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Features

Using One's Image and Personality, Part II: The Boundaries of the Right of Publicity

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This article, Part II of a series, explores the right of publicity by addressing the ways content creators can avoid liability by incorporating their own creative expression into their works. This discussion will cover the use of composite characters, the "transformative use" test and other methods of weighing creative contributions, and the application of such rules to less traditional media platforms, such as video games. Artists and other content creators should be careful to balance their desire to draw inspiration from real life against the law's expectation that they contribute their own substantial creative expression.

Composite Characters—*Greene v. Paramount Pictures*

In a suit decided at the trial court level on September 30, 2015, concerning *The Wolf of Wall Street* film—billed as "based on actual events"—the plaintiff, Andrew Greene, brought simultaneous right of publicity and defamation claims, alleging that he was defamed by the portrayal of a character that resembled him and was shown

"committing crimes and engaging in 'outrageous and depraved sexual and drug activities.'" *Greene v. Paramount Pictures Corp*., 138 F. Supp. 3d 226, 234 (E.D.N.Y. 2015).

Mr. Greene worked at the real-life, New York–based Stratton Oakmont brokerage house alongside the company's founder and his childhood friend, Jordan Belfort, who was played in *The Wolf of Wall Street* film by Leonardo DiCaprio. Another character in the movie, Nicky "Rugrat" Koskoff, was inspired, at least in part, by Mr. Greene. The film was released on December 25, 2013.

Ultimately, Mr. Greene's right of publicity and defamation claims failed for similar reasons. The plaintiff conceded to being a public figure, meaning that to succeed in his defamation claim, he needed to show that the defendants acted with "actual malice" (a knowing or reckless disregard for the truth). *Greene v. Paramount Pictures Corp.*, No. 19-135-cv, 2020 WL 3095916, at *2 (2d Cir. 2020). And as part of its holding that the defendants did not act with actual malice, the U.S. Court of Appeals for the Second Circuit on June 11, 2020, affirmed the trial court's ruling that no reasonable viewer would believe that the defendants intended the disputed character to actually depict Mr. Greene, the plaintiff. *Id*. at *2. The Second Circuit relied on the fact that the character at issue was not named after the plaintiff, and although based partially on the plaintiff, was in fact a composite character based on a combination of three different real individuals. *Id*. at *2.

The fact that the character in *The Wolf of Wall Street* had a fictitious name and only shared some of the plaintiff's characteristics was also the basis of the district court's earlier decision from September 30, 2015, to dismiss the plaintiff's right of publicity claim under New York law. *Greene*, 138 F. Supp. 3d at 232–33 ("[M]erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait,

or picture, is not actionable under the statute." (quoting *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985)).

Based on a True Story (and No Composite Character)—*Barbash v. STX Financing*

An ongoing case arising from the 2019 film *Hustlers*—similarly billed as "inspired by a true story"—may shed further light on the scope of protection afforded to the use of characters that are based on modifications to, or composites of, real-life individuals. In this case, *Barbash v. STX Financing*, *LLC*, the plaintiff, has attempted to distinguish *Greene* as involving a "composite character fictionalized beyond recognition," and has argued that the defendants should face liability because, rather than creating a "composite fictional character," they "depicted plaintiff as accurately as possible." Plaintiff's Memorandum of Law in Opposition of Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 10–11, *Barbash v. STX Fin., LLC,* No. 20-cv-00123-DLC (S.D.N.Y. filed June 29, 2020).

The defendants in *Barbash*, on the other hand, compare their case to *Greene*, and suggest that they can avoid liability because they did not use the plaintiff's name or literal likeness, regardless of the extent to which the *Hustlers* character shares certain characteristics with the plaintiff or the extent to which it is clear that the plaintiff is being depicted in the film. Defendants' Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Amended Complaint at 9–11, *Barbash*, No. 20-cv-00123-DLC (S.D.N.Y. filed May 29, 2020).

Depictions that are too similar, and thus not transformative, can violate an individual's right of publicity.

As of the date of this article, the *Barbash* court has yet to rule on the parties' arguments, but an eventual decision will likely provide useful guidance on the line that content creators must walk between accuracy and fictionalization when drawing inspiration from real-life individuals. The parties finished briefing this issue in July 2020, so a ruling should be expected in the coming months.

"Transformative Use" and Other Creativity-Based Protections

The extent to which an individual's identity can be used as a building block for a composite or fictionalized character is also central to another test frequently applied by California courts in right of publicity cases. The "transformative use" test asks "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Comedy III Prods., Inc. v. Gary Saderup, Inc.,* 21 P.3d 797, 799 (Cal. 2001). *Comedy III* was an important first use of the transformative use test in a right of publicity case.

The California Court of Appeal applied this standard in 2018 in *Sivero v. Twentieth Fox Film Corporation*, holding that a character from *The Simpsons* that resembled the plaintiff met the transformative use standard because it was not a literal likeness, but rather a cartoon character with transformative creative elements, such as "yellow skin, a large overbite, no chin, and no eyebrows." No. B266469, 2018 WL 833696, at *10 (Cal. Ct. App. Feb. 13, 2018); see also *De Havilland v. FX Networks, LLC,* 230 Cal. Rptr. 3d 625, 640–42 (Cal. Ct. App. 2018) (holding in the alternative that the Feud docudrama made a transformative use of actress Olivia de Havilland's persona).

In 1989, years before the development of the transformative use test, the Second Circuit articulated a thoughtful approach to the use of real identities in connection with creative works that is still used today. In *Rogers v. Grimaldi*, the Second Circuit

confronted a lawsuit by actress and dancer Ginger Rogers alleging the misappropriation of her identity in the title of the Federico Fellini film, *Ginger & Fred*, about Ginger Rogers and Fred Astaire impersonators. 875 F.2d 994 (2d Cir. 1989). Applying Oregon law, the Second Circuit affirmed the trial court's rejection of Ms. Rogers' right of publicity claim because the title was "clearly related to the content of the movie and not a disguised advertisement for the sale of goods and services or a collateral commercial product." *Id.* at 1002, 1004–05.

The court rejected Ms. Rogers' accompanying Lanham Act false endorsement claim pursuant to similar reasoning: Because the defendant's activities did not expressly mislead consumers into believing that Ms. Rogers had approved of or endorsed the film, the court held that she could not move forward with her claim.

Courts applying the transformative use test have declined to follow the *Rogers* interpretation of the right of publicity and have examined instead whether the accused work sufficiently transforms the plaintiff's identity to be permitted without the plaintiff's consent. These courts have found that the *Rogers* approach to right of publicity claims is too similar to the test *Rogers* applies to Lanham Act claims, making the approach appropriate for use only in "trademark-like right of publicity cases." See, e.g., *Hart v. Electronic Arts, Inc*., 717 F.3d 141, 157 (3d Cir. 2013); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013) ("The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly mislead consumers—is simply not responsive to [plaintiff's] asserted interests here.").

Another approach was adopted by the Supreme Court of Missouri in 2003, which coined its own "predominant use test" in deciding a hockey player's right of publicity claim against a comic book publisher. Under this standard, a work will not be

protected by the First Amendment if it "predominantly exploits the commercial value of an individual's identity … even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (*Mo*. 2003).

Expressive Works in Video Games

Right of publicity claims are increasingly common in cases involving less traditional media and platforms, such as video games and social media. The transformative use test, as applied to the character in *The Simpson*s in the *Sivero* case, is often used to determine whether a video game "misappropriated [the individual's] identity for commercial exploitation" or exercised fair use of an individual's likeness under the First Amendment. *Hart*, 717 F.3d at 148 (holding that use of a college quarterback's identity in a college football video game was not transformative). As a dissent in *Hart* noted, however, the transformative use analysis applied to video games has a "narrow focus on an individual likeness, rather than how that likeness is incorporated into and transformed by the work as a whole." *Id*. at 173.

Courts are thus most likely to reject liability for video game characters that exhibit different characteristics from their real-life inspirations. For example, although Epic Games created a character in the Gears of War game that looked similar to professional wrestler "Hard Rock Hamilton," even allowing players to dress the avatar in wrestling clothing, the U.S. District Court for the Eastern District of Pennsylvania held that the video game character was sufficiently transformative because the avatar had a different name and backstory. *Hamilton v. Speight*, 413 F. Supp. 3d 423, 431–34 (E.D. Pa. 2019), aff'd, No. 19-3495, 2020 WL 5569454 (3d Cir. Sept. 17, 2020).

Similarly, in *Pellegrino v. Epic Games, Inc*., the plaintiff sued the creators of the popular online Fortnite game over a function that allowed game characters to perform a dance move taken from the plaintiff. No. CV 19-1806, 2020 WL 1531867, at *3–4 (E.D. Pa. Mar. 31, 2020). The Eastern District of Pennsylvania court held, however, that performance in the game of the plaintiff's dance did not violate his right of publicity because the dance is used in conjunction with a variety of character avatars that are dissimilar from the plaintiff. *Id*.

On the other hand, depictions that are too similar, and thus not transformative, can violate an individual's right of publicity. The band No Doubt succeeded in its right of publicity claim after the California Court of Appeal found that avatars in the *Band Hero* videogame were lifelike visual depictions of the band members. *No Doubt v. Activision Publ'g, Inc.,* 122 Cal. Rptr. 3d 397, 409–12 (Cal. Ct. App. 2011).

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Sports video games, which usually emphasize realistic depictions of the sport and the individual athletes, are also particularly vulnerable to right of publicity claims, as the athletes' original likenesses are central to the game, even if the avatars based on them can also be altered. See, e.g., *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 177–78 (9th Cir. 2015); *Hart*, 717 F.3d at 166–69; *In re* NCAA, 724 F.3d at 1276–79.

On the other side of the coin, the New York Court of Appeals recently held that a character in *Grand Theft Auto: San Andreas* did not violate actress Lindsay Lohan's right of publicity because the video game character did not look specifically like Ms. Lohan, instead resembling a "generic … 'twenty something' woman without any

particular identifying characteristics." *Lohan v. Take-Two Interactive Software, Inc*., 97 N.E.3d 389, 395 (N.Y. 2018).

The Right of Publicity Varies by Jurisdiction

Greene and *Barbash* were brought under New York Civil Rights Law Sections 50 and 51, which contain a limited right of publicity prohibiting nonconsensual use of a person's "name, portrait, picture or voice" for advertising or purposes of trade. N.Y. Civ. Rights Law §§ 50, 51 (*McKinney* 2019). Other cases mentioned in this article interpret California, New Jersey, and Missouri law.

Notably, in August 2020, the New York State Legislature passed a new, more expansive, right of publicity statute which also includes protection for a person's likeness and signature, and creates a posthumous right. S. 5959-D, 2019-2020 Sess. (N.Y. 2019). While the new right carves out newsworthy works, parodies, satire, and the like, it remains to be seen how the courts will interpret this new statute. New York's new right of publicity statute is awaiting signature by New York Governor Andrew Cuomo.

The nature and extent of protection afforded to personality rights outside the United States varies greatly by jurisdiction, and this article limits its discussion to U.S. state law, as the United States does not have a nationwide right of publicity statute. The interpretations of U.S. state law can vary from state to state, as discussed in this article. And in a very recent decision, *Cousteau Society, Inc. v. Cousteau*, a U.S. federal court judge in the District of Connecticut determined that the right of publicity claim by the owners of the image rights and trademarks pertaining to underwater filmmaker Jacques Cousteau should be determined under French law. Civil No. 3:19-cv-1106, 2020 WL 5983647, at *15 (D. Conn. Oct. 8, 2020). The *Cousteau* court also

ruled, applying the test in *Rogers v. Grimaldi*, that the plaintiff raised a plausible claim that the defendants' activities could expressly mislead consumers into believing that the plaintiff endorsed or sponsored them. *Id*. at *10–11.

Conclusion

Referencing another's name or likeness in a creative work can be a delicate balance. Recent cases have arisen out of films and TV series based on actual events, as well as video game characters based on real-life individuals. Courts recognize the need to protect freedom of expression in these works and where there is a clear transformative use. But the closer the similarities are between the portrayal and the real person, the more courts are likely to find a potential right of publicity violation.

This is the second part of a two-part series. Part I explored the origins of right of publicity law and the tensions between it and freedom of expression.

Although every effort has been made to verify the accuracy of this article, readers are urged to check independently on matters of specific concern or interest.

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