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WHAT'S IN A NAME?

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Names and Reputations Have Commercial Value

- If names and reputations did not have commercial value, spokespersons and celebrities would never be used for promotional purposes
- Litigation regarding the ownership of one's name and reputation has a long lineage

A Classic Swing



56 Straight----An Enduring Record



Notoriety Has Advantages



Notoriety Has Commercial Value



Lineage of Case Law

- O'Brien v. Pabst Sales, Co., 124 F.2d 167 (5th Cir. 1941).
 - David O'Brien was a football player for TCU and the Philadelphia Eagles
 - His photo was used in a 1939 Pabst beer advertising calendar
 - O'Brien was a non-drinker and had refused opportunities to endorse beer

O'Brien v. Pabst Sales, Co., 124 F.2d 167 (5th Cir. 1941).

- The 5th Circuit threw out O'Brien's case reasoning that he was not a private person and could not be harmed by more publicity
- The dissent said that the time was ripe to recognize a legal claim for the uncompensated use of the identity of a professional athlete to sell a product

Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

- The defendants had used player's pictures without asking them
- Judge Frank created a new kind of property right under a new label
- The right of publicity is born

The Right of Publicity

- The right can give every person the right to either prevent or permit for a fee the use of his or her identity in an advertisement to help sell someone's product
- The right of publicity cannot be used to prevent someone's name or picture in news reporting
- It cannot be used to prevent use of identity in an unauthorized biography

The Right of Publicity

- In addition, it cannot prevent use of identity in an entertainment parody or satire such as Saturday Night Live
- The right of publicity is a wholly and separate legal right from the right of privacy
- The right of publicity is not a kind of trademark
- It is not a species of copyright
- It is not another kind of privacy right

The State Of The Law

- Living Persons – As of 2001 the right of publicity of living persons has been recognized as the law in 28 states.
- Deceased Persons - Under either common law or statute, a post-mortem right of publicity has been recognized as the law in 17 states.

The Right of Publicity

- The right of publicity is about 98% of the time, the use of some aspect of a person to help sell a product, like drawing attention to an advertisement
- The right of publicity protects everyone – both celebrities and non-celebrities
- The person must be identifiable with unaided identification

Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998).

- Similar to the O'Brien case, Newcombe was upset at the beer ad because he was a recovering alcoholic and a spokesperson warning against the dangers of alcohol
- Coors had used a drawing of a baseball pitcher in a stance that Newcombe was easily identifiable
- The court applied the CA Civil Code §3344(b) test of photos to this drawing
- The court held that there was a question of fact for trial as to whether the drawing was identifiable from Newcombe's pitching stance

Other Cases Of The Right Of Publicity

- Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996).
- Shamsky v. Garan, Inc., 632 N.Y.S.2d 930, 933 (N.Y. Sup. Ct. 1995).
- Cardtoons v. Major League Baseball Players Assoc., 95 F.3d 959 (10th Cir. 1996).
- ETW Corp. v. Jireh Publ'g, Inc., 99 F. Supp. 2d 829 (N.D. Ohio 2000).

Companion Law

- Lanham Act §43(a) – false endorsement claim is often the companion of a right of publicity claim

CA Civil Code § 3344(a)

- Any person who knowingly uses 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, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.
- In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.
- In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses.
- Punitive damages may also be awarded to the injured party or parties.
- The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

Inaccurate Use Of Physician Names

- DMHC fined Anthem Blue Cross and Blue Shield for inaccurate Covered California provider directories
- More than 25% inaccuracy
- In both cases auditors were unable to confirm Covered California participation status for more than 40% of physicians listed as participating

So What?

- There is no litigation ongoing from the physician community for violation of their right of publicity
- A question of the measure of damages is: Would a physician be entitled to \$750 in statutory damages or would the measure be how many times the physician's name was viewed in online advertising or in print directories?