

# Right of Publicity

*Contributing editor*  
Rick Kurnit



2018

GETTING THE  
DEAL THROUGH 

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*Contributing editor*

**Rick Kurnit**

**Frankfurt Kurnit Klein & Selz PC**

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# United States

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## Sources of law

### 1 Is the right of publicity recognised?

Yes. While there is no federal (ie, national) right of publicity, it has been determined by the US Supreme Court that the First Amendment (freedom of speech) does not prevent state law from providing a claim for commercial appropriation of a person's identity. Wherever it has been asserted, the states have permitted some version of it. Consequently, at a minimum, the use of a person's name or image virtually anywhere in the US, at least in advertising, can be assumed to give rise to a claim.

### 2 What are the principal legal sources for the right of publicity?

The majority of states have recognised the claim for commercial appropriation of an individual's identity as a matter of common law. Many states have enacted civil statutes defining the private right of action. A few states have a criminal statute (misdemeanours), but no enforcement criminally has occurred. New York was the first state to recognise the claim in 1903, after the courts had concluded that there was no claim under common law.

The statute that was enacted following that ruling included a criminal statute making the use of a person's name picture or portrait for purposes of advertising or trade punishable by up to six months in jail. See section 50 of the New York Civil Rights Law. The companion statute provides for a private right of action for such use without written authorisation and specifies that the writing must be signed by the parent or guardian for persons under the age of 18. See section 51 of the New York Civil Rights Law.

### 3 How is the right enforced? Which courts have jurisdiction?

The right is usually enforced by civil lawsuits brought in state court, but can also be brought in federal court through a Lanham Act (the US trademark statute) claim or because of jurisdiction over the claim based on the residency of the parties being from different states.

### 4 Are there other rights or laws that provide a claim based on use of a person's name, picture, likeness or identifying characteristics?

Federal law provides a claim for creating a likelihood of confusion as to the nature of the association (authorisation, endorsement) of a person with a brand. See section 43(a)(1)(A) of the Lanham Act. This claim is commonly included in any claim of violation of the right of publicity, as the unauthorised use of a person's identity in advertising is likely to support such a claim. The Lanham Act also prohibits unauthorised registration as a trademark of a living person's name, portrait, or signature. See section 2(c). Similarly, unauthorised registration of a living person's name as an internet domain name can be challenged under the Anticybersquatting Consumer Protection Act. See 15 USC 8131.

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## Existence of right

### 5 What aspects of a person's identity are protectable under the right of publicity?

The right of publicity protects the following aspects of a person's identity:

- name, which includes a first name or a nickname, assumed name, stage name and anything that is sufficient to identify a particular

person. A release from a person who bears the name will not prevent a claim from a famous person with the same name, at least where the context suggests the famous person;

- picture, including any portion of a person which is sufficient for that person to recognise him or herself;
- portrait, including a cartoon or illustration;
- likeness, including a look-alike or actual person who through makeup is made to appear like the famous person, or even an inanimate object such as a robot who by appearance or even context conjures up a celebrity;
- voice, which may include a voice impersonation;
- signature. Even the possibility that it is someone famous may be able to convince a court that the context of an advertisement implicates their identity;
- gesture. Indiana, at the urging of the estate of Groucho Marx, includes protection for a famous gesture that a celebrity made famous; and
- persona. In a much-criticised case, the Ninth Circuit Court of Appeals in a two-to-one decision reversed a trial judge who dismissed a claim brought by the woman who turned the letters on a famous television show called 'Wheel of Fortune' based on an advertisement that depicted the show 25 years in the future with a robot as the letter turner. The advertisement titled it the world's longest-running game show and specified the year as 25 years in the future, but the appellate court held that a jury could conclude that the robot evoked the persona of the woman who currently fulfilled that role on the show.

### 6 Do individuals need to commercialise their identity to have a protectable right of publicity?

No. The right to prevent commercial appropriation of one's identity began as a privacy right of ordinary (not famous) people. The mental anguish or personal discomfort arising from inclusion in something commercial is sufficient in most states to state a claim. In some states the rights of heirs of a deceased individual may be limited to where the individual had exploited the right during his or her lifetime.

### 7 May a foreign citizen protect a right of publicity under the law of your jurisdiction?

Yes. Many state statutes include use in that state's jurisdiction and consequently provide an argument for a foreign citizen to assert a claim. However, whether that person has a right of publicity at all may be determined by the law of their domicile. There is some authority, nevertheless, that even if the individual's domicile does not recognise a personal right of privacy, if there has been a licensing to exploit the person's name or likeness in the US it creates a protectable property right in the US.

### 8 Is registration or public notice required or permitted for protection of the right? If so, what is the procedure and what are the fees for registration or public notice?

No. There is no requirement of registration. However, it is important to note that California, Nevada, Oklahoma, and Texas provide for registration and require registration in order to assert post-mortem rights. Registration is with the state Secretary of State (as with corporate

registration to create a corporation to do business in the state) and entails filing a form and making a modest payment.

**9 Is the right protected after the individual's death? For how long? Must the right have been exercised while the individual was alive?**

The different states have taken different positions on whether the right of publicity may continue after death. Initially as a privacy right it was limited to living persons who would object to being used commercially. As celebrity rights became more valuable, the property right in licensing a person's celebrity came to be recognised. Most famously, Tennessee, the home state of Elvis Presley, passed a statute that would protect the extremely valuable rights to everything connected with Elvis. It is the most complicated state statute by providing for an initial 10-year period of use, but as long as the rights are commercially exploited there is no end until two years of non-use. Most states limit the continuation of the post-mortem rights to 20 (Virginia) and 100 years (Indiana). California by statute is 70 years, but New York has yet to recognise any post-mortem rights for the estates of New York residents. Very few states (eg, Utah) have continued the rule that the right had to be exercised during the individual's lifetime to extend after death.

**Ownership of right**

**10 Can the right be transferred? In what circumstances?**

Yes. Individuals are able to transfer any of the rights, including the right to use any recognisable aspect of their identity in any manner that they wish. Thus assignments may be limited in time, media, geography, and product category. Celebrities may assign all of their rights to a loan out company that they own or in which the ownership is divided. Celebrities are also advised to assign these rights upon their death to a corporate entity, charity, or preferred heir.

**11 Can the right be licensed? In what circumstances?**

Yes. An individual can license a third party to use of the rights for any period of time, geography, media, product category, or purpose.

**12 If the right is sold or licensed, who may sue for infringement?**

The individual. The owner of an exclusive right can enforce its rights with respect to the scope of its licence, but typically the licence will include a requirement that the owner pursue any infringer.

**13 If post-mortem rights are recognised, are they limited to natural heirs or can they be enforced under a contract by an assignee or left to an entity?**

Most states permit transfer by contract, will or other testamentary instructions. Where the individual has made no provision, most states treat any publicity rights as part of the residuary estate. In most instances that means that the executor of the estate may dispose of it for the benefit of the heirs. After the estate is closed, the heirs can license exploitation of the rights. A few states (eg, Florida) limit the intestate inheritance to natural heirs. California's right of publicity statute specifies that the surviving spouse and issue (children or grandchildren) receive half of the right each and in equal shares among the issue. If either the spouse or the issue do not survive, the survivor receives the entire right. If there are no surviving spouse or issue, the right of publicity terminates.

**14 Are there any actions that rights owners should take to ensure their rights are fully protected?**

A celebrity, or anyone with valuable publicity rights, should plan on establishing their estate in a state that recognises post-mortem rights. Creating a corporate entity and assigning all such rights may aid in the exploitation of the rights, especially in the immediate aftermath of the celebrity's death. The holder of the post-mortem rights would be well advised to file that ownership with the California Secretary of State.

**Infringement**

**15 What constitutes infringement of the right?**

The following elements constitute an infringement of the right of publicity:

- use of an element of a person's persona – name, picture, likeness, voice, signature, gesture, or context – sufficient that they can identify themselves;
- in advertising or a commercial promotion or product – even if there is no apparent endorsement; and
- that is not protected by the First Amendment or statutory public interest exceptions, or exceptions for truthful advertising of the content of a communications medium – books, magazines, films – where the individual is the subject or the artist contained in the publication.

**16 Are certain formats of intellectual property excluded from claims based on the right of publicity? What is the legal basis of the exclusions?**

Yes. The First Amendment does limit the ability of individuals to use the courts to penalise some speech. As a result, courts interpret state statutes and common law claims to be consistent with First Amendment protection of free speech on issues of public importance. Consequently, there needs to be a commercial aspect to the speech greater than just the fact that the publisher receives payment or subscription revenue. In 1903, when the first statute was enacted, the assumption was that advertising was easily distinguished from editorial or artistic expression and that a prohibition on a use for advertising or trade would not chill protected speech. Today the integration of brand messaging into content has made this a difficult issue. Publishers of editorial content are now creating content commissioned by advertisers that may well not be considered to be advertising (containing no claims about the product or the brand or its competitors), but a possible right of publicity claim by anyone referenced in the content is still a concern.

Many state statutes specifically exempt bona fide news, biography, political campaigns, art, entertainment, and sports reporting. Video games have been held to be First Amendment protected entertainment, but courts have held that video games based on actual athletes performing as they do in their actual careers may give rise to a right of publicity claim. These cases are still subject to ongoing litigation.

**17 Is knowledge or intent to violate the right necessary for a finding of infringement?**

No. It is essentially a strict liability tort. An advertiser may be liable for any repurposing of content, even a retweet, that it authorises or allows to remain after learning of it.

**18 Does liability extend to media publishing content created by an advertiser and website operators publishing posts by third parties? Does republishing or retweeting or other social media propagation of existing content give rise to liability?**

Yes. If the content is commercial as opposed to editorial, it may give rise to a claim. Recently, a congratulatory page in a commemorative issue of *Sports Illustrated* that was devoted to Michael Jordan being elected to the Hall of Fame was held to be sufficiently commercial (it enhanced the reputation of the supermarket chain that was congratulating him) to support a right of publicity claim. Any authorised republishing or retweeting or sponsored social media promotion may give rise to liability. Even allowing content posted by others that contains a reference to a celebrity to remain on a company site might be deemed to be a use of a celebrity for purposes of a right of publicity claim.

**Remedies**

**19 What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?**

Remedies include an injunction mandating the removal of the content and damages, such as punitive damages – damages based on the value of the business that has been held liable in order to award a substantial enough punishment to deter the offending conduct. This is not a situation where it can be assumed that all the user will receive is a cease and desist letter (see question 22).



**20 Is there a time limit for seeking remedies?**

There are statutory statutes of limitations requiring that the claim be brought within a limited period of time of first use, or discovery of the use. In California it is two years. In New York it is one year. The single publication rule – that the continuous publication of the content is measured from the first publication – is generally applied to calculation of the running time of the statute of limitations.

**21 Are attorneys' fees and costs available? In what circumstances?**

The general rule in the US is that each party bears its own costs and attorneys' fees. Where public policy favours certain claims, there is a specific statutory provision for the award of attorneys' fees. Therefore, it is significant that the California statute specifies that the prevailing party in a right of publicity claim brought under the statute is entitled to attorneys' fees and costs. In addition, a companion claim under the Lanham Act for creating the likelihood of a false connection or endorsement by a celebrity provides that the judge may award attorneys' fees where the violation was knowing and wilful.

**22 Are punitive damages available? If so, under what conditions?**

Yes. The New York statute explicitly provides that punitive damages may be awarded merely upon showing that the use was knowing. The California statute provides that the court may award punitive damages, but the general rule in California is that punitive damages are to be awarded where there is 'oppression, fraud, or malice'. Similar to California, most states require extraordinary wrongdoing to support punitive damages. Thus continuation of the use without a plausible justification after receiving a bona fide objection from the exclusive licensee or owner of the publicity rights might support an award of punitive damages. Documentation that the user knew that the use was unauthorised and objectionable and proceeded after a warning may also support an award of punitive damages.

**23 Is preliminary relief available? If so, what preliminary measures are available and under what conditions?**

Yes. A preliminary injunction requiring the cessation of the use pending the resolution of the case may be granted. Generally, this is determined by the court on preliminary motion and entails a brief hearing if requested to aid the court in determining whether the continuing use will cause damage that is sufficiently remedied by an award money. The party seeking the preliminary injunction will be required to demonstrate their likelihood of success on the claim – that they fulfil the elements of the claim – and the court must consider whether there is a defence to the claim that is likely to be successful. Most jurisdictions also require the court to consider the balance of the hardships resulting from the grant or denial of the injunction.

The party seeking the injunction is typically required to post a bond sufficient to compensate the defendant for any damage suffered due to an injunction that should not have been granted. The bond can be quite substantial where the injunction will delay or derail an advertising campaign or a product launch.

**24 What are the measures of damages?**

All of the above are acceptable measures of damages, except damage to reputation, which is properly not included as defamation claims are subject to strict limitations. However, damage to the value of a celebrity's endorsement for future deals will cover the same injury. The right of privacy as initially created was focused on the offence to personal integrity in being commercially exploited without permission. The damage in terms of mental anguish and upset remains available to anyone, including a private person with no apparent publicity value. The right of publicity is the extension of the unjust enrichment claim – the value to the user of not paying for the image or model. Thus the damages are far more significant in the case of a celebrity whose name or persona has value in getting attention or in implied endorsement.

**25 What significant judgments have recently been awarded for infringement of the right?**

A Chicago jury awarded Michael Jordan \$8.9 million for a single publication of an advertisement in only one magazine that was a commemorative issue of *Sports Illustrated* devoted to Michael Jordan. Mr Jordan

testified that he would not lend his name to a brand for advertising purposes for less than \$10 million.

In the leading case on punitive damages, the advertising agency proceeded with using a voice imitation of a professional singer in a radio commercial for potato chips after counsel advised that it might violate the singer's right of publicity. The value of the singer's performance or apparent participation was set at \$375,000, but the knowing and wilful nature of the violation added \$2 million in punitive damages.

A sponsor of a concert created a television commercial that promoted the concert and the product, which included a brief clip of a band that performed at the concert. The band sued. The award included \$2.8 million in punitive damages.

**Litigation****26 In what forum are right of publicity infringement proceedings held?**

These are private lawsuits instituted by the owner of the rights in the state of their choice as plaintiff. In response to a cease-and-desist letter, the company facing the claim may choose to bring a declaratory judgment action – seeking a ruling that the complained of content is not in fact a violation of the rights asserted – in order to choose the state or the court – state court or federal court. In either case, there is the possibility of moving the litigation to another jurisdiction on a variety of procedural motions.

The rights owner may choose a state where the law is more favourable or where damages awards are higher. The law that should be applied is the law of the state where the rights owner is domiciled, but courts often prefer the law of the state where they are located, so the selection of the court may be helpful in this regard. Where the rights are held by a corporate entity or the suit is based on violation of an exclusive licence, there is a better chance of using the law where the use is published rather than the law of the domicile of the individual who has been exploited.

The defendant often prefers to be in federal court, especially where there is a defence that the use is protected by the First Amendment (see question 16). In the US it is possible for the defendant to remove a case to the federal court when the parties are residents of different states and the controversy concerns more than \$75,000. Celebrities generally will include a number of claims, including false advertising and the Lanham Act claim for likelihood of confusion as to the nature of the association of the celebrity with the advertiser or false endorsement, which are federal claims and provide a basis for the case to be brought in federal court.

**27 Are disputes decided by a judge or a jury? Are damages determined by a judge or a jury?**

Either party to a civil suit can elect to have the case tried before a jury. Plaintiffs will generally elect to have a jury. This is because the defendant is usually a large corporation with large expenditures for advertising and marketing and big numbers in sales and perhaps profits, which are likely to be helpful in convincing a jury to award large amounts. Celebrities also generally expect to be handsomely rewarded by their fans on the jury.

A preliminary injunction is decided by the judge. The judge also decides whether to permit the jury to award punitive damages or whether to award attorneys' fees, although he or she can ask the jury for an advisory opinion on whether the use was knowing and wilful or otherwise warrants punitive damages. If the judge concludes that there are possible grounds for punitive damages, he or she can charge the jury to determine the amount. An excessive jury award may be reduced by the judge.

**28 How is the choice of applicable law determined?**

The predominant rule is that the law of the domicile of the individual determines the existence of the rights and the scope of the rights. The courts in New York have held that this is applicable to the question of whether there are post-mortem rights that can be asserted by the heirs, which is crucial since New York does not recognise such rights. Thus the estate of Marilyn Monroe was unable to sue for use of her image after her death once it was determined that New York was her domicile at the time of her death (based on the position taken by her estate) despite owning property and dying in California. Similarly, when the

estate of Tennessee Williams sued over the use of his name on a theatre in New York City, the highest court in New York State held that the existence of any post-mortem rights would be determined by Florida law, as his estate was domiciled in Florida.

However, some courts have held that these principles apply only to the personal rights of the individual, and that a licence to exploit the right of publicity can create a property right which can be viewed differently, even to provide a right where the domicile of the individual does not recognise such a right.

**29 To what extent are courts willing to consider, or bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?**

The predominant view is that the rights are defined by the domicile of the individual. On this basis, a foreign citizen suing in the US may be limited to the rights recognised in his or her home jurisdiction.

Since the right of publicity is created by state law, the federal courts have to apply the law of the state in which the federal court sits, including the conflicts of law principles of that state. Thus, for example, a federal court in New York would apply the principles that a New York State court would apply to determine the applicable law – to essentially determine how a state court would rule. In addition, the highest court of the state is the final arbiter of the state common law or the interpretation of state statutes (such as right of publicity statutes) where the law of that state is the one most appropriately applied. State courts are not bound by federal court rulings on state law (although they may consider them), and once the state courts rule differently the federal court precedent should not be followed even by other federal courts. A federal court can refer a question of state law to the state's highest court for clarification, such as whether a particular use of an individual would be a violation of the state's right of publicity law.

**30 What avenues of appeal are available in main proceedings or preliminary injunction proceedings? Under what conditions?**

A preliminary injunction decision is immediately appealable. A final judgment is appealable as of right. For the most part state and federal procedures limit appeals of orders of the trial court that are not dispositive. Most typically there is a mid-level appeals court to which appeal is a right, and a highest court from which an appeal of the mid-level appeals court can be taken, but at the discretion of the highest court. Thus a trial court in the federal system will determine a preliminary injunction or final judgment and either party may appeal to the circuit court in that jurisdiction (a three-judge panel of the court will hear the appeal).

An appeal to the US Supreme Court, however, is based on petitioning that court to take the case and the vast majority of those petitions are denied. The US Supreme Court is only interested in whether the state law or application of it to punish speech violates the First Amendment freedom-of-speech guarantees (see question 16).

**31 What is the average cost and time frame for a first-instance decision, for a preliminary injunction, and for appeal proceedings?**

A preliminary injunction motion and hearing can easily cost \$100,000. The appeal from that decision can take several months and add an additional cost of legal fees of \$50,000 to \$100,000.

The cost and time frame for a trial and final determination of injunction and damages can be much greater, as discovery of documents and sworn testimony of witnesses precedes the trial and often the parties will rely on expert witnesses to address the damages. These witnesses are expensive and their deposition testimony is essential. Each party to the litigation may incur legal fees of \$500,000 to \$1 million or more just to complete trial and there might still be an appeal from the final judgment, adding another \$50,000 to \$100,000 in legal fees. The total proceedings may take more than a year.

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