INTA BULLETIN

Features

Using One's Image and Personality, Part I: Free Speech or Right of Publicity Violation?

Published: September 30, 2020

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Individuals have a legal right to protect their identity and control the economic exploitation of their persona and image. But exemptions have been growing as society evolves.

Classic forms of intellectual property, like copyrights, trademarks, or patents, protect clearly identifiable outputs of human creativity—for example, novels, musical compositions, logos, or practical inventions. The right of publicity, on the other hand, protects a less easily defined, and more intimate, aspect of the individual from unwanted commercial exploitation: their "persona." In the United States, the right grants individuals some measure of control over uses of their name, image, voice, likeness, and other identifying aspects of the "self," and the ability to control exploitation of this bundle of traits is therefore, unsurprisingly, sometimes referred to as a set of "personality rights."

Most U.S. states recognize the right of publicity in these basic terms, though states diverge on other aspects of the law, including whether the right survives death and whether it can be assigned. Some state statutes provide quite extensive lists of the aspects of personality that are protected. Indiana's statute, for example, provides protection for a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, and mannerisms. *Ind. Code § 32-36-1-7 (2020)*.

The nature and extent of protection afforded to personality rights outside of the United States varies greatly by jurisdiction, and so this article limits its discussion to U.S. law. The interpretations of U.S. law also vary from state to state, as discussed in this article.

A right of publicity can be protected under state statutory law, common law, or both. In New York, there is no common law right of publicity; claims must be brought under Sections 50 and 51 of the New York Civil Rights Act, which legislate the "right of privacy" and protect against the non-consensual use of a person's "name, portrait, or voice" for commercial gain. N.Y. Civ. Rights Law §§ 50, 51 (McKinney 2019). As of the end of September 2020, however, a new bill passed by the New York legislature which will create a distinct, descendible, and transferable right of publicity was awaiting the signature of New York's governor. S. 5959-D, 2019-2020 Sess. (N.Y. 2019).

On the opposite coast, California recognizes both a statutory and a common law right of publicity, which similarly protect the unconsented use of an individual's image. Section 3344 of California's Civil Code prohibits the "knowing[] use[] [of] another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior

consent." Cal. Civ. Code § 3344 (West 2020). California common law sweeps beyond "knowing" uses for advertising purposes and prohibits any appropriation of a plaintiff's identity "to defendant's advantage, commercially or otherwise." *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

The Right of Publicity vs. Freedom of Expression

The right of publicity first emerged in an era prior to mass-market film, radio, or television as a narrow tool to prevent the misleading, unconsented use of an individual's (usually, a celebrity's) name or image to promote a product. The right thus simply allowed celebrities to carve out a market to obtain compensation for the value of their product endorsements.

However, the rise of the Mass-Media and Digital Ages through the 20th and 21st centuries have seen an expansion of both the importance of celebrity culture and the quantities and categories of works that reference or reflect the omnipresence of modern celebrities. A documentary filmmaker may, for example, want to refer to a celebrity to describe his or her role in an important cultural phenomenon. Or a television show may want to tell a fictional, entertaining story that will appeal to the concerns and values of its audience. The show might therefore be "ripped from the headlines," with uncanny similarities to real events and real individuals.

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When a plaintiff tries to assert his or her right of publicity against such works of creative expression, courts will balance the property interests that individuals possess

in their own identities against the public and creators' interests in the free flow of information and ideas.

To support these types of free expression, courts have carved out breathing room for cultural works from right of publicity claims. For example, in March 2018, a California court dismissed actress Olivia de Havilland's claim based on her depiction in the television miniseries, Feud, holding that the First Amendment "safeguards the storytellers and artists who take the raw materials of life —including the stories of real individuals, ordinary or extraordinary—and transform them into art[.]" *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 638 (Cal. Ct. App. 2018) (internal quotation marks omitted) (quoting *Sarver v. Chartier,* 813 F.2d 891, 905 (9th Cir. 2016)). (See March 15, 2019 *INTA Bulletin* article.)

And in a case involving the documentary Sicko, a Washington State court dismissed a right of publicity claim arising from footage of an individual being treated at a hospital, reasoning that "informative or cultural" uses of a person's identity are protected by the First Amendment. *Aronson v. Dog Eat Dog Films, Inc*., 738 F. Supp. 2d 1104, 1114 (W.D. Wash. 2010).

New York's "Newsworthy" Defense

Courts do not always sweep quite as broadly in their protection of free speech as the foregoing cases would indicate. A set of more specific, but nonetheless powerful, defenses against right of publicity claims have therefore also evolved to shield different types of expressive works. In New York, for example, a "newsworthy" defense—available for works that cover "newsworthy events and matters of public concern"—is one way that defendants invoke First Amendment and other free speech

protections. *N.Y. Civ. Rights § 51; Foster v. Svenson, 7 N.Y.S.3d 96, 100 (N.Y. App. Div. 2015)*.

The "newsworthy" defense generally protects reporters from liability for using an individual's identity for the purpose of news reporting. So, recently, a New York district court found no liability for a journalist's description of the plaintiff's "self-professed 'anti-feminist'" views in articles discussing an Australian university's "male studies" course and tensions between LGBTQ rights and religious liberty. *Hollander v. Pressreader, Inc.,* No. 19-cv-2130, 2020 WL 2836189, at *1–5 (S.D.N.Y. May 30, 2020).

Don't let its name mislead you, though—the "newsworthy" exemption has frequently been expanded to cover more than just the daily news. New York courts have applied the exception to literature, movies, theater, and, in a recent case, surreptitiously taken artistic photographs. In *Foster v. Svenson*, the New York Supreme Court, Appellate Division held in favor of a fine art photographer who was sued for his exhibit "The Neighbors," which contained photographs taken with a telephoto lens of people living in the building across from the photographer. 7 N.Y.S.3d at 98. Writing that the photographs constituted works of art, the court held that they must be "given the same leeway extended to the press under the newsworthy and public concern exemption. …" *Id.* at 159.

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Photographs also have a special sort of protection by the "newsworthy" exemption under New York law: even though the exemption typically (and unsurprisingly)

favors facts over fiction, a photograph that accompanies a newsworthy story can be shielded from right of publicity claims even if the use of the photograph in conjunction with the story creates a false impression about an individual depicted in the photo. This protection will apply as long as the photo bears a "real relationship" to the accompanying newsworthy story, and the story is not merely an advertisement-in-disguise.

Accordingly, in *Messenger v. Gruner + Jahr Printing & Pub*., when pictures of the plaintiff, a 14-year-old girl, were staged to illustrate a teen magazine advice column about underage drinking and sexual activity, the court held that the photos were protected, regardless of whether they carried the false implication that the plaintiff was the 14-year-old girl described in the article. *727 N.E.2d 549, 554 (N.Y. 2000)*.

Films, Facts, and Fictionalization

Although misleading photos may be protected when associated with an otherwise "newsworthy" story, the protection may recede in New York where the story itself is substantially fictionalized. Thus, in *Porco v. Lifetime Entertainment Services*, New York Supreme Court, Appellate Division refused to dismiss a case brought against the producer of a Lifetime movie by Christopher Porco, who had been convicted for murdering his father and attempting to murder his mother, because the film's depiction of Mr. Porco allegedly contained too many fictitious elements to qualify for the "newsworthy" exemption. *47 N.Y.S.3d 769, 77172 (N.Y. App. Div. 2017)*. The court held that this fictionalization opened the door for Mr. Porco to argue that the film may be "so infected with fiction, dramatization or embellishment that it [could not] be said to fulfill the purpose of the newsworthiness exception." *Id. at 771*.

Fictionalized biopics have received more favorable treatment in other jurisdictions where they were not analyzed based on their newsworthiness. As discussed above, a California court dismissed Ms. de Havilland's right of publicity claim against her fictionalized depiction in a story about Old Hollywood, writing that storytellers will be protected when taking "the raw materials of life" and "transforming them into art." *De Havilland, 230 Cal. Rptr. 3d at 638*.

Similarly, a federal court applying Michigan right of publicity law to claims against a fictionalized miniseries about the musical group The Temptations held that First Amendment considerations "are no less relevant whether the work in question is fictional, non-fictional or a combination of the two." *Ruffin-Steinbeck v. DePasse, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000)*.

Of course, even where fictionalized stories are protected from right of publicity claims, defamation law may give content creators another reason to be careful about straying too far from the truth in their depictions of real people. Truth is an absolute defense to defamation claims and plaintiffs often incorporate such claims into their right of publicity lawsuits. The Ruffin-Steinbeck court itself emphasized that the plaintiffs' concerns about the falsity of their depictions were more appropriately considered as defamation causes of action, and the court let stand one of the plaintiffs' defamation claims. *Id. at 731–733*.

Conclusion

The legal recognition of a right of publicity allows individuals to protect the personal integrity of their own identity and to control the economic value of exploitation of their persona or image. The moral and economic values protected by the right of publicity are not absolute, however. American society also values the free

dissemination of information and culture and the economic role of its prominent media and technology industries that may incidentally or intentionally leverage the identities of putative right of publicity plaintiffs.

Accordingly, a variety of legal doctrines have evolved allowing the use of individual identities in expressive works. Under these exemptions, companies may find immunity from right of publicity liability whether they are reporting a true story of public interest or whether they are telling a creative new story using reality only as a jumping-off point. Aided by legal counsel, a content creator may find many permissible paths through the right of publicity morass.

Part II of this series, to be published in an upcoming issue of the INTA Bulletin, will explore the development of specific subsets of the right of publicity, including composite characters, transformative use, and use of one's image or likeness in video games.