What You Don’t Know Can Hurt You: Right of Publicity Claims in a Digital Age

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What Is The Right Of Publicity (ROP)?

The right of a person to control commercial use of his/her identity, and to prohibit unauthorized commercial appropriation by others.
Why Should You Care About ROP?
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A Shoe In!

After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

Jewel-Osco
Good things are just around the corner.
Why Should You Care About ROP?
Legal Foundation of ROP

- *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) – originated "right of publicity" term
Legal Foundation of ROP: State Laws
Legal Foundation of ROP: Persons Protected (Generally)

Celebrities

Non-Celebrities

Deceased Persons
Elements of a ROP Claim

1. Defendant’s use or appropriation of plaintiff’s identity;

2. For commercial purposes or to defendant’s commercial advantage;

3. Without plaintiff’s consent; and

4. Resulting injury

*Stewart v. Rolling Stone, LLC, 181 Cal. App. 4th 664 (2010)*
State ROP Statute: California

“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, . . . or for purposes of advertising or selling, or soliciting purchases of products . . . or services, without such person’s prior consent, . . . shall be liable . . .”

CAL. CIV. CODE § 3344 (West 2016)
State ROP Statute: New York

“All any person whose name, portrait, picture, or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . .”

N.Y. CIV. RIGHTS LAW § 51 (West 2016)
Aspects of Identity Protected by ROP: Names

Abdul-Jabbar v. Gen. Motors, 85 F.3d 407 (9th Cir. 1996) (use of former name Lew Alcindor in GM car ad)
Aspects of Identity Protected by ROP: Names

Carson v. Here’s Johnny Portable Toilets, 698 F.2d 831 (6th Cir. 1983) (catch phrase used with porta-potties)
Aspects of Identity Protected by ROP: Names

*Hirsch v. S.C. Johnson & Son, Inc.,* 90 Wis. 2d 379 (Wis. 1979) (nickname “Crazylegs”)
Aspects of Identity Protected by ROP: Likeness and Image

*White v. Samsung Electronics*, 971 F.2d 1395 (9th Cir. 1992) (look alike Vanna White robot; $403,000 verdict)
Aspects of Identity Protected by ROP: Likeness and Image

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Aspects of Identity Protected by ROP: Voice

Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992)
(Tom Waits voice sound-alike in Dorito ad; $2.5 million verdict)
Aspects of Identity Protected by ROP: Several

(alleged misappropriation of name, image, and song lyrics)
Use of Identity In Social Media

Love a quick #DuaneReade run? Even @KatieHeigl can’t resist shopping #NYC’s favorite drugstore bit.ly/1gLHctl pic.twitter.com/uGTc3k1Mii
Element of ROP Claim: Commercial Use of Identity

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(dismissed; non-commercial speech)

Reversed, 743 F.3d 509 (7th Cir. 2014)
(commercial speech; serves commercial function of enhancing image of brand)
Element of ROP Claim: Commercial Use of Identity

Dominick’s trial: $8.9 million verdict
Permissible Tribute Ad?

Baby, that was much too fast.

1958 - 2016
Defenses: First Amendment

• News and public interest reporting

• Artistic works/entertainment

• Parody
Defenses: First Amendment

*ETW v. Jireh Publishing*, 332 F.3d 915 (6th Cir. 2003) (freedom of artistic expression outweighs right of publicity)
Defenses: First Amendment

*Winter v. DC Comics*, 30 Cal. 4th 881 (Cal. 2003) (comic’s depictions of musicians Johnny and Edgar Winters had significant expressive content)
Defense: Fleeting or Incidental Use


- *Amazon v. Cannondale*, No. 00CV02063, 2006 WL 650682 (D. Colo. Mar. 10, 2006) (bike catalog with small photos of plaintiff as member of sponsored bike team)
Defense: Fleeting or Incidental Use

Remedies for Violation of ROP

• Injunction

• Compensatory Damages

• Disgorgement of profits (some states)

• Punitive Damages
Damages Awards: Celebrities:

- White v. Samsung: $403,000
- Waits v. Frito-Lay: $2.5 million
- Hoffman v. Capital Cities: $3.27 million (reversed)
- Woody Allen v. American Apparel: $5 million (settlement)
- Jordan v. Safeway: $8.9 million
- Tony Twist v. Todd McFarlane: $15 million
Damages Awards: Non-celebrities

- Del Amo v. Baccash: $10,500 (model photos used on adult website)
- Campbell v. Van Nieulande: $136,943 (photo in newspaper ad for hair co.)
- Banks v. Charter Hospital: $269,500 (patient's image in hospital ad)
- Christoff v. Nestle: $15.6 million (model used on Taster's Choice coffee containers) (reversed)
Lanham Act False Endorsement Claim

- 15 U.S.C. § 1125(a) prohibits unauthorized use of person’s identity in manner that is likely to confuse consumers into falsely believing that the person approves, sponsors, or endorses defendant’s goods or services
**Lanham Act False Endorsement Claim**


- National Video franchise chain runs ads with Woody Allen look-alike Phil Boroff

- No violation of N.Y. right of publicity

- Amounts to false endorsement
FTC Rules Re: Endorsements and Testimonials in Advertising

• Endorsements must be honest and not misleading

• Connection b/w endorser and seller must be disclosed

16 C.F.R. Part 255
FTC Rules Re: Endorsements and Testimonials in Advertising
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FTC Enforcement Action against Lord & Taylor
Implied Consent
Expressed Consent

Everybody knows I love #MyMom!
@1800flowers Mother's Day is on Sunday!
Love your momma! Love u @pattiemallette
- bit.ly/YmJAJ1

Thanks @blackjet for the flight to Silicon Valley! #wecantstop

after idol auds i stopped by @Ford, got to drive their private track... no traffic, no speed limit! Fav new toy @FordFusion
Compensation
Exclusivity
Indemnity Clause
Brand Indemnification

• IP Protection

• Celebrity activities
Celebrity Indemnification

• Actions of Company
• Failure of product to perform
• General claims
Celebrities that have lost endorsements
Celebrities that have lost endorsements
Item 18 of FDD
Peyton Manning, a well-known professional football player, owns an interest in a “Papa John's” franchisee in the Denver market. Before investing in that franchise, Mr. Manning signed a limited-time endorsement agreement with us, under which he agreed to appear in television commercials to promote “Papa John's” products and our brand to consumers in exchange for compensation. Beginning in October 2012, on a very limited basis, Mr. Manning has also recommended our franchises to prospective franchisees. Mr. Manning is not involved in the management or control of the franchisor and has made no investment in the franchisor.
Hypotheticals time
What if.....
What if...

• ...a celebrity comes into your restaurant and a customer takes a photo of the celebrity eating and posts it on her Facebook page?

• ...the franchise owner of that unit re-posts the picture?

• ...the franchisor then re-posts the picture on the main brand Facebook page?
Any Changes to anyone’s answer if....

• ...the owner of the franchise unit is the one that takes the picture directly?

• ...the celebrity is “posing” or actually taking an action shot of the person taking a bite of a food?

• ...celebrity consents to photo use on social media in exchange for $500?
Thank You!

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