



Controlling the Commercial Use of a Celebrity's Identity

Generally, copyright and trademark laws protect the exclusive rights of an original author in the commercial value of their work. Ancillary to the intellectual property rights of original authors, however, is a celebrity's right to control the commercial use of identity under the "right of publicity." Originating from state law, the right of publicity governs the exploitation of a celebrity's name, likeness or characteristics. Accordingly, the right of publicity can be defined as the inherent right of every human being to control the commercial use of his or her identity.

The scope and degree of protection afforded by the right of publicity varies widely by jurisdiction and depends upon numerous factors. Currently, more than half of the states protect the right of publicity either by general legal principles or by statute. An understanding of case law development on the right of publicity can be a useful tool for tracing its evolution and identifying its modern application.

The Publicity Value of a Photograph

In 1953, the Second Circuit was among the first courts to recognize a legal claim for a violation of the right of publicity. The case involved the use of photographs and statistics of baseball players on bubble gum cards. Ultimately, the court held that New York law protected a baseball player's right in the publicity value of his photograph. In the course of its decision, the court coined the phrase "right of publicity" as the name of the athlete's right.

First Amendment Implications

The right of publicity has even trumped over the traditionally protected rights guaranteed by the First Amendment. In 1976, the U.S. Supreme Court issued a notable decision on the right of publicity and its First Amendment implications. The case involved a circus performer who, during the course of his circus act, was propelled from a cannon. Despite the performer's refusal to grant consent, his act was filmed by a television reporter and shown on a local station's nightly news. The Court held that the First Amendment did not shield the television station from liability for violating the performer's right of publicity.

Right of Publicity Exists "During Life"

However, there are some limitations on the scope of a celebrity's privilege to invoke protection under the right of publicity. In 1980, the Sixth Circuit determined that Elvis Presley's heirs did not retain his right of publicity after his death. The court's opinion emphasized that that celebrities have an exclusive right "during life" to control and profit from the commercial use of their name and personality.

By comparison, the same court later held that television comedian and talk show host Johnny Carson's right of publicity was violated by a corporation engaged in renting and selling "Here's Johnny!" portable toilets.

In another noteworthy case, Vanna White sued Samsung Electronics in 1992, protesting a television commercial that featured a female-shaped robot that dressed like White and turned letters on what resembled the "Wheel of Fortune" game show set. The Ninth Circuit held that White had produced sufficient evidence that Samsung's commercial appropriated her identity in violation of her right of publicity.

California's "Celebrity Rights Act" and Other State Legislation

Likely due to the large concentration of celebrities and performers in Hollywood, California was one of the first states to pass legislation related to the right of publicity. In the 1970's, California enacted a right of privacy statute that prohibited the knowing, unauthorized use of the name, photograph, or likeness of another for advertising purposes or for the purpose of soliciting purchases.

Later, after pressure from dissatisfied celebrities, the California legislature enacted the "Celebrity Rights Act." Under the Act, liability may be imposed on anyone who uses a "deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods." The Act also imposes liability "for using the name of such individuals for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services," in an unauthorized manner.

Other states, such as Tennessee, have also enacted right of publicity laws. New York has not enacted a separate right of publicity law. Rather, it addresses such cases under the state's right of privacy statute.