 2d 337 (D.N.J. 2000), available at https://law.justia.com/cases/federal/district-courts/FSupp2/78/337/2568975/.
[191]*Id.*
[192]*Id.*
[193]*Id.*

competition was dismissed. All other motions by the defendants were denied.[194]

Robert Burck d/b/a The Naked Cowboy v. Mars, Inc.

Robert Burck is a New York City Times Square street entertainer known as "The Naked Cowboy," wearing only a white hat, cowboy boots, and underpants while carrying a guitar placed over his lower body, giving the impression of nudity.[195] Burck has registered trademarks for the name "The Naked Cowboy" and its likeness. In April 2007, Mars, Inc. (Mars) ran an animated cartoon advertisement on two video billboards in Times Square featuring a blue M&M dressed exactly like Burck, wearing only a white cowboy hat, cowboy boots, and underpants, while carrying a guitar.[196] Burck sued Mars for compensatory and punitive damages, claiming that Mars had violated his right of publicity under New York Law and infringed on his trademarks under federal law by creating a cartoon character that copied his likeness, persona, and image for commercial purposes without his consent.[197]

In *Burck*, the issues were whether Mars violated Burck's right of publicity and his registered trademarks when the company displayed in an advertisement in Times Square a blue M&M wearing only a white cowboy hat, cowboy boots, underpants, and playing a guitar.[198]Burck claimed that Mars violated his New York right of publicity and trademark infringement under section 1125(a) of the Lanham Act.[199] The court held that because Mars employed a cartoon character and did not use Burck's name or voice or "The Naked Cowboy" phrase, there was no violation of Burck's right of publicity. However, the court opined thatSection 43(a) of the Lanham Act was violated because it creates liability for "any person who, on or in connection with any goods or services, . . . uses in commerce . . . false or misleading representation of fact, which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[200] Although Mars contended that the M&M character was a parody, the court was not convinced, and Mars' motion to dismiss was denied.

Spike Lee v. Viacom, Inc.

Shelton Jackson, also known as Spike Lee, is an American film director, screenwriter, and professor. In 1983, Lee's production company, 40 Acres and a Mule Filmworks, has currently produced more than 35 films. The company's name refers to a post-Civil War promise by Union General Sherman on January 16, 1865, where he promised to give freed slaves at most 40 acres of land. Lee's films include *She's Gotta Have It* (1986), *Jungle Fever* (1991), *Malcolm X* (1992), and, more recently,*BlacKkKlansman* (2018). Lee's films explored race relations and have won many awards.

The issue in *Spike Lee* was whether Viacom, Inc. (Viacom) violated Lee's right of publicity when it attempted to rename The Nashville Network (TNN) to "Spike TV."

The Romantics v. Activision Publishing, Inc.

The Romantics, also known as Master Beat, Inc., included Wally Palmer, Mike Skill, and Coz Canler. The plaintiffs sued Activision Publishing, Inc., Red Octane, Inc., and Wave Group Sound, asserting violations of their right of publicity, false endorsement under the Lanham Act, unfair competition, and unjust enrichment. The plaintiffs claimed that when a song is created, three distinct rights occur: (1) the right in the sound recording, (2) theright in the underlying musical composition, and (3) a publicity right that comes from the particular sound of the singer or band's voices or sounds, with which they are often recognized. This was the publicity right that formed the basis of Plaintiffs' first claim.

The right of publicity was governed by Michigan State law. Michigan has never recognized the right of publicity in the sound of a person's voice, even if the individual's voice is distinctive. The Michigan court opined that the plaintiff's case would likely not succeed on the merits, plaintiffs cannot demonstrate any irreparable injury, granting plaintiffs' preliminary injunction would cause substantial harm to defendants and others, and the plaintiffs have failed to show a preliminary injunction will serve the public interest. Thus, the plaintiff's motion was denied.

Waits v. Frito-Lay, Inc.

Tom Waits is an American musician, composer, songwriter, and actor with a distinctive low gravelly voice. Waits believed that product endorsements and commercials infringe on an artist's integrity, and thus he turned down numerous endorsements. Frito-Lay, Inc. (Frito-Lay), a large food manufacturer and distributor, hired Tracy-Locke, Inc. (Tracy-Locke), an advertising agency, Salsa Rio Doritos.[201] Tracy-Locke developed a jingle modeled after Waits's song, "Step Right Up," using a similar rhyme and wordplay. Tracey-Locke hired Stephen Carter to record the jingle, where Carter's impersonation of Waits' voice was uncanny. The advertisement aired on over 250 radio stations. Waits sued Frito-Lay and Tracey-Locke for voice misappropriation, violating the California right of publicity, and false endorsement under the Lanham Act.[202] At trial, Waits was awarded $375,000 in compensatory damages, $2 million for punitive damages for voice misappropriation, and $100,000 for Lanham Act violation damages.[203] The defendants appealed, claiming that Waits lacked standing to sue under the Lanham Act because he was not competing directly with Frito-Lay and Tracey-Locke, and the Lanham Act claim failed because the advertisement did not state that Waits had endorsed Salsa Rio Doritos.[204]

In *Waits*, the issue was whether imitating Tom Waits' distinctive voice for commercial gain without consent was voice misappropriation under California Law and false endorsement under the Lanham Act.[205] The Ninth Circuit affirmed the verdict in favor of Tom Waits for voice misappropriation and false endorsement while vacating the damages under the Lanham Act because it duplicated the right of publicity violation.[206] The advertisement misled consumers into believing that Waits had endorsed Salsa Rio Doritos. The Ninth Circuit opined that Waits' distinctive voice was integral to his artistic identity and thus protectable under the right of publicity. The Court found that Frito-Lay and Tracey-Locke misappropriated Waits' identity for commercial purposes because consumers might have been misled into believing that Waits had endorsed the product, an

[194] *Id.*
[195] *Burck V. Mars, Inc*., 571 F.Supp. 2d 446 (S.D.N.Y. 2008), *available at*https://casetext.com/case/burck-v-mars.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] LII Staff, 15 U.S. Code § 1125 - False Designations Of Origin, False Descriptions, and Dilution Forbidden, *Legal Information Institute* (n.d.), *available at*https://www.law.cornell.edu/uscode/text/15/1125.
[201] *Waits v. Frito-Lay, Inc*., 978 F.2d 1093 (9th Cir. 1992), *available at*https://casetext.com/case/waits-v-frito-lay-inc.
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

impression that he adamantly opposed.[207] The Ninth Circuit also awarded Waits attorney fees due to the malicious and deliberate conduct of Frito-Lay and Trace-Locke.[208]

Wendt v. Host International, Inc.

The issue in *Wendt* was whether a person could control the appropriation of his or her identity for commercial purposes.[209] According to the Ninth Circuit, under California Civil Code § 3344, a person can sue for damages that result from a known unauthorized use of the individual's name, voice, photograph, or likeness.[210] The Ninth Circuit opined that a robot might be a likeness if it is a caricature of an impressionistic resemblance to the person. In *Wendt*, actors George Wendt and John Ratzenberger prevented Paramount Pictures from using their identities for commercial purposes.[211]As for the common law right of privacy in appropriation, the Ninth Circuit held that even though Paramount owns the copyrights to the characters in the television program Cheers, the actors could sue to prevent their identities from being used for commercial purposes.[212] The Court reversed the federal district court's summary judgment and remanded the case for trial.

White v. Samsung Electronics America, Inc.

Vanna White is the hostess of the "Wheel of Fortune" television program, marketing her identity to various advertisers. In a sequence of advertisements by Samsung Electronics America, Inc. (Samsung) depicted a robot resembling White next to a game board resemblingThe Wheel of Fortune.[213] Samsung called the advertisement the "Vanna White ad." White neither consented to the ads nor was paid for using her identity. White sued Samsung for violating the California Civil Code Section 3344, the California common law right of publicity, and the Lanham Act.[214] The district court granted Samsung's motions for summary judgment, and White appealed.

The issue in *White* was whether the appropriation of a person's identity without consent is an invasion of the right to privacy.[215] Because television and other media generate identity value for a celebrity, the law protects a celebrity's right to exploit this value regardless of how the value was achieved.[216] The Court of Appeals reversed the summary judgment, noting that:[217]

- The use of a robot with White's likeness was not within the meaning of Section 3344 of the Lanham Act;
- The common law right of publicity could be pleaded by asserting Samsung's use of White's identity, and the use of White's identity by Samsung was to thecompany's advantage. *White did* not consent to Samsung employing her identity, and a resulting injury occurred. The right of publicity is not limited to the appropriation of a person's name or likeness;
- The right of publicity was created to protect a celebrity's commercial interests by preventing firms from promoting products that exploit their identity without consent; and
- Samsung's parody claim was rejected because the advertisement's message was to buy Samsung VCRs.

Winter v. DC Comics

In *Winter*, Johnny and Edgar Winter, who were brothers, were well-known musicians.[218] The Winter brothers had long white hair and albino features. Johnny Winter usually wore a tall black top hat. The defendant, DC Comics, published a series of comic books featuring Johnny and Edgar Autumn, who were brothers.[219] The Autumn brothers had pale faces and long white hair; one wore a stovepipe hat.[220] In one comic book volume, the Autumn brothers appeared in a story entitled, *Autumns of Our Discontent*, a takeoff on John Steinbeck's 1961 book entitled *The Winter of Our Discontent*,[221] and a reference to William Shakespeare's play *Richard III*, where King Richard says, "Now is the winter of our discontent / Made glorious summer by this sun [or son] of York."[222]

The issue was whether the First Amendment protects an artist's work against a celebrity's right-of-publicity challenge if it is significantly transformed from the celebrity's likeness.[223] The case was decided in California, where both the common law and a state statute regarding the right of publicity may apply.[224] The trial and appeals courts opined in favor of the Winter brothers. However, according to the California Supreme Court, any resemblance of the Winter brothers to the drawings of the Autumn brothers was distorted for parody purposes.[225] The right of publicity for Johnny and Edgar Winter was not threatened, even though the last name of the comic book characters was a play on words. The court observed that using DC Comics' Winter Brothers' likeness to increase sales was irrelevant.[226] The court concluded that because comic books were sufficiently transformative, they were entitled to First Amendment protection.[227] The California Supreme Court reversed the Appellate Court's decision and remanded the case for further proceedings.[228]

CONCLUSION

The purpose of this paper is to discuss the right of publicity and then briefly analyze 30 rights of publicity cases, thereby providing the reader with a general understanding of the subject. One could think of the right of publicity as the fifth prong of intellectual property, where the first four prongs consist of copyright, trade secrets, patents, and trademarks. When making this statement, the idea is that one's own person is a form of intellectual property because what one is and does are intangible goods controlled by an individual. Others do not have the right to use another person's persona for commercial gain without consent. If an individual is dead, then the individual's estate usually has the right to determine how a deceased person's persona is used for commercial purposes.

The point of this paper is to provide attorneys and laypeople with a basic understanding and appreciation of the right of publicity.

[207] *Id.*
[208] *Id.*
[209] *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997), *available at*https://casetext.com/case/wendt-v-host-international-inc.
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992), *available at*https://law.justia.com/cases/federal/appellate-courts/F2/971/1395/71823/.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003), *available at*https://law.justia.com/cases/california/supreme-court/2003/s108751.html.
[219] *Id.*
[220] *Id.*
[221] JOHN STEINBECK, THE WINTER OF OUR DISCONTENT (The Viking Press 1st ed. 1961).
[222] WILLIAM SHAKESPEARE (AUTH.), BARBARA A. MOWAT (ED.), PAUL WERSTINE (ED.), RICHARD III (FOLGER SHAKESPEARE LIBRARY) (Simon & Schuster 1st ed. 2015).
[223] *Winter v. DC Comics*, *supra*, note 218.
[224] Jonathan S, Jennings, & J. Michael Monahan, *supra*, note 27.
[225] *Winter v. DC Comics*, *supra*, note 218.
[226] *Id.*
[227] *Id.*
[228] *Id.*

Hopefully, this goal has been achieved. However, it is up to the readership to make that determination.

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Donald L. Buresh earned his Ph.D. in engineering and technology management from Northcentral University. His dissertation assessed customer satisfaction for both agile-driven and plan-driven software development projects. Dr. Buresh earned a J.D. from The John Marshall Law School in Chicago, Illinois, with a focus on cyber law and intellectual property. He also earned an LL.M. in intellectual property from the University of Illinois Chicago Law School (formerly, The John Marshall Law School), an LL.M. in cybersecurity and privacy from Albany Law School, graduating summa cum laude, and an LL.M.in financial compliance and risk management from Albany Law School, graduating summa cum laude. Dr. Buresh received an M.P.S. in cybersecurity policy and an M.S. in cybersecurity, with a concentration in cyber intelligence, both from Utica College. He has an M.B.A. from the University of Massachusetts Lowell, focusing on operations management, an M.A. in economics from Boston College, and a B.S. from the University of Illinois-Chicago, with a major in mathematics and philosophy. Dr. Buresh is a member of Delta Mu Delta, Sigma Iota Epsilon, Epsilon Pi Tau, Phi Delta Phi, Phi Alpha Delta, and Phi Theta Kappa. He has over 25 years of paid professional experience in Information Technology and has taught economics, project management, negotiation, business ethics, business law, quality management, and cybersecurity at several universities. Dr. Buresh is an avid Chicago White Sox fan and keeps active by fencing épée, foil, and now sabre at a local fencing club. Dr. Buresh is a member of the Florida Bar.

Abbreviation	Description
CBC	C.B.C. Distribution and Marketing
CCPA	California Consumer Privacy Act
Dillard	Dillard Department Stores
Epic	Epic Games, Inc.
Etsy	William Etsy Company
Frito-Lay	Frito-Lay, Inc.
GDPR	General Data Protection Regulation
GTAV	Grand Theft Auto V
HJPT	Here's Johnny Portable Toilets, Inc.
Mars	Mars, Inc.
MLB	Major League Baseball
NHL	National Hockey League
PA	Player's Association
Reynolds	R. J. Reynolds Tobacco Company
Schonhorn	Schonhorn Enterprises, Inc.
TCI	TCI Cablevision, Inc.
TNN	The Nashville Network
Tracy-Locke	Tracy-Locke, Inc.

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