RIGHT OF PUBLICITY CLAIMS IN A DIGITAL AGE

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The right of publicity is the right of a person to control the commercial exploitation of his or her identity (e.g., name, image, likeness, and voice) and prevent its commercial appropriation by others without permission. At first blush, this may sound like an area of the law that is not important to franchise businesses. But in today’s digital age of ubiquitous cell phone cameras, instant posting, tweeting, pinning, snapping, and sharing (and reposting, retweeting, repinning, etc.), and expanding social media platforms in which both businesses and celebrities are promoting their brands, understanding right of publicity law is important to virtually all businesses.

In today’s world, a person’s name, image, and likeness can be instantly disseminated (and redisseminated) on the Internet and throughout social media, along with accompanying messages, at a pace that could not have been imagined five or ten years ago. Just imagine how things would have been different in that classic 1986 movie – “Ferris Bueller’s Day Off” – when the teacher (played by Ben Stein) is calling role and asks for Mr. Bueller and Simone replies “My best friend’s sister’s boyfriend’s brother’s girlfriend heard from this guy who knows this kid who’s going with a girl who saw Ferris pass-out at 31 Flavors last night.” A simple review of any class member’s Snapchat account could easily tell where Ferris was!

However, the ability to take and instantly disseminate and redisseminate photographs can be potentially dangerous – legally speaking. The act of a business or brand (either at the store level or corporate or franchisor level) posting, tweeting, or “liking” the photographic image and/or name of a person can implicate a number of legal issues; such as, copyright issues, due to the need to have permission to use the photo; false endorsement issues, due to the perception that the person is somehow endorsing the brand’s product or service; or potentially right of privacy issues if the post communicates private or embarrassing information.2 Of course, there could also be a right of publicity issue – which, after all, is the topic of this paper!

The following examples illustrate the expanding reach of right of publicity law in our digital age.

*First example* - Justin Bieber eats lunch at a franchised restaurant location. Another patron snaps a photo of Bieber on her cell phone and posts it on her social media platforms to be seen by her family, friends from home, college, and swim team, and every other person she has had a digital connection with over the past 10 years. The Bieber photo is reposted dozens of times, including to an employee of the franchisee in whose restaurant Bieber was dining, who then reposts to the franchisee, who reposts to the franchisor. The franchisor posts the Bieber photo on its Facebook page to show the type of celebrities who eat at its restaurants, and the franchisee proudly tweets that “Justin Bieber loves the free range turkey burger at BurgerWorld’s Jacksonville location.”

What could possibly be wrong with this? Putting aside the copyright issues arising from the franchisor’s failing to get approval from the photographer to use her photo for commercial

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1 The authors would like to thank Elizabeth Falconer, a summer associate in Nelson Mullins’ Atlanta office, for her valuable assistance in helping to research and draft this paper.

2 Copyright and right of privacy issues are not the subject of this paper, but are mentioned to identify the type of legal issues that can arise in this situation.
purposes, Bieber almost certainly has a valid claim against both the franchisor and franchisee for violation of his right of publicity. He may also have a valid false endorsement claim against one or both, if the content of the post and tweet falsely suggest that Bieber is endorsing the restaurant chain or a particular menu item. After all, although businesses have a brand to promote and protect, so do celebrities: they promote and shape their brand by selecting the businesses with which their identity (i.e., their personal brand) will be associated, and protect that brand through right of publicity and false endorsement claims if their identity is used without permission.

Now take the same scenario as the last one, except that the photograph is of five non-celebrity members of a women’s softball team celebrating their team’s championship by having dinner and drinks at the franchisee’s restaurant, and it is this photo that is reposted to an employee of the franchisor who reposts it on the franchisor’s Facebook page to show the good times that are had at BurgerWorld restaurants. Shouldn’t this be OK, as no celebrities are involved and there appears to be no harm? The answer is – probably not. In most states ordinary citizens (i.e., non-celebrities) have a right of publicity that is violated, and for which damages can be sought, if aspects of their identity are used for commercial purposes without their permission.3

Speaking of damages, violations of a person’s right of publicity can result in substantial damages awards, particularly when celebrities are involved. Just ask Safeway, against whom Michael Jordan was awarded an $8.9 million damages award in 2015 after its Dominick’s grocery chain ran a tribute ad on behalf of MJ, without his permission, on the occasion of his entry into the NBA Hall of Fame.4

Do we have your attention now? Good! This paper provides an overview of right of publicity law, including the types of persons and aspects of identity protected, the elements of a claim for violation of the right, and available defenses and remedies. It also summarizes the related claim for false endorsement under Section 43(a) of the Lanham Act, and discusses examples of right of publicity and false endorsement scenarios, issues, verdicts and settlements from case law and news reports, including those involving social media, and briefly summarizes Federal Trade Commission endorsement regulations. Finally, we discuss ways to obtain consent for use of a person’s identity, and terms and conditions that are generally addressed and memorialized in celebrity endorsement agreements. The appendix includes a state by state chart identifying state right of publicity statutes and key cases addressing right of publicity claims.

I. RIGHT OF PUBLICITY LAW – OVERVIEW

A. The Legal Foundation of the Right of Publicity

The right of publicity is generally defined as the right of a person to control the commercial uses of his/her identity by prohibiting unauthorized commercial appropriation by others. In other words, the right of publicity accords persons an economic property right in their

3 This hypothetical would also raise a copyright issue, and could potentially give rise to a false endorsement claim, although it can be difficult for non-celebrities to maintain false endorsement claims.

4 See discussion of Jordan case, infra at Section I.E.2.
names and likeness so they may “profit from the full commercial value of their identities.”

Protected aspects of a person’s identity can include an individual’s name, image, likeness, and voice.

Rights of publicity are not protected under federal law, but by sometimes conflicting state laws developed in part from common law and statutory invasion of privacy torts. Over time, society began to recognize personal identity as a form of personal property warranting protection from unauthorized commercial exploitation. The term “right of publicity” originated in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, when the Second Circuit felt compelled to differentiate professional baseball players’ privacy rights from their commercial rights to grant a company the exclusive right to use their photographs on baseball cards. The court’s decision precluded Topps from printing baseball cards bearing player’s images without the player’s permission and/or in violation of contracts some of the players had signed with the plaintiff giving it exclusive rights to publish player’s photos in connection with sale of gum.

The right of publicity recognizes that a person’s identity has economic value worthy of protection. As a property right, the right can be transferred or licensed, and in many states, will survive a person’s death.

Currently, at least 37 states recognize the right to publicity in some form. Among these states, the legal framework for protection varies, with some states providing protection only under statute, some only under common law, and some under both statutory and common law. At least seven additional states recognize the common law tort of invasion of privacy by appropriation of likeness, which is similar to a right of publicity claim.

22 states have statutes that provide for and delineate the scope of individual’s rights of publicity and remedies for violations of the right. These include California and New York, where right of publicity jurisprudence is of particular significance because many celebrities, whose identities can have considerable commercial value, reside there.

**B. The Right of Publicity Contrasted with Rights of Privacy, Trademark and Copyright**

The right of publicity evolved from but is distinct from the right of privacy, which generally protects against extensive or unwarranted invasion of a person’s privacy or public disclosure of

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5 *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

6 202 F.2d 866, 868 (2d Cir. 1953) (“We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else. This right might be called a ‘right of publicity.’”).


8 See, e.g., CAL. CIVIL CODE § 3344.1 (West 2016).

9 The appendix to this paper includes a table identifying, by state, right of publicity statutes and certain case law addressing claims for right of publicity and for the similar claim of invasion of privacy by appropriation of likeness.
private and embarrassing information about a person.\textsuperscript{10} As Justice Brandeis said, the right of privacy relates to a person’s “right to be left alone.”\textsuperscript{11} Although privacy claims generally provide a remedy for mental distress or harm resulting from unauthorized commercial use of a person’s identity, the right of publicity is largely concerned with harm to a person’s economic interests in their identity.\textsuperscript{12} Although many states differentiate between the right of privacy and right of publicity, some states’ laws conflate the two. For example, in New York the right of publicity exists as part of New York’s right of privacy statute,\textsuperscript{13} which has resulted in inconsistent court decisions regarding the nature and scope of the two rights.

Right of publicity law bears some resemblance to trademark law, as both fall within the family of unfair competition laws. However, there are important differences. Trademarks are words, symbols, or other indicia that distinctively identify and distinguish the commercial source and origin of products and services, and trademark law prohibits a party from misappropriating another’s marks, or similar variations thereof, in a manner that is likely to confuse or deceive the public. By contrast, the right of publicity protects a person’s individual identity from being misappropriated by others for commercial purposes.\textsuperscript{14}

Copyright applies to the bundle of rights one acquires in “original works of authorship fixed in any tangible medium of expression.”\textsuperscript{15} The right of publicity has little to do with copyright, but both right of publicity and copyright issues can be implicated in a single usage of a work of authorship. For example, an advertisement featuring a celebrity’s photograph may require authorization from the photographer for copyright use, and from the celebrity for commercial use of his or her identity.

C. Persons Protected by the Right of Publicity

Among states recognizing the right of publicity, the majority rule is that all natural living persons possess a right of publicity.\textsuperscript{16} Some courts have held that the right is limited to celebrities and other personas that have demonstrable commercial value.\textsuperscript{17} Furthermore,


\textsuperscript{11} Id.

\textsuperscript{12} See generally McCarthy on Right of Publicity, supra note 7, at § 5:63. “Simplistically put, while the appropriation branch of the right of privacy is invaded by an injury to the psyche, the right of publicity is infringed by an injury to the pocketbook.” Id.

\textsuperscript{13} N.Y. CIV. RIGHTS LAW § 50 (West 2016).

\textsuperscript{14} See McCarthy on Trademarks, supra note 10, at § 28.8.

\textsuperscript{15} 17 U.S.C. § 102(a).

\textsuperscript{16} See KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 367, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000), (finding that “[a]lthough the unauthorized appropriation of an obscure plaintiff's name, voice, signature, photograph, or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California's appropriation statute is not limited to celebrity plaintiffs.); See generally McCarthy on Right of Publicity, supra note 7.

\textsuperscript{17} See, e.g., Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir. 2000) (“In sum, Landham has not demonstrated—either through direct evidence or by virtue of Galoob’s use of the ‘Billy’ character—that his persona has 'significant commercial value' or that the ‘Billy’ toy invokes his own persona, as distinct from that of the fictional character. For these reasons, we affirm the district court’s grant of summary judgment to Defendants on this claim.”);
although some state statutes limit protection to identities with commercial value,\textsuperscript{18} some courts presume that an identity has commercial value when it is used without permission for commercial purposes.\textsuperscript{19} Additionally, some statutes afford special protection to members of armed services.\textsuperscript{20}

The majority of the states that recognize a right of publicity extends that right to deceased individuals, but that right may be limited in duration or subject to additional requirements. For example, California recognizes a 70-year postmortem right of publicity, but that protection is limited to a deceased personality, such as a celebrity.\textsuperscript{21} California defines a deceased personality as any natural person who, at the time of or because of their death, has commercial value in any of their name, voice, signature, photograph, likeness.\textsuperscript{22}

Pennsylvania law grants individuals the exclusive right to their name and likeness, which includes voice.\textsuperscript{23} The state law further provides that “[a]ny natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without consent may sue for an injunction and damages.”\textsuperscript{24} A deceased individual's estate may bring such an action, although the right only lasts for thirty years postmortem.\textsuperscript{25} New York does not recognize a postmortem right because the right of publicity is part of the statutory right of privacy; therefore, the right is viewed as a personal right that does not survive death.\textsuperscript{26}

\textit{Pesina v. Midway Mfg. Co.}, 948 F. Supp. 40, 42 (N. D. Ill. 1996) (“There is no evidence that Mr. Pesina's name, likeness, or persona had [commercial value] prior to the plaintiff's association with Mortal Kombat and Mortal Kombat II, and the plaintiff's expert admits as much.”).

\textsuperscript{18} See, e.g., IND. CODE § 32-36-1-6 (West 2016); OHIO REV. CODE § 2741.01(A) (West 2015-16).

\textsuperscript{19}\textit{Canessa v. Kislak, Inc.}, 97 N.J. Super. 327, 353, 235 A.2d 62, 76 (N.J. Super. 1967). (“The reality of a case such as we have here is, in the court's opinion, simply this: plaintiffs' names and likenesses belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit.”).

\textsuperscript{20} Several states, including Arizona and Oklahoma, provide criminal penalties for certain unauthorized commercial uses of the identity of members of the armed services. See ARIZ. REV. STAT. § 13-3726 (West 2016); OKLA. STAT. tit. 21, § 839.1A (West 2016). Notably, Arizona's protection is limited to deceased soldiers. ARIZ. REV. STAT. § 13-3726(A).

\textsuperscript{21} CAL. CIV. CODE §§ 3344.1(a)(1) and 3344.1(g) (West 2016). Further, a deceased personality does not have to be commercially exploited during an individual's lifetime, but the California statute requires registration of postmortem rights ownership claims in order to recover monetary damages in a court action. Registration of postmortem rights involves filing a form with the Secretary of State and paying a fee. See id. § 3344.1(f).

\textsuperscript{22} CAL. CIV. CODE § 3344.1(h) (West 2016).

\textsuperscript{23} 42 PA. CONS. STAT. ANN. § 8316 (West 2015).

\textsuperscript{24} Id. at § 8316(a).

\textsuperscript{25} Id. at § 8316(a)-(c).

\textsuperscript{26} See \textit{Mirone v. MacMillan}, 894 F.2d 579, 585 (2d Cir. 1990). However, in May of 2015 recent legislation was introduced to provide for a 70-year postmortem right. The legislation has not been passed and was referred to the judiciary on January 6, 2016. New York State Assembly, Bill NO A07904, available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07904&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited July 20, 2016).
Some states that recognize a postmortem right impose certain requirements for acquiring, maintaining or enforcing the postmortem right. For example, one federal district court held that, for a common law postmortem right to exist, the person must have exploited her publicity rights during her life.\textsuperscript{27} Other states require a continuing use.\textsuperscript{28}

Generally speaking, corporations and other business entities do not have any right of publicity. However, these entities may own or use publicity rights of individuals under assignment, waiver or license agreements.\textsuperscript{29}

Some states have extended the right of publicity to musical groups comprised of multiple members. In the 1990s, a cover band was sued for use of the group name “The Beatles.”\textsuperscript{30} The defendant argued that Tennessee’s Personal Rights Protection Act only applied to individuals, but the court held “[t]o read Tennessee’s statute in that way would result in a perversion of its intent. Certainly, the stage name of a group of individuals is entitled to the same protection as the name of one of the individuals which compose that group.”\textsuperscript{31}

D. Aspects of Identity Protected Under Publicity Laws

The specific aspects of identity protected by the right to publicity can vary by state, but most states protect at least an individual’s name, photographic image, likeness, and voice. State right of publicity statutes often define exactly what encompasses a person’s “identity.” For example, Nevada’s statute protects “the name, voice, photograph, or likeness of a person….”\textsuperscript{32} New York’s statute protects “name, portrait, picture or voice.”\textsuperscript{33}

Some statutes and cases have extended protection beyond the aspects of name, image, likeness, and voice to include various other aspects of one’s identity. For example, Indiana’s statute protects distinct gestures and mannerisms.\textsuperscript{34} The Illinois Right of Publicity Act defines

\textsuperscript{27} See Nature’s Way Prods., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245, 252 (D. Utah 1990) (finding that “[t]his court is persuaded that if faced with this issue, the Utah Supreme Court would recognize a common law right of publicity cause of action, and that it would follow what appears to be the majority and modern rule that the common law right of publicity survives the death of the subject person in cases where he or she transferred or otherwise exploited such rights while alive.

\textsuperscript{28} The Tennessee statute provides for an initial ten-year postmortem right that can be extended indefinitely provided that the deceased individual’s name, likeness or image is continuously used for commercial purposes after the initial ten-year term. However, the right will terminate if it is not used for any two-year period following the ten-year term. See TENN. CODE Ann. § 47-25-1104 (West 2016).

\textsuperscript{29} See generally McCarthy on Right of Publicity, supra note 7, at §§ 10:1-10:81.

\textsuperscript{30} Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342, 348 (M.D. Tenn. 1993) (“Defendants also argue that Tenn. Code Ann. § 47–25–1105(a) [Tennessee’s Personal Rights Protection Act] cannot apply to the use of the group name ‘The Beatles’ because that statute only protects ‘individuals.’

\textsuperscript{31} Id. (“[T]his Court finds that Defendants’ use of the name ‘The Beatles’ in Defendants’ advertising and promotional materials violates Tenn. Code Ann. § 47–25–1105(a)

\textsuperscript{32} NEV. REV. STAT. §§ 597.770 (West 2015).

\textsuperscript{33} N.Y. CIV. RIGHTS LAW § 51 (West 2016).

\textsuperscript{34} IND. CODE. § 32-36-1-1 (West 2016).
identity as “any attribute of an individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.” The California courts have held that California’s common law right of publicity protects celebrities from appropriations of their identity not strictly definable as “name or picture.” The Ninth Circuit held that the use of a combination of elements, such as hair style and manner of dress, can violate California’s common law right of publicity, which protects a broader aspect of identity than that expressly protected by the statute.

1. Names

Protectable names can include proper names, nicknames, character names, former names, and catch phrases.

- *Hirsch v. S.C. Johnson & Son, Inc.*: former football player’s nickname “Crazylegs.”
- *Carson v. Here’s Johnny Portable Toilets, Inc.*: Tonight Show host Johnny Carson’s catchphrase “Here’s Johnny.”

35 765 ILL. COMP. STAT. § 1075/1-60 (West 2016).

36 See, e.g., *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (use of famous race car driver’s well-known race car in televised cigarette ad was sufficient to constitute an appropriation of driver’s identity).

37 *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (“[T]he common law right of publicity reaches means of appropriation other than name or likeness […] the specific means of appropriation are relevant only for determining whether the defendant has in fact appropriated the plaintiff’s identity. The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable.”).

38 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978) (“Even a cursory inspection of the picture which is the subject of this action strongly suggests that the facial characteristics of the black male portrayed are those of Muhammad Ali. The cheekbones, broad nose and wideset brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of the plaintiff, one of the most widely known athletes of our time. In addition, the figure depicted is seated on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side. Although the picture is captioned ‘Mystery Man,’ the identification of the individual as Ali is further implied by an accompanying verse which refers to the figure as “the Greatest”. This court may take judicial notice that plaintiff Ali has regularly claimed that appellation for himself and that his efforts to identify himself in the public mind as ‘the Greatest’ have been so successful that he is regularly identified as such in the news media.”).

39 “We hold that Abdul–Jabbar has alleged sufficient facts to state a claim under both California common law and section 3344. The statute’s reference to “name or likeness” is not limited to present or current use. To the extent GMC’s use of the plaintiff’s birth name attracted television viewers’ attention, GMC gained a commercial advantage.” *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996).

40 Johnson used “Crazylegs” on shaving gel and the court held: “The fact that the name, “Crazylegs,” used by Johnson, was a nickname rather than Hirsch’s actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action.” *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 397-98, 280 N.W.2d 129, 137 (1979).

41 *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983)(“[T]he public tends to associate the words “Johnny Carson”, the words “Here’s Johnny” with plaintiff, John Carson and, Mr. Braxton, in his deposition, admitted that he knew that and probably absent that identification, he would not have chosen it.”).
2. Image and Likeness

Protectable images depicting an individual can include photographs, sketches, computer generated images, and even use of celebrity look-alikes or robot look-alikes.

- **Onassis v. Christian Dior**: magazine ad containing a look-alike of Jackie Onassis.\(^{44}\)
- **Kim Kardashian v. Gap, Inc.**: commercial featuring a look-alike of Kim Kardashian.\(^ {45}\)
- **White v. Samsung Electronics**: advertisement featuring Vanna White look-alike robot.\(^ {46}\)
- **Wendt v. Host Int'l**: animatronic robot figurines modeled after characters from *Cheers* TV show.\(^ {47}\)
- **Burck v. Mars, Inc**: M&M commercial featuring cartoon M&M’s mimicking various New York icons, including the naked cowboy (aka Burck) (finding no right of publicity violation).\(^ {48}\)

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\(^{42}\) “The district court held, in effect, that an actor who portrays a character in such a manner that the character becomes inextricably intertwined with the individual, to such an extent that the individual comes to utilize the character’s name as his own, has no proprietary interest in the exploitation of the name or image. We disagree. At its heart, the value of the right of publicity is associational. People link the person with the items the person endorses and, if that person is famous, that link has value.” *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994).

\(^{43}\) “Donchez has not presented any evidence to establish that he, as opposed to the character he created, is a celebrity. Second, and relatedly, Donchez is not claiming that Coors used his personal likeness to its commercial advantage. Rather, Donchez is claiming that Coors used the term “beerman,” as well as certain characteristics similar to his “Bob the Beerman” character, to its commercial advantage. See *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624-25 (6th Cir. 2000) (noting “the focus of any right of publicity analysis must always be on the actor's own persona and not the character’s”). Finally, a review of the Coors’ commercials reveals that none of the beer vending characters portrayed therein bear a close resemblance to Donchez. The district court properly granted summary judgment in favor of defendants on Donchez’s right of publicity claim.” *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1220-21 (10th Cir. 2004).

\(^{44}\) A New York court “held that the advertisement was an appropriation without consent of the well-known personality's “portrait or picture” for advertising and trade in violation of civil rights statute prohibiting such misappropriations, even though the picture was that of a “look-alike” model rather than of the well-known personality herself.” *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984), aff'd, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1985).


\(^{46}\) *White*, 971 F.2d at 1397–99 (The court determined that use of robot dressed like Vanna White next to a “Wheel of Fortune” mock set sufficiently identified her to state a cause of action under California common, but not statutory, law.).

\(^{47}\) The court found “fact issues existed as to actors’ claim that their statutory and common law right of publicity was violated.” *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997)
violation under New York statute, but denying motion to dismiss Lanham Act false endorsement claim).48

3. Voice

Courts have held that the use of sound-alike voices can violate an individual’s right to publicity.49

- *Waits v. Frito Lay*: radio commercial using an imitation of Tom Waits voice.50
- *Midler v. Ford Motor Co.*: sound-alike sang Bette Midler song in Ford commercial.51

In 2004, the estate of Grateful Dead guitarist and lead singer Jerry Garcia sued the Moe’s Southwest Grill franchise chain, alleging violations of Garcia’s right of publicity and false endorsement through unauthorized use of Garcia’s name, image and song lyrics.52 At the time, the décor of Moe’s restaurants featured paintings of deceased musicians and entertainers including Garcia, Janis Joplin, Jim Morrison, Bob Marley, and Elvis Presley, whose names were used as the inspiration for names of menu items (the “Alfredo Garcia” was a fajita dish) and whose modified song lyrics appeared below their painted images (below Garcia’s image was the following modified lyric from the Grateful Dead’s well known *Casey Jones* song: “Trouble Ahead, Trouble Behind, Just Have My Taco Ready On Time”). Not appreciating the humor in Moe’s approach, Garcia’s estate alleged that “Defendant’s widespread misappropriation of Mr. Garcia’s likeness, song lyrics, and name have turned the internationally famous musician, artist, and founder of the ‘Grateful Dead’ band . . . into little more than a taco huckster, in complete disregard for the licensing policies carefully developed and guarded by his successors.”53 This case settled for undisclosed terms, and the Moe’s chain eventually modified its décor to

48 *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 454 (S.D.N.Y. 2008) (“Here, there was no attempt to create a portrait or picture of Burck himself. Rather, the purportedly infringing images were M & M characters wearing Burck’s signature outfit. The images were not portraits or pictures of Burck as The Naked Cowboy, but of M & Ms dressed as The Naked Cowboy. Thus, they do not violate sections 50 and 51, and accordingly, Burck’s right of privacy claim is dismissed.).

49 See, e.g., *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337, 349 (D.N.J. 2000) (“The Court is persuaded by those cases holding that imitating a celebrity’s voice can give rise to a cause of action for violation of the right of publicity, and concludes that the New Jersey courts would adopt such a rule.”).

50 “[W]e agree with the district court that the ‘great weight of evidence produced at trial indicates that Tom Waits is very widely known.’ In sum, we find no error in the instructions given to the jury on Waits’ voice misappropriation claim.” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992), abrogated by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

51 “We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. Midler has made a showing, sufficient to defeat summary judgment, that the defendants here for their own profit in selling their product did appropriate part of her identity.” *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988).

52 *Jerry Garcia Estate LLC v. Moe’s Southwest Grill, LLC*, U.S. District Court for the Northern District of Georgia, Civil Action No. 1:04-cv-359 (Amended Complaint filed April 14, 2005).

53 *Id.*, Amended Complaint at ¶ 2.
eliminate use of the celebrity images and changed its menu names to draw from tv, movie, and popular culture.\textsuperscript{54}

E. \textbf{Elements of a Claim for Violation of the Right of Publicity}

The specific requirements for proving a right of publicity infringement varies by state, but a violation generally consists of unauthorized use of a protected aspect of identity for commercial purposes. In most states, 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.''

Statutory right of publicity claims involve similar elements. For a California statutory claim, a plaintiff must prove the elements of the common law cause of action for commercial misappropriation, in addition to proving that the defendant knowingly used the plaintiff’s name and that there is a connection between the use of the name and the commercial purpose.\textsuperscript{56} In New York, a plaintiff must prove (1) use of his/her name, portrait, or picture, (2) for commercial or trade purposes, (3) without written permission, and (4) “with the additional requirement that the plaintiff have developed a property interest with a monetary value in his or her name or face.”\textsuperscript{57} The Supreme Court in Georgia has held that in order to bring a common law appropriation of likeness claim, the plaintiff must prove: ``(1) the appropriation of another’s name and likeness, whether such likeness be a photograph or other reproduction of the person’s likeness, (2) without consent, and (3) for the financial gain of the appropriator.”\textsuperscript{58}

Additionally, some states, such as New York, require that the infringement occur within the state.\textsuperscript{59} Other states, such as Ohio, require that the individual whose identity is being unlawfully used reside within the state.\textsuperscript{60}

\textsuperscript{54} For example, the names of the “Art Vandalay” burrito and “Close Talker” salad come from \textit{Seinfeld} television episodes, and the “John Coctostan” quesadilla is a reference from the movie \textit{Fletch}.

\textsuperscript{55} \textit{Stewart v. Rolling Stone LLC}, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98, 111 (2010); see also \textit{White v. Samsung Elecs. Am., Inc.}, 971 F.2d 1395, 1398 (9th Cir. 1992); \textit{Newcombe v. Adolf Coors Co.}, 157 F.3d 686, 691-92 (9th Cir. 1998); \textit{Prima v. Darden Restaurants, Inc.}, 78 F. Supp. 2d 337, 339 (D.N.J. 2000) (”[T]he plaintiff must be able to prove that she ‘owns an enforceable right in the identity or persona of [Louis Prima],’ and that the defendants ‘without permission, ... used some aspect of identity or persona in such a way that [Louis Prima] is identifiable from defendant[s'] use, and that the ‘defendant [s'] use is likely to cause damage to the commercial value of that persona.’”).

\textsuperscript{56} The California statute prohibits “[u]se of another’s name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes.” CAL. CIV. CODE § 3344 (West 2016). See, e.g., \textit{Downing v. Abercrombie & Fitch}, 265 F.3d 994, 1001 (9th Cir.2001); \textit{Blue v. Johnson}, No. C 07-05370 SI, 2008 WL 2024995, at *7 (N.D. Cal. May 9, 2008).


\textsuperscript{58} \textit{Bullard v. MRA Holding, LLC}, 292 Ga. 748, 752, 740 S.E.2d 622, 626 (2013) (internal quotations and brackets omitted).

\textsuperscript{59} See \textit{N.Y. CIV. RIGHTS LAW} § 51 (West 2016).

\textsuperscript{60} See \textit{OHIO REV. CODE} § 2741.03 (West 2015-16).
The Restatement (Third) of Unfair Competition recognizes a cause of action for violation of a person's right of publicity, stating that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate.”\(^{61}\) A person’s identity is used “for purpose of trade” if used “in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user.”\(^{62}\)

Some states that have not expressly recognized a right of publicity claim have recognized the similar common law tort of invasion of privacy by appropriation of likeness, as one type of invasion of privacy recognized by the Restatement (Second) of Torts.\(^{63}\)

1. **Use of Plaintiff’s Identity**

To succeed on a right of publicity claim, a plaintiff's identity must be identifiable through the defendant's use.\(^{64}\) When in doubt, the issue of whether a persona is identifiable is a question of fact. Forms of evidence of an identifiable persona may include unsolicited recognition by the public, surveys showing that the identity is recognizable from that use,\(^{65}\) and contextual elements suggesting a particular identity.\(^{66}\)

In an interesting factual situation, the Ninth Circuit concluded that a Samsung commercial featuring a robot wearing a blonde wig placed in front of a game board resembling that of Wheel of Fortune violated letter-turner Vanna White's right of publicity even though “Samsung did not use a likeness of her. The performer depicted in the commercial advertisement is unmistakably a lifeless robot.”\(^{67}\) The court reasoned that the common law right of publicity was not limited to the appropriation of name or likeness, emphasizing that it is not

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\(^{61}\) Restatement (Third) of Unfair Competition, § 46.

\(^{62}\) Id. § 47.

\(^{63}\) Restatement (Second) of Torts, §§ 652A(2)(b), 652C. See **Lawrence v. A.S. Abell Co.**, 299 Md. 697, 702 (Md. App. 1984) (explaining that the invasion of privacy by appropriation tort protects an individual's interest in exclusive use of his identity from appropriation by another to advertise his business or product or for similar commercial purpose); **Brasel v. Hair Co.**, 976 So.2d 390 (Miss. App. 2008) (elements of appropriation claim are the defendant's appropriation of plaintiff's name or likeness, without plaintiff's consent, and use in a commercial enterprise.

\(^{64}\) The element of identifiability can vary drastically from state to state. Compare **IND. CODE** § 36-1-6 (2002) (stating use of “gesture” or “mannerisms” can serve to identify) with **N.Y. CIV. RIGHTS LAW** § 51 (West 2016) (limiting identifiability to use of name, portrait, picture, or voice). See also **Leval v. Prudential Health Care Plan, Inc.**, 610 F. Supp. 279, 281 (N.D. Ill. 1985) (the plaintiff alleging unauthorized use of his likeness must show that the likeness was recognizable.).

\(^{65}\) “Thus, after comparing Mr. Pesina and the game character, Johnny Cage, who allegedly resembles the plaintiff, only 6% of 306 Mortal Kombat users identified Mr. Pesina as the model.” **Pesina v. Midway Mfg. Co.**, 948 F. Supp. 40, 42 (N.D. Ill. 1996).

\(^{66}\) See generally McCarthy on Right of Publicity, supra note 7, at § 3:22; see also Restatement Third, Unfair Competition § 46, comment d (1995) (“Relevant evidence includes the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience").

\(^{67}\) **White v. Samsung Elecs. Am., Inc.**, 971 F.2d 1395, 1408 (9th Cir. 1992).
important how defendants appropriated plaintiff's identity, but whether or not defendant had in fact misappropriated the plaintiff's identity.

a. **Identity in social media contexts.**

In the age of digital images and social media, it is now easier than ever to misappropriate the identity or image of another on the Internet. The use of someone's name, image, and/or likeness on Facebook and Twitter profiles meets even the narrowest test for whether the use identifies an individual. In such cases, issues of commerciality and consent are becoming more important in publicity rights cases.

For example, in April 2014, drug store chain Duane Reade posted a picture on Twitter and Facebook of actress Katherine Heigl carrying a Duane Reade shopping bag. The tweet read:

> Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore http://bit.ly/1gLHctI

Heigl promptly filed a six million dollar lawsuit against Duane Reade claiming the store had violated her right to publicity. According to Heigl's attorney, after Duane Reade removed the objectionable content and "made a contribution to benefit the Jason Debus Heigl Foundation," Heigl "voluntarily dismissed her lawsuit" and "[t]he parties [] agreed to keep the terms of the agreement confidential."  

In 2009, an individual created a fake Twitter account for then St. Louis Cardinals manager Tony La Russa who, in response, filed suit claiming a violation of his publicity rights based on the Twitter profile that used both his name and a photo of him taken after an arrest for driving under the influence. However, La Russa eventually withdrew the suit, apparently without any payment being made, demonstrating that even when a plaintiff's name and likeness is clearly misused, it can still be difficult to succeed on a right of publicity claim based on social media platforms if there is an absence of any apparent commercial purpose and the possibility of a successful affirmative First Amendment defense.

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69 Id.


71 Notice of Dismissal of Complaint with Prejudice, La Russa v. Twitter, Inc., No. 09-2503 (N.D. Cal. June 26, 2009) ("No payment was made by Twitter to La Russa in exchange for this dismissal.").

72 See infra Section I.F., Defenses/Exemptions.
In 2011, Facebook launched a Sponsored Stories feature on its website.\(^{73}\) Sponsored Stories functioned by creating customized paid advertisements, starring its own users, based on the user's activity on the site. For example, if John Doe "liked" Rosetta Stone, anyone within his network of "friends" might see his profile picture featured underneath a Rosetta Stone logo on the right side of the page—the portion where advertisements appeared.\(^{74}\)

In 2012, a class action was filed against Facebook because of its Sponsored Stories feature. The plaintiffs described the feature as, "a new form of advertising which drafted millions of [Facebook members] as unpaid and unknowing spokespersons for various products," therefore violating their rights of publicity.\(^{75}\) Mark Zuckerberg, Facebook’s CEO and founder, on the other hand, described the function as a "trusted referral" or "the Holy Grail of advertising."\(^{76}\) Further, the plaintiffs alleged that Facebook itself represented “that friend endorsements have more than double the value of a generic advertisement, and that Facebook profited from selling this added value to advertisers.”\(^{77}\) The plaintiffs asserted class action claims for misappropriation of Facebook users' rights of publicity, alleging that the use of their identities provided Facebook with a commercial benefit of which the users themselves were being deprived.\(^{78}\) In its defense, Facebook asserted that the use was authorized because the users had agreed to Facebook’s Terms of Use and could chose to opt-out of the Sponsored Stories provision.\(^{79}\)

The trial court did not determine whether such use was in fact authorized, but allowed the suit to survive Facebook’s motions to dismiss.\(^{80}\) Before the issue of consent could be resolved, the class action was settled for 20 million dollars.\(^{81}\) This suit sheds light on the contractual issue of consent in the context of social media platforms, leaving open the issue of whether this type of commercial use is authorized.

In 2011, an Illinois federal court decided *Maremont v. Susan Fredman Design Group, Ltd.*, an early decision involving social media platforms and the right of publicity.\(^{82}\) In *Maremont*, the plaintiff was in charge of writing blog posts for a company's website, posting links to these blog posts on her personal Twitter and Facebook accounts.\(^{83}\) After the plaintiff was in a car

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\(^{73}\) See *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).

\(^{74}\) *Id.* at 791-92.

\(^{75}\) *Id.* at 792.

\(^{76}\) *Id.*

\(^{77}\) *Id.*

\(^{78}\) *Id.* at 796-800.

\(^{79}\) *Id.* at 805.

\(^{80}\) *Id.* at 815.


\(^{83}\) *Id.* at *2*-3.
accident, leaving her unable to write the blog posts, her co-workers assumed the role—writing the blogs as well as tweeting the links from the plaintiff's personal Twitter account. In response, the plaintiff sued the company for violating her right of publicity when it assumed her personal Twitter account. The court held that the company did not violate her right of publicity because she could not prove "appropriation" of her name or likeness, as required under Illinois' Right of Publicity Act.

2. **Commercial Use**

As discussed, the right of publicity protects unauthorized uses of a person's identity for commercial purposes. Absent commercial use of someone's persona, there can be no liability.

As an example, the Illinois Right of Publicity Act defines commercial use as "the public use or holding out of an individuals' identity (1) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (2) for purposes of advertising or promoting products, merchandise, goods, or services; or (3) for the purpose of fundraising." Most state statutes set out specific types of prohibited commercial uses. For example, California's statute specifically prohibits unauthorized uses of identity on products, merchandise or goods, and for purposes of advertising or selling products, merchandise, or goods.

As these statutes indicate, the right of publicity is violated when a person's name or likeness is used on a product, as well as in advertising. For example, in *Fifty-Six Hope Road Music v. A.V.E.L.A, Inc.*, the defendant was found to have violated Bob Marley's right of publicity by designing, manufacturing and selling t-shirts bearing Marley's image, likeness, and other manifestations of his identity. In *Hillerich & Bradsby Co. v. Christian Bros.*, the court granted a preliminary injunction prohibiting the unauthorized use of professional hockey player Mark Messier's prominently displaced signature on defendant's hockey sticks.

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84 Id. at *1.
85 Id.
86 Id. at *7.
87 However, in the absence of a commercial purpose, the right of privacy may be still implicated because the right does not focus on commercial interests. *See Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984).
88 765 ILL. COMP. STAT. § 1075/5 (West 2016).
89 *See CAL. CIV. CODE §§ 3344(a) and 3344.1(a)(1) (West 2016). However, the California right of publicity statute provides that if material is simply commercially sponsored or contains paid advertising that is not a sufficient basis on which to impose liability. Id. Under California common law, a valid claim can be asserted if a person's identity is appropriated for the defendant's advantage, "commercially or otherwise." Eastwood v. Superior Court, 149 Cal. App.3d 409, 198 Cal. Rptr. 342 (Cal. App. 2d Dist. 1983). (emphasis added).
91 *Hillerich & Bradsby Co. v. Christian Bros.*, 943 F. Supp. 1136, 1138 (D. Minn. 1996) ("Christian Brothers was selling its Pro–Rite hockey blades with the name 'Messier' clearly affixed on the blade and UPC label without permission from H & B, Messier, or Messier Management.").
Use of protected aspects of identity for a non-commercial purpose will generally fall outside the scope of the law. For example, in New York, the courts have consistently observed that violations of publicity rights “are to be strictly limited to nonconsensual commercial appropriations.”\(^\text{92}\) The statute was “drafted narrowly to encompass only the commercial use of an individual’s name or likeness and no more.”\(^\text{93}\)

However, determining whether an activity is for a commercial or non-commercial purpose sometimes can be difficult. For example, on the occasion of Michael Jordan’s entry into the NBA Hall of Fame, Chicago’s Jewel/Osco grocery chain ran a full page tribute ad to Jordan. The ad included the Jewel/Osco logo and a pair of basketball shoes bearing Jordan’s well-known number 23, and read:

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 Chicagoman who was “just around the corner” for so many years.\(^\text{94}\)

Unfortunately, Michael Jordan did not view this as a welcome celebratory gesture but as a misappropriation of his identity for Jewel/Osco’s commercial benefit. He filed a lawsuit alleging a violation of his right of publicity and for false endorsement under the Lanham Act. The district court dismissed his claims, finding that the ad was non-commercial speech protected by the First Amendment.\(^\text{95}\) But the Seventh Circuit reversed on appeal, holding that the tribute ad had a commercial function of enhancing the image of the Jewel/Osco brand, and broadly stating that “an ad congratulating a famous athlete can only be understood as a promotional device for the advertiser.”\(^\text{96}\) Jewel/Osco eventually reached a confidential settlement with Jordan, after Jordan won an $8.9 million verdict in a trial of the same claims alleged against another Chicago grocery chain (Dominick’s) that had run a different Jordan tribute ad in the same Sports Illustrated commemorative issue.\(^\text{97}\)

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\(^{92}\) Finger v. Omni Publications Int’l, Ltd., 77 N.Y.2d 138, 141, 566 N.E.2d 141, 143 (1990) (emphasis added); See Beverley v. Choices Women’s Med. Ctr., Inc., 78 N.Y.2d 745, 751, 587 N.E.2d 275, 278 (1991) (holding that “[t]he pervasive and prominent placement of Choices’ name, logo, address and telephone number on each page of the calendar, the wide scope of distribution of the calendar and the range and nature of the targeted audiences, and the glowing characterizations and endorsements concerning the services Choices provides, leave no doubt that the calendar is commonly recognized as quintessential advertising material.” Therefore, “we also conclude that plaintiff’s photo, name and professional title were used ‘for advertising purposes’ in a manner forbidden by Civil Rights Law § 51.”); see also Kane v. Orange Cty. Publ’ns, 649 N.Y.S.2d 23, 25, 232 A.D. 2d 526, 527 (N.Y. App. Div. 1996) (determining use for purposes of trade involves analyzing whether the use would draw trade to the defendant.).


\(^{94}\) See image of ad at http://3.bp.blogspot.com/-x9l80hJYOQ/UwYB00E-Z9I/AAAAAAAABok/MXXstBlJnZI/s1600/jewel1.png


\(^{96}\) Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 518 (7th Cir. 2014).

\(^{97}\) http://www.theproducenews.com/component/content/article/9-news-section/story-cat/17552-michael-jordan-and-jewel-osco-settle-lawsuit-after-8-9-million-decision-against-safeway. The Dominick’s ad was more blatantly
In 2006, more than twenty years after the passing of John Facenda, NFL Films used voice clips of this famous NFL announcer in a promotional documentary about the making of the Madden NFL videogame.98 Facenda's estate sued, arguing that he had never given NFL films the right to use his voice for promotional endorsement purposes.99 The court ruled in favor of Facenda, finding that the documentary was commercial in nature and that the claim was not barred by the First Amendment.100

In the 1980s, Dustin Hoffman starred in the movie “Tootsie,” playing an actor who dresses as a woman in order to get a part on a soap opera. Nearly twenty years later, Los Angeles Magazine (LAM) published an article titled “Grand Illusions” that used “computer technology to alter famous film stills to make it appear that the actors were wearing Spring 1997 fashions.”101 Hoffman filed suit, alleging that “the altered photograph misappropriated Hoffman's name and likeness.”102 LAM asserted a First Amendment defense and the district court initially “concluded that the magazine article was commercial speech not entitled to constitutional protection.”103 However, on appeal, the Ninth Circuit disagreed, concluding that:

LAM did not use Hoffman's image in a traditional advertisement printed merely for the purpose of selling a particular product. Insofar as the record shows, LAM did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message.104

3. Lack of Consent

A right of publicity claim will not succeed if the defendant has obtained appropriate consent from the rights owner. For consent to be a viable defense, the consent must cover the specific use at issue and comply with any specific state requirements. Some states require that


99 Id. (“The Estate also claims that the program was an unauthorized use of Facenda's name or likeness in violation of Pennsylvania's 'right of publicity' statute.”).

100 Id. at 1025 (“The District Court held that the NFL violated this statute with its use of Facenda's voice because (a) his voice's commercial value was not disputed, (b) the NFL used his voice for a commercial purpose, and (c) the standard release Facenda signed did not consent to the use of his voice in endorsements. Facenda, 488 F. Supp. 2d at 502. We agree that the NFL has violated § 8316 on its face for precisely the reasons provided by the District Court[].”)


102 Id.

103 Id. at 1184.

104 Id. at 1185.
consent be in writing,\textsuperscript{105} while others, such as California, allow consent to be inferred from the words and conduct of the parties.\textsuperscript{106}

As demonstrated in the \textit{Fraley} Facebook case, questions about consent can be contentious in right of publicity claims. For example, can a single click of a mouse amount to consent? Furthermore, can a single click constitute \textit{written} consent, under a statute such as the Illinois Right of Publicity Act that requires written consent?\textsuperscript{107} Courts have held that click through agreements generally are a valid form of consent so long as users have notice that the click constitutes acceptance of specific terms.\textsuperscript{108}

With the expansive growth of social media in the digital age, \textit{Fraley} demonstrates a “trend in users demanding more reasonable terms, more transparency, and more direct control over applications that threaten to infringe their publicity rights.”\textsuperscript{109}

4. \textbf{Damages/Harm}

Knowledge or intent to use a person’s identity generally is not required when asserting a violation of the right of publicity.\textsuperscript{110} However, intent may be relevant to damages, particularly punitive or exemplary damages. Furthermore, proof of actual damage to an individual, or commercial gain by the infringer, is generally not required for liability. For monetary recovery, proof of actual damages is often but not always required, while injunctive relief may be issued without proof of actually damages.\textsuperscript{111}

\textsuperscript{105} See, e.g., 765 ILL. COMP. STAT. §§ 1075/15; 1075/20; 1075/30; 1075/35 (West 2016).

\textsuperscript{106} Consent to use a name or likeness may be implied from the consenting party’s conduct and the circumstances of the case. \textit{See Newton v. Thomason}, 22 F.3d 1455, 1461 (9th Cir. 1994) (granting summary judgment to defendant in right of publicity suit because plaintiff failed to show a lack of consent even though plaintiff never consented in writing because plaintiff nonetheless expressed excitement about the use of his likeness and did not object to the use of his likeness for over several months.).

\textsuperscript{107} \textit{See} 765 ILL. COMP. STAT. §§ 1075/15; 1075/20; 1075/30; 1075/35 (West 2016).


\textsuperscript{110} An exception to this general rule is stated in the California living persons statute, which provides for liability against a defendant who \textit{knowingly} uses protected aspects of identity. CAL CIV. CODE § 3344(a) (West 2016) (emphasis added). To succeed on a § 3344 claim, a plaintiff must prove the elements of the common law cause of action for commercial misappropriation, in addition to proving that the defendant knowingly used the plaintiff's name and that there is a direct connection between the use of the name and the commercial purpose. \textit{See Downing v. Abercrombie \& Fitch}, 265 F.3d 994, 1001 (9th Cir. 2001). However, California courts have interpreted the knowledge requirement narrowly to mean mere knowledge of lack of consent at any time during the course of use. For example, the receipt of a written objection satisfies the requirement. \textit{See Blue v. Johnson}, No. C 07-05370, 2008 WL 2024995, at *7 (N.D. Cal. May 9, 2008) ("While it is true that plaintiff has not put forth any evidence suggesting that defendant knowingly used plaintiff's name in 2000 or 2001, plaintiff can establish that defendant knowingly used plaintiff's name without plaintiff's consent at least beginning in December 2006, when the parties were in communication regarding defendant's use of the name 'Violet Blue.'").

\textsuperscript{111} \textit{See generally} McCarthy on Right of Publicity, \textit{supra} note 7 ("There is no necessity to "prove" some actual commercial damage to identity or persona in order to establish a claim for liability. Rather, as with other fields of
The amount of damages and monetary relief awarded in verdicts or settlements in right of publicity cases can be substantial, especially when celebrities are involved. See list of illustrative examples in Section I.G, infra.

F. Defenses/Exemptions

Just as prohibited conduct varies from state to state, exemptions and defenses to a right of publicity claim will also depend on laws of the state and the particular facts of each case. Both the common law and state statutes provide various defenses to and/or exemptions from a right of publicity claim.

Use of a person’s identity in expressive or informational activities are generally exempt from right of publicity liability, as they are typically protected under the First Amendment. The Restatement (Third) of Unfair Competition explains that right of publicity liability generally does not attach for use of a person’s identity “in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”112

Activity falling outside the scope of a state’s defined prohibited conduct will be exempt from liability. For example, the California statute exempts uses of identity in connection with news, public affairs, sports broadcast, and political campaigns.113 The Nevada right of publicity statute excludes several uses from liability including uses in “an attempt to portray, imitate, simulate or impersonate a person in a live performance[,]” “in connection with a news, public affairs or sports broadcast or publication[,]” and “in connection with an original work of art except that multiple editions of such a work of art require consent.”114

The most common defenses and exceptions provided for in state statutes and/or recognized by the courts are for newsworthiness, artistic or expressive works, and incidental uses.

1. Newsworthiness/Public Interest Exception

When the media uses another’s identity in reporting on newsworthy events or public interest matters, such use falls outside the scope of publicity claims because such uses are not for commercial purposes or trade.

In Finger v. Omni Publ’ns Int’l, two parents and their children filed suit against Omni magazine seeking damages for the commercial publication, without their consent, of a family photograph in conjunction with an article discussing a research project on caffeine-aided fertilization.115 The magazine moved to dismiss the complaint, “arguing that its use of the photograph in conjunction with the article […] was not used for trade or advertising but to intellectual property, such as trademark law, it is not necessary for plaintiff to prove actual damage or injury to obtain injunctive relief.”). See generally discussion of remedies, infra Section I.G.

112 Restatement (Third) of Unfair Competition, § 47.

113 CAL. CIV. CODE §§ 3344(d) and 3344.1(j) (West 2016).

114 See NEV. REV. STAT. § 597.790 (a)-(g) (West 2015).

Although the New York statute did not define “purposes of trade” or “advertising,” the court emphasized that “courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest.” The court held that nonconsensual publication of photograph in connection with a feature article discussing research project relating to caffeine-aided fertilization did not violate the New York statute, as use of the photograph did not amount to commercial exploitation of the family’s name and likeness.

However, a right of publicity violation may occur when a news story uses the entire value of a performer's act. In Zacchini v. Scripps-Howard Broadcasting Co, a local television news channel broadcast Hugo Zacchini's entire “human cannonball” act. The case went all the way to the U.S. Supreme Court, which held that the unauthorized broadcasting violated Zacchini's right of publicity, explaining that:

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'

2. **Other First Amendment Defenses: Artistic Use, Parody, Entertainment**

The United States Supreme Court has directed that state law rights of publicity must be balanced against First Amendment considerations. First Amendment defenses have been successful in cases where a person's identity was used in artistic works, as parody, and for entertainment purposes.

116 *Id.* at 140-41.

117 *Id.*

118 *Id.* at 141.

119 *433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).*

120 *433 U.S. at 575-76, 97 S. Ct. at 2857, 53 L. Ed. 2d 965 (1977) (quoting Kalven, *Privacy in Tort Law Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326, 331 (1966)).* The Supreme Court explained that if "respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property." *Id.*, *433 U.S. at 569.*

121 *Zacchini, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).*
a. **Artistic Works**

The First Amendment defense has been successful where significant transformative creative components have been added to the use of the identity.” For example, in *Winter v. DC Comics*, the court applied a balancing test to comic books containing characters resembling rock musician brothers Johnny and Edgar Winter and concluded that the comics were not “conventional depictions of plaintiffs but contain[ed] significant expressive content other than plaintiffs' mere likenesses.” As a result, the comic books were entitled to First Amendment protection.

In the late 1990s, famous sports artist Rick Rush painted *The Masters of Augusta*, commemorating Tiger Wood's victory at the Masters Tournament in 1997 with a painting which included three views of Woods in different poses. Rush's publisher marketed and sold limited edition prints of the painting. In response, Wood's licensing agent filed suit alleging a violation of Woods' right of publicity. The Sixth Circuit ruled against Woods, concluding that “[a]fter balancing the societal and personal interests embodied in the First Amendment against Woods's property rights, we conclude that the effect of limiting Woods's right of publicity in this case is negligible and significantly outweighed by society's interest in freedom of artistic expression.”

However, in *Facenda*, the court rejected the NFL's argument that using Facenda's distinctive voice in a documentary promoting the making of “Madden” video football game was an artistic choice entitled to First Amendment protection.

b. **Parody**

In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, Cardtoons brought an action to obtain a declaratory judgment that its parody trading cards featuring caricatures of MLB players did not infringe on baseball players' publicity rights. Addressing Cardtoons' First Amendment argument, the Tenth Circuit held:

Cardtoons' parody trading cards receive full protection under the First Amendment. The cards provide social commentary on public figures, major

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122 *Winter v. DC Comics*, 30 Cal. 4th 881, 886-890, 69 P.3d 473, 476-79 (2003) (“We developed a test to determine whether a work merely appropriates a celebrity's economic value, and thus is not entitled to First Amendment protection, or has been transformed into a creative product that the First Amendment protects.”).

123 *Id.* at 480.


125 *Id.* at 938. ("[H]ere Rush has added a significant creative component of his own to Woods' identity. Permitting Woods's right of publicity to trump Rush's right of freedom of expression would extinguish Rush's right to profit from his creative enterprise.”).

126 “The NFL posits that its program, taken as a whole, is a work of artistic expression, and that the producers' use of the particular sound clips at issue in this case represented an artistic choice.” *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1016 (3d Cir. 2008).

league baseball players, who are involved in a significant commercial enterprise, major league baseball. 128

The La Russa fake Twitter account stated, in the use profile, “[b]io parodies are fun for everyone,” 129 a fact that might have weighed in favor of finding that the Twitter handle was being used for parody and not in a commercial manner.

c. Entertainment

The First Amendment defense has been successful when aspects of athletes' identities were used in statistical web content for entertainment purposes. For example, a fantasy baseball website made extensive use of players' names and other identifying information, and yet the court affirmed the website's free speech rights and upheld the use as permissible. 130

The United States Supreme Court has held that “[v]ideo games qualify for First Amendment protection.” 131 However, many courts have rejected the First Amendment defense in right of publicity cases involving use of celebrities' likeness in video games. Following a series of cases filed by former football players against video game manufacturer Electronic Arts, the United States Court of Appeals for the Third 132 and Ninth 133 Circuits held that the players' likenesses in the games were insufficiently transformative for First Amendment protection because the games accurately depicted the players' physical features and characteristics in the very setting where they are known to the public (playing football). This led EA to reach a $40 million settlement of a class action filed on behalf of current and former NCAA football and basketball players. 134

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128 Id. at 969 (concluding that Cardtoons' First Amendment right to free expression outweighs MLBPA's proprietary right of publicity).

129 La Russa Complaint, supra note 70, at Exhibit A.

130 C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007) ("[W]e hold that CBS's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity.").


132 Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (3d. Cir. 2013) ("We therefore hold that the NCAA Football 2004, 2005 and 2006 games at issue in this case do not sufficiently transform Appellant's identity to escape the right of publicity claim and hold that the District Court erred in granted summary judgment in favor of Appellee. While we do hold that the only apparent use of Appellant's likeness in NCAA Football 2009 (the photograph) is protected by the First Amendment, Appellant's overall claim for violation of his right of publicity should have survived Appellee's motion for summary judgment.").

133 See In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013) ("Under California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment."); See also Davis v. Elec. Arts Inc., 775 F.3d 1172, 1181 (9th Cir. 2015), cert. denied, 136 S. Ct. 1448 (2016) ("EA has not shown that its unauthorized use of former players' likenesses in the Madden NFL video game series qualifies for First Amendment protection under the transformative use defense, the public interest defense, the Rogers test or the incidental use defense.").

Similarly, a California court rejected a video game manufacturer’s First Amendment defense against the band No Doubt’s right of publicity claim concerning depiction of their likenesses in the video game Rock Band.\footnote{No Doubt v. Activision Publ’g, Inc., 192 Cal. App. 4th 1018, 1040, 122 Cal. Rptr. 3d 397, 415 (2011) ("[W]e have already concluded that Activision’s use of No Doubt’s avatars is not “transformative” because the avatars are simply precise computer-generated reproductions of the band members that do not meld with the other elements of Band Hero to become, in essence, Activision’s own artistic expression.").}

3. **Incidental/Fleeting Use Exception**

Incidental or negligible use of an identity that has a minimal commercial impact is often exempt from liability.\footnote{See generally McCarthy on the Right of Publicity, supra note 7, at § 7:20.} These “insignificant” uses do not trigger liability because “such a usage will have only a de minimis commercial implication.”\footnote{McCarthy on Trademarks, supra note 10, at § 28:7.50.} Whether the incidental use doctrine is applicable is determined by the role that the use plays with respect to the entire publication.\footnote{Ladany v. William Morrow & Co., 465 F. Supp. 870, 882 (S.D.N.Y.1978).} A number of factors are relevant in this regard: (1) whether the use has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.\footnote{For examples of incidental/fleeting uses see the following: Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116, 119 (S.D.N.Y.1991) ("Whether a use falls within this exception to liability is determined by the role that the use of the plaintiff’s name or likeness plays in the main purpose and subject of the work at issue."); Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 894–895, 118 Cal. Rptr. 370, 381 (Cal. App. 1975) (holding that the republication of an article about plaintiff in a textbook was not directly connected to the sale of the textbook); Stayart v. Google Inc., 710 F.3d 719, 723 (7th Cir. 2013) ("For use of a person’s name for advertising or trade purposes to be actionable ... there must be a substantial rather than an incidental connection between the use and the defendant's commercial purpose." (internal quotation marks omitted)); Yeager v. Cingular Wireless, LLC, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009) ("The rationale underlying this doctrine is that an incidental use has no commercial value.").}

For example, one New York court held that the brief mentioning of a consultant's name in a trade journal did not violate the New York right of publicity statute because the use was “fleeting and incidental.”\footnote{Marks v. Elephant Walk, Inc., 156 A.D.2d 432, 434, 548 N.Y.S.2d 549, 551-52 (1989) ("It is well settled that where, as here, a reference to an individual is “fleeting and incidental”, it will not be actionable as a nonconsensual use of that person's name for the purpose of advertising or trade.").} Another New York court concluded that a photo of a former medical student in a hospital brochure "could hardly have been more ‘incidental,’ both as a matter of New York law and common sense, where the plaintiff was one of 42 people whose photos appeared in the brochure."\footnote{D’Andrea v. Rafia-Demetrious, 972 F. Supp. 154, 157-58 (E.D.N.Y. 1997), aff’d, 146 F.3d 63 (2d Cir. 1998).} A Colorado court found that defendant's bicycle catalog containing “three small photographs” of the plaintiff as a member of a sponsored bike team did not satisfy
the necessary elements for a misappropriation of plaintiff's right of publicity claim because the
defendant "did not receive any benefit from this minimal use."

As another example, in 1969, Rolling Stone Magazine published a special issue entitled
"American Revolution 1969," with a cover which depicted a photograph of a police officer
holding a billy club kneeling over a student protester. In 1993, a 29 minute infomercial
promoting the "Rolling Stone Collection" rock music anthology aired, and "[a]pproximately six
minutes into the program[,] [t]he cover appears on the screen for approximately four seconds
and disappears into the montage of other sights and sounds in the infomercial." The police
officer depicted on the cover filed a right of publicity claim under California law. The court held
that defendant's use of plaintiff's picture was incidental and therefore did not support a claim,
reasoning that "[the photograph] is one of dozens of Rolling Stone covers used in the program
and is insignificant to the commercial purpose of selling the music anthology. It is inconceivable
that commercial profits could inure to Defendants as a result of this fleeting and inconsequential
use."

To contrast, in Facenda, the court rejected an incidental use defense, concluding that:
"[e]ven taking into account the importance of the script that Facenda narrated, it is difficult to
believe that the 'voice of God,' was used only incidentally. It is more credible that his film clips
were selected to enhance the parallel between Madden NFL and NFL football." An Arizona
court found that the use of a doctor's name in press releases located on websites advertising a
specific medication did not fall within the incidental use exception, as such use was intended to
promote Naturally Vitamin's commercial purposes.

4. **Statute of Limitations**

A majority of states apply a statute of limitations to right of publicity claims. The
limitation period varies from state to state, but they typically range from one to six years.
Notably, most states follow the single publication rule, meaning that a single publication, such
as a magazine or Internet publication, "gives rise to only one cause of action, which accrues on
the date of first distribution to the public."

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144 Id. at *1.
145 Id. at *3.
148 See generally McCarthy on Right of Publicity, supra note 7, at § 11:39.
G. **Remedies**

Although the remedies for a right of publicity violation vary by state, injunctive and monetary relief are routinely awarded for violations.

1. **Injunctive Relief**

An injunction is typically sought to stop a right of publicity violation. Courts have held that injunctive relief is appropriate because harm to a person's interest in his or her identity cannot be adequately remedied through money damages.\(^\text{149}\)

2. **Monetary Relief**

Monetary relief available for right of publicity violations can include compensatory damages, recovery of an infringer's profits, and punitive damages.\(^\text{150}\) “The plaintiff in a right to publicity action is not required to show that the defendant made money off the commercial use of the name or likeness.”\(^\text{151}\) Furthermore, “[a] claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.”\(^\text{152}\)

   a. **Compensatory Damages**

   Compensatory damages may include market value of the unauthorized identity use and damages for injury to professional reputation and income prospects.\(^\text{153}\) In cases (typically involving non-celebrities) where actual damages are not calculable, some state right of publicity statutes provide for statutory minimum damages. For example, the California statute provides for a minimum of $750.\(^\text{154}\) Indiana's statute provides statutory minimum damages of $1,000.\(^\text{155}\)

   b. **Infringer's Profits**

Several state statutes authorize recovery of the infringer's profits. For example, California's statute authorizes an award of profits attributable to the violation that are not taken

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\(^{149}\) Several courts have held that a celebrity's property interest in his name and likeness is unique, and cannot be adequately compensated by money damages. *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y.1978); *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1283 (D. Minn. 1970); *see generally* McCarthy on Right of Publicity, *supra* note 7, at § 11.6[B].

\(^{150}\) The Restatement (Third) of Unfair Competition, §§ 48, 49, provides that a plaintiff whose right of publicity is violated can obtain injunctive relief, and monetary relief for loss caused by the misappropriation of identity or for a disgorgement of the defendant's gain resulting from the misappropriation, whichever is greater.


\(^{153}\) *See generally* McCarthy on Right of Publicity, *supra* note 7, at §§11:30-11:33.

\(^{154}\) *CAL. CIV. CODE* § 3344(a) (West 2016).

\(^{155}\) *IND. CODE* § 32-36-1-10 (West 2016).
into account in the actual damages calculation.\textsuperscript{156} The Restatement (Third) states: “One who is liable for an appropriation of the commercial value of another’s identity is liable for the pecuniary loss to the other caused by the appropriation or for the actor’s own pecuniary gain resulting from the appropriation, whichever is greater, unless such relief is precluded by an applicable statute or is otherwise inappropriate[.]”\textsuperscript{157}

c. **Punitive Damages**

The availability of punitive damages is addressed by state statutes and common law, with most permitting awards of punitive damages for right of publicity violations. California courts apply a statutory requirement that “oppression, fraud or malice” is required for an award of punitive damages, determining that a conscious disregard of the injured party’s rights will support a punitive damage award in a common law right of publicity case.\textsuperscript{158} In New York, if the infringer knowingly used a protected aspect of identity in violation of the statute, then it is within a jury’s discretion whether to award punitive damages. In Cohen v. Hallmark Cards, Inc., the court held that this knowledge requirement can be satisfied if the infringer continues to misuse the identity after receiving an objection from the injured party.\textsuperscript{159}

3. **Examples of Damages and Monetary Relief Awarded**

Settlement agreements and jury verdicts have provided for a wide range of damages and monetary awards based on the unauthorized use of another's image. Some verdicts have been substantial, especially for celebrities.\textsuperscript{160}

a. **Celebrities**

- \textit{White v. Samsung Electronics America, Inc.}: $403,000 verdict for ad depicting a robot that appropriated the image of Vanna White.\textsuperscript{161}
- \textit{Midler v. Ford Motor Co.}: $400,000 verdict for a sound alike of Bette Midler’s voice.\textsuperscript{162}
- \textit{Waits v. Frito-Lay, Inc.}: $2,500,000 for use of a sound-alike voice in a Dorito’s radio ad, consisting of $100,000 for fair market value of Wait’s services; $200,000 for injury to his

\textsuperscript{156} In California, the injured party need only prove gross revenue attributable to the use and the infringer must prove deductible expenses. CAL. CIV. CODE § 3344(a) (West 2016).

\textsuperscript{157} Restatement (Third) of Unfair Competition, § 49.

\textsuperscript{158} Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1104 (9th Cir. 1992).

\textsuperscript{159} 382 N.E.2d 1145 (N.Y. 1978).

\textsuperscript{160} Some of the verdicts and settlement amounts reported below were taken from the article by Robert O'Brien and Bela Lugosi. \textit{Update to the Commercial value of Rights of Publicity: A Picture is Worth a Thousand Words…or Sometimes a Million Dollars}, Vol. 27 ENTERTAINMENT AND SPORTS LAWYER (Fall 2009), available at, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjPhvCW9oLOAhXLuB4KHapTD0QFghMAA&url=http%3A%2F%2Fstatic1.1.sqspcdn.com%2Fstatic%2Ff%2F632462%2F2F21304803%2F13558699631470%2FABA_ESL_09.pdf%3Ftoken%3D3DJeMHlWFv4VUmSENhj7E3vhzTf54%253D&usg=AFQjCNFG7V0cQdNHkPTDQcvzW73zesLWxw (last visited July 20, 2016).

\textsuperscript{161} 971 F.2d 1395 (9th Cir. 1992)

\textsuperscript{162} 849 F.2d 460 (9th Cir. 1989)
peace, happiness and feelings; $75,000 for injury to his goodwill, professional standing, and future publicity value; and $2 million in punitive damages.\(^{163}\)

- **Hoffman v. Capital Cities/ABC, Inc.:** $3,270,000 ($1.5 million for compensatory damages, $1.5 million for punitive damages, and $270,000 for attorneys' fees), but judgment for liability was reversed on First Amendment grounds on appeal.\(^{164}\)

- **Joyner v. Akhtarzad:** $18,000 (unauthorized newspaper ad featuring track and field star Florence Joyner and her daughter).\(^{165}\)

- **Sirico v. Best Buy Co., Inc:** $1,500,000 Settlement (unauthorized newspaper ad depicting cast of The Sopranos).\(^{166}\)

- **Woody Allen v. American Apparel, Inc:** $5,000,000 Settlement (unauthorized use of Allen's image by retail clothing company on two billboard advertisements).\(^{167}\)

- **Tony Twist v. Todd McFarlane:** $15,000,000 jury verdict for retired hockey player whose name was used without authorization for a character in a comic book who was portrayed as an enforcer.\(^{168}\)

- **Michael Jordan v. Safeway:** $8,900,000 damages verdict for unauthorized use of name and Jordan's number by grocery store in a tribute ad published in Sports Illustrated commemorative edition.\(^{169}\)

b. **Non-Celebrities**

- **Sahelian v. Orexis:** $75,000.\(^{170}\)

- **Del Amo v. Baccash:** $10,500.\(^{171}\)

- **Christoff v. Nestle USA, Inc:** $15,630,000 (reversed on appeal).\(^{172}\)

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\(^{163}\) 978 F.2d 1093 (9th Cir. 1992) The jury and court were influenced by the fact that Waits had made it known publicly that he did not endorse products or appear in commercials, believing that doing so detracts from a musician's artistic integrity, and that the commercial therefore created the public impression that Waits was a hypocrite.

\(^{164}\) 33 F. Supp. 2d 867 (C.D. Cal. 1999), rev'd, 255 F.3d 1180 (9th Cir. 2001).


\(^{166}\) No. 2:03CV01688 (C.D. Cal. Nov. 26, 2003).

\(^{167}\) No. 08-3179 (S.D.N.Y. May 18, 2009).

\(^{168}\) 207 S.W.3d 52, 79 U.S.P.Q. 2d 1727 (Mo. Ct. App. 2006). A jury initially awarded Twist $24.5 million, but the judge overturned the verdict on First Amendment grounds. On appeal, the Missouri Supreme Court vacated the trial judge's decision and remanded the case for a new trial. The jury in the new trial awarded Twist $15 million, relying on expert testimony regarding lost endorsement opportunities and entitlement to royalties for use of his name.

\(^{169}\) See note 96, supra.


\(^{171}\) No. CV 07-663, 2008 WL 2780978 (C.D. Cal. July 15, 2008). (court found that plaintiff held right of publicity to 14 photographs of models impermissibly displayed on an adult website and awarded statutory recovery of $750 for each of the 14 photographs).

\(^{172}\) 152 Cal. App. 4th 1439, 62 Cal. Rptr. 3d 122 (2007), aff'd in part, rev'd in part, 47 Cal. 4th 468, 213 P.3d 132 (2009). The jury found that former model Russell Christoff should have been paid $330,000 for the use of his likeness on Taster's Choice coffee containers over a period of approximately six years and awarded an additional $15.3 million because of expert testimony that Christoff's photograph was responsible for five to fifteen percent of Nestle's profits on sale of the product. After the case was reversed on appeal, it settled for a confidential amount.
H. State Statutes and Table

The appendix to this paper includes a table identifying, by state, right of publicity statutes and certain case law addressing right of publicity claims.

II. FALSE ENDORSEMENT CLAIMS UNDER THE LANHAM ACT

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), generally prohibits a person’s use of a name, a false designation of origin, or a false or misleading description or representation of fact which, in connection with goods and services, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of a person with another person, or as to the origin, sponsorship, or approval of goods, services, or commercial activities by another person. This statutory language is broad enough to provide a vehicle for “false endorsement” claims; i.e., claims of falsely implying the endorsement of a product or service by a celebrity or other person.176

False endorsement claims are similar to claims for misappropriating the right of publicity, in that they both involve unauthorized use of a person's name, image, likeness, or other aspect of identity for commercial purposes. However, false endorsement claims require proof of the added element of falsity – i.e., that the unauthorized use of the person's identity is likely to falsely deceive or mislead consumers into believing that the person approves, sponsors, or endorses the goods or services of the business at issue.

A. Elements and Examples of False Endorsement Claims

The Sixth Circuit has explained that:

Courts have recognized false endorsement claims under § 43(a) of the Lanham Act where a celebrity's image or persona is used in association with a product so as to imply that the celebrity endorses the product. False endorsement occurs when a celebrity's identity is connected with a product or service in such a way

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173 No. CIV011146 (Cal. Super., Marin Cnty. Apr. 11, 2007) (Bloomberg Law, Cal. Dockets) (damages were awarded for the unauthorized use both the name and image of Ghafourpor on a website, breach of contract, and breach of fiduciary duty).


176 See generally McCarthy on Trademarks, supra note 10, at § 28:15.
that consumers are likely to be misled about the celebrity's sponsorship or endorsement of the product or service.\textsuperscript{177}

The Southern District of New York similarly said that “the unauthorized use of a person's name or photograph in a manner that creates the false impression that the party has endorsed a product or service in interstate commerce violates the Lanham Act.”\textsuperscript{178}

A false endorsement claim requires proof of a likelihood of consumer confusion, \textit{i.e.}, that the defendant's use of the plaintiff's identity is likely to confuse consumers into falsely believing that plaintiff sponsors or endorses defendant's goods or services. To analyze likelihood of confusion in false endorsement claims involving celebrities, the Ninth Circuit has modified its standard factors used to evaluate likelihood of confusion in trademark infringement cases, to the following restated factors:

1. The level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended;
2. the relatedness of the fame or success of the plaintiff to the defendant's product;
3. the similarity of the likeness used by the defendant to the actual plaintiff;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant's intent on selecting the plaintiff; and
8. likelihood of expansion of product lines.

\textit{Downing v. Abercrombie & Fitch.}\textsuperscript{179} In \textit{Downing}, Abercrombie & Fitch included a 1965 photograph of several professional surfers taken at a Hawaii surfing competition in a clothing catalog that had a surfing theme, and created t-shirts, like the ones worn by the surfers in the photograph, that it promoted for sale in the catalog. The Ninth Circuit reversed the district court's grant of summary judgment in favor of Abercrombie, holding that there were genuine issues of material fact concerning a likelihood of confusion as to plaintiffs' endorsement of Abercrombie's products.\textsuperscript{180}

A violation of the Lanham Act, including false endorsement, entitles a plaintiff to seek relief in the form of an injunction, damages and a disgorgement of defendant's profits from its

\begin{itemize}
\item \textsuperscript{177} \textit{ETW Corp. v. Jireh Publ'g, Inc.}, 332 F.3d 915, 925-26 (6th Cir. 2003).
\item \textsuperscript{178} \textit{Allen v. Nat'l Video, Inc.}, 610 F. Supp. 612, 626 (S.D.N.Y. 1985). In the Tom Waits case, the Ninth Circuit explained that “[a] false endorsement claim based on the unauthorized use of a celebrity's identity is a type of false association claim, for it alleges the misuse of a trademark, \textit{i.e.}, a symbol or device such as a visual likeness, vocal imitation or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of a product.” \textit{Waits v. Frito-Lay, Inc.}, 973 F.2d 1093 (9th Cir. 1992).
\item \textsuperscript{179} 265 F.3d 994, 1007-08 (9th Cir. 2001).
\item \textsuperscript{180} \textit{id.} at 1008-10.
\end{itemize}
wrongful conduct, both of which can be potentially trebled, and attorneys’ fees in an exceptional case.\footnote{181}{15 U.S.C. §§ 1116, 1117.}

Given the frequency with which celebrities and public personas endorse products, services, and brands, it should come as no surprise that in many cases involving a celebrity plaintiff an alleged violation of the right of publicity will also support a claim that the use of the celebrity's identity misleads consumers into falsely believing that the celebrity is sponsoring or endorsing the defendant's product or service. For example, in Hillerich & Bradsby Co. v. Christian Bros., Inc., the court ruled that defendant's sale of “Messier” hockey sticks bearing the name of hockey star Mark Messier created both a false endorsement in violation of the Lanham Act as well as an infringement of plaintiff's right of publicity.\footnote{182}{943 F. Supp. 1136, 1140 (D. Minn. 1996).} In the Tom Waits case, the Ninth Circuit held that singer Waits had proven a false endorsement violation under Lanham Act §43(a) and a violation of Waits right of publicity, where an advertisement for Doritos chips used a sound-alike performer.\footnote{183}{Waits, 978 F.2d 1093.} In the Vanna White case, the Ninth Circuit held that Samsung's use of a robot likeness of White created a triable issue of fact on whether the advertisement created a likelihood of confusion as to whether White was endorsing Samsung's VCRs and on whether Samsung violated White's right of publicity.\footnote{184}{White, 971 F.2d 1395, 1400.}

\textit{Allen v. Nat'l Video, Inc.}\footnote{185}{610 F. Supp. 612 (S.D.N.Y. 1985).} involved an interesting false endorsement and right of publicity claim in a franchise context. National Video was a nationally franchised video rental chain that ran an advertisement featuring Woody Allen look-alike Phil Boroff. In the ad, Boroff was depicted as a customer at the counter in a National Video store, holding his National Video V.I.P. card with videotape cassettes of “Annie Hall” and “Bananas” (two of Woody Allen's movies) on the counter waiting to be rented. The headline on the ad read “Become a V.I.P. at National Video. We'll Make You Feel Like a Star.” The ad ran in the Video Review magazine, and also in an in-house publication that National Video distributed to its franchisees. The same photo and headline were used on counter-cards distributed to National's franchisees to be used inside National Video stores.

Woody Allen was not amused by this, and brought claims against National Video and Boroff for violations of his right of publicity and false endorsement. The district court struggled with the portion of the New York statutory right of publicity claim requiring use of the plaintiff's “name, portrait, or picture,” since the photo in the ad was a picture of Allen's look-alike, Boroff, and not Allen himself.\footnote{186}{Id. at 622-25.} But it had no problem in determining that this conduct amounted to false endorsement in violation of the Lanham Act, concluding that it only had to determine whether the Allen look-alike was “sufficiently similar to plaintiff” to create a likelihood of confusion as to Allen's endorsement of National Video. After analyzing the evidence, the court was led “to the inescapable conclusion that defendant's use of Boroff's photograph in their
advertisement creates a likelihood of consumer confusion over plaintiff's endorsement or involvement."\(^{187}\) As a result, the court granted summary judgment to Allen on his Lanham Act claim and entered an injunction prohibiting potentially confusing use of the photograph.\(^{188}\)

The *Allen* case included a discussion of whether a disclaimer would be sufficient to avoid a likelihood of confusion as to false endorsement. National Video's ad in the Video Review magazine contained a disclaimer in small print reading "Celebrity double provided by Ron Smith's Celebrity Look-Alike's, Los Angeles, Calif.", but the other versions of the ad did not include a disclaimer. The court found that the disclaimer in the magazine was so small that it was unlikely to be noticed by most readers; and that "to be effective, a disclaimer would have to be bolder and make clear that plaintiff in no way endorses National, its products, or its services. [cite omitted] Having gone to great lengths to evoke plaintiff's image, defendants must do more than pay lip service to avoiding confusion."\(^{189}\)

Even a "look-alike" M&M has been held to support a false endorsement claim. In *Burck v. Mars, Inc.*, Burck (Times Square's "Naked Cowboy" street entertainer) brought a right of publicity and false endorsement claim over a Times Square billboard featuring an M&M dressed in Burck's signature outfit of cowboy hat and boots, white briefs, and a guitar.\(^ {190}\) The Court dismissed the right of publicity claim under New York law, because the billboard did not contain a portrait or picture of Burck.\(^ {191}\) However, it denied a motion to dismiss the false endorsement claim, finding that the complaint sufficiently pled facts to suggest that the billboard was not a parody and that viewers would believe that Burck endorsed M&Ms.\(^ {192}\)

**B. Defenses to False Endorsement Claims**

As with right of publicity claims, the First Amendment, and associated rights of freedom of speech and expression, can serve as valid defenses to a false endorsement claim. Lanham Act Section 43(a) "protects the public's interest in being free from consumer confusion about affiliations and endorsements, but this protection is limited by the First Amendment, particularly if the product involved is an expressive work."\(^ {193}\)

Most courts use the *Rogers* test, derived from the Second Circuit's opinion in *Rogers v. Grimaldi*,\(^ {194}\) to balance free speech policies with false endorsement claims that relate to use of a

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\(^{187}\) *Id.* at 625-28.

\(^{188}\) *Id.* at 632.

\(^{189}\) *Id.* at 629.

\(^{190}\) 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

\(^{191}\) *Id.* at 454.

\(^{192}\) *Id.* at 454-56.

\(^{193}\) *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013) (because of free speech policies, the use of former NFL football player Jim Brown's identity in an expressive video football game did not trigger a false endorsement claim).

\(^{194}\) 875 F.2d 994 (2d Cir. 1989).
person's name, image or likeness in expressive works. Under that test, an accused use of an identity in an expressive work will be immune from liability as creative free speech, unless: (1) it has “no artistic relevance” to the underlying work or, if there is artistic relevance; (2) the use “explicitly misleads as to the source or the content of the work.”

In *ETW Corp. v. Jireh Publ'g, Inc.*, discussed earlier, Tiger Wood's licensing agent sued over a painting which included images of Woods during his victory at the 1997 Masters Tournament. After discussing a number of cases balancing the First Amendment right of creative expression against a proprietary right of publicity and to be free from false endorsements, the court found that Wood's image had artistic relevance to the creative work of art and that it did not mislead as to the source of the work. Thus, the court held that the Lanham Act did not apply to the work.

Similarly, in *Hoffman v. Capital Cities/ABC, Inc.*, as discussed earlier, the Ninth Circuit rejected Dustin Hoffman's right of publicity and false endorsement claims against a magazine that had published an article that included an altered photograph of Hoffman's “Tootsie” character, explaining that “[a]ny commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out 'from the fully protected whole.'”

The Michael Jordan-Jewel case illustrates that when the work at issue is an advertisement involving commercial speech – even a tribute ad that does not directly promote the advertiser's products - it will receive significantly less free speech protections than will expressive works like paintings, books, articles, movies, and song and film titles. In that case, the Seventh Circuit reversed the district court's ruling dismissing the case on the First Amendment ground that the tribute ad was non-commercial speech, and held that Jordan was entitled to try his false endorsement and right of publicity claims.

**C. False Endorsement Claims by Deceased Persons and Non-celebrities**

In *Astaire v. McKenzie*, a New York federal court refused to enjoin the defendant from presenting “Fred and Adele Astaire Awards” for dancing, finding that there was no evidence that persons would be deceived into believing that the deceased dancer Fred Astaire endorsed the awards. However, a number of courts have held that heirs or estates of deceased celebrities

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195 Id. at 1248; see *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 927 (3rd Cir. 2003).

196 332 F.3d 915 (3rd Cir. 2003).

197 Id. at 924-37. The Court held that survey evidence showing that some members of the public would draw the incorrect inference that Woods had some connection with Rush's print did not change this result, because “[t]he risk of misunderstanding, not engendered by any explicit indication on the face of the print, is so outweighed by the interest in artistic expression as to preclude application of the [Lanham] Act.” Id. at 937.

198 255 F.3d 1180 (9th Cir. 2001).

199 Id. at 1185.

200 *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

have valid claims for false endorsement in addition to for right of publicity infringement. For example, as discussed earlier, the estate of Jerry Garcia (guitarist and lead singer of the Grateful Dead) brought a false endorsement and right of publicity claim against franchise restaurant chain Moe’s Southwest Grill, alleging unauthorized use of Garcia’s images, name, and song lyrics in connection with the décor, menu, and trade dress of the restaurant chain.

Courts have differed on whether and when non-celebrities can maintain a false endorsement claim. One court held that a non-celebrity model whose image was used as part of a consumer advertisement could not maintain a false endorsement claim, because few people would recognize plaintiff’s picture or be confused or deceived into buying a product because she endorsed the product. However, another court has held that Lanham Act § 43(a) “does not require celebrity, only a likelihood of confusion,” and denied a motion to dismiss a false endorsement claim filed by a fashion model whose image was used to advertise cosmetics.

Use of a non-celebrity’s name to endorse a product has been held sufficient to state a false endorsement claim, in a case where a non-celebrity’s personal profile and purported sexual proclivities were posted without her permission on defendant’s online “swinger” website and on advertising for the site. However, in another case a court held that “only celebrities have standing to assert a false association or endorsement claim under the Lanham Act.”

III. FTC ENDORSEMENT RULES

Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” The FTC has implemented Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Endorsement Guides”), which address the application of Section 5 to use of endorsements and testimonials in advertising.


203 See discussion of Garcia lawsuit supra, at 9 and n.52.

204 Ji v. Bose Corp., 538 F. Supp. 2d 349 (D. Mass. 2008) (finding that non-celebrity’s image would have a low level of recognition, and granting summary judgment to defendant where photo of non-celebrity model was used in advertising BOSE home audio equipment).

205 Bondar v. LASplash Cosmetics, No. 12 CIV 1417, 2012 WL 6150859, at *7 (S.D.N.Y. Dec. 11, 2012). This court observed that “the misappropriation of a completely anonymous face could not form the basis for a false endorsement claims, because consumers would not infer that an unknown model was ‘endorsing’ a product as opposed to lending her image to a company for a fee.” Id.


209 16 C.F.R. Part 255.
For purpose of the Endorsement Guides, “an endorsement means any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”\textsuperscript{210} The Endorsement Guides apply to endorsements made by celebrities and non-celebrities, and in traditional advertising media, such as television, magazines, and infomercials, as well as in new media such as blogs and social media.

The Endorsement Guides reflect three basic truth-in-advertising propositions: (1) endorsements must be honest and not misleading; (2) ads that feature endorsements from people who achieved exceptional or above average results must disclose the generally expected results; and (3) if there is a connection between an endorser and the seller of the product or service that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed.\textsuperscript{211}

The disclosure requirement in the Endorsement Guides means that if a sponsoring advertiser pays a celebrity or non-celebrity money or something else of value (e.g., free products or services) in exchange for endorsing a product or service on a social media site (e.g., Facebook, Twitter, or Pinterest), or through posts on an online blog or product review, then the fact of payment or compensation must be disclosed in a clear and conspicuous manner.\textsuperscript{212}

There is no special wording that has to be used to make the disclosure, as long as readers or viewers are given the essential information in a clear and conspicuous manner. For example, a blogger could state that “Company X gave me this product to try,” or “I was paid to try this product.” The words “Sponsored,” “Advertisement,” or “Promotion,” may be sufficient. Endorsers who tweet about products can start or end a tweet with “Ad” or “#ad.”\textsuperscript{213}

In December 2015, the FTC issued an Enforcement Policy Statement on Deceptively Formatted Advertisements, to discuss application of FTC deceptive trade practice standards in the context of advertising and promotional messages integrated into and presented as non-commercial content\textsuperscript{214}. This includes online advertising known as native advertisements or sponsored content, which is often indistinguishable from news, articles, product reviews, editorials, and entertainment. The FTC explained that in evaluating whether an ad's format is misleading, it considers the net impression the ad conveys to a reasonable consumer.

In early 2016, the FTC filed an enforcement action against Lord & Taylor for its allegedly deceptive use of native advertising that also violated the FTC Endorsement Guides.\textsuperscript{215} In 2015,

\begin{itemize}
\item \textsuperscript{210} 16 C.F.R. § 255.0(b).
\item \textsuperscript{212} 16 C.F.R. § 255.5; see “The FTC’s Endorsement Guides, What People Are Asking”.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted.
\item \textsuperscript{215} https://www.ftc.gov/news-events/blogs/business-blog/2016/03/ftcs-lord-taylor-case-native-advertising-clear-disclosure.
\end{itemize}
Lord & Taylor used an extensive social media campaign to launch Design Lab, an apparel line aimed at women between 18 and 35. The native advertising campaign involved having Nylon, an online fashion magazine, run an article about the Design Lab collection that was paid for by Lord & Taylor, and post a photo of a Design Lab paisley asymmetrical dress on Nylon’s Instagram page. At the same time, Lord & Taylor gave the same paisley dress to 50 fashion influencers who had substantial followers on social media platforms, and paid each of them to post photos of themselves in the dress on Instagram on a specified weekend (the same weekend Nylon posted its photo), along with the campaign hash tag #DesignLab in the photo caption with the photo tagged as @lordandtaylor.216

Lord & Taylor’s Instagram campaign reached 11.4 million users resulting in 328,000 brand engagements with Lord & Taylor’s Instagram handle. And the paisley dress sold out. The problem was that Lord & Taylor did not require Nylon to disclose the commercial arrangement behind the article and posting. Nor did the Instagram posts approved by Lord & Taylor include disclosures that the fashion influencers had received the dress for free, been compensated for the post, or that the post was part of an ad campaign.

An FTC complaint charged Lord & Taylor with three violations of Section 5 of the FTC Act: (1) falsely representing that the 50 Instagram images and captions reflected independent statements of impartial fashion influencers; (2) failing to disclose that the influencers were paid endorsers; and (3) falsely representing that the Nylon article and post reflected Nylon’s independent opinion about the Design Lab line, when they were paid ads. Under a settlement agreed to by the company, Lord & Taylor (1) can’t falsely claim that an endorser is an independent user or ordinary consumer; (2) must clearly disclose a material connection between the company and an endorser in close proximity to the claim; and (3) can’t suggest or imply that a paid ad is a statement or opinion from an independent or objective publisher or source.217

IV. ITEM 18 OF FRANCHISE DISCLOSURE DOCUMENT — USE OF PUBLIC FIGURES

Under the FTC Franchise Rule, Item 18 of a Franchise Disclosure Document must make certain disclosures about a franchisor’s use of a paid celebrity or public figure to endorse or recommend the franchise to prospective franchisees. That portion of the Rule provides:

(r) Item 18: Public Figures. Disclose:

(1) Any compensation or other benefit given or promised to a public figure arising from either the use of the public figure in the franchise name or symbol, or the public figure’s endorsement or recommendation of the franchise to prospective franchisees.

(2) The extent to which the public figure is involved in the management or control of the franchisor. Describe the public figure’s position and duties in the franchisor’s business structure.

216 Id.
217 Id.
(3) The public figure’s total investment in the franchisor, including the amount the public figure contributed in services performed or to be performed. State the type of investment (for example, common stock, promissory note).

(4) For purposes of this section, a public figure means a person whose name or physical appearance is generally known to the public in the geographic area where the franchise will be located. 218

The FTC Franchise Compliance Guide further explains that:

If a public figure’s name is used as part of the franchisor’s name, the public figure’s image is used as a symbol associated with the franchise, or the public figure endorses or recommends the franchise to prospective franchisees, then the franchisor must disclose any compensation or other benefits given or promised to the public figure. Item 18 is limited to circumstances when a public figure’s identification with a system is for the purpose of selling franchises. Merely using a public figure as a spokesperson to promote a system’s products or services sold to consumers does not bring a franchisor within the ambit of the amended Rule’s Item 18 requirements. 219

Furthermore, a public figure’s investment in a franchised business only needs to be disclosed if he or she invests in the franchisor. It does not apply when a public figure is a franchisee or invests in a franchisee.

For an illustration of the applicability of Item 18, consider the relationship between Papa Johns and NFL all-time great quarterback Peyton Manning. Peyton Manning is a multi-unit franchisee of Papa Johns, and also appears on television commercials along with Papa Johns founder. Papa Johns’ Item 18 disclosure is as follows regarding its arrangement with Manning and with another former NFL player, Jerome Bettis:

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.

Jerome Bettis, a well-known former professional football player, is a principal in a Papa John’s franchisee that owns and operates Papa John’s restaurants in the Pittsburgh Pennsylvania area. In June 2013, we entered into an agreement with Mr. Bettis and the franchisee in which we agreed to make an annual contribution of $25,000 to the Papa John’s advertising Cooperative for the Pittsburgh area in

218 16 C.F.R. § 436.5(r).

exchange for Mr. Bettis recording two radio advertisements. In 2014, we began using the radio advertisements featuring Mr. Bettis to promote the sale of Papa John's franchises. Mr. Bettis is not involved in the management or control of the franchisor and has made no investment in the franchisor.

Wingstop provided the following Item 18 disclosure in its 2015 FDD (which no longer appears in the 2016 FDD):

Troy Aikman, former quarterback for the Dallas Cowboys and current National Football League sports broadcaster, is a spokesman on the consumer-marketing level for the products sold by Wingstop Restaurants, and his picture and “voice-overs” are likely to appear in our advertising, on our website, and elsewhere. As a prospective franchisee, you might see or hear Troy Aikman because of this type of involvement in our consumer marketing. However, Mr. Aikman does not have a position in the Wingstop system's management structure, is not involved in our operations or day-to-day business activities, and does not appear in the franchise name or symbol. Mr. Aikman receives no compensation or other benefit from the Wingstop system for any activity other than his product consumer-marketing. Except as described above, no public figure is associated with the Wingstop system.

Item 18 of the 2016 FDD for ServiceMaster provides:

ServiceMaster is collaborating with Matt Paxton, a television personality and the author of “The Secret Lives of Hoarders.” The business relationship between Mr. Paxton, his company Clutter Cleaner and ServiceMaster provides lead generation to our franchises. Mr. Paxton serves as a consultant and training resource for ServiceMaster and as a spokesperson for the ServiceMaster brand, our franchise opportunities, and our consumer cleaning products.

If any of the above individuals were not franchisees and just “stars” of a consumer commercial, then there would be no need to include them within Item 18. However, the fact that they promote the brand to prospective franchisees in some form or fashion requires the inclusion within the FDD. An interesting twist could occur when a franchisee is a celebrity and does not have an agreement of any kind or character with the franchisor to promote the brand and the need to then disclose within Item 18. An argument could be made that every franchisee in some form or fashion is a brand promoter (or at least the marketing department would like to think so), and in that event would a public figure franchisee need to be disclosed if all they do is serve the role as franchisee? A conservative answer would be “yes”, and utilize a phrase similar to Papa John's which provides: “Beginning in October 2012, on a very limited basis, Mr. Manning has also recommended our franchises to prospective franchisees.” Because if a prospective franchisee goes down the list of current franchisees from Item 20, then it is possible that prospect could end up on the phone with Mr. Manning – or perhaps more likely, if the prospect is looking to sign a multi-unit deal, Mr. Manning could end up in the same room or restaurant table as this prospect and the disclosure of Mr. Manning in Item 18 would serve to be a wise move.

V. GETTING CONSENT FOR USING SOMEONE'S IDENTITY

As discussed in the preceding sections of this paper, commercial appropriation of a person's name, image, likeness, voice, or other aspect of identity can give rise to a claim for
violating his or her right of publicity, and possibly also for false endorsement. Therefore, the question is, “how can that photo (or other image or aspect of identity) be used in order to avoid a right of publicity claim”?

The easiest way to use a photo is through the form of implied consent. As an example, think of the classic Italian restaurant in New York City, Miami, Chicago, or other major metropolitan city where the wall is covered in photos of famous guests arm-in-arm with the owner. When the celebrity poses for a photo in this situation and smiles for the camera, that celebrity is doing so with the almost certain knowledge that the photo is going on the “wall of fame” and such action would be considered implied consent. However, there are limits to this form of consent. For example, the celebrity posing with the restaurant owner is almost certainly consenting to the photo being posted on the wall, but not being posted on the front of the menu for the next year.

If the ultimate goal is to prevent disputes, then getting express written permission would be best. As a practical matter, this is achieved by reaching out to the agent or representative of the celebrity. Although this may sound like a daunting task, it is not as hard as it seems. If you are the franchisee then the recommended step would be to reach out to the marketing department of your franchisor who likely has a relationship with a public relations firm who can help facilitate this process. If the franchisor does not have a marketing department, then social media can be your best friend. It will allow you to search for the celebrity and either direct message or post a request or communication asking for contact to enter into a deal, contract or other arrangement. Additionally, an internet search can be helpful in finding the proper person to talk who represents the celebrity. This author has found that the more famous the celebrity the better the celebrity’s own search engine optimization is, meaning you can easily find certain information without doing a lot of work. For example, this author went to Google and in the search bar typed “contact information for Matt Damon” and 0.55 seconds later, the first result was entitled “Matt Damon contact information”. Upon making that selection there was contact information for Mr. Damon’s agent, publicist, production managers, and even his attorney! Therefore, in today’s age of speed, reaching the proper person is not difficult and the more famous the celebrity, the easier it is to comply with a celebrity’s right of publicity.

In some franchise systems there may be a contractual requirement for the franchisee to notify the franchisor in the event the franchisee wants to use an image of someone of fame or if they want to enter into a possible deal with a celebrity. There are several reasons why the franchisor may want to get involved in this process, including the following.

First, the franchisor may want to make sure the image of the celebrity in question is consistent with the image of the system as a whole. Some celebrities are famous for reasons that are not in line with the brand’s core values. In today’s social media market, people obtain vast amounts of “likes” or posts or tweets for things that may not be considered mainstream, and while that may be popular, it may not be “brand popular”.

The second reason for franchisor involvement would be the exact opposite reason, where the celebrity in question would be a positive influence on the brand in the eyes of the franchisor. The franchisor may have had no idea that the celebrity liked the brand’s product or service or regularly stopped at the franchised location. This could cause the franchisor to seek to do a promotional deal with the celebrity on a national level or, even if it is a local deal,
franchisor involvement may give the celebrity’s team more comfort in doing the deal and knowing there is corporate support behind the promotional activity.\footnote{Of course, there could be local celebrities, who may be perfect for the local market where the franchisee is located but not perfect for a national campaign. Think of a local athletic star. Both of the authors live in Atlanta, and there could be a player from the Atlanta Hawks who has reached a local level of fame; but who would not be a good national marketing partner for the brand that has stores in the west coast of the country.}

Third, the celebrity could have other business ventures that are synergistic to the franchisor or philanthropic causes that align with the franchisor, both of which could benefit the brand as a whole. For example, if the celebrity does a lot of work with Autism and that cause is important to the franchisor, then there could be an opportunity for the franchisor to partner with the celebrity in a fundraiser supporting Autism (like a walkathon) in which the celebrity could bring awareness to the charity at the same time it is promoting the brand. This can create goodwill in the eyes of the public for the franchisor and the celebrity.

A fourth reason for franchisor involvement would be for product promotion purposes, as opposed to overall brand promotion. For example, a celebrity who loves a less popular franchised restaurant menu item could work with the franchisor to bring awareness to that particular product. This could cause more consumers to purchase that product by thinking that “if Celebrity loves these nachos then maybe I would love them also and next time I am at that franchised restaurant I will try them,” or could create a broader appeal of thinking “I had no idea that Celebrity eats at franchised store X, next time I am going out for lunch I will stop in and give it a try”.

Finally, if a celebrity enjoys a certain product then he or she may want to own a franchised location (or two or three or more) and therefore, the fifth reason for franchisor involvement could lead to the franchisor providing the celebrity (or likely the celebrity’s team) a franchise disclosure document. Many athletes and other celebrities own franchises not just for investment purposes, but because they want to be franchisees of brands they enjoy that sell products or services that they like.\footnote{For an example of celebrities trying their hand at their own restaurants one needs to look no further than Nyla by Britney Spears or Madre’s by Jennifer Lopez. \url{http://www.foxnews.com/leisure/2013/09/13/wont-believe-these-10-celebrities-own-chain-restaurants/} last visited on May 26, 2016.} Just as an example, the following celebrities at one time owned franchises\footnote{The celebrities listed and the name of the franchises associated with the celebrity was from the webpage: \url{http://moneytips.areavoices.com/2015/10/26/12-celebrities-that-own-fast-food-franchises/} and the website \url{http://www.foxnews.com/leisure/2013/09/13/wont-believe-these-10-celebrities-own-chain-restaurants/} both of which were last visited on May 26, 2016. The website also lists the number of purported units owned and the general location of such units.}:

(a) 
Venus Williams (professional tennis player) was associated with Jamba Juice locations
(b) 
Phil Mickelson (professional golfer) is connected to the Five Guys franchise
(c) 
Rick Ross (rapper within the music industry) owns Wing Stop locations
(d) 
Peyton Manning (former NFL star and recent Superbowl MVP) owns Papa John’s locations
(e) 
Shaquille O’Neal (2016 inductee to the NBA Hall of Fame) owns Five Guys locations and he is invested in a number of units within the Auntie Anne’s Pretzels franchise system
Earvin “Magic” Johnson (NBA Hall of Famer and Laker great) owned a number of Starbucks locations (he has since sold them) but he also is an owner of Burger King franchises.

Once the celebrity has been identified, and a decision made to enter into an agreement, there are many things to be considered. The first such consideration is the type of arrangement – should there be a full agreement covering all sorts of topics such as product development, usage, and endorsement, or is the agreement something more simple just covering the use of the particular photo that was taken while the celebrity was at the franchised location?

If the franchisor and the celebrity would like to use a celebrity photo and the celebrity approves of the photo (meaning there is not food dripping off of his face or a mustard stain on a shirt), then a simple agreement would be the easiest manner to obtain consent and avoid a right of publicity claim. Although the following discussion points are not meant to be exhaustive, they address key points that should be considered for a short agreement governing the use of the single photo that was taken at a specific franchised store: (1) identify the types of media the photo can be utilized in – meaning on the home page, or local franchised store’s Facebook page or a Tweet with the image or a Snapchat; (2) determine how long the photograph can be used, meaning for a defined time period, such as the next 90 days and then it would have to be taken down (if the social media platform allows for that action) or if it can used in perpetuity; (3) purposes of use - Can the photo be used for presentations? Can the photo be used as part of marketing material? Can the photo be used as decorative features in local franchised stores (beyond the specific store the photo was taken in)? Can the photo be used at a franchisee summit?; and (4) is there a fee for the use of the photo, which does not need to come in the form of cash, perhaps it is a card for 10 free meals or free meals for the next 30 days or maybe have your brand be a sponsor at the celebrity’s next birthday party and provide all the ice cream the party attendees can eat.

VI. ENDORSEMENT AGREEMENTS

In the event there is a bigger promotional plan in place, or an attempt to create a brand ambassador or celebrity appearance for the creation of product bearing the celebrity’s name or likeness, then a more comprehensive endorsement agreement should be negotiated and executed. There are numerous contractual concepts to be thought through, which cover both business and legal issues. Like any good contract, the two sides must attempt to balance interests so that a mutually acceptable working relationship can be established.

This section summarizes a number of issues that should or could be addressed in the context of a celebrity endorsement agreement; however, this is in no way an exhaustive list of concepts that should or could be covered.223

A. Rights Granted

One of the most important provisions to cover in an agreement with a celebrity is the scope of “rights” being granted. Rights can have a few different concepts built into it – it could encompass topics such as exclusivity, the type of media or geographic territory in which the images can be used, or even the types of stores a product can be sold in or where a statement can appear.

223 This paper will not discuss “boiler plate” provisions, such as entireties clause, notice, counterparts, waiver, or independent contractor provisions.
In an agreement where the celebrity is providing his or her name or likeness to a product – for example, an image to be reproduced on a cell phone case or cover – there could be a clause relating to exclusivity. It goes without saying that a brand would prefer to be the only brand within that industry that was working with the celebrity. This would provide the brand with consistency with the partnership and avoid consumer confusion if the consumer sees a celebrity promoting a competitor’s product and then thinks of the competitor instead of the brand – which would be an epic failure of the goal at hand. A sample provision that a brand could consider would be to prevent a celebrity from using his or her names, trademarks, service marks, photographs, sketches, caricatures, sobriquets, likeness, portraits, autographs, signatures, recorded and live performances, recorded voice, demographic information, biography and/or other distinctive indicia or identifying characteristics affiliated with CELEBRITY, directly or indirectly, to promote or advertise in any media, any competing products or companies selling, licensing and/or otherwise distributing Products or related services. These rights are not intended to preclude CELEBRITY from appearing in national television or radio programs which may be sponsored by similar products provided that CELEBRITY does not appear in any commercial portion of such program including billboards, lead-ins to or lead-outs from such commercial portions or make specific product mention or use of the competing products therein.224

An off-shoot of the exclusivity provision would be a non-circumvention provision. This provision is helpful where a celebrity is newly associated with a product or service, and provides that for a period of time (which of course is hotly negotiated) the celebrity would agree not to circumvent the brand by dealing directly or indirectly with any previously unknown sources, contacts, clients, customers, suppliers, sources of materials or goods, manufacturers, or any other entities made known to the celebrity by the brand. This helps the brand prevent the celebrity from going to a competitor, which would be much easier after the brand has essentially given the celebrity the play book on what to do with respect to a certain product or service.

The following is an example of a clause addresses the types of media in which materials bearing the celebrities image and identity can be used:

The Materials produced pursuant to this Agreement may be used in any and all media now or hereafter known, including but not limited to free, cable and pay television, radio, print, theatrical promotion, digital platforms and social media, podcasts, autocasts, blogcasts, webcasts (live, archived or otherwise), MMS feeds, Mobilecast, Voicecasts, MP3blogs, phonecasting, skypescasting, video image podcasting, photofeeds, screencasts, subscription services, digital downloads, audio streaming, video streaming, and any other type of interactive and/or noninteractive audio only or audiovisual format and regardless of the type of content delivery system which shall include all forms including the internet and/or any other digital or electronic transmissions, cable, satellite, wireless, broadband, cellular transmissions, or any other system now known or hereafter

224 All provisions provided within this paper have been modified from various negotiated agreements that were prepared by an author of this paper and are meant to serve as illustrations of the concept being referenced and they were drafted for a particular purpose and they are not intended to be copied and used without the reader’s thought to make sure it covers the business objective at hand.
developed, throughout the world. All Materials produced hereunder may be used and reused during the entire Term of this Agreement to the maximum extent permitted under applicable union codes.

B. **Promotional Activities**

Another important provision in an endorsement agreement is specifying the scope and types of promotional services and activities that the celebrity will provide for the brand as a spokesperson and/or endorser. This highly negotiated section of any agreement covers a wide variety of actions, such as the following:

(a) mentions on talk shows or other television appearances.
(b) use of the product in any professional bookings, television appearances, red carpet events, social events, regular television shows that the celebrity may be an actor, etc.
(c) participation in any contests, sweepstakes, or promotions sponsored by the brand.
(d) participation in photo shoots.
(e) participation in any “set-up” photograph opportunities.\(^{225}\)
(f) providing approved quotes for the brand to use in any form of media.
(g) provision of pre-approved images for use in any form of media.\(^{226}\)
(h) Social media activity, such as tweeting a certain number of times a month or some other period of time, posting to Instagram accounts, post, upload, or engage with a company's blog.

As part of public appearances, there are often provisions within agreements that cover hair and make-up fees, wardrobe fees, wardrobe consultant fees, specific travel conditions (for the celebrity and any companion(s)), special accommodation requests, requests for greeters within a city, and numerous other conditions and requirements which can all be negotiated and discussed. However, these fees can add up so it is important to create limits or caps on these types of fees so that the endorsement does not become significantly more expensive than planned.

If and to the extent that a brand requests these endorsement type activities, there should be a provision within the contract that addresses complying with requirements of the Federal Trade Commission, the several networks, and any print medium concerning the use of testimonials and endorsements in advertising. The agreement should require the celebrity to furnish affidavits attesting to celebrity’s *bona fide* use of and preference for the products or services.\(^{227}\)

\(^{225}\) A “set-up” photography shoot is essentially a staged paparazzi citing where the celebrity is prepared, ready, and willing to be photographed and is clearly using or holding the product so that it is focused.

\(^{226}\) Some pre-approved images are owned by third parties, as the copyright holder, and as such there could be a fee for this, and it is typical for the brand to pay any such costs.

\(^{227}\) See Section III of this paper, *supra*, for a summary of FTC endorsement regulations.
C. **Term and Territory**

The term of an endorsement agreement, and the territory within which the endorsement will occur, must also be addressed.

The term, like most points, is negotiable; there is no “standard” period of time. However, having a renewal right or several renewal rights may be important. Certain celebrities are prominent and established; others are “up and coming;” and of course there are “rookies” who make take time to develop. It would be a major win for a brand to enter into an agreement with a “rookie” celebrity and as said celebrity becomes more main-stream and well-known the brand has the option to renew the agreement at pricing significantly reduced from what that celebrity would charge if the parties were starting from scratch. Additionally, there should be consideration given to the ability to utilize any materials, photos, videos, tweets, posts, blogs, or any other types of materials given or recorded during the renewal period, as a brand would not want to repay the celebrity for items it already has paid for once.

The territory is primarily a business point negotiated between the parties. In today’s digital age (as discussed numerous times within this paper) the dissemination of information is almost instantaneous and as such a brand would want to make sure the ability to use a particular endorsement or advertisement is not limited to a particular city, state, or region of the country; it would be suggested to be able to use any of the commercial materials throughout the entire country. However, in the event there is a product arrangement with a celebrity which product is then sold at franchised locations, then some attention should be spent on what happens in the event of resells – meaning if the brand sells a product to a franchisee which in turn sells the product outside the territory. Although the franchise agreement may prevent these types of sales, the celebrity and his or her legal team will not know or care about the franchise agreement, so there would need to be thought given to “accidental” violations of this contract provision.

D. **Location of Use of Images**

Another geographic type limitation is the actual locations a celebrity’s image can appear or stores where products can be sold. For example, some celebrities would not want products bearing their name, likeness, image, etc. appearing in a discount store. On the other hand, the goal for the brand would be to control all aspects of where the product can be sold, because after all, the marketing folks never know (ahead of time) where they think product will sell and keeping options open is easier than going back and having to renegotiate at a later time. A sample of such a provision would be the ability to sell the product to any and all retailers and customers as BRAND desires, in the sole discretion of BRAND, including but not limited to the following retail channels: sales over the internet (or any other existing or future form of electronic commerce), big box retailers, mass market stores, mid-tier stores, specialty stores, independent shops, department stores, branded kiosks, carts, toy stores, military post exchanges, airports, e-tailers, drug stores and convenience stores, national wireless carriers, mail order and catalogue sales, sales via radio and television, any and all stores depicting the BRAND name, and any and all other distribution channels, and to any other persons or entities, in the BRAND’S discretion.
Additionally, some celebrities may want to avoid having their image or other indicia of themselves appear in certain magazines (e.g., Playboy), while other celebrities and their public relation teams may prefer their image promoting your brand in that periodical.

**E. Design and Approval**

Appearances are of crucial importance to a celebrity. Thus, they generally want to have the right to approve the photograph or image used by the brand on a product or in an advertisement. Thus, approval rights and provisions should be covered in detail within the contract. If the brand uses an image of the celebrity that is not approved, and the image gets picked up by a national story or a product is distributed, it could be extremely costly to correct. Not only would there a potential for damages by the celebrity, but if product has been created it would need to be recalled and then essentially thrown away.

It can be helpful if the celebrity has numerous pre-approved images stored in different digital formats which could be sent to the brand to be used, thus allowing the brand to avoid holding and paying for a photo shoot and permitting quick approval by the celebrity. If this is not possible, then there should be a specific person from the celebrity’s team designated as the contact person to whom the brand can send the selected photo image or product with the image on it, and a process and time period described in the contract for allowing the celebrity to provide comments or changes or propose a total redo. So as an example, in the event there is a product bearing an image of a celebrity, the brand would design the product, provide the “rendering” to the designated person from celebrity’s team for comments, and then make any resulting changes. Once the rendering has been approved and a sample of the product is created, the same process can be followed regarding comments and approval of the sample, after which production can start.\(^{228}\)

**F. Social Media Linkage**

Permission for use of the celebrity’s image on social media sites should be pre-negotiated, especially when there is a sale or promotion of a product involved. The brand would want to be entitled to include links to celebrity’s websites, Facebook pages, and any other social media sites (i.e. Pinterest, Twitter, blogs, Instagram, etc.) connected with the products or brand. Also, the brand would want to have pre-approved information and material that the celebrity could post information on his or her website (usually if product is involved there is a royalty paid, so the celebrity is motivated to inform fans that they can buy the products).

**G. Compensation**

As promotional activities are of crucial importance to the brand, compensation is of crucial importance to the celebrity. Depending on the level of stardom as it relates to the product or service, the level of compensation will vary. Now that the obvious statement has been addressed, there are a number of different ways a celebrity can receive compensation.

One method is a straight payment, such as a one-time flat fee to permit the brand to use a candid photo taken when the celebrity was eating at the brand’s restaurant.

\(^{228}\) In the event a product is being made, the parties should negotiate any logo or other trademark placement on the product and any other information that would be required to be placed on the product or packaging.
A second method involves the brand paying an advance upon full execution of all the documents, with the advance charged against and recoupable from future royalties that accrue to the celebrity.

A third and very common approach is a royalty based compensation plan. A royalty plan requires negotiation and documentation of a number of points: This includes the percentage royalty rate charged (which is highly negotiated), and the revenue or other base on which the royalty rate is multiplied to determine the royalty being paid. Gross sales price could be a good starting point for a base since it is easy to determine; however certain amounts should be subtracted to be “fair” to the brand, such shipping charges, sales tax and/or VAT of each individual item sold, less any and all discounts, allowances and/or bona fide returns. There needs to be a method of calculation to true-up for any damaged items or returned goods. Depending on how the product is sold and how much negotiating power the brand has, royalties should only be paid on items that have actually been paid for and no royalty would be owed for items in those instances where payment has not been received. The timing of royalty payments also needs to be addressed (monthly, quarterly, etc.).

A fourth compensation concept is a guaranteed payment. For example, the celebrity would receive at least one million dollars from royalty payments, inclusive of any advance paid by the brand. There are inherent business risks in this method of payment, especially if the marketing and sales team over estimates potential sales. The potential benefit to the brand is that it might allow them to negotiate for no advance or a lower royalty rate in exchange for the guaranteed amount.

Another common provision associated with compensation is the celebrity’s request for audit rights. The relevant negotiating points are the length of time the audit rights would be available from the payment of the royalty, the payment for the audit, any cost shifting events (such as if the audit reveals underpayment by more than a certain percentage), and what happens in the event of an under-reporting of sales or under-payment of royalties (besides termination and a possible lawsuit).

H. Intellectual Property

Ownership of intellectual property rights in a product design bearing a celebrity image should be addressed. In an ideal world, the brand would retain ownership of any and all intellectual property rights, with the celebrity having rights only relating to his or her image or name as used on the product. For example, in a situation of a product design involving two squiggly lines and a celebrity image, if the agreement with the celebrity ends the brand may want to take the image off the item and still sell the underlying product that contains the two squiggly lines. A sample provision could include the following:

Any ideas and artistic materials that the BRAND furnishes to CELEBRITY shall remain the BRAND’S sole property. Any scripts, materials, compositions and expressions prepared or made by CELEBRITY and any related recordings, and the services performed by CELEBRITY, shall be the BRAND’S sole property during and after the expiration of this Agreement. Neither BRAND nor CELEBRITY shall take any action that would impair, denigrate, convey ownership and/or damage BRAND’S rights in and to the designs, copyrights, patents, ideas, inventions, trade secrets, trademarks and/or service marks created and/or owned by BRAND. CELEBRITY agrees that all audio, video, digital, textual, graphic, multimedia or other works created or developed by CELEBRITY and BRAND in connection with this
Agreement, including without limitation, radio spots, TV spots, publicity, advertising or promotional material (including any and all audio-only and audio-visual works), and any words, videos, audio, skits, artistic elements, images and other elements included therein shall constitute works made for hire to the fullest extent possible under all applicable laws, including, without limitation, copyright laws, and shall be the exclusive property of the BRAND. CELEBRITY agrees to cooperate and facilitate any efforts by the BRAND to register, preserve and protect all rights in the works referenced above. BRAND shall have exclusive copyrights in all items made pursuant to this Paragraph, and CELEBRITY agrees to execute documents necessary to evidence such ownership by the BRAND.

I. Indemnity

Without stating the obvious, this provision can be referred to as the “umbrella clause” – if you need it, you are glad you have it and if you do not need it, then no big deal and it just takes up a small amount of space in an agreement that has no set page limitation in the first place. The indemnification provision can be requested by both sides, with a different goal from each side.

The celebrity wants to make sure he or she is indemnified against any claim connected with failure of the products to perform as mandated by state or federal laws, codes and/or ordinances, and/or claims that the brand intellectual property infringes on another party’s rights. The celebrity does not want to be named, no less have to pay for the defense of, a product liability case, when all the celebrity did was enter into a license agreement with the brand to lend his or her name to a particular product or service.

The brand would want to make sure it is covered with respect to the breach of any promises or warranties made by the celebrity in the agreement or any claims that the intellectual property created, furnished, selected, licensed, provided or rendered by the celebrity, or by any person or entity on behalf of the celebrity, infringes upon or otherwise violates the intellectual property or any other right of others. In the event the brand receives images from the celebrity, then the brand would want protection if there is a claim for a copyright violation from the photographer of the image. Another example would be if the celebrity had some catch phrase or slogan that was incorporated into a product and it was later discovered that the phrase was not original and allegedly violated a third party’s rights.

J. Termination

The ability to terminate a celebrity endorsement agreement is important to both parties. The main reason the celebrity would want to terminate is for non-payment, or perhaps a violation of the agreement that the celebrity believes goes to a core issue – such as a misrepresentation or shift of the brand away from the celebrity’s core value (image a celebrity who is a vegetarian that is endorsing a vegetarian restaurant chain that decides to change its menu and start serving meat dishes). Although there are numerous reasons why a brand may want to terminate, the main focus of this section is the morals clause as a cause for termination, which is discussed in the following section.

It is important for the agreement to address what happens in the event of early termination of the endorsement agreement. In the event a product is being manufactured, the effect of termination by the celebrity could include cessation of production of product, which could have expensive side effects, especially if there were minimum quantity requirements from
the manufacturer. In that event, the brand would want a sell-off period for any product that has already been produced. Even if the agreement is for promotion and endorsement and not production of a product, there can still be a lot of work involved in the event of termination, such as having to change websites and social media sites by taking down the image or endorsement phrase. The parties cannot control websites and social media sites outside of their control, but the contract should address requirements and timing for changing franchisor, franchisee, and celebrity controlled sites and pages.

K. **Morals Clause**

Morals clauses allow a brand to terminate an agreement with a celebrity in the event the celebrity engages in conduct that may violate a law or says or publishes a comment on social media that is “so bad” in the brand’s eyes that it must sever ties with such person – immediately. A typical morals clause could read as follows:

During the term hereof, CELEBRITY will conduct herself at all times with due regard to public morals and conventions. If CELEBRITY shall have committed or shall commit any act or do anything that is or shall be an offense involving moral turpitude under Federal, State or local laws, or, even if not unlawful, which brings her into public disrepute, contempt, scandal, or ridicule, or which insults or offends the community and/or which harms or embarrasses BRAND and its affiliates, successors, agents, assigns, retailers and franchisees, or which thereby injures the success of BRAND or its affiliates, successors, agents, assigns, retailers and franchisees, products or services, shall make any statements in derogation of BRAND, and/or any of its affiliates, successors, agents, assigns, retailers and/or franchisees, or the products and such statements are made to the general public or become a matter of public knowledge, then at the time of any such act or at any time within ten days after BRAND learns of any such act, BRAND shall have the right, in addition to its other legal and equitable remedies, to terminate this Agreement.

There are a number of examples where various celebrities have lost deals based upon their conduct, such as:

(a) Manny Pacquiao
   i. Nike

(b) Maria Sharapova
   i. Nike
   ii. Porsche

(c) Kobe Bryant
   i. McDonalds
   ii. Ferrero of Italy (they make Nutella)

(d) Tiger Woods
   i. Gillette

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Although a “typical” morals clause covers the majority of celebrities, there are some celebrities – such as certain reality stars, as one possible example, where the very nature of what they are doing or what he or she is “known for” may violate the typical morals clause before the agreement is even signed. These types of celebrities have bargaining power and appeal and it is the very nature of what they do and who they are that makes the celebrity interesting to the brand. A morals clause in this situation is going to have a different focus and be more favorable to the celebrity. Instead of being arrested it may be focused on an actual conviction and perhaps not a conviction for any type of criminal activity but specific types. The following is an example of an alternative morals clause:

(e) Lance Armstrong

i. Nike
ii. Trek Bicycle Corp
iii. Honey Stinger (a manufacturer of honey based nutrition products)
iv. Easton-Bell Sports (maker of Giro brand bike helmets)
v. 24 Hour Fitness
vi. Anheuser-Busch
vii. Oakley
viii. FRS (energy drink maker)
ix. RadioShack

If the commercial value of CELEBRITY’S name and image becomes substantially impaired by reason of CELEBRITY’S conviction (including exhausting all appeals) in the United States of a felony involving any act of serious moral turpitude, comprising assault with intent to commit murder; attempted lewd act on a child under 13; arson; child abuse; extortion; kidnapping; possession for use, other than de minimus amounts intended for private use, or sale of a “narcotic drug” (as defined in 21 U.S.C. §801) or a “depressant or stimulant substance” (as defined in 21 U.S.C. §801) excluding amphetamines (it is acknowledged possession or sale of marijuana irrespective of amount shall not constitute an Event of Default); forcible rape; armed robbery; murder; and/or voluntary manslaughter, as determined under federal or state laws and BRAND and its affiliates, successors, agents, assigns, retailers, licensees and franchisees, after best efforts to continue to sell the Products, determines through substantially diminished sales results that such conviction has materially diminished the ability of BRAND and its affiliates, successors, agents, assigns, retailers, licensees and franchisees to sell the Products, then at the time of any such act or at any time within ten (10) days after BRAND learns of any such act, BRAND shall have the right, in addition to its other legal and equitable remedies, to terminate this Agreement forthwith.

VII. CONCLUSION

This paper has discussed a number of practical, legal, and business issues relating to right of publicity law and related claims. However, the key concept underlying right of publicity law is straightforward. If a franchisor or franchisee wants to use someone’s name, image, likeness, voice, or other aspects of identity for any commercial purpose, it generally must obtain the approval of such person for such use. This rule applies to use of the identity of celebrities and non-celebrities alike, but it is especially important to comply with when using the identity of celebrities. Celebrities can afford to and will sue to protect unauthorized use of their personal “brands,” and have rung up high damages awards and settlements against companies that have used their identities without permission.

Understanding and complying with right of publicity law is particularly important in this day and age of universal smart phone use, digital technology, and expanding social media platforms, in which posting and reposting of images and other aspects of identity can be done instantly and without much thought. And don’t forget to comply with FTC endorsement rules when engaging in advertising and promotion on the Internet and social media. Both franchisors and franchisees should develop a basic understanding of the law in these areas, where, as Benjamin Franklin said in an earlier, pre-digital time, “an ounce of prevention is worth a pound of cure.”
## APPENDIX
### 2016 ABA Franchise Forum
Right of Publicity Claims in a Digital Age

### State Statutes and Case Law

<table>
<thead>
<tr>
<th>STATE</th>
<th>Right of Publicity Statute</th>
<th>Common Law Right of Publicity</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>YES</td>
<td><strong>UNCLEAR</strong></td>
</tr>
<tr>
<td></td>
<td>The Alabama Right of Publicity Act went into effect on August 1, 2015, codified at ALA. CODE § 6-5-770 et seq. (West 2016)</td>
<td>The 11th Circuit has interpreted Alabama’s privacy-based appropriation tort as analogous to a right of publicity. It is unclear what effect the recently passed statute will have, if any, on any future recognition of a common law right of publicity.</td>
</tr>
<tr>
<td>Alaska</td>
<td>NO</td>
<td>No Court Rulings</td>
</tr>
<tr>
<td>Arizona</td>
<td>YES-For Soldiers Only</td>
<td><strong>YES</strong></td>
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<tr>
<td></td>
<td>ARIZ. REV. STAT. § 13-3726 (Criminal)(West 2016)</td>
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<tr>
<td>Arkansas</td>
<td>NO</td>
<td><strong>PRIVACY CLAIM</strong></td>
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<tr>
<td></td>
<td></td>
<td>Arkansas recognizes invasion of privacy by appropriation as analogous to right of publicity.</td>
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<td><em>Dodrill v. Arkansas Democrat Co.</em>, 265 Ark. 628, 590 S.W.2d 840 (Ark. 1979)</td>
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<tr>
<td>California</td>
<td>YES</td>
<td><strong>YES</strong></td>
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<td><em>White v. Samsung</em>, 971 F.2d 1395 (9th Cir. 1992).</td>
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<tr>
<td>STATE</td>
<td>Right of Publicity Statute</td>
<td>Common Law Right of Publicity</td>
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<tr>
<td>Colorado</td>
<td>NO</td>
<td>LIKELY YES</td>
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<tr>
<td></td>
<td></td>
<td>Federal courts have suggested that the Colorado Supreme Court might adopt a right of publicity.</td>
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<td><em>Donchez v. Coors Brewing Co.</em>, 392 F.3d 1211 (10th Cir. 2004)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>NO</td>
<td>LIKELY YES</td>
</tr>
<tr>
<td></td>
<td></td>
<td>One federal court has held that the state would recognize an independent right of publicity.</td>
</tr>
<tr>
<td>Delaware</td>
<td>NO</td>
<td>LIKELY YES</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A federal appellate court has suggested that Delaware would recognize an enforceable property right in one’s name or likeness.</td>
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<tr>
<td></td>
<td></td>
<td><em>Ettore v. Philco Television Broadcasting Corp.</em>, 229 F.2d 481 (3d Cir. 1956)</td>
</tr>
<tr>
<td>Florida</td>
<td>YES</td>
<td>LIKELY YES</td>
</tr>
<tr>
<td></td>
<td>FLA. STAT. § 540.08 (West 2016)</td>
<td>Courts have treated the statutory misappropriation tort akin to a right of publicity.</td>
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<td><em>Tyne v. Time Warner Entm’t Co.</em>, 901 So.2d 802 (Fla. 2005)</td>
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<tr>
<td>Georgia</td>
<td>NO</td>
<td>YES</td>
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<td></td>
<td></td>
<td><em>Bullard v. MRA Holding, LLC</em>, 292 Ga. 748, 740 S.E.2d 622 (2013)</td>
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<tr>
<td>STATE</td>
<td>Right of Publicity Statute</td>
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<td>Toffoloni v. LFP Pub. Grp., LLC, 572 F.3d 1201 (11th Cir. 2009)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HAW. REV. STAT. § 482P-1 et seq. (West 2016)</td>
<td>No Court Rulings</td>
</tr>
<tr>
<td>Idaho</td>
<td>NO</td>
<td>PRIVACY CLAIM</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Idaho recognizes invasion of privacy by appropriation as analogous to right of publicity.</td>
</tr>
<tr>
<td>Illinois</td>
<td>YES</td>
<td>Not Anymore</td>
</tr>
<tr>
<td></td>
<td>765 ILL. COMP. STAT. 1075/1 et seq. (West 2016)</td>
<td>Preempted by Illinois Right of Publicity Statute</td>
</tr>
<tr>
<td>Indiana</td>
<td>YES</td>
<td>PRIVACY CLAIM</td>
</tr>
<tr>
<td></td>
<td>IND. CODE § 32-36-1 et seq. (West 2016)</td>
<td>Indiana recognizes invasion of privacy by appropriation as analogous to right of publicity.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949)</td>
</tr>
<tr>
<td>Iowa</td>
<td>NO</td>
<td>LIKELY YES</td>
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<td></td>
<td></td>
<td>No Iowa court to date has recognized a right of publicity. One federal district court has predicted that Iowa would recognize a right of publicity.</td>
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<tr>
<td>State</td>
<td>Recognizes Invasion of Privacy by Appropriation</td>
<td>Court Rulings</td>
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</tr>
<tr>
<td>Kansas</td>
<td>NO</td>
<td>PRIVACY CLAIM</td>
</tr>
<tr>
<td>Kentucky</td>
<td>YES</td>
<td>LIKELY YES</td>
</tr>
<tr>
<td>Louisiana</td>
<td>YES</td>
<td>PRIVACY CLAIM</td>
</tr>
<tr>
<td>Maine</td>
<td>NO</td>
<td>No Court Rulings</td>
</tr>
<tr>
<td>Maryland</td>
<td>NO</td>
<td>PRIVACY CLAIM</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>YES</td>
<td>NO</td>
</tr>
</tbody>
</table>

**Kansas**

Kansas recognizes invasion of privacy by appropriation as analogous to right of publicity.


**Kentucky**

Kentucky Supreme Court has indicated that it is an open question whether the statute subsumes the common law right of publicity or the privacy-based tort of appropriation. At least one federal court has concluded that common law rights remain.


**Louisiana**

Louisiana recognizes invasion of privacy by appropriation as analogous to right of publicity.

*Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386 (La. 1979)

**Maine**

No Court Rulings

**Maryland**

Maryland recognizes invasion of privacy by appropriation as analogous to right of publicity.


**Massachusetts**


**Michigan**

Yes
<table>
<thead>
<tr>
<th>Location</th>
<th>Yes/No</th>
<th>Likely Yes/No</th>
<th>Relevant Case/Citation</th>
</tr>
</thead>
</table>
| Minnesota    | NO     | LIKELY YES    | Federal courts have held that Minnesota would recognize a right of publicity. 
Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) |
| Mississippi  | NO     | PRIVACY CLAIM | Mississippi recognizes invasion of privacy by appropriation as analogous to right of publicity. 
Brasel v. Hair Co., 976 So.2d 390 (Miss. App. 2008) |
| Missouri     | NO     | YES           | Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) 
Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (Mo. Ct. App. 1911) 
C.B.C. Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007) |
| Montana      | NO     |               | No Court Rulings |
| Nebraska     | YES    | NO            | Carson v. Nat'l Bank of Commerce Trust & Sav., 501 F.2d 1082 (8th Cir. 1974) |
| Nevada       | YES    | NO            | Nevada courts have held that the right of publicity statute is the sole protection against a right of publicity claim. 
<table>
<thead>
<tr>
<th>State</th>
<th>Right of Publicity</th>
<th>Recognition</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>NO</td>
<td>LIKELY YES</td>
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<td>Federal courts have treated New Hampshire's appropriation tort as a “right of publicity.”</td>
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<tr>
<td>New Jersey</td>
<td>NO</td>
<td>YES</td>
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<td>Federal courts have held that New Jersey would recognize a right of publicity and at least one state court has suggested that “celebrity goodwill” is a recognized state property right.</td>
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<td>New Mexico</td>
<td>NO</td>
<td>YES</td>
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<td>The court has recognized the right of publicity is equivalent to the tort of appropriation of name or likeness.</td>
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<td>New York</td>
<td>YES</td>
<td>NO</td>
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<td>New York's right of publicity claim is part of its &quot;Right of Privacy&quot; statute at Article 5 of the N.Y. Civil Rights Law</td>
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<td>N.Y. CIV. RIGHTS LAW § 50. Right of Privacy (West 2016)</td>
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<tr>
<td>State</td>
<td>Recognition</td>
<td>Privacy Claim</td>
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</table>
| North Carolina   | NO          | PRIVACY CLAIM | North Carolina recognizes invasion of privacy by appropriation as analogous to right of publicity.  
| North Dakota     | NO          | No Court Rulings |                                                                                       |
| Ohio             | YES         | YES           | At common law, Ohio has not distinguished the right of publicity from the tort of misappropriation. The state provides a common law right of publicity that appears to remain in place even after the passage of the statute.  
*ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).  
*Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (Ohio 1976) |
| Oklahoma         | YES         | YES           | *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996)  
<table>
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<tr>
<th>Location</th>
<th>Result</th>
<th>Citations</th>
</tr>
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| Oregon            | NO     | Oregon Supreme Court suggested that a person with an economically valuable identity whose name or image is used for commercial purposes has a cause of action. The Second Circuit has presumed Oregon would recognize such a right.  


*Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941)  

*Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). |
| Pennsylvania      | YES    | 42 PA. CONS. STAT. ANN. § 8316 et seq. (West 2016)  

At common law, Pennsylvania has distinguished the right of publicity from the tort of misappropriation (called "invasion of privacy by appropriation of name or likeness"). However, it is unsettled whether the statute has absorbed the common law tort.  


*Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008)  


| Rhode Island      | YES    | R.I. GEN LAWS § 9-1-28 et seq. (West 2016)  


|                  | NO     |                                                                 |

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<table>
<thead>
<tr>
<th>State</th>
<th>Common Law Right</th>
<th>Statutory Right</th>
<th>Case References</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Dakota</td>
<td>YES</td>
<td>NO</td>
<td>S. D. CODIFIED LAWS § 21-64 et seq. (West 2016) Statutory right expressly excludes any common law claims.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>YES</td>
<td>UNCLEAR</td>
<td>TENN. CODE ANN. § 47-25-1101 et seq. (West 2016) Tennessee courts have held that there is a common law right of publicity and that the right is descendible. The Tennessee Personal Rights Protection Act also expressly states that the remedies are meant to be “cumulative” and “in addition to any other provided for by law.” Nevertheless, federal courts have held that the statutory right supplants the common law right, and state courts have not yet disagreed. State ex rel. Elvis Presley Intern. Mem’l Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987) Marshall v. ESPN, Inc., 111 F. Supp. 3d 815 (M.D. Tenn. June 8, 2015)</td>
</tr>
<tr>
<td>Texas</td>
<td>YES</td>
<td>YES</td>
<td>ONLY POST MORTEM TEX. PROP. CODE ANN. § 26.001 et seq. (West 2015) A Texas appellate court has held that there is a claim for misappropriation of one’s name or likeness even if a person is a public figure and has no or a limited right to privacy. A 1951 Texas Civil Court of Appeals opinion suggests that there may also be a separate property-based claim for the use of one’s name and signature independent of any right to privacy. Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. App. 1975)</td>
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<tr>
<td>State</td>
<td>Status</td>
<td>Statute References</td>
<td>Notes</td>
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<tr>
<td>Utah</td>
<td>YES</td>
<td>UTAH CODE ANN. § 45-3-1 et seq. (West 2016)</td>
<td>U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289 (Tex. App. 1951)</td>
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<tr>
<td>Utah</td>
<td>LIKELY YES</td>
<td></td>
<td>At least one federal court has held that Utah has a common law right of publicity and that it is not preempted by the state’s Abuse of Personal Identity Act. The statute expressly states that it does “not limit or supersede any causes of action otherwise available to the parties.” This provision, however, has not yet been interpreted by state courts in the context of deciding whether a common law right of publicity exists. Nature’s Way Prods. v. Nature-Pharma, Inc., 736 F. Supp. 245 (D. Utah 1990)</td>
</tr>
<tr>
<td>Vermont</td>
<td>NO</td>
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<td>Staruski v. Continental Telephone Co. of Vermont, 154 Vt. 568, 581 A.2d 266 (1990)</td>
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<td>VA. CODE ANN. § 18.2-216.1 (West 2016)</td>
<td>(interpreting statute)</td>
</tr>
<tr>
<td>Washington</td>
<td>YES</td>
<td>WASH. REV. CODE ANN. § 63.60.010 et seq. (West 2016)</td>
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<td>LIKELY YES</td>
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<td>The Washington Supreme Court has protected individuals from the nonconsensual uses of their names or likenesses under a property-based rubric, and no Washington court has suggested that the statute preempts common law rights.</td>
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<tr>
<td>State</td>
<td>Recognizes Right of Publicity</td>
<td>State Statute(s)</td>
<td>Courts Rulings</td>
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<tr>
<td>West Virginia</td>
<td>NO</td>
<td>Federal courts have held that West Virginia would recognize a right of publicity and the West Virginia Supreme Court has acknowledged that such a right contrasts with the privacy-based appropriation tort.</td>
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<tr>
<td>Wisconsin</td>
<td>YES</td>
<td>Courts have treated the misappropriation tort akin to a “right of publicity.”</td>
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<td>Hirsch v. S.C. Johnson &amp; Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979)</td>
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<tr>
<td>Wyoming</td>
<td>NO</td>
<td>No Court Rulings</td>
<td></td>
</tr>
</tbody>
</table>
JASON ADLER

Jason Adler is General Counsel and Secretary for Cellairis Franchise, Inc. located in Alpharetta, Georgia. Cellairis and its affiliates are manufacturers and distributors of accessories for wireless devices and currently operate units domestically and internationally in 8 countries, as well as holding retail space within numerous retail centers, such as Walmart. Mr. Adler is responsible for handling all legal matters for Cellairis and its affiliates, which cover a wide range of legal and business issues including franchise (registration and system compliance), litigation matters, corporate governance and regulatory matters, intellectual property, real estate, labor and employment, celebrity and endorsement law, and social media/information technology matters, insurance/risk management, and mergers and acquisitions both in domestic and international forums. With respect to franchising matters, Mr. Adler handles compliance with state and federal regulations including drafting franchise disclosure documents, complying with state franchise registration and disclosure laws, preparing expansion into international markets, and developing social media policies, operational standards, and advertising guidelines.

Mr. Adler co-authored an article entitled “Critical Privacy and Data Security Risk Management Issues for the Franchisor” published in the Summer 2015 issue of the Franchise Law Journal. Additionally, Mr. Adler is a frequent presenter and author on domestic and international franchise-related topics, including privacy and information security loss prevention, best practices for domestic franchisors expanding internationally, and the ethical issues that arise for domestic franchise lawyers advising international clients. Mr. Adler currently serves on the Board for the State Bar of Georgia Franchise and Distribution Section as well as being a Member on the Marketing Committee for the American Bar Association Franchise Section. Mr. Adler also serves as Treasurer for Creating Connected Communities, a 501(c)3 organization, with the mission to provide young adults with tools and resources to assist people in need and to help them become community leaders through partnership, advocacy and mentorship training, where the seminal event each year is Christmas celebration for over 800 children from homeless shelters, foster care homes and refugee centers around metro-Atlanta every December with the help of over 300 teen volunteers. Mr. Adler also serves as Treasurer and advisor to numerous judges in Atlanta, Georgia, by providing campaign finance advice as well as handling all of the regulatory and compliance requirements promulgated by the Georgia Government Transparency and Campaign Finance Commission.

Mr. Adler received his J.D. degree in 2002 from the Emory University School of Law, where he was the Managing Editor of the Bankruptcy Law Journal. He received a Bachelor of Arts degree majoring in Economics, minoring in Business and Managerial Economics, and receiving a Legal Studies Concentration from Brandeis University in 1999.
Mr. VanderBroek is a partner in the Atlanta office of Nelson Mullins Riley & Scarborough LLP, where his practice focuses on franchise law and litigation (including litigating franchise and business disputes for franchisors and franchisees, defending franchisors against vicarious liability claims, and counseling franchisors on franchise disclosure, regulation, contracts, and compliance); intellectual property litigation (involving trademarks, trade dress, copyrights, false advertising, unfair competition, restrictive covenants, trade secrets, the Internet, and social media), and business litigation (including claims of breach of contract, defamation, fraud, tortious interference, and other business torts).

Mr. VanderBroek has been recognized in the International Who's Who of Franchise Lawyers since 2012. He has written articles for the ABA Franchise Law Journal on franchise trade secrets, copyright law, and covenants not to compete, and was a presenter at the 2009 ABA Forum on Franchising on the topic of protecting and enforcing trade dress rights. He also is a regular presenter on franchise topics for the Georgia Bar Franchise and Distribution Law Section, and earlier this year gave an International Franchise Association/Southeast Franchise Forum presentation on "NLRB and the Joint Employer Threat."

Mr. VanderBroek received his Bachelor of Business Administration degree in 1981 from the University of Michigan, and his J.D. degree in 1984 from the University of Chicago Law School, where he was a member of the law review. He served as a law clerk to Judge James C. Hill of the United States Court of Appeals for the Eleventh Circuit.