

Copyright News You Can Use **By Andrew Berger**

“Hey, That Publication Is Using A Photo of Me” The Right of Publicity Explained

You may have a multi-million-dollar problem when you use another’s photo without that person’s permission. A jury in California recently awarded a kindergarten teacher, Russell Christoff, \$15.6 million for violating his right of publicity. The violation arose when Nestle U.S.A. used his image without authorization on its Taster’s Choice coffee labels.

The verdict focused increased interest on the right of publicity and raised a number of questions, including:

- A. What is the right of publicity and what interests does it protect;
- B. What damages may a person receive when her publicity rights have been violated and why was the verdict in the Taster’s Choice case so high;
- C. When will the First Amendment protect your unauthorized use of another person’s identity;
- D. How does the right of publicity differ from the right of privacy and
- E. What should I include in my model release to avoid liability for violating another’s publicity rights.

Some answers follow.

What is the right of publicity? It recognizes that a person’s identity has economic value resulting from the person’s creativity and efforts. The value may be significant. For example, some athletes earn more from endorsements than from their salary.

The right of publicity protects **each person**, celebrity or not, and allows each to control and profit from his or her identity. A majority of states recognize publicity rights either by statute or through case law. California and some others protect publicity rights even after a person’s death.

What aspects of a person's identity does the right of publicity protect against unauthorized use? The right protects all aspects of a person's persona, in addition to their photo and likeness. Also protected are a person's voice, name, nickname and even property and phrases closely associated with that person. Here are examples of various aspects of one's identity the courts have protected:

1. Bette Midler won a verdict of \$400,000 against Ford Motor for appropriating her **voice** in a commercial by a voice impersonator;
2. Vanna White was awarded \$403,000 because Samsung created a TV ad using a robot that **looked and acted like** her in a Wheel of Fortune-like game show;
3. Lothar Motschenbacher's right of publicity was violated when R.J. Reynolds made an advertising use of a distinctive **race car** that was identifiable as belonging to this famous driver; and
4. Johnny Carson stated a claim for a violation of publicity rights when defendant used the **phrase** "Here's Johnny" in its advertisements for portable toilets.

What are the damages a plaintiff may expect to receive for a violation of the right of publicity? Damages include an amount sufficient to compensate a plaintiff for her diminished ability to commercially license her identity in the future. Also recoverable is the lost licensing fee a defendant would have paid if the defendant had negotiated the fee with the plaintiff before engaging in the unauthorized use. In addition, California and some other states permit a plaintiff to recover a defendant's profits arising from and attributable to the unauthorized use.

Why were the damages in the Taster's Choice case so high? Because Mr. Christoff was able to recover a portion of defendant's profits. Nestle had generated substantial profits from its sales over a five-year period of the Taster's Choice brand containing Mr. Christoff's image on the label. The jury determined that 5% of those profits, or a whopping \$15.3 million, arose from Nestle's use of that image. The jury also awarded Mr. Christoff \$330,000 as his lost licensing fee.

When does the First Amendment protect the unauthorized use of another's identity? The line between a protected and an unprotected use is often elusive. A literal copy of another's identity used for commercial gain is likely to infringe that person's publicity rights. But if the copy adds significant creative elements or is used to provide social commentary on a matter of public

interest, the copy may be protected under the First Amendment. Here are three examples where the courts protected the use of celebrity images:

In the first, *Los Angeles Magazine* used an image of Dustin Hoffman's head from the movie *Tootsie* and superimposed it on a male model's body wearing a designer dress and heels. The magazine published this composite image, along with 16 others, in an article called "Grand Illusions" designed to show how movie stars, living and deceased, looked in 1997 fashions.

The appellate court threw out the lower court's verdict of \$3.2 million in favor of Mr. Hoffman, finding the magazine's use was shielded by the First Amendment. The appellate court reached that result because the image was part of an article that combined "fashion, photography, humor, and visual and verbal editorial comment on classic films and famous actors."

Similarly, a court found baseball trading cards, featuring readily identifiable caricatures of major league baseball players with humorous commentary about their careers on the backs, worthy of First Amendment protection. That is because the cards provided social commentary on public figures and added a significant creative component to the celebrities' identity. Finally, a painting of Tiger Woods commemorating his victory at a golf tournament was protected because it contained creative and informational elements about the golfer.

How does the right of publicity differ from the right of privacy? The right of publicity protects the business value of your identity. In contrast, the right of privacy protects your right to be left alone. It shields you from the emotional anguish resulting from the public disclosure of private facts or images that are not a legitimate concern of the public.

What's the benefit of a model release? It will not prevent a lawsuit. But it will shield you from liability from publicity claims if the release authorized the use about which plaintiff now complains. A properly drafted release will also protect you from privacy claims. The scope of protection for privacy violations is a topic for another newsletter and is not covered here.

What should I include in my model release to avoid publicity claims?
Here are two suggestions:

1. Even though your use may be protected by the First Amendment, you may decide on a different use in the future that may not be protected. To avoid problems down the road, have the subject of your work authorize you in the release to make any possible use of the work, commercial and non-commercial, in all media, including those not yet created.

2. Anticipate that you and your licensees may use digital technology to manipulate your work. Therefore, include a clause in your release authorizing the

unlimited right to distort, manipulate, modify, alter or change your work using any technologies, including those presently unknown.

In sum, the right of publicity will continue to grow in importance as the opportunities to exploit one's identity grow. Therefore, understanding the scope of publicity rights and taking steps to protect against publicity claims will repay the effort.



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