

MONDAY, DECEMBER 22, 2014

PERSPECTIVE

Publicity rights about free speech in 2014

By David Halberstadter

What do a basketball star, a self-destructive actress, a deceased World War II icon, and a reviled former dictator have in common? Each of these individuals, as well as a bunch of former football players, a dead rock 'n' roll legend, and a mobster-type character actor pursued claims in 2014 for commercial misappropriation of their names and likenesses.

While a person may control how his or her name and likeness may be used for another's commercial advantage, the issue is cloudier involving a work that may be protected by the First Amendment. Conflicts between publicity rights and expressive speech raged throughout 2014, and will continue into 2015.

Speech or Advertisement?

In September 2009, Sports Illustrated published a special issue commemorating superstar Michael Jordan's induction into the Basketball Hall of Fame. Jewel-Osco, a Chicago supermarket chain, placed an advertisement in that issue featuring a large pair of Jordan's basketball shoes and Jewel-Osco's logo and saluted "a fellow Chicagoan who was 'just around the corner' for so many years." "Just around the corner" is part of the chain's slogan.

Jordan sued Jewel-Osco for violating the federal Lanham Act and Illinois' right of publicity statute, contending that the ad misappropriated his identity for the supermarket's commercial benefit. The district court found that the ad constituted First Amendment-protected speech and that any advertising message was "inextricably intertwined" with that speech.

On appeal, the 7th U.S. Circuit Court of Appeals agreed with Jordan that the advertisement was merely a promotion of the supermarket chain tied to Jordan's popularity. *Jordan v. Jewel Food Stores Inc.*, 743 F.3d 509 (2014). Just because the ad was linked to an issue of public interest didn't make it any less of an advertisement. The court also rejected the argument that the commercial aspects of the advertisement could not be separated from the expressive content. "No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here."

The Jimi Hendrix Experience

For many years, the heirs of Jimi Hendrix have fought to prevent others from selling products exploiting the rock icon's

name and likeness. When they first sought to enforce their exclusive rights to Hendrix's image, the Washington Personality Rights Act (WPRA) was ruled inapplicable to Hendrix because he had been domiciled in New York when he died, and New York does not recognize post-mortem rights of publicity.

When the WPRA was subsequently amended to apply to deceased personalities regardless of their place of domicile at the time of death, the heirs received another chance to enforce exclusive rights to Hendrix's image. Their company, Experience Hendrix, challenged the unauthorized merchandising activities of Hendrixlicensing.com.

The district court rejected the heirs' claims, ruling that the revised WPRA violated the U.S. Constitution by giving the Washington statute an impermissible extraterritorial reach, encompassing transactions "occurring 'wholly outside' Washington's borders." Although the 9th U.S. Circuit Court of Appeals disagreed, it limited its ruling to the specific, narrow facts of the case before it. *Experience Hendrix LLC v. Hendrixlicensing.com LLC*, 742 F.3d 377 (2014). The parties' dispute involved only the sale of Hendrix-related merchandise within the state of Washington, so application of the WPRA implicated no extraterritorial issues.

The "Call of Duty"

When former Panamanian dictator Manuel Noriega filed a right of publicity lawsuit against Activision for including him as a minor character in the videogame "Call of Duty: Black Ops II," it garnered substantial media attention. *Noriega v. Activision/Blizzard, Inc.*, Case No. BC 551747 (L.A. Sup. Ct. Oct. 27, 2014). Activision, seeking summary dismissal of Noriega's claim, argued that the First Amendment provided a complete defense and the trial court agreed.

Although the decision has no precedential value, it is noteworthy that the trial court expressly rejected decisions from both the 9th and 3rd U.S. Circuit Courts of Appeals in 2013, which held that NCAA football videogames published by Electronic Arts were not transformative of the featured college players' likenesses. The trial court in Noriega concluded that under the relevant state Supreme Court decisions, the "transformative use" test requires an evaluation of the entire work in question, not merely

the plaintiff's likeness. Noriega's likeness was only one of the extensive "raw materials" from which the videogame had been synthesized, not the "very sum and substance" of the game; so Activision's First Amendment rights prevailed.

NFL Football

In another trial court decision, a group of former professional football players unsuccessfully pursued claims that the NFL violated their publicity rights by including game footage in over 100 documentary-style video productions. *Dryer v. National Football League*, 2014 WL 5106738 (D. Minn. 2014). These productions comprised clips of game footage that were woven into dramatic narratives, combining music, narration, interviews and dramatic storytelling.

The federal district court agreed with the NFL that the First Amendment fully protected its use of the plaintiffs in these productions. The programs were expressive, noncommercial works; the court therefore considered it unnecessary to balance the NFL's First Amendment rights against the players' publicity rights. But had it engaged in such an assessment, the court added, "the balance between Plaintiffs' publicity rights and the constitutional protection due the uses involved here tips decidedly in favor of the NFL."

The Outlook for 2015

At least five lawsuits filed in 2014 are likely to be resolved next year, with potentially dramatic conclusions. In July, erstwhile actress Lindsay Lohan sued the makers of the videogame "Grand Theft Auto V" claiming that the game's character, Lacey Jonas, was an "unequivocal" reference to Lohan, depicting her image, voice and styles from her clothing line. In addition to facing the same arguments that dispatched Noriega's lawsuit, Lohan must deal with the fact that the game's character does not purport to be her, only superficially resembles her, and at least arguably lampoons her.

In September, 40 retired football players sued the NFL in federal court, claiming that their names and likenesses had been used to promote the NFL, sell NFL-related merchandise and otherwise to generate income for the NFL and its teams. But it appears that the real focus of their claims is the same "hundreds of hours" of filmed productions found in *Dryer* to be fully protected speech, so the chances of this group of players obtaining

a better result are slim.

Not to be outdone by the pros, in October, a group of former college athletes filed a putative class action against various television networks and college athletic conferences for allegedly profiting from the use of their names and likenesses without the players' permission. The focus appears to be the game telecasts themselves, and commercials that promote those telecasts — both of which receive the full protection of the First Amendment.

Also in October, a character actor best known for playing a mobster in the film "Goodfellas" sued over the inclusion, in several episodes of "The Simpsons," of an animated hoodlum character named Louie, who the actor claims misappropriates his likeness. The plaintiff, Frank Sivero, not only will have to overcome substantial statute of limitations problems — the character first appeared in an episode in 1991 — but also the fact that he does not own the Mafioso character that he portrayed, that "The Simpsons" has a long-established reputation for parody and satire, and that even if his likeness was the basis for this fictional animated character, the character itself and the series in which it appears are highly transformative expressive works.

Finally, in November, the representatives of the heirs of World War II icon General George S. Patton commenced litigation over a 2012 videogame called "HISTORY Legends of War: Patton." Filed by CMG Worldwide Inc., the lawsuit asserts claims for violation of the Lanham Act and California's right of publicity statute for deceased personalities, Civil Code Section 3344.1. These claims — filed one day before the statute of limitations would have expired — appear to suffer from nearly insurmountable problems. The Lanham Act claim likely will fail based upon well-established precedent; and the right of publicity claim is likely to be barred by the express language of the operative statute.

And who knows which famous or infamous personalities will sue next?



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