Right of Publicity

Contributing editor
Rick Kurnit

2018

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2011
Eighth edition
ISSN 2045-4325

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Global overview

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The right of publicity originates in the 'right of privacy' as first described in an 1890 law review article that advocated creation of a right to be left alone. This was a remarkable expansion of the recognised right to sue for trespass on one's property to a right to sue for invasion of one's person. The article advocated four related rights of privacy, three of which were extensions of known rights that were recognised in many cultures and actionable in private tort law:

- the claim against other people for intrusion on private space;
- the claim of false light – false speech causing emotional injury; and
- the claim based on truthful publication of embarrassing private fact – protecting a reasonable person's secrets.

The latter two extended the long-recognised common law of defamation to go beyond the traditional false speech damaging reputation.

The most revolutionary suggestion was the fourth right – almost an afterthought – the right to sue for commercial appropriation of one's name or image. Initially, this was a corollary to the other two new claims: a claim for the individual's emotional anguish – anger or embarrassment in being commercially exploited without permission. Until the technologies of photography and the concurrent inclusion of images in advertising, there would have been little need for a claim based on unauthorised inclusion of one's image in advertising. But with the proliferation of advertising-supported publications, this privacy right gained popular support. Professional models and famous film stars lobbied legislatures and brought claims in court prodding common law development. It seemed only natural that someone making money from another person's name or image should account for the value of that name or image. The right of privacy expanded to encompass damages for the unjust enrichment of a user at the expense of the person whose name or image was commercially appropriated. This led to the creation of the right of publicity.

The antipathy to advertising and the more egregious appropriations – using small children or including an unwitting person in sleazy marketing materials – fuelled the expansion of the private right to prevent unauthorised commercial appropriation. In 1903, the first statute was enacted in New York in response to a ruling by the state's highest court that the English and American common law did not recognise a claim for use of a person's picture in advertising and packaging. The case arose from a silk-screen image of a young girl as part of the design on flour sacks. The response was to make it a crime punishable by up to six months in jail to use a person's 'name, picture or portrait for purposes of advertising or trade' without written permission and, in the case of a minor, that written permission had to come from the parent or guardian. The legislature took this so seriously that the legislation included a private right of action with a presumption of an injunction and a presumption of punitive damages. The right of privacy was the right of a living person to avoid the embarrassment or notoriety of being connected with anything as crass and objectionable as advertising and commerce. It was thus limited to living persons who would experience the presumed emotional injury.

The right of publicity developed as celebrities sought recognition for the far more lucrative claims for the value of their endorsement. Having relinquished much of their 'privacy' as far as being in media or participating in advertising and marketing, their focus was on the value of their endorsement. This authorisation – more of a licence than a release – became extremely valuable.

The right of publicity expanded through the second half of the 20th century, with more statutes expanding its scope and more case law development. What started in New York in 1903 spread across the United States. Other countries, most notably France and Canada, embraced the right of publicity in the last quarter of the 20th century. Although Great Britain did not recognise it, the European Court of Human Rights did, and by the turn of the century it was something to contend with throughout much of the world.

When Elvis Presley died in 1977 (although some to this day say maybe not), his personal manager objected when a poster immediately appeared with his image and the words 'In Memoriam'. It was clear that Elvis's right of publicity would continue to be valuable for as long as it was kept 'alive'. Thus the post-mortem rights for the heirs or the estate became a battleground for litigation and legislation. Consequently, the right of publicity was untethered from privacy. The most public celebrity could protect the value of his or her name or association when commercialised and it would not end with the celebrity's death.

All through its development, as new technologies for communication were developed, the right expanded to encompass additional bases for celebrities to state a claim for compensation. Voice and voice imitation, signature or gesture were added to the aspects of identity that could be recognised as the basis for a claim. Ultimately, in a much-criticised decision in 1992, the California Federal Court surmised that California common law would extend further than the recently enacted California Right of Publicity statute and held that no name, picture or likeness of an actual person was necessary to support a claim. The scene or subject of the content might be sufficient to give a celebrity a right of publicity claim – even where no living or actual person is depicted and there is no use of anyone's name, picture or portrait.

Also, over the past 20 years with the digital revolution in media and means of communication, the separation of advertising from other communication has eroded. Today, commercialisation of content – branding, messaging or just brands seeking to enhance their relationship with consumers, together with the need for content creators to monetise content beyond strictly separable paid media insertions – has collapsed most easily recognisable distinctions between advertising and editorial content. This has led regulators and consumer protection advocates to demand that brand integration with content be disclosed in a manner that tends to classify everything as advertising or commercial. The effort to do more than necessary to avoid any regulatory issue runs the risk of opening the door to right of publicity claims. Moreover, these claims could conceivably be based on no more than a celebrity claiming association with the cultural event or public phenomenon, or context alluded to in a generic depiction of a type of entertainment or cultural event.

The right of publicity continues to expand to encompass more elements of personality and more media and forms of communication. Trained advertising professionals were previously included in the creation of advertising and were careful to obtain necessary licences. Advertising agencies created advertising and also supplied the advertiser with insurance that covered such claims. Today, content commissioned and paid for by advertisers is created without input from advertising professionals. The content may include discussions of popular cultural events and celebrities. When it also includes product placements and advertiser-dictated content or even just an advertiser's credit for sponsoring or underwriting the cost of the content, it may

expose the advertiser to claims by people who are identified in the content.

Advertisers and brands will need to be aware of the changing laws of many countries regarding labelling as advertising or disclosing the brand's involvement with content creation and the possibility of triggering a right of publicity claim as the content is disseminated worldwide.

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Law Business Research

Right of Publicity
ISSN 2045-4325

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