Right of Publicity: An Open Casebooklet

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1. Successful Claims: Elements and Patterns

This section written by EEJ. Section A, and perhaps other sections, borrow in substance, and to some extent in text, from Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891 (2017).

A. Requirements for a successful right of publicity claim

A.1. The overbreadth of blackletter statements

On any subject in any field of law, a learned expert is likely to tell a student that it is totally inadequate to learn just the blackletter law – i.e., the legal doctrine refined to a simple abstractly stated rule. Sure. But when it comes to the right of publicity, the blackletter law is not just hopelessly inadequate, it's dangerously misleading.

According to blackletter law, the right of publicity provides persons with a cause of action against anyone who makes a commercial use of their name, image, likeness, or other indicia of identity. Here's an example:

> Considering plaintiffs' appropriation claim, the elements of the tort are: an appropriation, without consent, of one's name or likeness for another's use or benefit. {The tort} is designed to protect a person from having his name or image used for commercial purposes without consent.

Dwyer v. Am. Express Co., 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995) (citations omitted)).

This account, with slight variations in language, is recited by countless courts, but a moment's reflection demonstrates that it is not true.

Imagine what would happen if people really could recover just because their names are being exploited commercially. Every credit reporting agency would be put out of business. The celebrity gossip media could not function. And the booming business of selling customer data to marketers would come to an end. Based on the blackletter law, the right of publicity should stop all these commercial uses of identity. Yet it does not.

A.2. Reliance on defenses and exceptions to shape the right of publicity

In right of publicity cases, courts tend to spend little attention on what the right of publicity is – instead, courts tend to focus on what it *is not*. This is apparent upon reading a typical court opinion on the right of publicity. In a usual case, the court will devote little or no analysis to the question of whether the plaintiff has stated a prima facie case for violation of the right of publicity. Rather, the court will quickly move to considering exceptions and defenses, and the bulk of the court's analytical work will be devoted to those.

Defenses or exceptions that are habitually engaged to give the right of publicity are: (1) the First Amendment's guarantee of free expression or related ideas using different labels, such as the "newsworthiness exception," and (2) preemption by federal copyright law.

In moving straight to discussing exceptions and defenses, courts are not necessarily explicit about the structure of their analysis. That is to say, with right of publicity cases, it is not uncommon that courts gloss over distinctions such as what things are elements of the plaintiff's claim, what things are defenses, who has the burden of proof, and so forth.

The ordinary model of a claim litigated in court is that the first order of business is for the plaintiff to try to prove a prima facie case for some cause of action. If there's no prima facie case, then there is no reason to bother to discuss defenses at all. And with other subjects – e.g., breach of contract, negligence, patent infringement, trademark infringement – you are much

more likely to find that before addressing defenses the court will first address whether the plaintiff has established a prima facie case.

But with the right of publicity, there is little in the words of statutes or the articulations of caselaw that explains in a meaningfully bounded way what it is that makes for a successful claim. Thus, courts tend to rely on defenses and exceptions to begin the endeavor of giving the right of publicity its essential shape.

A.3. Doctrinal indeterminacy with defenses

While First Amendment free expression and copyright preemption are heavily relied upon by courts to delineate the scope of the right of publicity, that does not mean that these defenses supply clarity. A fair appraisal is that there is a great lack of doctrinal muddiness insofar as how the First Amendment and copyright preemption apply in right of publicity cases. Both defenses, as articulated by courts, lend themselves to indeterminacy. They are fuzzy, so to speak. And they are arguably employed in ways that raise logical inconsistencies.

A.4. Predictable patterns for successful right of publicity cases

While the words used by courts and statutes to describe the right of publicity may not provide a clear picture of the scope of the right of publicity, the cases themselves – in terms of facts and outcomes – do tend to show substantial coherence. When a plaintiff succeeds on a right of publicity claim, as a factual matter, the defendant's conduct tends to fall into one of three categories.

Thus, exploring these three patterns is how this chapter proceeds. Thinking in terms of these patterns of cases may offer the lawyer and law student more of a sense of the likelihood of liability for the right of publicity than abstract doctrinal formulations.

The first category is advertising/endorsement. If the defendant uses the plaintiff's name, image, likeness, or recognizable identity to advertise something (e.g., goods or services) or in a manner that suggests the plaintiff endorses some product, service, or enterprise, then that is extremely likely to create liability.

The second category is merchandizing. In this context, the word "merchandizing" means selling products – often called "merch" – that serve primarily or substantially as a vehicle for displaying the plaintiff's name, image, likeness, etc. Think of a souvenir keychain, pinback button, or iron-on patches. Use of the plaintiff's identity for merchandizing is very likely to create liability.

The third category is more nebulous, more recent, less well recognized in courts, and much more contestable. It's both contestable as to whether the law does or should recognize these claims, and it is contestable as to whether these claims should be grouped together as a category. While having greatly dissimilar facts, cases in this vein all involve an underlying pattern in which the plaintiff – physically absent and nonparticipating – is unwittingly made to put on some kind of performance in some virtual sense. A working label might be "virtual impressment." Included here are various circumstances involving some element of performance. Celebrity-impersonator concerts, videogames with player-controllable avatars of an athlete or rock star, and the use of digital technology to insert an actor into a film they never appeared for.

B. Case: *Downing v. Abercrombie & Fitch* (9th Cir. 2001)

B.1. Advance notes

This case involves a set of facts that are close to the borderline between advertising and non-advertising – or what media industry people might term the border between an "advertising" use of a photo and an "editorial" use of a photo.

The plaintiffs are surfers who were notables in the 1960s surf scene, and their claim springs from their being seen in a vintage beach-side photo of them published adjacent to a write-up about surfing, in a mass-distributed paper periodical with a quarterly publication cycle.

Lots of magazines, of course, have pages that end up being a mixture of ads that the magazine is paid to include, and "editorial" content the magazine is publishing for the gratification of its readers – news stories, opinion pieces, celebrity profiles, photo spreads, info-graphics, advice columns, puzzles, readers' letters, and what-have-you. With mainstream

magazines, there's a pretty clear-cut distinction: Advertising content is money coming in – the magazine gets direct revenue for including ads. Editorial content is money going out the door – the magazine has to pay to produce or acquire the editorial content it runs. There's also a third category – promotional content – where the magazine promotes itself. But that's usually a tiny part of the magazine, traditionally one or two tear-out business-reply-mail cards a reader can drop in the mail to become a subscriber.

The publication involved in this case is *A&F Quarterly,* a soft-bound paper periodical published by Abercrombie & Fitch, an up-market clothing retailer. *A&F Quarterly* is a magazine. Or maybe it's a catalog. And if it's a catalog, perhaps it's really just one giant advertisement.

If you actually grab a copy of *A&F Quarterly* – and thus take into your hands the raw facts of the case – you will likely see that the publication is not so easily characterized as either a magazine or a catalog. In fact, the publication seems carefully designed to straddle the boundary. It might be thought of as a magazine owned by its only advertiser, with its editorial content being pliably bent around the retailer's need to grab onto fashion trends – or better yet to set them. On the other hand, *A&F Quarterly* might be thought of as a catalog, but one with nonpareil production value. This is a catalog you don't pick up when tidying your place. Rather, you insouciantly leave it lying about *after* you've cleaned. Maybe you even leave its pages splayed open, given that its thick, cottony paperstock is sumptuously furnished with easy-read essays in a clubby leisure-class prose and dazzling photographs, stylishly desaturated and contrasty, of deiform youths engaged in an unceasing series of warm-weather athletic pursuits. All of these exertional and exceedingly social recreational activities are apparently hilarious – to judge by the freeze-frames of squeeze-eyed laughter – and exceedingly chummy – to judge by the participants' persistent, overt physical closeness.

Being the carefully engineered lifestyle missile that it is, the *A&F Quarterly* seemed destined to provoke a line-drawing fight along the advertising/editorial frontier. Indeed, the court's opinion suggests the magazine-catalog/advertising-editorial is key to the case. But Abercrombie's sand-in-the-cushions/privileged-kids good vibes don't seem to have any effect on the court.

The court chooses the "catalog" label in the first paragraph and sticks with it, using that word for the defendant's periodical as often as "Quarterly." The opinion also makes repeated use of the word "magazine" – but never for the *A&F Quarterly* – only for publications in cases that came out the other way, cases that this *Downing* court distinguishes.

Yet the *Downing* court never suggests that the advertising/not-advertising distinction has any relevance to whether there's a prima facie case for right of publicity misappropriation. Not for one moment. Instead, the advertising-connection and catalog nature of *A&F Quarterly* are presented as context – or unconnected background – to the court's analysis as to whether Abercrombie's use of the photo was protected by the First Amendment (it's not, per the court) or preempted by the Copyright Act (nor that, the court holds).

In terms of the First Amendment, the *Downing* court's analysis is interesting to compare with a case that comes out on the other side, *Stephano v. News Group*, which dismisses a model's claim against a magazine for making a use of a photo the magazine had agreed to abstain from. (The *Stephano* case is discussed in later.) And with regard to copyright preemption, the analysis of the Ninth Circuit in *Downing* seems impossible to square with the Ninth Circuit's application of copyright preemption in *Laws v. Sony* (also discussed later). But doctrine aside, the case is straightforward as an example of a court upholding a right of publicity claim in a situation where the court points at the use of the plaintiff's identity as an advertising-type use.

B.2. Opinion

The following case abridgement/edit is by EEJ. For readability, substantial liberalities have been taken with re-styling or deleting – in whole or in part – citations, footnotes, and typographical technicalities. This edit has superscript symbols to identify more significant editing work: ˜ means omitted text, ˂ and ˃ set off text taken from footnotes and placed inline in the body text.

Downing v. Abercrombie & Fitch

U.S. Court of Appeals for the Ninth Circuit
265 F.3d 994 (9th Cir. 2001)

Judge PROCTER RALPH HUG JR., opinion of the court:

Appellants brought this diversity action against Abercrombie and Fitch ("Abercrombie") for publishing a photograph of them, with identification of their names, for Abercrombie's commercial benefit without the Appellants' authorization. They allege a violation of California's common law and statutory prohibition against misappropriation of a person's name and likeness for commercial purposes, a violation of the Lanham Act for confusion and deception indicating sponsorship of Abercrombie goods, and a claim for negligence and defamation. The district court entered summary judgment for Abercrombie, holding that their California state claims were foreclosed because Abercrombie's use of the photograph was protected by the First Amendment, and those claims were also preempted by the federal Copyright Act~.~ We reverse the grant of summary judgment and remand for trial.

BACKGROUND

I. Factual Background

Abercrombie is an outfitter catering to young people. The upscale retailer sells casual apparel for men and women, including shirts, khakis, jeans, and outerwear. In addition to sales in approximately 200 stores nationwide, Abercrombie also sells merchandise through its subscription catalog, the "Abercrombie and Fitch Quarterly" ("Quarterly").

The Quarterly is Abercrombie's largest advertising vehicle. It accounts for approximately 80% of Abercrombie's overall advertising budget. The primary purpose of the Quarterly is to build brand awareness and increase sales. Each issue is over 250 pages in length and embraces a theme such as collegiate lifestyle, back to school, or winter wear. The Quarterly contains photographs of models wearing Abercrombie's garments as well as pictures of the clothing displayed for sale. In addition, approximately one-quarter of each issue is devoted to stories, news and other editorial pieces.

In 1998, Michael Jeffries, Abercrombie's CEO, developed a surfing theme for the upcoming Quarterly. Abercrombie held the photo shoot for the upcoming issue at San Onofre Beach, California. While at the

photo shoot, Abercrombie employees Sam Shahid and Savas Abadsidis looked through a compilation of surfing photographs by surf photographer LeRoy Grannis. The photo book contained a picture of Appellants which Grannis had taken at the 1965 Makaha International Surf Championship in Hawaii. Sam Shahid purchased the photograph, along with three other photographs from the book, for $100 each. LeRoy Grannis then handwrote the names of Appellants at the bottom of the photograph.

Subsequently, Sam Shahid showed Appellants' photograph to Jeffries who decided to use the photograph in the upcoming Quarterly. Abercrombie did not obtain Appellants' permission. Jeffries also decided to create t-shirts, exactly like those worn by the Appellants in the photograph, for sale in the upcoming issue. Abercrombie labeled the t-shirts "Final Heat Tees." The t-shirts were advertised for sale in the Quarterly.

The Spring 1999 Quarterly, "Spring Fever," contains a section entitled "Surf Nekkid." The "Surf Nekkid" section includes an article recounting the history of surfing. Abercrombie also included a 700–word story, entitled "Your Beach Should Be This Cool," describing the history of Old Man's Beach at San Onofre, California. The following page exhibits the photograph of Appellants. The two pages immediately thereafter feature the "Final Heat Tees."

The "Spring Fever" issue contains other articles about the surfing lifestyle. An article entitled "Beachcombing" documents the efforts of the Surfrider Foundation, an ecological group founded by surfers. Still another article entitled "Where the Wild Things Are," written by the editor of Surfer Magazine, describes various surfer "types." Also contained in the issue is an interview of Nat Young, former world surfing champion and the first professional surfer. The interview is accompanied by photographs of Young and his son wearing Abercrombie clothing.

II. Procedural History

On April 28, 1999, Appellants George Downing, Paul Strauch, Rick Steere, Richard Buffalo Keaulana, and Ben Aipa filed a complaint in the United States District Court for the Central District of California. Appellants later amended the complaint to add Joey Cabell and Mike Doyle. Appellants alleged that Abercrombie misappropriated their names and likenesses in violation of California's statutory and common law protections against commercial misappropriation~. The district court entered summary judgment for Abercrombie.~

On appeal, Appellants contend: (1) Abercrombie's use of the photograph is not protected under the First Amendment; (2) the state law publicity claims are not preempted by the Copyright Act~.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo.~

ANALYSIS

I. First Amendment and Right of Publicity Claims

The district court concluded that Abercrombie's use of the photograph containing Appellants' names and likenesses was proper because it constituted expression protected under the First Amendment. We disagree.

California has long recognized a common law right of privacy for protection of a person's name and likeness against appropriation by others for their advantage. *See Eastwood v. Superior Court,* 149 Cal.App.3d 409, 416 (Cal. App. 1983). To sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."

In addition to the common law cause of action, California has provided a statutory remedy for commercial misappropriation under California Civil Code § 3344. The remedies provided for under § 3344 complement the common law cause of action; they do not replace or codify the common law. *See Newcombe v. Adolf Coors Co.,* 157 F.3d 686, 691–92 (9th Cir. 1998). Section 3344 provides in relevant part, "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner ... for purposes of advertising ... without such person's prior consent ... shall be liable for any damages sustained by the person." Cal. Civ.Code Under section 3344, a plaintiff must prove all the elements of the common law cause of action. In addition, the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose. *See Eastwood* at 417.

Under both the common law cause of action and the statutory cause of action "no cause of action will lie for the publication of

matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 793 (Cal. App. 1995). This First Amendment defense extends "to almost all reporting of recent events," as well as to publications about "people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." *Eastwood* at 422. However, the defense is not absolute; we must find "a proper accommodation between [the] competing concerns" of freedom of speech and the right of publicity. *Id.*

In the instant case, Abercrombie defends on the basis of the First Amendment arguing that the photograph illustrates an article about surfing, a matter in the public interest. To support its defense, Abercrombie relies on *Dora v. Frontline Video, Inc.,* 15 Cal.App.4th 536 (Cal. App. 1993). In *Dora,* the court held that a surfing documentary was in the public interest because it was "about a certain time and place in California history and, indeed, in American legend." *Dora* involved a surfing legend, Mickey Dora, who sued the producer of a video documentary on surfing claiming common law and statutory appropriation of his name and likeness. The trial court entered summary judgment for the film's producer and the California Court of Appeal affirmed. In addressing the First Amendment issue, the court found that the documentary was about a matter of public interest, specifically surfing, and, therefore, the producer was protected by the defense. In so concluding the court stated:

> surfing is of more than passing interest to some. It has created a life-style that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, because it affects purchases, travel, and the housing market. Surfing has also had a significant influence on the popular culture, and in that way touches many people. It would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.

Id. at 546.

Although the theme of Abercrombie's catalog was surfing and surf culture, a matter of public interest, the use of Appellants' names and pictures is quite different from that involved in the *Dora* case. In *Dora,* Mickey Dora's contribution to the development of the surf life-style and his influence on the sport was "the point of the program." Dora

was depicted in the documentary because his identity directly contributed to the story about surfing which came within the protected public interest.

In the current action, there is a tenuous relationship between Appellants' photograph and the theme presented. Abercrombie used Appellants' photograph essentially as window-dressing to advance the catalog's surf-theme. The catalog did not explain that Appellants were legends of the sport and did not in any way connect Appellants with the story preceding it. In fact, the catalog incorrectly identifies where and when the photograph was taken. We conclude that the illustrative use of Appellants' photograph does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First Amendment defense.

<This case is also distinguishable from *Hoffman v. L.A. Magazine,* 255 F.3d 1180 (9th Cir. 2001), in which the defendant magazine successfully asserted a First Amendment defense to Dustin Hoffman's claim of misappropriation. In that case, L.A. Magazine used a digitally-altered picture of Hoffman, as "Tootsie," in a current designer dress to illustrate its "Grand Illusions" article. We concluded that such use was noncommercial speech entitled to full First Amendment protection. In contrast to the present case, where Abercrombie, itself, used Appellants' images in its catalog to promote its clothing, L.A. Magazine was unconnected to and received no consideration from the designer for the gown depicted in the article. Further, while L.A. Magazine merely referenced a shopping guide buried in the back of the magazine that provided stores and prices for the gown, Abercrombie placed the Appellants' photograph on the page immediately preceding the "Final Heat Tees" for sale. Based on these factors, we conclude that Abercrombie's use was much more commercial in nature and, therefore, not entitled to the full First Amendment protection accorded to L.A. Magazine's use of Hoffman's image.>

Accordingly, we reverse the district court's grant of summary judgment in favor of Abercrombie.

II. Federal Copyright Preemption

Abercrombie contends that its right to reproduce and publish the photograph of the Appellants is governed by the federal Copyright Act, 17 U.S.C. §§ 101–1101, and that Appellants' state law claims are preempted by federal copyright law.

~Under 17 U.S.C. § 301, States are expressly prohibited from legislating in the area of copyright law. In order for preemption to

occur under the federal Copyright Act, two conditions must be satisfied. First, the content of the protected right must fall within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106 of the Copyright Act.~

{*Ed. note:* The court discussed, cited, and reproduced the statutory text of 17 U.S.C. §§ 102, 103, and 106. For brevity, here are summaries:

- Section 102 provides that copyright applies to original works of authorship that have been fixed or recorded in some tangible form – such as writing, recording, filming, etc. And § 102 states that works of authorship include various categories, the most notable of which are literary works, musical compositions, sound recordings, and pictorial, graphic and sculptural works.
- Section 103 provides that copyright will also apply to an original compilation of pre-existing works and to derivatives of pre-existing works. But such copyrights provide only rights to the creative work done by the compilator or deriver – not to the pre-existing works themselves.
- Section 106 sets forth the rights that copyright owners have, namely the right to exclude others from doing certain things with the copyrighted work. The key exclusive rights – including those relevant to this case – are reproducing the work (making copies), public performance (such as playing in a public place or on the radio), and preparing derivative works.}

The photograph itself, as a pictorial work of authorship, is subject matter protected by the Copyright Act. *See* 17 U.S.C. § 101 (providing that "pictorial, graphic, and sculptural works include ... photographs.") However, it is not the publication of the photograph itself, as a creative work of authorship, that is the basis for Appellants' claims, but rather, it is the use of the Appellants' likenesses and their names pictured in the published photograph. The Nimmer treatise on copyright law states:

> [T]he "work" that is the subject matter of the right of publicity is the persona, i.e., the name and likeness of a celebrity or other individual. A persona can hardly be said to constitute a "writing" of an "author" within the meaning of the copyright clause of the Constitution. A fortiori it is not a "work of authorship" under the Act. Such name or likeness does not become a work of

> authorship simply because it is embodied in a copyrightable work such as a photograph.

1 Nimmer on Copyright § 1.01[B][1][c] at 1–23 (1999). The same point is made in McCarthy's Treatise on Right of Publicity and Privacy:

> The "subject matter" of a Right of Publicity claim is not a particular picture or photograph of plaintiff. Rather, what is protected by the Right of Publicity is the very identity or persona of the plaintiff as a human being ... While copyright in a given photograph may be owned by the person depicted in it, the exact image in that photograph is not the underlying "right" asserted in a Right of Publicity case. To argue that the photograph is identical with the person is to confuse illusion and illustration with reality. Thus, assertion of infringement of the Right of Publicity because of defendant's unpermitted commercial use of a picture of plaintiff is not assertion of infringement of copyrightable "subject matter" in one photograph of plaintiff.

J. Thomas McCarthy, *Rights of Publicity and Privacy* § 11.13[C] at 11–72–73 (1997).~

The subject matter of Appellants' statutory and common law right of publicity claims is their names and likenesses. *See Newcombe* at 691. A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102. This is true notwithstanding the fact that Appellants' names and likenesses are embodied in a copyrightable photograph. The same concept is specifically embodied in 17 U.S.C. § 103, which provides that the copyright in derivative works extends only to the material contributed by the author as distinguished from preexisting material employed in the work.

<Abercrombie relies on the California case of *Fleet v. CBS*, 50 Cal.App.4th 1911, 58 Cal.Rptr.2d 645 (1996).~ In *Fleet*, the plaintiffs were actors in a copyrighted film. The claims of the plaintiffs were based on their dramatic performance in a film CBS sought to distribute. The court stated:

> We agree that as a general proposition Civil Code section 3344 is intended to protect rights which cannot be copyrighted and that claims made under its provisions are usually not preempted. But appellants' analysis crumbles in the face of one obvious fact: their individual performances in the film White Dragon were copyrightable. Since their section 3344 claims seeks only

> to prevent CBS from reproducing and distributing their performances in the film, their claims must be preempted by federal copyright law.

Fleet, 50 Cal.App.4th at 1919, 58 Cal.Rptr.2d 645. This is clearly distinguishable from this case where the Appellants' claim is based on the use of their names and likenesses, which are not copyrightable.>

The second requirement for copyright preemption as noted above is that the right asserted under state law must be equivalent to the exclusive rights contained in § 106 of the Copyright Act. This requirement also is not met. Because the subject matter of the Appellants' statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in § 106.

REVERSE AND REMAND FOR TRIAL.

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2. Defenses and Exceptions

This chapter written by EEJ. The text incorporates text from Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891 (2017).

A. The use of defenses and exceptions in right-of-publicity litigation

A.1. Generally

In the absence of meaningful doctrinal guidance about what sorts of conduct are actionable as violating a person's right of publicity, courts have looked to defenses and exceptions. Courts have used free expression guarantees, copyright preemption, and other means to excuse the imposition of liability in cases where the right of publicity would seem to go too far.

A.2. The First Amendment, freedom of expression, and newsworthiness

With the blackletter right-of publicity doctrine being as broad as it is, the First Amendment is constantly called upon to do the frontline work of deciding in run-of-the-mill cases whether an action for right-of-publicity infringement can be maintained. That is, instead of policing the law at its outer bounds or in its broadest strokes, the First Amendment is constantly invoked to micromanage the application of right of publicity law and resolve routine cases.

The interaction of the First Amendment and the right of publicity is puzzling. In the right-of-publicity context, the First Amendment is both incredibly weak and incredibly strong. It is weak because the courts have made it clear in a number of ways that the right of publicity can proceed largely unhassled by the First Amendment, owing to the right of publicity's economic-incentive rationale and its status as a property right. On the other hand, one does not need to read many cases to see that the right of publicity is dogged by the First Amendment at every turn.

It's important to point out that the right of publicity's engagement with the First Amendment does not come from lawsuits brought for the purpose of challenging the constitutionality of right-of-publicity statutes. Of course such cases would require the involvement of the First Amendment, just as cases challenging the constitutionality of gun laws will require involvement of the Second Amendment. But suppose that most criminal trials involving a weapons charge required Second Amendment analysis to resolve. That would be analogous to the habitual state of right-of-publicity litigation.

Exactly how much the First Amendment limits the right of publicity, and what tests should be used when deciding the matter, have long been vexing for courts and scholars. One might wonder, how can courts apply the First Amendment so routinely in right-of-publicity cases without well-articulated tests or standards for doing so? The answer is that such a question points up a false dilemma. Using the First Amendment to resolve a right-of-publicity case is not constitutional jurisprudence—not really. It is better thought of as ordinary, non-constitutional private-law jurisprudence, done under a First Amendment label. In other words, we should not be vexed by the lack of articulation of First Amendment law in the right-of-publicity context. We should be troubled instead by the lack of articulation of right-of-publicity law, leading courts to constantly invoke the First Amendment.

One way to see the nature of the problem is to look at this through the lens of constitutional avoidance. As a general matter, courts seek to avoid reaching constitutional questions by interpreting statutes in a way that prevents serious doubts about their constitutionality. But that principle is frequently thrown to the wind in right-of-publicity cases, as the First

Amendment often seems to be the first thing courts reach for in explaining why a plaintiff must lose in everyday cases.

Some legal authorities do seek to conform to norms of constitutional avoidance insofar as they may bring in free expression rights under some banner other than the First Amendment. For instance, First Amendment-type concerns may be addressed under the label of a "newsworthiness" exception or privilege. California's statute, for instance, has a "news" and "public affairs" exception that serves as a statute-based means of bringing free speech protections to bear without directly invoking the First Amendment. And sometimes courts seek to introduce some sheltering vagueness by using "First Amendment" as an adjective, speaking in terms of "First Amendment considerations." Notwithstanding the occasional nods to constitutional avoidance, however, there is an epidemic of courts dealing with right-of-publicity litigation by directly invoking the First Amendment without first trying to re-interpret statutory language or clarify common-law doctrine.

The U.S. Supreme Court has addressed the right of publicity and its interaction with the First Amendment only once. *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562 (1977), concerned a claim under Ohio law brought by "human cannonball" Hugo Zacchini, who performed his daredevil act at the Geauga County Fair in Burton, Ohio. In a performance that lasted all of 15 seconds, Zacchini was shot from a cannon to land in a net about 200 feet away. The dispute arose out of a visit by a freelance reporter with a video camera. When Zacchini first saw the man, he asked him not to film his performance. And the reporter initially complied. But the next day, on instructions from a news producer, the reporter returned to the fair and videoed the entire act, which was then shown on the local news. Zacchini sued. The broadcast of his cannonball act apparently offended his sense of family pride: Zacchini asserted that the act, which his father invented, had been performed exclusively by the Zacchini family for the past half century.

As plaintiff, Zacchini pursued his lawsuit on a variety of claims that ultimately proved unworkable, including the tort of conversion and a claim based on a purported common-law copyright. The Ohio Supreme Court, however, did entertain his suit on the basis of a "right to the publicity value of his performance." Although the Ohio high court impliedly recognized

that Zacchini had proved a prima facie violation of the right of publicity, the court nonetheless ruled in favor of the broadcaster on the basis of the First Amendment.

At the U.S. Supreme Court, Zacchini vaulted the First Amendment to a win with a 5–4 decision authored by Justice Byron White that emphasized the economic-incentive rationale of the right of publicity. Observing that perfecting the human cannonball act required great talent and effort, Justice White reasoned that "if the public can see the act free on television, it will be less willing to pay to see it at the fair." Broadcasting the act on TV thus "poses a substantial threat to the economic value" of Zacchini's act.

In this way, Justice White's opinion found the state's interest in protecting an individual's proprietary interest to encourage such entertainment to be persuasive in allowing the right-of-publicity claim to proceed—the First Amendment notwithstanding:

> Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. . . . These laws . . . were intended definitely to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public. The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work.

By putting the right of publicity into the same constitutional basket as copyright, the Supreme Court's rationale gave the right of publicity a powerful shield to blunt what blows the First Amendment might strike against it. Legal scholar Wendy Gordon has noted that because copyrights are classified as property, "courts seem willing to overlook the most basic canons of the law of free expression." Enforcing a prior restraint against speech, as she points out, is "one of the most troublesome things a judge can do under classic First Amendment jurisprudence. . . . Yet in copyright

cases, judges routinely enjoin books prior to publication without even appearing to notice the anomaly." And while defamation law—as a species of tort—is subject to intensive First Amendment policing, copyright—as a species of intellectual property—tends to get a free pass under the First Amendment. Thus, by analogizing the right of publicity to copyrights, *Zacchini* seems to have given the right of publicity exceptional status with regard to free expression guarantees.

The fact that the U.S. Supreme Court has not revisited the right of publicity since *Zacchini* seems to be a clear signal that state legislatures and courts are free to apply and even expand the right of publicity with little worry about First Amendment impingement. In this vein, it is particularly telling to consider the appellate posture of *Zacchini.* The Ohio Supreme Court fettered its own common law by imposing First Amendment limitations, and the U.S. Supreme Court reversed on the basis that the First Amendment did not function to limit the Ohio law as the Ohio court had said it did.

Why then, if the U.S. Supreme Court has signaled that the First Amendment will treat the right of publicity with a light touch, have lower and state courts brought the hammer of the First Amendment down on the right of publicity over and over again? It is part of the right of publicity's dysmorphia that courts interpreting state law have reached for the First Amendment to bash the doctrine into the shape they want. That is, instead of the First Amendment providing an externally imposed outer boundary on the reach of state law, courts have been using free speech rights to laser away unwanted liability.

Examples abound.

In *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860 (Cal. 1979), the California Supreme Court held that a motion picture about silent film heartthrob actor Rudolph Valentino was protected from right-of-publicity liability on the basis of the First Amendment.

In *New Kids on the Block v. News America*, 971 F.2d 302 (9th Cir. 1992), a California federal court used the First Amendment to halt a right-of-publicity claim by a boy band against a newspaper using the band members' names in connection with a pay-to-call 1-900-number survey to determine the most popular or sexiest New Kid.

In *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (Cal. App. 2001), a California court held that the First Amendment privileged professional baseball to print game-day programs, publish websites, and release documentaries with names and identities of retired ballplayers who had never given their consent for such commercial exploitations—actions that, otherwise, would ostensibly qualify as common-law right-of-publicity infringement.

Guglielmi, *New Kids on the Block*, and *Gionfriddo* illustrate the wide array of cases in which the First Amendment is applied as a constraint. But note that neither *Guglielmi*, nor *New Kids on the Block*, nor *Gionfriddo* fall into any of the three categories of endorsement right, merchandizing entitlement, or right against virtual impressment.

One area in which the First Amendment has been used repeatedly to strike down right-of-publicity claims is in the context of non-fictional books. A leading case is *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994), in which the Fifth Circuit decided that the First Amendment bars a former law-enforcement officer's right-of-publicity claim for portraying his life in a book and movie. The cases do not disclose a per se rule making biographies First Amendment protected, but biography cases have led to consistent defendant victories. While the First Amendment interest in non-fiction books is clearly strong, courts could reach the same result in these cases without confronting free speech rights at all by noting that non-fiction constitutes neither endorsement, nor merchandizing, nor virtual impressment.

A case that may illustrate how the First Amendment can be an ill fit in right-of-publicity cases is *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.,* 505 F.3d 818 (8th Cir. 2007), in which the Eighth Circuit used the First Amendment to stop a right-of-publicity claim against the use of baseball players' names in fantasy baseball games. Complainant C.B.C., a provider of web-based fantasy baseball services, sought declaratory judgment that its game-running services did not violate the rights of publicity held by Major League Baseball (MLB) players. The Eighth Circuit held that C.B.C.'s conduct was, under Missouri law, sufficient for a prima facie right-of-publicity infringement case. But the Eighth Circuit used the First Amendment to bar the claim, cutting a large swath out of the nominal scope of the right of publicity.

The *C.B.C.* case is interesting as an example of the strained way in which *Zacchini* has been dealt with by lower courts. *C.B.C.* cited *Zacchini* for the proposition that "[t]he Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations." It is a peculiar citation, because the *Zacchini* Court did not say rights of publicity must be balanced with the First Amendment—nor, even, is it fair to say the Court implied this.

Nonetheless, proceeding to the First Amendment balancing it felt obliged to do under *Zacchini*, the *C.B.C.* court weighed heavily the "public value of information about the game of baseball and its players," referring to the "substantial public interest" in the "recitation and discussion of factual data concerning the athletic performance of [MLB players]." And the court gave little weight to the economic interests of baseball players, observing that "major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements." Comparing these two sets of interests, the court concluded "CBC's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity."

Viewed exclusively through a First Amendment lens, the *C.B.C.* decision is strange when considered alongside other right-of-publicity decisions. For instance, a right-of-publicity cause of action has been upheld in the cases of celebrity identities being used on buttons, posters, and t-shirts—all of which are much more straightforwardly within the First Amendment sphere, being vehicles of viewpoint-bearing communication, than the game of fantasy baseball. Notably, however, the use of player names in fantasy baseball does not fit easily within the categories of endorsement, merchandizing, or virtual impressment.

The same free speech interests upheld by the First Amendment in right-of-publicity cases are sometimes pursued under other labels.

In Minnesota, for instance, the courts recognize a "newsworthiness defense" to the right of publicity, which "is akin to a First Amendment privilege and arises from the same roots as that privilege." The Minnesota case of *Dryer v. National Football League*, 814 F.3d 938 (8th Cir. 2016), held that a former football player's right-of-publicity claim for the use of old film footage in new documentary-style television productions was

barred by the newsworthiness privilege—notwithstanding that the passage of three or four decades would seem to take subject matter out of the category of "news." But while an ill fit for newsworthiness, *Dryer* makes sense as a case that involves neither endorsement, nor merchandizing, nor virtual impressment.

New York has recognized a newsworthiness exception as well—and has also applied it in surprisingly broad ways. In *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 485 N.Y.S.2d 220 (N.Y. 1984), a model's right-of-publicity claim was rejected where photos for which he posed were used for more than the one article to which he had agreed. The photo sued over featured the plaintiff modeling a bomber jacket. The newsworthiness value of the photo—the jacket had a "'fun fur' collar" and would be on sale the following week at Bloomingdale's—seems strained, to say the least. But it does seem clear that as an editorial photo spread as opposed to an ad, the usage tread on none of the rights of endorsement, merchandizing, or virtual impressment.

In the overall calculus, the cases reveal that the right of publicity is not merely *constrained* by free speech interests. The doctrine gets much of its *essential shape* from courts' habitual use of free speech-type defenses, even as the application of these defenses seems incoherent when taken on their own terms.

A.3. Copyright preemption

Another subtrahend that cuts the scope of the right of publicity down to a tenable size is copyright preemption. Compared with the ubiquity of free speech jurisprudence in right-of-publicity decisions, copyright preemption is more rare. Nonetheless, copyright preemption seems to play a substantial role as a pressure-relief valve for the extreme expansiveness of the right of publicity's blackletter doctrine. The fact is, some claims that are at odds with our right-of-publicity intuitions do not lend themselves to disposal through a free speech defense.

A brief background on copyright law may be helpful before delving into the role of copyright preemption in shaping the right of publicity: Copyright provides a monopoly right over original works of authorship. Works of authorship is a broad category. It includes books, poems,

photographs, paintings, sculptures, and other modes of expression authored by natural persons. There is no need to apply for a copyright—the copyright in a work of authorship arises instantaneously when the work is "fixed in any tangible medium of expression." That means, for instance, that as soon as creative expression is written down on paper, recorded to tape, captured on film, or stored digitally by a computer, copyright protection commences.

Copyright law in the United States is essentially exclusively federal, and it preempts state law. There is an express preemption provision at 17 U.S.C. § 301. In addition, generally applicable theories of federal preemption—not based on an express statutory provision—would appear to apply to copyright as well. Like other invocations of preemption in litigation, copyright preemption is an affirmative defense.

A leading case regarding the application of copyright preemption to a right-of-publicity claim is the Ninth Circuit's 2006 case, *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134 (9th Cir. 2006). The case is particularly interesting because its awkward, improbable reasoning regarding preemption demonstrates how the right of publicity's doctrinal crisis can put other law under strain.

The dispute arose out of the 2002 song "All I Have," recorded by Jennifer Lopez and LL Cool J for Epic Records. That song used a sample containing the voice of R&B singer Debra Laws, from her 1981 ballad "Very Special," an Elektra Records release. Epic's parent, Sony Music Entertainment, obtained a license for the sound-recording sample from Warner Special Products, Inc., which acted as agent for Elektra/Asylum Records, owner of the sound-recording copyright in "Very Special." But although Sony got the license for the sound-recording copyright, Sony did not seek permission from Laws to use her voice, nor was Laws compensated in any way for Sony's usage.

Based on the use of her voice in "All I Have," Laws sued Sony for common law right-of-publicity misappropriation and misappropriation under California's right-of-publicity statute, Civil Code § 3344. Because the blackletter scope of the right of publicity is so broad, Laws had a clear-cut violation to sue over: There was a commercial exploitation. And it was of Laws' voice, identifiable as Laws'.

The *Laws* court declined to say anything about whether a claim had been stated. Instead, the opinion skipped straight to the affirmative defense of copyright preemption. The court applied a two-part test for preemption under 17 U.S.C. § 301, copyright law's express preemption provision. According to the *Laws* court, a claim is preempted under § 301 if (1) the subject matter of the plaintiff's right-of-publicity claims comes within the subject matter of copyright and (2) the state-law rights asserted by the plaintiff are equivalent to those created under the federal copyright statute.

The court held Laws' claim preempted. The court's analysis, particularly with regard to the first prong, is largely inscrutable. The court seemed to be persuaded by Sony's argument that "once a voice becomes part of a sound recording in a fixed tangible medium it comes within the subject matter of copyright law." This cannot be right, however. If this were how a court is to construe the subject matter of copyright, then almost all right-of-publicity claims would be preempted by copyright. All uses of voices and likenesses in print, on film, in audio recordings, or affixed to any lunch box, coffee mug, or t-shirt would be preempted. To take just one example, Zacchini's claim regarding his human cannonball act would be preempted under the *Laws* logic, since his performance was fixed on film. In fact, with the exception of perhaps a handful of live-performance cases, every right-of-publicity case arising since 1989, when copyright law changed so that copyright attaches immediately upon fixation, involves a plaintiff's name, likeness, voice, or other indicia of identity being incorporated into a copyrighted work.

In trying to make sense of the *Laws* court's work, one might initially suspect that what the court was actually talking about is an implied license theory—that Laws impliedly licensed her right of publicity as part of her recording deal with Elektra. That, however, cannot be the explanation, because it was apparently undisputed in the case that Laws had not given Elektra a sublicensable right to exploit her voice in the future beyond the distribution of her own records. Thus an implied license theory cannot explain the court's holding.

The *Laws* court strained to distinguish various cases that seem incompatible with its holding. A particular problem for the *Laws* court were two Ninth Circuit cases that upheld right-of-publicity claims for commercial exploitation of the plaintiff's voice. In *Midler v. Ford Motor*

Co., 849 F.2d 460 (9th Cir. 1988), singer Bette Midler's voice was imitated in a Ford television advertisement. And in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), singer Tom Waits' voice was imitated in a Doritos radio commercial. The *Laws* court distinguished both on the basis that the voices were imitated, rather than copied verbatim. The court's implication was that the imitated voices were not the subject of copyright. Yet in both *Midler* and *Waits*, the imitation voices were fixed in the sound recording for the advertisement, and as such, they were then within the subject matter of copyright—at least as the *Laws* court had construed the concept.

Another case that would seem to be incompatible with the *Laws* holding was *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005). There, the Seventh Circuit held that model June Toney's right-of-publicity claim was not preempted by copyright where she sued the L'Oreal cosmetics company for using her image in advertising and on packaging after the expiration of L'Oreal's endorsement deal with Toney. The *Laws* court clumsily attempted to distinguish *Toney* on the grounds that the defendants in that case had each, at some point, owned the copyright to the photo bearing the plaintiff's likeness. By contrast, Sony had only licensed the "Very Special" sound recording, not owned it outright. This logic, if taken seriously, would have bizarre implications. For one, it would mean that copyright licensees have a greater ability to exploit a copyrighted work than the copyright owner does.

While the *Laws* case is impossible to make sense of on its own terms, its result, along with the results of the cases it sought to distinguish, conforms without difficulty to a three-rights framework view of the right of publicity. *Midler, Waits,* and *Toney* were each endorsement cases, thus a right-of-publicity cause of action was upheld, notwithstanding the specter of copyright preemption. The usage in *Laws*, however, does not fit as endorsement, merchandizing, or virtual impressment.

Many cases have followed the illogic of *Laws* in using copyright preemption against right-of-publicity claims. And they can be reconciled in the same way.

In *Aronson v. Dog Eat Dog Films, Inc.*, (W.D. Wash. 2010), plaintiff Ken Aronson took video of himself and a friend during a trip to England. When the video was used in Michael Moore's feature-film documentary *Sicko*, Aronson sued for copyright infringement and right-of-publicity

infringement. The court held his right-of-publicity claim was preempted by copyright since his voice and image were fixed in a copyrighted videotape.

In another 2010 case, *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146 (9th Cir. 2010), an adult film performer, director, and producer sued for right-of-publicity infringement over the unauthorized distribution and marketing of films he had made and performed in. The court held that his claim was preempted by copyright because the subject of the alleged misappropriation was "contained within a copyrighted medium."

The most sensible explanation for the maladroit reasoning in these cases is that the right of publicity's stated blackletter scope is erroneously broad, and the right of publicity does not, in fact, generally create liability for commercial exploitation of indicia of identity of natural persons. Commercial use of a person's identity in advertising does—as in the *Midler*, *Waits*, and *Toney* cases. But the gravamina of the other cases fail to fit within the advertising/endorsement ambit or within the scope of merchandizing or virtual impressment.

So, in the end, *Laws* and the cases following it got to the right result, but copyright preemption did not have—and logically could not have had—anything to do with it.

A.4. Other subtrahends

Beyond the application of free speech rights and copyright preemption, there are other means occasionally employed by the courts to avoid allowing plaintiffs to proceed where a right-of-publicity claim, though supported by the nominal blackletter doctrine, is nonetheless at odds with judicial intuition.

Many courts have applied an "incidental use" exception to the right of publicity. For instance, in *Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), a court in New Mexico cited "incidental use" in granting summary judgment for a defendant publisher who used a photograph of the plaintiff in an article about the photographer. The *Benally* use is one that would fail to establish a prima facie case under the three-rights view of the right of publicity.

Other courts seem to have selectively ignored the law or facts.

An example of selectively ignoring the law can be found in *Landham v. Lewis Galoob Toys, Inc.,* 227 F.3d 619 (6th Cir. 2000). Actor Sonny Landham sued a toy company under Kentucky law over his apparent depiction in the form of an action figure for Billy—a camo-clad, machine-gun-wielding operative whom Landham portrayed in the 1987 movie *Predator* alongside Arnold Schwarzenegger. The court affirmed summary judgment against the plaintiff's statutory right-of-publicity cause of action on the basis that the identity of the plaintiff, whom the court derided as a "fringe actor," was not shown to have "significant commercial value." In support of its assertion that the law required this showing, the court cited common law cases not considering the Kentucky statute. Yet Kentucky's statute very clearly has no requirement that a person be a celebrity or that her or his identity have significant commercial value.

B. Case: *Polydoros v. Twentieth Century Fox* (Cal. App. 1997)

B.1. Advance notes

An example of spuriously characterizing the facts of a case to avoid right-of-publicity liability can be found in *Polydoros v. Twentieth Century Fox Film Corp*., in which the California Court of Appeal considered a right-of-publicity claim brought against a studio for the film *The Sandlot.*

In the movie, a "comedic coming-of-age story set in . . . the 1960's," a new kid moves into a San Fernando, California neighborhood and tries to fit in by joining the local sandlot baseball team. Hijinks ensue. The film was well received by many. Famed film critic Roger Ebert gushed about the absorbing world created by the movie. Ironically, Ebert also wrote that the film doesn't have "any connection with the humdrum reality of the boring real world," and he saluted its ability to "tap directly into a vein of nostalgia and memory that makes reality seem puny by comparison."

Contrary to how Ebert saw it, however, plaintiff Michael Polydoros perceived a very tight connection between the movie and real life. In particular, Michael Polydoros thought his resemblance to the film's "Michael Palledorous" character was no coincidence. Polydoros had a number of compelling facts on this score. Both the plaintiff and the character grew up in a similar neighborhood in the early 1960s. Both the

plaintiff and the character played sandlot baseball with friends. Both swam in a community pool. Moreover, as the court acknowledged, "A photograph of [the plaintiff] dating from the 1960's is similar to a photograph of the Palledorous character in the movie, right down to appellant's eyeglasses and the color and design of his shirt." The character and the plaintiff also shared the characteristic—according to the court—of being "somewhat obstreperous."

Given these compelling similarities between *The Sandlot*'s world and the real world, it will come as no surprise that writer–director David Mickey Evans and the plaintiff were schoolmates when growing up.

Overall, the undisputed facts clearly showed that Polydoros's name, identity, and likeness had been appropriated. In terms of alleging a prima facie case under the blackletter law, Polydoros had it made. Under California common law, "an individual's right to publicity is invaded if another appropriates for his advantage the individual's name, image, identity or likeness." It cannot seriously be disputed that this Polydoros had proved his case by this standard. Yet the intuitive result would be that no right-of-publicity violation should lie.

The *Polydoros* court could have confronted head-on the uncomfortable breadth of the blackletter law and its failure to conform to a collective intuition about the right of publicity. It did not. Instead, the court proceeded to boldly draw one implausible factual inference after another until it reached the result that made intuitive sense.

The court explained "there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous." The court said this notwithstanding that the film portrayed events happening thirty years earlier. "No person seeing this film could confuse the two," the court then asserted—a conclusion belied by, among other things, the court's mention that after the movie people had begun calling the plaintiff by the movie character's nickname, "Squints."

The case seems preposterously reasoned. Yet *Polydoros* can be justified with reference to a particularized depiction of the right of publicity as three distinct rights. The studio's use of Polydoros's indicia of identity was neither for endorsement, nor merchandizing, nor virtual impressment.

B.2. Opinion

The following case abridgement/edit is by EEJ. For readability, liberalities have been taken with citations, footnotes, and typographical technicalities. This edit has superscript symbols to identify some of the refurbishing: ˂ and ˃ set off text originally set in a footnote.

Polydoros v. Twentieth Century Fox Film Corp.

California Court of Appeal, Second District
67 Cal. App. 4th 318 (1997)

Presiding Justice ROGER W. BOREN, opinion of the court:

A noncelebrity sued the makers and distributors of a film called The Sandlot (Twentieth Century Fox 1993), claiming that the filmmakers invaded his privacy by appropriating his name and likeness. We conclude that the filmmakers' release of a patently fictional movie did not invade the plaintiff's privacy and is, in any event, protected by constitutional guarantees of free expression. Moreover, the film is not defamatory. Accordingly, we affirm the trial court's judgment in favor of the defendant filmmakers.

Facts

In 1993, respondents released THE SANDLOT, a comedic coming-of-age story set in the San Fernando Valley in the 1960's. The film's protagonists are a motley group of boys on a sandlot baseball team who, in the course of one summer, overcome various adversaries, including a disdainful, well-funded opposing team and a gigantic, ferocious dog that has taken possession of the team's baseballs and secreted them in a neighboring yard. One of the boys on the sandlot team is a character named Michael Palledorous, nicknamed "Squints." The Palledorous character is one of the team's leaders, and spearheads the team's valiant efforts to reclaim a baseball autographed by Babe Ruth from the slavering canine next door.

Appellant Michael Polydoros grew up in a setting similar to that described in the film. Appellant was a schoolmate of respondent David Mickey Evans. Evans wrote and directed The Sandlot. A photograph of appellant dating from the 1960's is similar to a photograph of the Palledorous character in the movie, right down to appellant's eyeglasses and the color and design of his shirt. Appellant played baseball with friends on a sandlot when he was a child, swam in a community pool like the one shown in the movie, and was somewhat

obstreperous, like the "Squints" character. Other than the similarity in names and attire, the enjoyment of baseball and swimming, and the brash nature of the "Squints" character, appellant cannot point to any other aspects in which the film accurately depicts his life. Appellant concedes that the work is fiction. He also concedes that he has not been financially damaged by the motion picture.

Piqued by the similarities in name and by the physical likeness of the "Squints" character to himself as a child, appellant filed suit in March of 1994. The operative pleading asserts causes of action for commercial appropriation of identity, invasion of privacy, negligence and defamation. Appellant alleges that the nickname "Squints" used in the film "is a blatantly derogatory moniker derived from the thick glasses the character wears throughout the film" and that people began teasing appellant by calling him "Squints." Appellant felt "embarrassed and humiliated" by the nickname. To make matters worse, in appellant's view, respondents used the "Squints" Palledorous character as their principal advertising image for the film.

In January of 1996, the parties filed cross-motions for summary judgment. The trial court ruled in favor of respondents on March 25, 1996. It found that respondents are entitled to judgment because their film and the characters it portrays are protected speech under the federal and state Constitutions. The court also concluded that The Sandlot is demonstrably a work of fiction which does not defame Polydoros as a matter of law. A timely appeal was taken from the trial court's judgment.

Discussion

1. Commercial Appropriation of Identity

Appellant maintains that he can proceed with a common law claim for invasion of privacy as well as a claim under Civil Code section 3344 because respondents exploited his name and likeness for commercial gain. <Civil Code section 3344 provides, "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 ... shall be liable for any damages sustained by the person or persons injured as a result thereof."> Respondents counter that their film, as a work of fiction rather than an advertisement, is absolutely protected by the constitutional right to free speech and artistic expression. Respondents also argue that there is no evidence that they

knowingly used appellant's name or likeness for a commercial purpose, as required by section 3344. <The difference between the common law and the statutory actions is that Civil Code section 3344 requires a knowing use of the plaintiff's name or likeness, whereas mistake and inadvertence are not a defense against commercial appropriation at common law. (*Eastwood v. Superior Court*, 149 Cal.App.3d 409, 417, fn. 6 (Cal. App. 1983).)>

a. Appellant Cannot Establish the Elements of His Claim

To succeed in his claims, appellant must establish a direct connection between the use of his name or likeness and a *commercial* purpose. (*Fleet v. CBS, Inc.* 50 Cal.App.4th 1911, 1918 (Cal. App. 1996).) The law was never intended to apply to works of pure fiction: "[A]s a matter of law, mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person." (*Aguilar v. Universal City Studios, Inc.*, 174 Cal.App.3d 384, 388 (Cal. App. 1985).)

Invasion of privacy claims have been rejected by the courts when there is merely alleged to be some resemblance between an actual person and a character in a work of fiction. In *Aguilar*, for example, the plaintiff alleged that the movie Zoot Suit (Universal Pictures 1981) invaded her privacy by exposing "unsavory incidents" from her adolescence through the use of a character who shared plaintiff's surname. The court observed that the plaintiff, a grown woman, was not the 13-year-old person shown in the movie, although plaintiff was 13 at the time of the historical incident recreated in the movie. Because there was no consonance between the plaintiff's present age and the movie character's age or physical appearance, and because plaintiff's actual experiences diverged in many respects from those of the character who shared her name, no trier of fact could reasonably draw a connection between the two. (*Aguilar* at 389, 390-391.)

We find particularly compelling the reasoning in the New York case of *People v. Charles Scribner's Sons,* 130 N.Y.S.2d 514 (N.Y. Sup.Ct. 1954), which involved the interpretation of a commercial appropriation of likeness statute. <The New York statute imposed a criminal penalty on those making unauthorized commercial use of a person's name or likeness.> The complainant in that case, Joseph A. Maggio, served in the United States Army in Hawaii in the early 1940's in the same Army company as James Jones. Jones thereafter authored a successful book entitled, *From Here to Eternity* (1951) which was

made into a motion picture. The book tells a story about Army personnel stationed in Hawaii in the early 1940's. One of the characters portrayed in the book and film is called "Angelo Maggio" or "Maggio." Despite the obvious similarities in name and his former contact with the author, Maggio did not claim that the story portrayed acts performed by him: "Except for the alleged identity of name, none of the things which the character 'Angelo Maggio' does in the book, nor any of the details of the background and life of 'Angelo Maggio' as set forth in the book, are claimed by the complainant to be a portrayal of him or of his life and do not in any wise point to or identify him as the person intended or referred to." (*Charles Scribner's Sons* at 517.) As the court noted, if the author had not chosen the name "Maggio" for his fictional character, "the complainant could not by any stretch of the imagination have implied any identity of the character with himself." (*Id.* at 518.)

The court rejected the misappropriation of name charge made against the book publisher and the motion picture company. It wrote, "It is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed are fictional, but very often they grow out of real persons the author has met or observed. This is so also with respect to the places which are the setting of the novel. The end result may be so fictional as to seem wholly imaginary, but the acorn of fact is usually the progenitor of the oak, which when fully grown no longer has any resemblance to the acorn. In order to disguise the acorn and to preserve the fiction, the novelist disguises the names of the actual persons who inspired the characters in his book. Since a novel is not biography, the details of the character's life and deeds usually have, beyond possible faint outlines, no resemblance to the life and deeds of the actual person known to the author. Thus, the public has come to accept novels as pure fiction and does not attribute their characters to real life." (*Charles Scribner's Sons* at 517-518; accord, *Middlebrooks v. Curtis Publishing Company*, 413 F.2d 141, 143 (4th Cir. 1969).)

For the reasons cited in *Aguilar* and *Maggio*, the cases above, appellant cannot state a claim that respondents invaded his privacy by appropriating his name or likeness for commercial purposes. First, there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous. No person seeing this film could confuse the two. Second, the rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about appellant's

life. This is a universal theme and a concededly fictional film. The faint outlines appellant has seized upon do not transform the fiction into fact.

b. The Film Is Constitutionally Protected

Film is a "significant medium for the communication of ideas" and, whether exhibited in theaters or on television, is protected by constitutional guarantees of free expression. (*Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-502 (1952); *Guglielmi v. Spelling-Goldberg Productions,* 25 Cal.3d 860, 865 (Cal. 1979).) Popular entertainment is entitled to the same constitutional protection as the exposition of political ideas: "It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories." (*Guglielmi* at 867.)

The plaintiff in *Guglielmi* was the nephew of deceased silent picture star Rudolph Valentino and had a proprietary interest in the commercial use of Valentino's name and likeness. He sued the defendants after they exhibited a film purporting to recreate a portion of the life of Valentino using Valentino's name, likeness and personality. Plaintiff alleged that the film did not truthfully portray Valentino's life and that Valentino's name and likeness were used to sell or commercially exploit the film for defendants' profit. (*Guglielmi* at 862.)

At the heart of *Guglielmi* was the fictional nature of the film exhibited by the defendants. Four justices of the Supreme Court agreed that plaintiff was protected by the common law right of publicity. Nevertheless, the context and nature of the defendants' use of Valentino's name and likeness in a *fictional* work of art, even if created *for financial gain*, was protected by the constitutional right to free expression, the justices concluded. (*Id.* at 864-865, 868-870.) They observed, "The First Amendment is not limited to those who publish without charge. Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit. The fact that respondents sought to profit from the production and exhibition of a film utilizing Valentino's name and likeness is not constitutionally significant." (*Guglielmi* at 868-869.)

Guglielmi unequivocally prevents appellant from proceeding on his claim for commercial appropriation of identity. There is no question that The Sandlot is a fanciful work of fiction and imagination. In the movie, the dog next door to the sandlot assumes the

proportions of a grizzly bear (having been magnified by the boys' fear); baseball hero Babe Ruth appears and offers advice (notwithstanding Ruth's death some 20 years before the movie takes place); the dog's owner just happens to be a former teammate of Babe Ruth; the "Squints" character fakes his own drowning death in order to sneak a kiss from the pretty female lifeguard, and so on. Appellant does not attempt to suggest that any of this is true or actually happened to him. <*Guglielmi* states, "Whether respondents' work constitutes a serious appraisal of [appellant's] stature or mere fantasy is a judgment left to the reader or viewer, not the courts." (*Guglielmi* at 870.) While conceding that The Sandlot is fantasy, appellant posits that he should be able to dictate the screenplay himself rather than leaving it to the imagination of the author: Appellant testified, "I had absolutely no say so in the direction this character took who was me. I had absolutely no say so in the events or in the actions that the character did. I had no say so on how he spoke or anything that he did."> Because the film is obvious fantasy, appellant could not reasonably suffer injury to his feelings or his peace of mind. (See *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 542 (Cal. App. 1993).) This film is not a portrait of appellant's life and reveals no private facts about appellant: His name and former physical appearance are not private facts.

Appellant is especially vexed because respondents used photographs of "his" character in particular to advertise and promote public viewing of The Sandlot. This issue is addressed in *Guglielmi.* A filmmaker's use of photographs of an actor resembling an actual personage to promote a fictional work is "merely an adjunct to the exhibition of the film." (*Guglielmi v. Spelling-Goldberg Productions*, *supra*, 25 Cal.3d at p. 872.) "Having established that any interest in financial gain in producing the film did not affect the constitutional stature of respondents' undertaking, it is of no moment that the advertisements may have increased the profitability of the film. It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise. Since the use of Valentino's name and likeness in the film was not an actionable infringement of Valentino's right of publicity, the use of his identity in advertisements for the film is similarly not actionable." (*Guglielmi* at 873; accord, *Cher v. Forum Intern., Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) and *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 797 (Cal. App. 1995) (advertising to promote a story is protected by the First Amendment

and is not actionable under an appropriation of publicity theory so long as the advertising does not claim that the story subject endorses the news medium).)

In sum, appellant is not entitled to recover under a commercial appropriation of name or likeness theory merely because respondents used a name that sounds like appellant's name or employed an actor who resembles appellant at the age of 10. Because respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected. This right was not diminished when respondents advertised then sold their work as mass public entertainment.

2. Negligence

{*Editor's note:* The court addressed Polydoros's negligence claim, which it tersely rejected based on defendants' free-expression rights.}

3. Defamation

{*Editor's note:* The court rejected Polydoros's defamation claim on the basis that "this film is manifestly not about appellant" and that "[r]hetorical hyperbole and vigorous epithets are not defamatory[.]"}

Disposition

The judgment is affirmed.

Fukuto, J., and Nott, J., concurred.

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