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Blurred lines: free speech and the right of publicity

Mark Litwak is a veteran entertainment attorney and producer-s rep based in Beverly Hills. He is the author of six books including: "Dealmaking in the Film and Television Industry," "Contracts for the Film" and "Television Industry, and Risky Business: Financing and Distributing Independent Film." He is an adjunct professor at USC Gould School of Law, and the creator of the Entertainment Law Resources with lots of free information for filmmakers (www.marklitwak.com). He can be reached at lau2@marklitwak.com.



Ricky Ross was a notorious drug lord in the 1980s who was indicted and convicted on drug trafficking charges. He was infamous for bringing crack cocaine to Los Angeles and eventually sold up to 3 million dollars' worth every day. Although he was illiterate, he was entrepreneurial and built a business empire worth hundreds of millions of dollars, including more than 30 real estate ventures and "legitimate" businesses, such as a custom tire and rims shop, beauty salon and junk yard.

In 1989, Ross was arrested in Ohio and charged with

trafficking cocaine and was indicted on separate charges in Texas. He pled guilty to the charges and received lengthy sentences. While in prison, he helped to uncover a ring of dirty cops who planted evidence and framed innocent people using false evidence. His testimony helped to free approximately 120 wrongly convicted men, and he was rewarded with a significantly reduced sentence, leading to his release from prison in 1994.

About six months after his release, Ross was arrested once again and convicted on fresh charges of conspiracy to traffic cocaine. While Ross was incarcerated, a reporter interviewed him and wrote a piece about his ties to the Nicaraguan Contras. As a result, there was widespread exposure regarding his role in the Iran-Contra scandal. Cocaine from Nicaragua was given to Ross with the CIA's blessing, while Ross funded the anti-communist movement in Nicaragua. Journalist Gary Webb wrote a book called "Dark Alliance: The CIA, the Contras, and the Crack Cocaine Explosion" that chronicled these events.

While Ross was in jail, a former correctional officer by the name of William Leonard Roberts started using the name "Rick Ross" allegedly to help him sell his rap music. His lyrics frequently include fictional accounts of selling drugs and running a large scale cocaine operation. As a former correctional officer, Roberts was the antithesis of what is often lauded in the rap world. In order to gain street cred, he adopted a different persona and tried to hide his real background. He has released numerous albums which have achieved tremendous commercial success.

In 2006, Ricky Ross discovered that Roberts was using the name "Rick Ross," when he saw a magazine article about "up and coming" rappers. Ross had a lawyer write a cease and desist letter, but never received much of a response. After he was released from prison in 2009, Ross filed suit, first in federal court and later in state court. Ross claimed that Roberts misappropriated Ross' name and identity to further his rap music career. The former crime lord claims to have changed his ways and now wants to use his celebrity status to promote literacy and teach children not to repeat his mistakes.

The "right of publicity" is the right that individuals have to control the use of their name and likeness. You cannot put a picture of another person on your spaghetti sauce without their permission. The right of publicity is typically exploited by celebrities who earn large fees from endorsing products. A problem arises, however, when one person's publicity rights come in conflict with another person's rights under the First Amendment. Suppose a newspaper publisher wants to place a picture of Brad Pitt on

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Amendments scuttle arbitration bill's enforcement measures

Arbitration advocates have successfully gutted controversial enforcement provisions from a bill requiring them to publicize information about the cases they handle.

Mergers & Acquisitions

Latham grabs most M&A work in California Firm did more California M&A volume and deals than any other firm, according to a recent report.

Natural Resources

Drought may bring tsunami of legal woes

Gov. Jerry Brown's recently issued emergency drought declaration has moved the legal issues surrounding water to center stage. By Eric L. Garner and Paeter E. Garcia

Litigation

Defendants in public corruption case allege prosecutorial misconduct

In motions filed Monday, Jeffrey Burum and former San Bernardino County officials who are defendants in the case go on the attack against prosecutors.

Securities

Delaware law revision could spur acquisitions

Attorneys are looking at the forces that could shape their practice this year, especially a revision of Delaware corporate law that could spur a more robust M&A marketplace.

Litigation

LAUSD superintendent takes the stand for second day in education suit

John E. Deasy, a witness called by the plaintiffs in a potentially landmark education lawsuit, testified that statutes governing teachers' employment deny students the right to a quality education.

Activists can't canvass in front of California Target stores, judge rules

Superior Court Judge Joel M. Pressman refuted the canvassers' claim that their free speech rights under the state Constitution should give them access to space in front of the retail outlets.

Lawyer for witness wants attorney-client emails suppressed

An attorney for a witness in a criminal DuPont trade secrets case asked a federal judge Monday to bar the use of privileged emails that the government accidentally produced.

Government

the front page of its paper. Is his permission required? What if "60 Minutes" wants to broadcast an exposé of a corrupt politician? What if an author wants to write a critical biography of a celebrity?

In each of these instances, a person's name and likeness is being used on a "product" that is sold to consumers. However, products such as books, movies and plays are also forms of expression protected by the First Amendment. The First Amendment allows journalists to freely write about others without their consent. Otherwise, subjects could prevent any critical reporting of their activities. When one person's right of publicity conflicts with another person's rights under the First Amendment, the courts have to decide whose rights will prevail.

California recognizes both a common law and statutory right of publicity. California Civil Code Section 3344 states: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof." However, there are exemptions for news, public affairs, sports and political campaigns.

When a use is newsworthy, or the use is in the context of a documentary, biography or parody, the First Amendment will often protect the producer. In *Hicks v. Casablanca Records*, 464 F. Supp 426 (S.D.N.Y. 1978), Casablanca Records made a movie called "Agatha" about mystery writer Agatha Christie. The film portrayed her as an emotionally unstable criminal. An heir brought suit alleging infringement of Christie's right of publicity. The court held that Casablanca's rights under the First Amendment were paramount to the estate's rights. The court reasoned that the First Amendment outweighed the right of publicity because the subject was a public figure, and the events portrayed were obviously fictitious.

However, the First Amendment does not always prevail over the right of publicity. In 1976, the Ohio Supreme Court discussed the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St.2d 224 (1976). Here, Zacchini, known as the Human Cannonball, was videotaped without his consent while performing his act of being shot out of a canon. His performance was later broadcast on a television news program. The Ohio Supreme Court held that Zacchini's right of publicity was outweighed by the First Amendment. On appeal, the U.S. Supreme Court reversed, holding that the First Amendment did not insulate the defendant from liability for violating Zacchini's right of publicity where the defendant broadcast the plaintiff's entire act. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

The outcome of these conflicts often turns on whether the use of a celebrity's name or likeness is "transformative." When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, without adding any new expression, the right of publicity will likely be the paramount right. However, when a work contains significant creative elements it is more likely to be considered worthy of First Amendment protection, and less likely to interfere with the economic interests protected by the right of publicity.

In other words, the issue becomes whether the celebrity's likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. If a product containing a celebrity's likeness has been so transformed that it has become something new and original, and more the product of defendant's own expression rather than the celebrity's likeness, then it will be considered protected expression. See *Cal. Comedy III Productions v. Gary Saderup*, 25 Cal. 4th 387, 406 (2001).

In Ross' case, the California Court of Appeal found that Roberts created a celebrity identity using the name "Rick Ross," a cocaine kingpin turned rapper. *Ross v. Roberts*, 2013 DJDAR 16737 (Dec. 23, 2013). He composed music out of fictional tales of dealing drugs and other exploits - some of which related to Ricky Ross. However, the court found that Roberts was not simply an imposter seeking to profit solely off the name and reputation of Ricky Ross.

While the trial court had granted Roberts' motion for summary judgment on the basis that Ross' claim was barred by statutes of limitation and the doctrine of laches, the Court of Appeal was not convinced that the trial court's rulings were correct. However, it found for Roberts based on a First Amendment defense. The court concluded "Using the name and certain details of an infamous criminal's life as basic elements, he [Roberts] created original artistic works." The court explained: "A work is transformative if it adds 'new expression' ... The economic value of Roberts' work is reflected to a large extent by the number of CD's and records he sells. It can safely be assumed that when individuals purchase music, they generally do so in order to listen to music that they enjoy. It defies credibility to suggest that Roberts gained success primarily from appropriation of plaintiff's name and identity, instead of from the music and professional persona that he (and the other defendants) created." (Internal citations omitted.)

Brown appoints three judges to superior courts

Gov. Jerry Brown elevated three commissioners to superior court judgeships Tuesday.

U.S. Court of Appeals for the 9th Circuit UCLA law professor helps expand free speech protections to bloggers

Eugene Volokh persuaded the 9th U.S. Circuit Court of Appeals that First Amendment protections in libel cases apply to everyone who publishes their view, not just to a favored group of professional journalists.

Law Practice

Archer Norris opens 3-attorney San Francisco office

The firm's new office opened earlier this month and will house partners Michael C. Osborne and Jonathan W. Thames, who moved from the firm's Walnut Creek office.

U.S. Court of Appeals for the 9th Circuit 9th Circuit joins other circuits with arbitration appealability ruling

Parties sometimes agree to altogether eliminate judicial review of arbitration awards. Until recently, such agreements were binding in the 9th Circuit. By David Martinez and Jill Casselman

California Courts of Appeal

Blurred lines: free speech and the right of publicity

A Court of Appeal recently decided that William Roberts -- aka rapper "Rick Ross" -- did not violate former drug lord Ricky Ross' right of publicity by using Ross' name. By Mark Litwak

International

Hitler manifesto cleared for republication

It seems "Mein Kampf" is shortly to be republished in Germany for the first time since World War II. By Julie L. Kessler

Judicial Profile

Derek Woodhouse

Superior Court Judge Santa Clara County (San Jose)

Government

Victorville the only court for miles

In serving an area roughly the size of Massachusetts, prosecutors and defense attorneys in Victorville have a special problem: grappling with far removed witnesses who may have to travel several hours to testify, among other things.

In summary, the court found that Roberts' music and persona were much more than literal depictions of the real Ricky Ross, and therefore were protected under the First Amendment.

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