

Celebrity Rights

Rights of Publicity and Related Rights in the United States and Abroad

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Foreword

In our celebrity-obsessed culture, it cannot be denied that celebrities are big business. Sports stars such as Tiger Woods are paid millions of dollars to endorse a wide variety of products and services, and often earn more from their endorsements than they do from their sporting prowess. Actors, singers and other performers are paid millions of dollars to appear in films and on television, to make recordings, and to endorse products or services. Supermodels are paid millions of dollars to have their photographs taken and published in various states of dress and undress. Tabloid newspapers and gossip magazines pay millions of dollars for the right to publish photos of celebrities and celebrity offspring, while paparazzi make a living by stalking celebrities and taking candid photos which they sell to the highest bidder. Manufacturers make millions of dollars selling products—everything from t-shirts and posters to coffee mugs, dart boards and bobblehead dolls—adorned with celebrity likenesses. Even dead celebrities can earn millions of dollars annually when their heirs lend their fame to various commercial enterprises.

The legal foundation for all of this economic activity is the right of publicity. The right of publicity can be defined simply as “the inherent right of every human being to control the commercial use of his or her identity.” J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2008). Technically speaking, however, there is not one right of publicity but many, since the right of publicity is protected in the United States only as a state-law right (although various aspects of the right of publicity may also be protected under federal trademark and unfair competition law, as we will see). These rights help insure that celebrities get paid for their labors in accumulating fame and bestowing the benefit of that fame upon various products and services.

As of 2008, at least 28 states recognize a right of publicity (10 states as a common-law right, 10 states as a statutory right, and 8 states as both). McCarthy, § 6:3. In addition, all states recognize a common-law or statutory right of privacy, which generally provides at least some protection against commercial appropriation of a celebrity’s identity. And yet, despite widespread agreement that celebrities should be paid for their endorsements, rights of publicity are often shrouded in controversy. How far should rights of publicity extend? Should a tabloid newspaper be prohibited from featuring a celebrity on its cover without that celebrity’s consent? Can a local television station show a clip of a performance at the county fair of a human cannonball without his consent? May an artist create and sell pictures of celebrities without their consent? To what extent should celebrity impersonators be permitted to imitate others in advertisements and performances? Should rights of publicity endure after the death of a celebrity; and if so, for how long?

Moreover, although courts in the United States may consider the right of publicity to be an inherent right, the same consensus is not necessarily shared in other countries of the world. As you will see, a number of countries protect celebrities from the use of their names and likenesses in situations that lawyers in the United States would recognize as sim-

ilar, if not identical, to our “right of publicity.” However, the rationales used in other countries differ significantly from our conception of the “right of publicity,” which sometimes leads to differing results. Obviously, it is impossible to canvass all of the countries of the world to determine which ones grant such rights, and to what extent. However, these materials are designed to give you some idea of the range of issues contested in the United States, and a taste of how other countries address those issues.

The purpose of these materials, therefore, is twofold. First, these materials are designed to give you a thorough understanding of rights of publicity as they are understood in the United States. Therefore, each chapter begins with materials from courts and/or legislatures in the United States. Second, these materials allow you to compare the analysis and conclusions of courts and legislatures in the United States with those in other countries. Again, these comparisons are only selected samples of what is done elsewhere. Moreover, because of language issues, some of the material concerning other countries is presented via commentary from knowledgeable academics and practitioners.

Although any significant discussion of other legal systems is beyond the scope of these materials, you should understand that not all countries have legal systems that mirror the system in the United States. In the United Kingdom and in many countries in which British influence is strong, such as Canada and Australia, the common-law system of legal development through case law is an important aspect of the legal system. (As in the United States, however, those systems are also increasingly governed by statutory schemes. Moreover, because the United Kingdom is part of the European Union, there is now a strong European influence in many aspects of British law, particularly in intellectual property.) Other countries, such as France, are governed by a civil law tradition, in which civil codes set forth various rights and responsibilities. In these countries (at least in theory), it is the codes that govern civil wrongs, and relatively less importance is placed on case law. However, some of the provisions of those codes are relatively broad, which has allowed courts to interpret those provisions in ways that in many respects are similar to rights of publicity in the United States.

As you read the materials, do not just seek the results of the cases. You should attempt to develop a sense of the differences in the various legal systems and traditions that lead courts in different directions. Often courts in different countries may reach similar results, but they arrive at those results from very different premises. It is important that you recognize those differences as we go through the course. Consider for yourself how courts in other countries might decide some of the difficult issues faced by courts in the United States.