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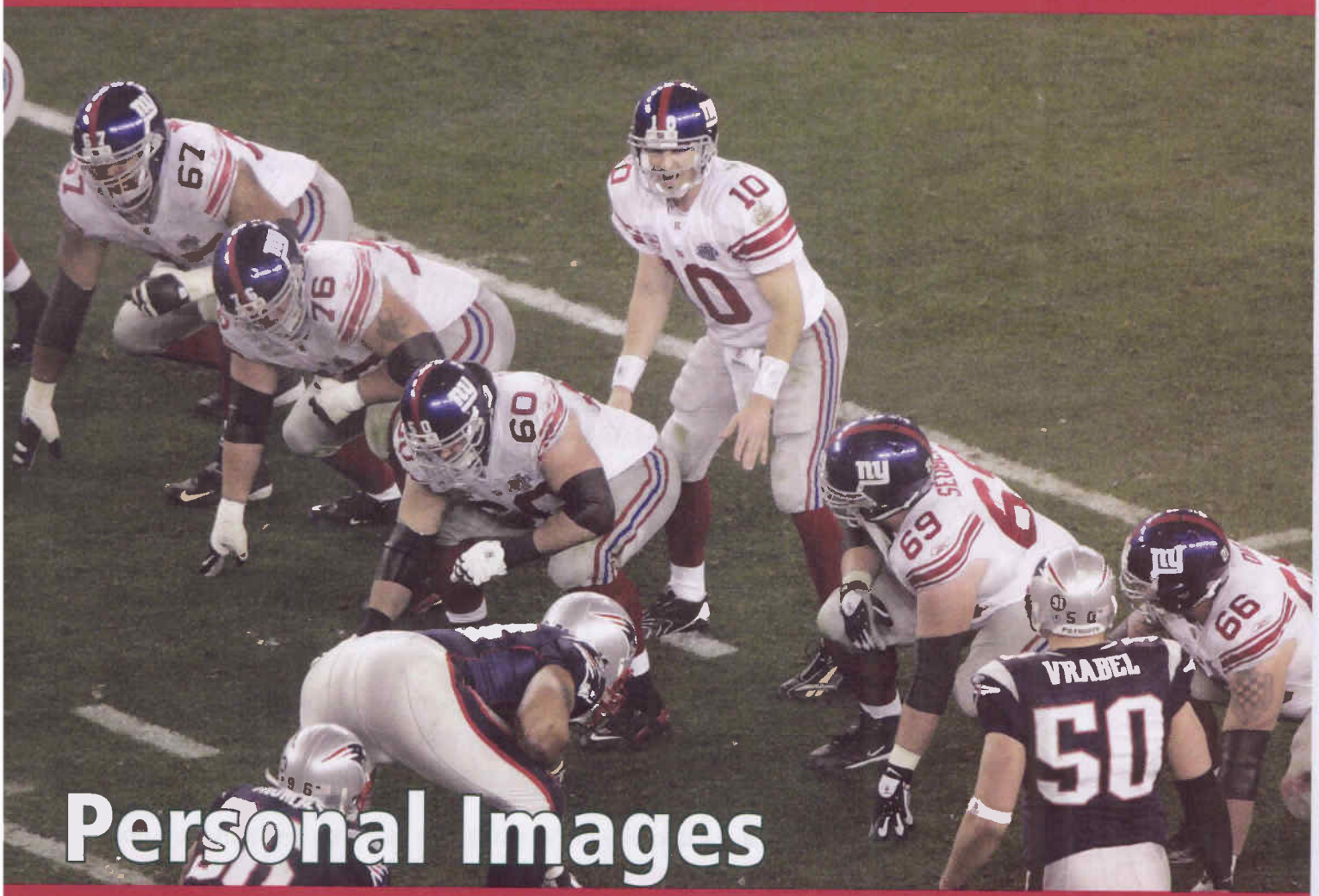

Personal Images

Unauthorized Publicity vs. Public Interest

by James A. Johnson

Also in this Issue

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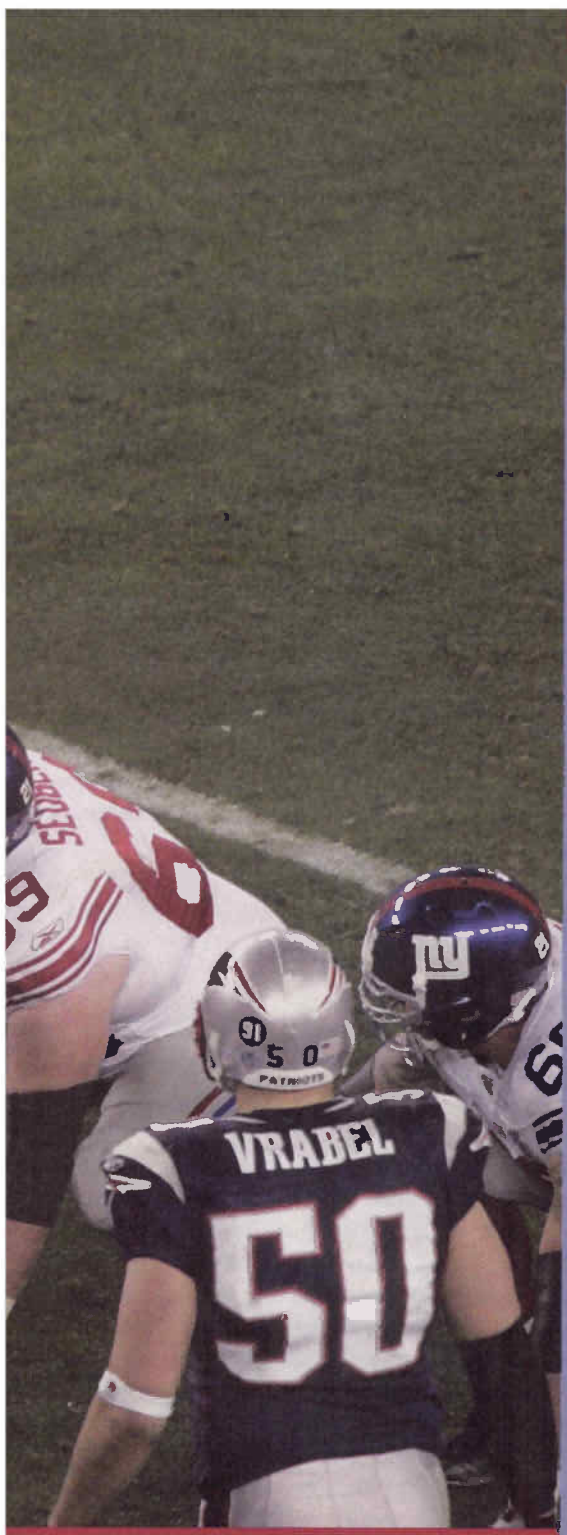

Personal Images: The Professional Athlete's Right of Publicity

By James A. Johnson

The First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. This is congruent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.

Distinction of Rights

The right of publicity is a protectable property interest in one's name, identity or persona. Every person – celebrity or non-celebrity – has a right of publicity, which is the right to own, protect and commercially exploit one's identity. The genesis of the legal right of publicity is rooted in and intertwined with the right of privacy.[1]

The right of privacy is a personal right; it is non-assignable and terminates at death. It protects against intrusions upon one's seclusion or solitude to obtain private facts for public disclosure, facts that would be highly offensive, false or embarrassing to a reasonable person. In short, this is a right to be left alone. Privacy and publicity rights become entwined when one's name or likeness is appropriated, without permission, for the benefit of another.[2] To illustrate: a photograph in an advertisement causes injury to a plaintiff. If that injury is to the plaintiff's feelings and dignity, resulting in mental

or physical damages, that implicates the right of privacy. If that injury is infringement upon the plaintiff's legal right to exploit for commercial purposes his or her name, character traits, likeness[3] or other indicia of identity, that comes within the ambit of publicity rights. Depending on state law a caricature,[4] popular phrase ("Here's Johnny"),[5] sound-alike voice,[6] name in a car commercial,[7] animatronic likeness[8] and statistics of professional baseball players,[9] used without consent, have all been held to come within the ambit of publicity rights, constituting infringement.

Proprietary Interest

An individual has the right to control, direct and commercially use his or her name, voice, signature, likeness or photograph. Publicity rights may include the right to assign, transfer, license, devise and to enforce the same against third parties. Today, 18 states have publicity statutes,[10] which differ widely. At least a half dozen other states rely on common law, and 12 states do not recognize the right of publicity.[11]

Constitutional Protection

The reporting of newsworthy events, with nonconsensual use of a name or photo in a magazine, is afforded First Amendment guarantees of freedom of speech and the press.[19] There is no violation of publicity rights; newsworthiness provides constitutional protection. Where a newspaper was selling promotional posters of NFL Quarterback Joe Montana's four Super Bowl Championships,[20] and the posters were reproductions of actual newspaper pages of that newspaper, the California Court of Appeals opined that the posters depicted newsworthy events and the newspaper had a right to promote itself with them.

> A prevailing party, in appropriate circumstances, can collect treble damages, costs and attorney fees on Lanham Act claims.

Commercial value together with the commercial exploitation without prior consent triggers a cause of action. The unauthorized use, in a commercial context, engenders money damages or equitable relief by way of an injunction or both. Moreover, as to a celebrity, subject to exemptions, the post-mortem right of publicity extends after death to 70 years in California[12] and 100 years in both Oklahoma[13] and Indiana.[14] New York, with one of the most developed jurisprudence in this area, excludes protection for the persona of deceased celebrities.[15]

Supplemental Jurisdiction

There is no federal statute or federal common law governing rights of publicity, which stands in contrast to other fields of intellectual property law. Nevertheless, federal claims of unfair competition and false advertisement or false endorsement under the Lanham Act,[16] together with a state claim of right of publicity, can be asserted in federal court under supplemental jurisdiction. A prevailing party, in appropriate circumstances, can collect treble damages, costs and attorney fees on Lanham Act claims by establishing unfair competition, dilution or the likelihood of public confusion.[17]

Monetary relief in establishing liability for infringement of one's right of publicity is measured by the commercial value of the person's name, likeness or persona. In the absence of actual loss of money as a result of the defendant's unauthorized use, the "going rate" or compensatory damages is the appropriate measure of damages. Where the defendant's activities are also in willful disregard of the plaintiff's rights, punitive damages are warranted.[18]

The plaintiff Tony Twist,[21] a former professional "enforcer" hockey player, sued the creator of a comic series who used the name Anthony "Tony Twist" Twistelli as a fictional Mafia character. Twist claimed association with the comic book thug damaged the endorsement value of his name. The Missouri Supreme Court adopted a predominant purpose test and held that the use and identity of Twist's name was predominantly a ploy to sell comic books rather than an artistic or literary expression. Under these circumstances, free speech must give way to the right of publicity. Because of improper jury instructions, however, the verdict of $24.5 million in the plaintiff's favor was set aside. A second trial in 2004 resulted in a $15 million jury verdict. On June 20, 2006, in a 3-0 opinion, a three-judge panel of the Eastern District Appeals Court upheld the $15 million jury verdict against the comic book creator Todd McFarlane and his company, Todd McFarlane Productions Inc.

A publisher of an artist's work depicting Tiger Woods's likeness, titled "The Masters of Augusta," is afforded First Amendment protection based on its being "fine art,"[22] despite the fact that 5,250 copies of the print had been sold. The court found that the print was not a mere

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poster or item of sports merchandise, but rather an artistic creation seeking to express a message. Further, the right of publicity does not extend to prohibit depictions of a person's life story in a television miniseries,[23] book[24] or film.[25]

In *Gionfriddo v. Major League Baseball*,[26] the First Amendment protected Major League Baseball's use of names and statistics of four former players on MLB's Web sites, media guides, and programs for All-Star and World Series games. The California Court of Appeal held that those uses were of substantial public interest and not commercial speech.

New York's highest court extended such rights to a magazine that used a 14-year-old girl's picture, without her consent, to illustrate a magazine column on teenage sex and drinking. The New York Court of Appeals ruled that publishers cannot be held liable, so long as the photograph bears a genuine relationship to a newsworthy article and is not an advertisement in disguise,[27] despite the fact that the plaintiff's photo was used in a substantially fictionalized way and may by implication make the plaintiff the subject of the article. "[W]hen a plaintiff's likeness is used to illustrate a newsworthy article, the

NATIONAL BASKETBALL ASSOCIATION UNIFORM PLAYER CONTRACT

THIS AGREEMENT made this ___ day of _____ is by and between _____ (hereinafter called the "Team"), a member of the National Basketball Association (hereinafter called the "NBA" or "League") and _____, an individual whose address is shown below (hereinafter called the "Player"). In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows:

1. TERM.

The Team hereby employs the Player as a skilled basketball player for a term of Two (2) year(s) from the 1st day of September 2005.

2. SERVICES.

The services to be rendered by the Player pursuant to this Contract shall include: (a) training camp, (b) practices, meetings, workouts, and skill or conditioning sessions conducted by the Team during the Season, (c) games scheduled for the Team during any Regular Season, (d) Exhibition games scheduled by the Team or the League during and prior to any Regular Season, (e) if the Player is invited to participate, the NBA's All-Star Game (including the Rookie-Sophomore Game) and every event conducted in association with such All-Star Game, but only in accordance with Article XXI of the Collective Bargaining Agreement currently in effect between the NBA and the National Basketball Players Association (hereinafter the "CBA"), (f) Playoff games scheduled by the League subsequent to any Regular Season, (g) promotional, and commercial activities of the Team and the League, as set forth in this Contract and the CBA, and (h) any NBADL Work Assignment in accordance with Article XLII of the CBA.

3. COMPENSATION.

(a) Subject to paragraph 3(b) below, the Team agrees to pay the Player for rendering the services and performing the obligations described herein the Compensation described in Exhibit 1 or Exhibit 1A hereto (less all amounts required to be withheld by any governmental authority, and exclusive of any amount(s) which the Player shall be entitled to receive from the Player Playoff Pool). Unless otherwise provided in Exhibit 1, such Compensation shall be paid in twelve (12) equal semi-monthly payments beginning with the first of said payments on November 15th of each year covered by the Contract and continuing with such payments on the first and fifteenth of each month until said Compensation is paid in full.

* * *

12. PROHIBITED ACTIVITIES.

The Player and the Team acknowledge and agree that the Player's participation in certain other activities may impair or destroy his ability and skill as a basketball player, and the Player's participation in any game or exhibition of basketball other than at the request of the Team may result in injury to him. Accordingly, the Player agrees that he will not, without the written consent of the Team, engage, in any activity that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury including, but not limited to: (i) sky-diving, hang gliding, snow skiing, rock or mountain climbing (as distinguished from hiking), rappelling, and bungee jumping; (ii) any fighting, boxing, or wrestling; (iii) driving , or riding on a motorcycle or moped; (iv) riding in or on any motorized vehicle in any kind of race or racing contest; (v) operating an aircraft of any kind; (vi) engaging in any other activity excluded or prohibited by or under any insurance policy which the Team procures against the injury, illness or disability to or of the Player, or death of the Player, for which the Player has received written notice from the Team prior to the execution of this Contract; or (vii) participating in any game or exhibition of basketball, football, baseball, hockey, lacrosse, or

plaintiff may not recover under sections 50 and 51 [of the Civil Rights Law] even if the use of the likeness creates a false impression about the plaintiff."[28]

The New York ruling begs the question: Would the result have been different if a high-profile celebrity's picture was used without permission? Should any and all purported newsworthy uses provide a safe haven for authors and publishers? If § 50 of the Civil Rights Law provides a criminal misdemeanor penalty and § 51, civil damages, then when do they really become actionable? Moreover, how is it that celebrities may prevent the use of their visual and audio images, yet cannot stop authors from writing about them? The courts do not draw a clear path between commercial exploitation and protected expression. In this morass, questions abound and answers elude.

In *Cobb v. Time, Inc.*,[29] Randall "Tex" Cobb, a former professional boxer, sued *Sports Illustrated* for an article describing his alleged participation in drug use and a fixed boxing match. The Sixth Circuit affirmed summary judgment of the district court based on the actual malice standard, because Cobb was a public figure.

Consider the Ninth Circuit's reversal of $1.5 million in compensatory damages and $1.5 million in punitive

other team sport or competition. If the Player violates this Paragraph 12, he shall be subject to discipline imposed by the Team and/or the Commissioner of the NBA. Nothing contained herein shall be intended to require the Player to obtain the written consent of the Team in order to enable the Player to participate in, as an amateur, the sports of golf, tennis, handball, swimming, hiking, softball, volleyball, and other similar sports that a reasonable person would not recognize as involving or exposing the participant to a substantial risk of bodily injury.

13. PROMOTIONAL ACTIVITIES.

(a) The Player agrees to allow the Team, the NBA, or, a League-related entity to take pictures of the Player, alone or together with others, for still photographs, motion pictures, or television, at such reasonable times as the Team, the NBA or the League-related entity may designate. No matter by whom taken, such pictures may be used in any manner desired by the Team, the NBA, or the League-related entity for publicity or promotional purposes. The rights in any such pictures taken by the Team, the NBA, or the League-related entity shall belong to the Team, the NBA or the League-related entity, as their interests may appear.

* * *

(c) Upon request, the Player shall consent to and make himself available for interviews by representatives of the media conducted at reasonable times.

(d) In addition to the foregoing, and subject to the conditions and limitations set forth in Article II, Section 8 of the CBA, the Player agrees to participate, upon request, in all other reasonable promotional activities of the Team, the NBA, and any League-related entity. For each such promotional appearance made on behalf of a commercial sponsor of the Team, the Team agrees to pay the Player $2,500 or, if the Team agrees, such higher amount that is consistent with the Team's past practice and not otherwise unreasonable.

14. GROUP LICENSE.

(a) The Player hereby grants to NBA Properties, Inc. (and its related entities) the exclusive rights to use the Player's Player Attributes as such term is defined and for such group licensing purposes as are set forth in the Agreement between NBA Properties, Inc. and the National Basketball Players Association, made as of September 18, 1995 and amended January 20, 1999 and July 29, 2005 (the "Group License"), a copy of which will upon his request, be furnished to the Player; and the Player agrees to make the appearances called for by such Agreement.

(b) Notwithstanding anything to the contrary contained in the Group License or this Contract, NBA Properties (and its related entities) may use, in connection with League Promotions, the Player's (i) name .or nickname and/or (ii) the Player's Player Attributes (as defined in the Group License) as such Player Attributes may be captured in game action footage photographs. NBA Properties (and its related entities) shall be entitled to use the Player's Player Attributes individually pursuant to the preceding sentence and shall not be required to use the Player's Player Attributes in a group or as one of multiple players. As used herein, League Promotion shall mean any advertising, marketing, or collateral materials or marketing programs conducted by the NBA, NBA Properties (and its related entities) or any NBA team that is intended to promote (A) any game in which an NBA team participates or game telecast, cablecast or broadcast (including Pre-Season, Exhibition, Regular Season, and Playoff games), (B) the NBA, its teams, or its players, or (C) the sport of basketball.

COMMISSIONER
SEPT. 12, 2005.

damages in *Hoffman v. Capital Cities/ABC, Inc.*[30] The Ninth Circuit disagreed with the district court's conclusion that a magazine article which featured a digitally altered photograph of Dustin Hoffman together with a fashion spread was pure advertisement and commercial speech. Instead, the court opined, the fashion article's purpose was not to propose a commercial transaction.[31] *Los Angeles Magazine* was fully protected by the First Amendment and could not be subjected to liability unless, under *New York Times v. Sullivan*,[32] the magazine intended to mislead its readers. Thus, the court raised the burden of proof to clear and convincing evidence that the magazine acted with constitutional "actual malice."

> To keep the jump shot and other indicia of identity "pure," the individual's consent should be secured.

Is it now time for a uniform federal statute governing the rights of publicity? In 2004, the ABA Section of Intellectual Property Law proposed for consideration the following recommendation:

> That the American Bar Association supports the enactment of federal legislation to protect an individual's right of publicity to the extent the individual's identity is used for commercial purposes in "commerce," as that term is defined in Section 45 of the Lanham Act, 15 U.S.C. § 1127, and to prospectively preempt inconsistent state and territorial laws.

Post-mortem Rights

Two central issues in any right-of-publicity statute: (1) To whom does the right of publicity extend, to any person or just celebrities? And what elements of personality are protected – name, signature, voice? (2) Is a post-mortem property right provided? Not only do the publicity statutes in the 18 states vary widely, but so do the post-mortem protections. For example: in Kentucky post-mortem rights last 50 years; in Ohio, 60 years; in Tennessee, 10 years with a potential perpetual right, so long as there is no nonuse for two consecutive years. New York does not recognize a post-mortem right of publicity.

On September 7, 2007, the California Senate passed an act to amend § 3344.1 of the Civil Code, relating to deceased personalities: testamentary instruments. The legislative intent as set out in the Legislative Counsel's Digest is as follows:

> Existing law establishes a cause of action for damages on behalf of specified injured parties for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness for commercial purposes within 70 years of the personality's death, except as specified. Existing law provides that the rights recognized under these provisions are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person in whom the rights vest under these provisions or the transferees of that person.
>
> This bill would provide, instead, that the above property rights are freely transferable or descendible by contract or by means of any trust or any other testamentary instrument executed before or after January 1, 1985. It would provide that those rights shall be deemed to have existed at the time of death of any person who died prior to January 1, 1985, and shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death, except as specified. The bill would provide that, in the absence of an express provision in a testamentary instrument to transfer these rights, a provision in the instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights.

Senate Bill No. 771 was signed into law by the Governor on October 10, 2007.

Right to Use Persona

To keep the jump shot and other indicia of identity "pure," and to avoid a violation of the right of publicity, the individual's consent should be secured. Most professional athletes, as part of their employment, in their individual contracts and through the relevant collective bargaining agreements, give their consent to the team and league to broadcast their pictures, attributes and use of their names for promotional purposes. (*See* sidebar, page 14: NBA Uniform Player Contract #13 Promotional Activities and #14 Group License.) Absent expressed or implied consent, the most effective way is to obtain a release, endorsement agreement or a license. The appropriate instrument should transfer, in whole or in part, specific rights setting forth, at a minimum, the scope, term, representations, warranties, fees, choice of law and a morals clause. A morals clause permits a team, league, product developer or licensee to terminate the player or the agreement for engaging in criminal conduct or acts involving moral turpitude. (*See* sidebar, page 18: Sample Endorsement Agreement.)

Conclusion

Not all commercial unauthorized uses of identity violate the right of publicity. Violations turn on how the identities are used in a commercial context. Is the use solely to promote, sell or endorse products and services, or is it a

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Endorsement Agreement

_____ AGREEMENT made this _____ day of _____, by and between _____, a Delaware Corporation having its principal place of business at Minneapolis, Minnesota (Licensee) and _____, an individual residing in New York City (Licensor).

WHEREAS, Licensee wishes to use Licensor's name and likeness in Licensee's _____ forthcoming print marketing and advertising campaign, entitled _____ (The "Campaign") in connection with _____ _____ (the "Products");

WHEREAS, Licensee and Licensor desire to establish the terms of such use.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, Licensee and Licensor hereby agree as follows:

1. License

Licensee shall have the right, but not the obligation, to use the name and likeness of Licensor as attached as Exhibit A, in connection with the Campaign, for print advertising, out-of-home media, in-store marketing and direct mail in connection with the Product and for public relations materials, in any media, produced and distributed by Licensor to promote the Product and/or the Campaign, throughout the world, in any language and in multiple languages. Licensor agrees that Licensor will not use or license the likeness attached hereto as Exhibit A for use by any third party, in any print advertising or in-store or out-of-home media marketing or direct marketing for the duration of this Agreement applicable to in-store usage.

2. Term

_____

Licensee's rights under this Agreement shall terminate _____ months from first publication for print advertising and/or first out-of-home media usage for both print _____ _____ advertising and out-of-home media usage, and _____ _____ months from first in-store usage and/or public relations usage for all other uses. Licensee has the option to extend _____ use for print advertising and/or out-of-home media usage for an additional _____ months, to total _____ months from first use (of print and/or out-of-home media), upon payment of an additional use fee as set forth below.

3. Fees

Licensee shall pay Licensor $_____ upon first publication of the image, first out-of-home media usage or in-store usage, or first public relations usage, _____ _____ whichever comes first. Licensee shall pay Licensor an additional fee of $_____ upon Licensee's election by written notice to Licensor to exercise its option to extend the term for print advertising and/or out-of-home media.

4. Advertising and Marketing

All copy appearing on or with Licensor's image must be submitted to Licensor for written approval which approval may not be unreasonably withheld or delayed.

5. Representations and Warranties

Licensor represents and warrants that Licensor has the exclusive right to grant this license to use the likeness attached hereto as Exhibit A and that the rights granted will not infringe or violate any copyright, patent, trademark, trade name, service mark, trade dress or other personal property or proprietary right of any person or entity. Licensor agrees to indemnify and hold Licensee harmless against any and all claims, damages and expenses arising directly or indirectly from the breach of the foregoing representation and warranty.

6. Choice of Law

This Agreement shall be governed and constructed in accordance with the laws of the State of New York without regards to conflicts of laws. The parties agree the sole jurisdiction and venue for any disputes or actions arising under this Agreement shall be the jurisdiction of the Supreme Court of the State of New York or the United States District Court for the Southern District of New York.

7. Termination for Cause

Licensee may terminate this agreement upon written notice to the licensor, upon the Licensor's death, disability, suspension and for cause. Cause shall mean, the arrest, indictment or conviction for the commission of a crime by licensor or any other conduct, public or private, involving moral turpitude on which has or may reasonably be expected to have a material adverse effect on Licensee, its business, reputation or interests.

8. Entire Agreement

This Agreement, including all Exhibits hereto, constitutes the entire agreement between the parties relating to this subject matter and supersedes any and all prior or simultaneous representations, discussions, negotiations, documents and/or agreements, whether written or oral.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first set forth above.

LICENSOR
By:
Name:
Title:
LICENSEE
By:
Name:
Title:

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fair use? The ultimate answer is based on the facts and circumstances of each case.

The value of endorsements is astronomical. With the advent of the Internet and sophisticated computer technology, we can expect the value of commercial endorsements by celebrities to go literally off the charts. As of July 2005, America's highest paid professional athletes for endorsements[33] were as follows:

Tiger Woods, golf	$80 million
Andre Agassi, tennis	$44.5 million
Lebron James, basketball	$24 million
Phil Mickelson, golf	$21 million
Dale Earnhart Jr., auto racing	$20 million

Fame is valued. The right of publicity protects the professional athlete's proprietary interest in the commercial value of his or her identity from exploitation by others.[34] Advertising is the quintessential commercial speech and a violation of the right of publicity is a tort that quintessentially consists of advertising. The crux of the right of publicity is the commercial value of human identity. In order to lawfully and properly exploit this legitimate proprietary interest, it is just like the game itself – one must know the rules. ■

1. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (rejected the common law right of publicity which led to the enactment of the New York privacy law, codified in the N.Y. Civil Rights Law §§ 50–51); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (first state to recognize a personal privacy right against unauthorized commercial exploitation); *Pallas v. Crowley Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911(1948) (Supreme Court of Michigan recognizes a right of publicity where invasion of privacy was pleaded in preventing the nonconsensual use of a model's photograph in a local department store advertisement. The plaintiff was not a nationally known celebrity. Michigan recognizes publicity rights through a derivative privacy right at common law); *Janda v. Riley-Meggs Indus.*, Inc., 764 F. Supp. 1223 (E.D. Mich. 1991). *Haelan Labs. v. Topps Chewing Gum* is the seminal case that coined the term right of publicity. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

2. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (1986) (demonstrates the labyrinth of intellectual property rights in publicity issues such as copyright infringement and trademark dilution).

3. *Newcombe v. Coors*, 157 F.3d 686 (9th Cir. 1998). Brooklyn Dodger pitcher Don Newcombe's stance and windup displayed in a drawing in *Sports Illustrated* created a triable issue of fact whether Newcombe is readily identifiable as the pitcher in the beer advertisement. (It is interesting to note that Don Newcombe, Cy Young Award, MVP and Rookie of the Year, is the only player in major league history to have won all three awards.)

4. *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989).

5. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

6. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Waits v. Frito Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

7. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

8. *Wendt v. Host Int'l Inc.*, 125 F.3d 806 (9th Cir. 1997); *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395 (9th Cir. 1992); 989 F.2d 1512 (9th Cir. 1993).

9. *Uhlaender v. Hendricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

10. California: Cal. Civ. Code § 3344.1; Florida: Fla. Stat. Ann. § 540.08; Illinois: 765 Ill. Comp. Stat. § 1075/30; Indiana; Ind. Code 32-36-1-1; Kentucky: Ky. Rev. Stat. Ann. § 391.170; Massachusetts: Mass. Gen. L. Ann., ch 214, § 3; Nebraska: Neb Stat. §§ 20-201–20-211 and 25-840.01; Nevada: Nev. Stat. §§ 597.77–597.810; New York: N.Y. Civ. Rights L. §§ 50–51, N.Y. Gen. Bus. L. §397; Ohio: Ohio Rev. Code Ann. § 2741.04; Oklahoma: 21 Okla. Stat. §§ 839.1–839.3; 12 Okla. §§ 1448–1449; Rhode Island: R.I. Gen. Laws § 9-1-28; Tennessee: Tenn. Code Ann. §§ 47-25-1101–47-25-1108; Utah: Utah Code Ann. § 45-3-1; Virginia: Va. Code Ann. §§ 8.01-40, 18.2-216; Washington: Wash. Rev. Code §§ 63.60.030–63.60.037; Wisconsin: Wis. Stat. Ann. §§ 895.50; in Texas the tort of misappropriation protects a person's persona and the unauthorized use of one's name, image or likeness. *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000) (post-mortem right of publicity); Tex. Prop. Code §§ 26.001–26.015.

11. Alaska, Arizona, Idaho, Louisiana, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, Vermont and Wyoming.

12. Cal. Civ. Code §3344.1(g).

13. Okla. Stat. Ann. tit. 12, § 1448(g).

14. Ind. Code Ann. § 32–36-1-8.

15. *Stephano v. News Group Publ'ns*, 64 N.Y.2d 174, 485 N.Y.S.2d 220 (1984).

16. Lanham Act § 43(a), 15 U.S.C. § 1125(a).

17. Lanham Act § 35(a), 15 U.S.C. § 1117(a).

18. *Frazier v. South Fla. Cruises, Inc.*, 19 U.S.P.Q. 2d (BNA) 1470 (E.D. Pa. 1991) (defendant placed a full-page unauthorized advertisement in Ring Magazine inviting the public to cruise with former world heavyweight champion, Smokin' Joe Frazier. Cecil Fielder, three-time MLB All-Star, in 2003 won over $400,000 against a design firm for using his name without permission in commercial ads).

19. *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976); *see Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995 (Col. 2001) (Colorado Sup. Ct. recognizes the tort of invasion of privacy by appropriation of name or likeness subject to First Amendment privilege where the use involves publication of matters that are newsworthy or of legitimate public concern).

20. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995); *see, e.g., Hogan v. Hearst*, 945 S.W.2d 246 (Tex. App. 1997) (exemplifying the breadth of the newsworthy exception in negating a claim of invasion of privacy based on disclosure of highly embarrassing facts, obtained from a public record); *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888 (Mass. App. Ct. 1999) (defense summary judgment on basis of newsworthiness to a statutory private facts claim).

21. *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

22. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *see Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (a T-shirt artist's realistic drawing of the Three Stooges was not sufficiently transformative to defeat a claim of California's publicity rights statute).

23. *Ruffin-Steinbeck v. Depasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000).

24. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (applying Texas law).

25. *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (applying Pennsylvania law).

26. 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).

27. *Messenger v. Gruner & Jahr Printing & Publ'g*, 94 N.Y.2d 436, 706 N.Y.S.2d 52 (2000).

28. *Id.* at 447.

29. 278 F.3d 629 (6th Cir. 2002).

30. 255 F.3d 1180 (9th Cir. 2001).

31. *Id.* at 1184–86.

32. 376 U.S. 254 (1964).

33. Kortney Stringer, *Winning Isn't Everything*, Detroit Free Press, Mar. 20, 2006, at C1.

34. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (involving famed Heisman Quarterback and Philadephia Eagle, case opened the door to the professional athlete's right of publicity).