

## RIGHT OF PUBLICITY AND RELATED COPYRIGHT, TRADEMARK, AND UNFAIR COMPETITION ISSUES

Raymond E. Scott  
Howard & Howard Attorneys, P.C.

### 1) INTRODUCTION

- a) The "**Right of Publicity**" as distinguished from the "right of privacy" is the exclusive right to a person's name and image or likeness.
- b) The right of publicity may be granted to another by license or assignment "in gross" without transfer of a business or anything else.
- c) The right of publicity is created by a person or the public by the fame of an individual, such as a famous entertainer or sports person.
- d) Certain jurisdictions have a right of publicity statute and other jurisdictions do not recognize a separate right of publicity.
- e) But, is it descendible?

### 2) EARLY DEVELOPMENT OF THE RIGHT OF PUBLICITY

- a) Early commentators were the first to suggest a separate right of publicity.
- b) Early case law.
  - i) *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Suit between rival baseball card manufacturers; held that "a man has a right to the publicity value of his photograph" and that right may be granted "in gross."
  - ii) *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836 (S.D.N.Y. 1975). This was the first case holding that the right of publicity of Stan Laurel and Oliver Hardy was descendible; but was it?
  - iii) *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Plaintiff was a "human cannonball" and sued a T.V. station for a 15 second broadcast of his act. The Ohio Supreme Court held that the broadcast was protected by the first amendment privilege as a newsworthy event, but the U.S. Supreme Court reversed, holding that the "State's interest in permitting a 'right of publicity' is protected by the proprietary interest of the individual in his act in part to encourage such entertainment." Like the Copyright Act, the T.V. station could not broadcast his entire act.

3) THE ELVIS PRESLEY CASES.

- a) Personal history
- b) ***Factors ETC., Inc. and Boxcar Enterprises, Inc. v. Pro Arts, Inc.***
  - i) Presley died August 16, 1977.
  - ii) Vernon Presley signed an agreement with Factors ETC., Inc. the following day.
  - iii) Pro Arts purchased a copyrighted photograph from Atlanta Journal and published "IN MEMORY" poster.
  - iv) Suit brought in U.S. District Court, S.D.N.Y. under right of publicity.
  - v) 2nd Circuit finally held descendability was dependent upon the law of Presley's domicile and 6th Circuit does not recognize a right of publicity.

4) DOES "KISS" HAVE A RIGHT OF PUBLICITY?

- a) The answer is probably "No."
  - i) Names are fictitious
  - ii) True likeness kept secret
- b) Images protected by registered trademarks
  - i) "KISS" registered as trademark and service mark
  - ii) Face makeup registered as service mark and trademark
  - iii) Copyrights in album covers, etc.

5) MORE RECENT CASE LAW AND STATUTORY RIGHT OF PUBLICITY

- a) Several states have enacted a right of publicity statute; limited descendability.
  - i) Florida was the first state to enact a right of publicity statute.
  - ii) Following the Elvis Presley cases, Tennessee enacted a right of publicity statute; descendible.
  - iii) Following an adverse ruling in the ***Bela Lugosi*** cases, California also enacted a right of publicity statute, which is descendible. See also ***Guglielmi v. Spelling-Goldberg Productions***, 25 Cal. 3d 860 (1979); case brought by nephew of Rudolph Valentino.
- b) There is still a split of authority regarding the right of publicity.

- i) In January, 1993, Professor Michael Madow published an article in the *California Law Review* severely criticizing the right of publicity on the basis that it depletes the public domain and stifles free expression by permitting celebrities to monopolies words, names and images of general cultural significance and none of the underlying interests that proponents offer as support for the right can justify its impact.
  - ii) In *Newcombe the Adolph Coors Co.*, Coors published an advertisement in the 1995 *Sports Illustrated* Swimsuit Edition which included a drawing of a 1949 World Series photograph of Jim Newcombe with a big, frothy glass of beer. Jim Newcombe's career was cut short due to his service in the army and a personal battle with alcohol. The District Court granted Coors' summary judgment on all claims, but the 9th Circuit reinstated only the right of publicity claim.
  - iii) In *Lord Simon Cairns et al. v. Franklin Mint Company*, (10th Cir. 1998) the Court affirmed the California District Court's dismissal of the right of publicity claim of Princess Diana because she was a resident of the U.K. which does not recognize this right, but affirmed the denial of summary judgment under (1) Section 43(a) of the Lanham Act, (2) Federal trademark dilution (3) false advertising and (4) unfair competition. It is only necessary to read the introduction to this decision to recognize that the Franklin Mint is in big trouble.
  - iv) In *Dustin Hoffman v. Capitol City/ABC, et al.*, (D.C.C.D. Cal., 1999) the Court awarded Dustin Hoffman \$1.5 million in damages and later awarded \$1.5 million in punitive damages based upon a photograph layout in Los Angeles Magazine from "Tootsie" redigitized with a contemporary silk gown designed by Richard Tyler and high heels designed by Ralph Lauren. The Court considered the following five factors in making its award.
    - 1. Stature of Plaintiff in the motion picture industry in the past thirty years;
    - 2. The first time use of Mr. Hoffman's name and likeness in a non-movie promotional context;
    - 3. Self perception of what impact the commercial use of Hoffman's name and likeness would have on executives in the motion picture industry;
    - 4. Uniqueness of opportunity in the role and character of Hoffman in Tootsie; and
    - 5. The fact that the periodical involved was a regional periodical in the hometown of the motion picture industry.
- 6) FINALLY I WOULD LIKE TO GIVE YOU A TEST
- a) Actress Florence Henderson, the wholesome "Brady Bunch" T.V. mom brought suit on February 19th in the State Court of Los Angeles over a "Porn Queen" T-shirt by Serial Killer, Inc. which Henderson claims violates her rights of publicity and exposes her to "contempt and ridicule."
  - b) Don't forget the "Pretty Woman" case where the U.S. Supreme Court held that parody is protected by the First Amendment.

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