

ONCE MORE INTO THE BREACH: CONTRASTING US AND AUSTRALIAN ‘RIGHTS OF PUBLICITY’

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ABSTRACT

[263] Commentators often contrast the broad right of publicity in the US to the failure in Australia to recognise a right of publicity. In this article, I focus on the limitations on publicity rights in the US due to (1) freedom of expression and (2) copyright fair use and first sale doctrines. Complicating matters, there is technically no US ‘right of publicity’ because of common law and statutory variations among the states, as well as the fact that only slightly more than half the states recognise it. A close reading of the Tiger Woods painting case (*ETW Corp v Jireh Publishing*) confirms that the US right of publicity is not as strong as celebrities and professional athletes would like. Moreover, Australia’s protective alternatives to the right of publicity in many cases accomplish as much as the so-called US right of publicity.

In terms of the protection conferred on personal identity, ... Australian law compares unfavourably with its American equivalent.¹

New York [unlike California] currently does not allow celebrities to sufficiently protect their identities and persona from unauthorized commercial exploitation.²

In 1997, golfer Tiger Woods won the Masters Tournament in Augusta, Georgia; in early 1998, Rick Rush painted *The Masters of Augusta* — depicting Woods in three poses — and limited edition prints were [264] produced and sold by Jireh Publishing. By June of 1998, Woods’ licensing agent sued Jireh alleging trademark and false endorsement violations. In 1999, in his ‘Legal Issues Update’, Melbourne lawyer Trevor Choy

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¹ Scott Ralston, ‘Australian Celebrity Endorsements: the Need for an Australian Right of Publicity’ (2001) 20(4) *Communications Law Bulletin* 11.

² Seth Dymond, ‘So Many Entertainers, So Little Protection: New York, the Right of Publicity, and the Need for Reciprocity’ (2003) 47 *New York Law School Law Review* 447, 475.

remarked that 'If Tiger Woods sued in Australia, he'd lose'.³ By 2000, Woods had lost in a US federal court as well,⁴ leading one commentator to warn that the US right of publicity is 'endangered':

As the most recognizable name in sports art, LeRoy Neiman, asked, 'Why should an artist just looking for a hot market do something without having an arrangement? The [celebrity] is entitled to a cut.' Restitution, in the form of an accounting for profits, accommodates society's fundamental interest in free expression, while apportioning profits from that expression to those who created it.⁵

On appeal to the US Court of Appeals for the Sixth Circuit, Woods lost again, though the presence of a strong dissenting opinion suggests that the US right of publicity is unsettled if not on the wane.⁶ Indeed, one scholar regrets the 'almost complete unpredictability of the courts regarding ... the right of publicity ...'.⁷

The purpose of this article is to revisit the frequent comparison of the broad right of publicity in the US with the failure to recognise a right of publicity in Australia.⁸ First, I set forth a preliminary taxonomy of the types of appropriations of likeness or identity. A summation of the background and current debates regarding the US right of publicity is then provided, with particular attention to (1) the limitations on such privacy and/or property rights due to free speech rights and copyright 'fair use' and 'first sale' doctrines, as well as (2) proposals for reform. Complicating matters, there is technically no 'US right of publicity' because of the common law and statutory variations among the states as well as the fact that only slightly more than half the states recognise it.⁹ Then follows a

³ See Trevor Choy, *AGDA Legal Issues Update* (August 1999) <<http://www.agda.asn.au/dm/studios/99982LegalIssuesUpdateAugu.html>>.

⁴ See *ETW Corporation v Jireh Publishing, Inc.*, 99 F Supp 2d 829 (ND Ohio, 2000).

⁵ David Michnal, 'Tiger's Paper Tiger: The Endangered Right of Publicity' (2001) 58 *Washington & Lee Law Review* 1155, 1194, citing Marcia Chambers, 'Lawsuit Pits Artists' Rights vs Athletes', *New York Times* (New York), 16 February 1999, D1 (quoting LeRoy Neiman).

⁶ See *ETW Corporation v Jireh Publishing, Inc.*, 332 F 3d 915 (6th Cir, 2003).

⁷ See George P Smith, II, 'The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right' (2002) 54 *South Carolina Law Review* 1, 4.

⁸ See, eg, John McMullan, 'Personality Rights in Australia' (1997) 8(2) *Australian Intellectual Property Journal* 86. McMullan argues that the 'United States' right of publicity ... extends well beyond the Australian position pursuant to the Trade Practices Act', though he points out that the remedies given to Kieren Perkins, in *Talmax Pty Ltd v Telstra Corporation Ltd* [1996] ATPR 41-484, 'were fortuitously similar to those which he would have obtained were he to proceed in either the United States or Canadian jurisdictions under their law without the need for the legal fiction of a degree of misrepresentation': at 95.

⁹ Compare *ibid*, where McMullan refers to the US position as 'straightforward in relation to the common

close reading of the lengthy *Jireh Publishing* majority opinion and dissent, which confirms by reference to earlier cases that the right of publicity is not as strong as celebrities and professional athletes would like. Finally, I briefly explore the protective Australian alternatives to the right of publicity, which in many cases accomplish as much as the so-called US right of publicity.

A Preliminary Taxonomy

One might distinguish four different types of ‘appropriations’ — of a celebrity’s name, likeness, identity, or ‘persona’ — two of which, if not authorised by the celebrity, constitute [265] violations of a typical US right of publicity (in those jurisdictions where it is recognised):

1. Artistic representations that are primarily ‘transformative’ or ‘creative’, and only secondarily function to appropriate the celebrity’s image, are protected under the auspices of freedom of expression — they have value apart from the celebrity’s image, and the mere fact that they *refer* to the celebrity is a type of fair use, a matter of public interest, or a parallel to ‘newsworthiness’ in the journalistic realm. Plays, biographical books or films, parodies, and even satirical drawings fall into this category. Rick Rush’s painting of Tiger Woods fell into this category, but not according to the dissenting judge, who thought the next category was applicable.¹⁰

2. Literal or conventional representations of celebrities may involve some creativity, but basically have commercial value only because of the celebrity’s image. Baseball cards with photographs of athletes,¹¹ T-shirts with pictures of movie stars,¹² and (according to the dissenting judge in the Tiger Woods case) paintings of victorious golfers should support a claim for compensation as a violation of a right of publicity. Interestingly, photographs of celebrities in (or on the cover of) magazines or newspapers generally fall

law right of publicity’; as I will argue, there is no single right of publicity in the US, but rather a spectrum of variations, and in some (state) jurisdictions it is non-existent.

¹⁰ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915 (6th Cir, 2003).

¹¹ See *Haelan Laboratories v Topps Chewing Gum*, 202 F 2d 866 (2d Cir, 1953) (finding publicity claim to redress monetary loss as separate and distinct from claim for invasion of privacy; unauthorised use of photograph on baseball player trading cards was basis for compensation).

¹² See *Comedy III Productions, Inc v Gary Saderup, Inc*, 25 Cal 4th 387, 106 Cal Rptr 2d 126, 21 P 3d 797 (2001) (lithograph drawing of *Three Stooges* reproduced on T-shirts was not sufficiently transformative to overcome claim of commercial appropriation of likeness).

into the next category, and claims that those publications are like objects in *this* category (which gain their value from the celebrity's image) have had mixed success.¹³

3. News, criticism, reporting, and information (in the public interest) about 'newsworthy' celebrities, and even journalistic parodies, are generally protected under the auspices of freedom of speech and the press. Even a commemorative poster of an athlete, reproduced from the cover of a magazine supplement to a daily newspaper, was considered to be a report of a newsworthy item of public interest.¹⁴ On the other hand, an Abercrombie & Fitch clothing catalogue with unauthorised pictures of surfing legends, obviously unrelated to the sale of clothing (that is, a picture of an athlete on the cover of *Sports Illustrated* is protected), falls into the next category as an example of 'associative' advertising.¹⁵

4. Advertisements that establish a link or association with, or an endorsement by, a celebrity are viewed as commercial speech and are generally not protected as artistic or journalistic expressions. Examples range from unauthorised use of a photo¹⁶ to far more creative (on the part of advertisers) [266] uses of sound-alike singing voices,¹⁷ similar-in-appearance race cars,¹⁸ nicknames,¹⁹ previously-used names,²⁰ and even 'reminders' of the celebrity's persona — 'Here's Johnny' from the *Johnny Carson Show*,²¹ or a robot

¹³ See *Hoffman v Capital Cities/ABC, Inc*, 255 F 3d 1180 (9th Cir, 2001) (digitally altered photo of Dustin Hoffman in a dress was not a violation of right of publicity due to freedom of expression); *Montana v San Jose Mercury News, Inc*, 34 Cal App 4th 790, 40 Cal Rptr 2d 639 (1995) (poster of football star reproduced from magazine insert of newspaper was protected freedom of expression); but see *Ali v Playgirl, Inc*, 447 F Supp 723 (SDNY, 1978) (identification of Ali by his nickname 'The Greatest' next to nude drawing of boxer in magazine was violation of right of publicity); *Eastwood v Superior Court*, 149 Cal App 3d 409 (1983) (*National Enquirer* tabloid wrongfully appropriated Clint Eastwood's photo in false news story to attract readers and gain commercial advantage).

¹⁴ See *Montana v San Jose Mercury News, Inc*, 34 Cal App 4th 790, 40 Cal Rptr 2d 639 (1995).

¹⁵ See *Downing v Abercrombie & Fitch*, 265 F 3d 994, 60 USPQ 2d 1184 (9th Cir, 2001).

¹⁶ See *Pavesich v New England Life Insurance Co*, 122 Ga 190, 50 SE 68 (1905) (unauthorised picture of plaintiff in newspaper advertisement falsely stated that plaintiff had purchased defendant's life insurance).

¹⁷ See *Midler v Ford Motor Co*, 849 F 2d 460 (9th Cir, 1988) and *Waits v Frito-Lay, Inc*, 978 F 2d 1093 (9th Cir, 1992), cert. denied, 506 US 1080 (1993), both involving appropriation by voice impersonator.

¹⁸ See *Motschenbacher v R J Reynolds Co*, 498 F 2d 821 (9th Cir, 1974) (name and likeness were not used in advertisement, but picture of distinctive race car — with slight changes, eg, number '11' became number '71' — violated race car driver's right of publicity).

¹⁹ See *Hirsch v SC Johnson & Son, Inc*, 90 Wis 2d 379, 290 NW 2d 129 (1970) ('Crazylegs' label used on shaving gel was appropriation of professional football player's nickname that caused consumer confusion regarding endorsement).

²⁰ See *Abdul-Jabbar v General Motors Corp*, 85 F 3d 407 (9th Cir, 1996) (basketball star's earlier name, Lew Alcindor, used without permission to suggest endorsement in automobile advertisement).

²¹ See *Carson v Here's Johnny Portable Toilets, Inc*, 698 F 2d 831 (6th Cir, 1983) (unauthorised use of the opening line of Carson's television show — 'Here's Johnny' — was violation of right of publicity because

with blond hair and dressed like game show (*Wheel of Fortune*) hostess Vanna White.²²

In my categories above, I intentionally avoided the labels commercial and non-commercial to distinguish between celebrity rights of publicity and protected expression by others — not only are paintings (sold as prints) and publications ‘commercial’ enterprises, but advertisements that only incidentally (and not directly) use an image of or ‘remind’ consumers of a celebrity are ‘protected’.²³ That said, it bears mentioning that categories 1 and 3 set substantial limits on the US right of publicity. Moreover, as efforts to expand the right of publicity in category 2 have often not succeeded, it is category 4 that draws attention (as the paradigm for an expansive right of publicity in the US) because of California cases that, it must be added, have been criticised as overly expansive. Finally, the interplay between rights of publicity, on the one hand, and trademark and copyright laws, on the other, suggests that so-called publicity rights are often protected by less controversial doctrines of false endorsement and unfair competition. Viewed in that light, the differences between the rights of publicity in the US and in Australia are not so stark.

Rights of Publicity in the US

Forty years of judicial and legislative effort have produced a coherently defined and rather clearly enumerated independent right of publicity protecting the economic associative value of identity.²⁴

[T]here is intense theoretical dissension regarding the nature of identity, the scope of its protection, and how far a right of publicity should extend All of these matters ... are contentious issues, despite forty-six years of doctrinal consolidation.

It is worth asking why ... the doctrinal confusion is so extreme.²⁵

the line reminded consumers of Carson).

²² See *White v Samsung Electronics America, Inc*, 971 F 2d 1395 (9th Cir, 1992) (right of publicity extended to evocation of Vanna White’s identity in any manner).

²³ See *Page v Something Weird Video*, 908 F Supp 714 (CD Cal 1995) (distributor of Battle Page’s films used drawing of her in advertisement; incidental use of the image did not violate right of publicity).

²⁴ Sheldon Halperin, ‘The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality’ (1995) 46 *Hastings Law Journal* 853, 869.

²⁵ Alice Haemmerli, ‘Whose Who? The Case for a Kantian Right of Publicity’ (1999) 49 *Duke Law Journal* 383.

[267] Over a century ago, Warren and Brandeis called for development of a right of privacy,²⁶ which is paradoxically the source of what would later become a right of publicity to ensure that those who seek and gain fame and notoriety, and even desire commercial exploitation of their name and likeness, will be paid by those who *use* them. Indeed, the most successful professional athletes rarely prefer privacy over endorsement and licensing opportunities that will generate income — often in excess of their team/player contracts. Nevertheless, such opportunities have their roots in the broad notion that individuals have a right to be left alone, subject to the qualifications that ‘to whatever degree and in whatever connection a man’s life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.’²⁷

When Prosser (in the mid-20th century) classified the right of privacy into four distinct torts — including intrusion on solitude, public disclosure of private facts, and publicity placing another in false light — the fourth was ‘appropriation of another’s name or likeness for one’s own advantage.’²⁸ The latter, one might say, is closest to the contemporary conception of a right of publicity, but two complexities persist. First, the commercial appropriation tort potentially also involves an intrusion on solitude and a ‘false light’ claim, and perhaps even a disclosure of private facts, such that Prosser’s classification scheme is unstable and his ‘fourth tort’ does not really describe an independent or distinct ‘right of publicity’ tort.²⁹ Second, the right of publicity has in

²⁶ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 196: The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip ... has become a trade ... [M]an, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but ... invasions upon his privacy [have] subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

As Professor George Smith explains:

Warren and Brandeis were hard-pressed for leading case precedents that would reinforce their argument for a privacy right. Nevertheless, early English cases were found [supporting their argument] that, since the common law granted a right to copyright to the artist ... , to the author ... , and to the letter-writer ... , in order to prevent their products from being made public, ergo, every individual should have a similar right not to have his personality invaded or published [And] since the Roman law awarded damages for mental suffering when one’s honor was assailed wrongly, this was all the more reason why the American courts should recognize a right of privacy.

Smith, above n 7, 5–6.

²⁷ Warren and Brandeis, above n 26, 215.

²⁸ See Smith, above n 7, 9, citing William L Prosser, *Handbook of the Law of Torts* (2nd ed, 1955) ch 20, ‘97.

²⁹ See *ibid* 10 (‘The great majority of courts will only recognize a violation of the right of privacy and not attempt to classify the offense into one of Prosser’s four groups’).

recent years been justified as a property right ‘protecting exclusively economic interests, as opposed to “personal” privacy rights, where the relevant damage is to feelings and human dignity.’³⁰ Nevertheless, both the property right and the privacy right remain in play in various judicial opinions concerning the right of publicity. For example, in a 1981 case brought by supermodel Christie Brinkley under New York’s privacy statute, both injury to feelings and loss of a property interest were considered to be compensable under the statute.³¹ By contrast, some courts have defined the right of publicity only in terms of ‘humiliation, embarrassment, and mental distress’³² or ‘emotional injury’,³³ but a trend is discernible toward recognition of ‘the right of publicity [as having an] independent status, a distinct right and remedy unmoored from privacy ...’.³⁴

[268] Distinguishing a *property* right of publicity from a *personal* right of privacy is appealing, as commingling publicity rights with privacy torts can be seen as the ‘source of much confusion’.³⁵ Indeed, a compelling distinction can be made between ‘private person [who] may experience injured feelings by public exposure’ and ‘actors or celebrities [who] care only about economic harm’;³⁶ in other words, ‘[p]ublicity plaintiffs seek public exposure; privacy plaintiffs seek anonymity’.³⁷ For some scholars, however, that ‘facile’ distinction is itself ‘misleading, as publicity plaintiffs may eschew certain types of exposure for reasons of personal feelings’.³⁸ In another formulation, ‘the confusion that permeates the right of publicity’ is the result of ‘the myopic and limited understanding of the right of publicity as either a property right or a privacy right, [which ignores] the right’s dual nature ...’.³⁹ For example, when Dustin Hoffman sued the owners of *Los Angeles Magazine* for digitally altering and publishing a still photograph (from the motion picture *Tootsie*) of Hoffman, dressed as a woman, making him appear to be wearing a designer dress and shoes he’d never worn, the federal trial court ruled in his favour on the basis that the common law right of publicity (as well as California’s

³⁰ See Haemmerli, above n 25, 407.

³¹ See *Brinkley v Cassablancas*, 438 NYS 2d 1004, 1012 (App Div, 1981).

³² See *Waits v Frito-Lay, Inc*, 978 F 2d 1093, 1103 (9th Cir, 1992).

³³ See *Abdul-Jabbar v General Motors Corp*, 85 F 3d 407, 416 (9th Cir, 1996).

³⁴ See Halpern, above n 24, 853.

³⁵ *Ibid* 855.

³⁶ See Haemmerli, above n 25, 408, n 95.

³⁷ See Pamela Samuelson, ‘Reviving *Zacchini*: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases’ (1983) 57 *Tulane Law Review* 836, 845.

³⁸ See Haemmerli, above n 25.

³⁹ See Natalie Fisher, ‘The Right of Publicity: Understanding a Misunderstood Right after *Hoffman v*

statutory right of publicity, federal trademark laws against false endorsement, and California's unfair competition law) protected his property interest in his name and likeness.⁴⁰ On appeal, however, Hoffman lost because his 'right of publicity' was viewed primarily 'as a privacy right, subject to a high level of First Amendment protection' toward the press.⁴¹ The appellate court held that the magazine's depiction of Hoffman was not literal but 'transformative', was not an advertisement (which was pertinent as commercial speech is less protected), and was not intended to create a false impression that the body in the dress was Hoffman's.⁴²

The two *Hoffman* opinions, which are each subject to the criticism that the court 'went to the extreme in their treatment of the right of publicity'⁴³ — either the *property* extreme or the *privacy* extreme — illustrate the limitations on the right of publicity arising from US constitutional freedoms of expression, as well as the typical interplay of federal trademark and copyright law in right of publicity claims. Indeed, to the extent that the right of publicity is viewed as a property right, freedom of speech concerns are often eclipsed, and 'the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavours and having little to do with protecting feelings of reputation'.⁴⁴ Likewise, when a celebrity's or sports figure's identity (name, likeness, voice) is used without permission in an advertisement, the commercial aspect of the 'speech' renders the 'parody' or 'newsworthiness' defences unavailable.⁴⁵ On the other hand, the right of publicity nearly always involves a balancing of freedom of expression against an individual's interest in his or her identity, not only because of the public's interest in information but because a creative artist may have copyright protection in his or her own 'transformative' work.⁴⁶

Capital Cities/ABC' (2003) 43 *Santa Clara Law Review* 1455, 1456, 1482.

⁴⁰ See *Hoffman v Capital Cities/ABC, Inc.*, 33 F Supp 2d 867, 873–4 (CD Cal, 1999).

⁴¹ See Fisher, above n 39, 1482.

⁴² See *Hoffman v Capital Cities/ABC, Inc.*, 255 F 3d 1180, 1184–8 (9th Cir, 2001).

⁴³ See Fisher, above n 39, 1482.

⁴⁴ See *Zacchini v Scripps-Howard Broad. C.*, 433 US 562, 573–5 (1977).

⁴⁵ See *White v Samsung Elecs. Am., Inc.*, 971 F 2d 1395 (9th Cir, 1992) (appropriation of likeness for advertising purposes); *Abdul-Jabbar v Gen Motors Corp.*, 85 F 3d 407 (9th Cir, 1996) (appropriation of birth name previously used by plaintiff).

⁴⁶ See, eg, *Comedy III Productions, Inc v Saderup, Inc.*, 21 P 3d 797 (Cal, 2001) (tension between right of publicity and First Amendment rights of 'creative' lithographer).

[269] The confusion surrounding the right of publicity in California, for example, has led to proposals that combine ‘common law and statutory rights of publicity’, with an exception for ‘news’, but also incorporating:

copyright and trademark laws [and] the fair use defense That is, in order to be protected, a commercial use of the plaintiff’s identity must be reasonably necessary to convey information or news to the public [without suggesting] sponsorship or endorsement The courts should also retain both the parody defense and the actual malice standard [if the use is newsworthy] and not for commercial gain alone.⁴⁷

In light of the variation among state schemes for protecting the right of publicity, others have recommended pre-emptive federal legislation. The International Trademark Association (INTA) prepared draft publicity rights legislation in 1996, but it was withdrawn pending further research.⁴⁸ Because that draft ‘focused exclusively on advertising and product use’, Dean Alice Haemmerli has proposed that the scope of such a proposal be expanded:

to embrace both moral and economic claims and making it applicable to both performance and associative value, [constrained by] a fair use limitation from copyright doctrine [to allow] social commentary, criticism, or parody ... [as well as by] a First Amendment privilege Finally, the right of publicity would be limited by a variant of the first sale doctrine ...⁴⁹

Haemmerli takes issue not only with those who view the right of publicity as a means to protect primarily economic or property interests, but also those who think that the right of publicity has been overextended.⁵⁰ Critics of the right of publicity, for example, point to *White v Samsung Electronics America, Inc*⁵¹ for an overly expansive right of publicity — an advertisement depicting a robot in a blond wig and evening gown, in front of a game-

⁴⁷ See Fisher, above n 39, 1482–3.

⁴⁸ See Haemmerli, above n 25, 477–8, citing *Int’l Trademark Assoc. Draft Publicity Rights Legislation* (Proposal to Amend the Trademark [Lanham] Act of 1946), 30 September 1996.

⁴⁹ See *ibid* 409, 485–6. Under this proposed variant of the first sale doctrine, ‘once a use of persona has been authorized and used on products or goods, the owner’s right to compensation from, or ability to curtail, further use would be exhausted’: at 486. As to the reference to ‘performance value’, if a news reporter or biographical film-maker broadcasts a performer’s entire show, that would be considered an unlawful appropriation in the guise of fair use.

⁵⁰ See *ibid* 386–7.

show letter board (similar to the one in the television show *Wheel of Fortune*), was found to have evoked, and therefore misappropriated, Vanna White's image.

Such a test does not insist on ... showing a realistic rendering of the plaintiff; it merely requires a showing that the questioned conduct reminds the audience of the celebrity.

... [T]he absurdity of the result in *White* can best be illustrated by the logical extreme of its application. For instance, any song previously popularized by a particular celebrity that is used in an advertisement could conceivably be viewed as a violation of that celebrity's right of publicity ...⁵²

For Haemmerli, however, such arguments (which are usually based in freedom of expression) fail to acknowledge that identity *should* be protected, as long as the scope of identity is 'tamed' to include an evocation only 'if it is immediate and not merely suggestive of a connection'.⁵³ Haemmerli also argues [270] that the copyright doctrines of fair use and first sale should limit right of publicity claims, alongside freedom of expression concerns.⁵⁴

Significantly, the argument that the right of publicity is expanding is often made with reference to California cases, and even though New York and Tennessee (that is, Nashville and Memphis) are also 'entertainment capitals', their 'rights of publicity' are in several respects less expansive.⁵⁵ To illustrate the right of publicity in a more 'normal' setting — Ohio — the recent Tiger Woods case deserves attention because almost all of the aforementioned complexities are addressed and debated.

ETW Corporation v Jireh Publishing Inc

Tiger Woods is chairman of the board of ETW, which owns a trademark registration for the mark 'TIGER WOODS'; Woods also assigned to ETW all his publicity rights, including the right to exploit his name, image, likeness, and signature. ETW sued Jireh, which distributed limited edition prints of Rick Rush's painting of Woods, alleging (1)

⁵¹ 971 F 2d 1395 (9th Cir, 1992).

⁵² Smith, above n 7, 27.

⁵³ See Haemmerli, above n 30, 461. 'White would ... have had a different outcome under this test', because the evocation was 'rarefied, rather than robust and immediate': at 462–3.

⁵⁴ See *ibid* 464–76.

trademark infringement, dilution of trademark, and unfair competition under federal law; (2) unfair competition and deceptive trade practices under Ohio statutory law; and (3) unfair competition, trademark infringement, and violation of Woods' right of publicity under Ohio common law. Jireh, on the basis that the prints were protected by the First Amendment and did not violate federal law, moved for summary judgment and won in the trial court; ETW appealed, and the Appellate Court reviewed the matter *de novo*.⁵⁶

Unauthorised Use of the 'Tiger Woods' Trademark

Under the doctrine of 'fair use', the holder of a trademark *cannot* prevent others from using the word that forms the trademark in its *primary* or *descriptive* sense.⁵⁷

Trademark claims under US federal law⁵⁸ 'follow the same analysis' as Ohio trademark claims, so the appellate court dismissed both claims on the basis that the name 'Tiger Woods' was not on the face of the prints, and its use on the back of the envelope (in which prints were mailed) and in the narrative literature enclosed with the print 'are purely descriptive Woods is mentioned only to describe the content of the print'.⁵⁹

Unauthorised Use of the 'Trademarked' Likeness of Tiger Woods

[The Court is being asked], in effect, to constitute Woods himself as a walking, talking trademark. Images and likenesses of Woods ... cannot function as a trademark because there are undoubtedly thousands of images ... taken by countless photographers, and drawn, or sketched, or painted by numerous artists No reasonable person could believe ... they all originated with Woods.⁶⁰

Trademarks, however, need not be registered (as is the name 'Tiger Woods'), and ETW claimed that Woods's image and likeness are unregistered trademarks. However, to qualify as a protectable mark, the 'symbol or [271] device' must perform 'the job of identification, ie, to identify one source and to distinguish it from others.'⁶¹ As 'a general

⁵⁵ See generally Dymond, above n 2.

⁵⁶ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 918–19 (6th Cir, 2003).

⁵⁷ *Car-Freshener Corp v SC Johnson & Son, Inc*, 70 F 3d 267, 270 (2nd Cir, 1995).

⁵⁸ 15 USC ' 1114 (Lanham Act). [' author to clarify what this symbol means/represents]

⁵⁹ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 920–1 (6th Cir, 2003).

⁶⁰ *Ibid* 922.

⁶¹ See *ibid* 921–2. Regarding unregistered trademarks, Lanham Act ' 43(a)(1), 15 USCA. ' 1125(a)(1), provides that any person who, on or in connection with any goods or services, ... uses in commerce any word, term, name,

rule, a person's image or likeness cannot function as a trademark', though a single photograph that consistently appears on specific goods could be.⁶² ETW's 'sweeping claim to trademark rights in every photograph and image of Woods' was therefore rejected.⁶³

False Endorsement and Right of Publicity Claims, and the First Amendment Defense

The elements of a [federal] Lanham Act false endorsement claim are similar to the elements of a right of publicity claim under Ohio Law. In fact, one legal scholar has said that a Lanham Act false endorsement claim is the federal equivalent of the right of publicity.⁶⁴

Before discussing ETW's remaining intellectual property claims, the Appellate Court addressed how First Amendment rights are to be balanced against the false endorsement doctrine and the right of publicity. Any medium of expression 'is protected even though it is carried in a form that is sold for profit', and disseminators are likewise protected by the First Amendment's 'free speech' clause.⁶⁵ (Purely commercial speech, proposing a commercial transaction, is not entitled to the full protection of the First Amendment, but 'Rush's prints are not commercial speech'.⁶⁶)

symbol, or device, or ... any false designation of origin, false or misleading description of fact, ... which —

- (A) is likely to cause confusion ... or to deceive as to the affiliation ... of such person, or as to the origin, sponsorship, or approval of his or her goods ... by another person, or
- (B) in commercial advertising ... misrepresents the nature, characteristics, qualities, or geographic origin of ... goods ..., should be liable in a civil action by any person ... damaged by such act.

As explained in J Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (1999) (vol 4) ' 27.14 (citations omitted):

The courts have nearly unanimously held that ' 43(a) provides a federal vehicle for assertion of infringement of even unregistered marks and names. [It] 'is the only provision in the Lanham Act that protects an unregistered mark'

See also *Two Pesos, Inc v Taco Cabana, Inc*, 505 US 763, 768 (1992) ('[I]t is common ground that ' 43(a) protects qualifying unregistered trademarks and that the general principles qualifying a mark for registration ... are for the most part applicable in determining whether an unregistered mark' is protected). Marks must be inherently distinctive (inherently or through secondary meaning), not merely descriptive, to be protected: at 769.

⁶² See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 922–3 (6th Cir, 2003), citing *Pirone v MacMillan, Inc*, 894 F 2d 579 (2d Cir, 1990) (rejecting claim by Babe Ruth's daughter that photographs of her father in a calendar suggested sponsorship).

⁶³ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 923 (6th Cir, 2003).

⁶⁴ *Ibid* 924, citing Bruce P Keller, 'The Right of Publicity: Past, Present, and Future' (October 2000) 1207 *PLI Corporate Law and Practice Handbook* 159, 170.

⁶⁵ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 924–5 (6th Cir, 2003).

A false endorsement ‘occurs when a celebrity’s identity is connected with a product or service in a way that consumers are likely to be misled about the celebrity’s sponsorship or approval of the product or service’.⁶⁷ The likelihood of confusion test, however, ‘is not appropriate [for artistic expression cases] because it fails to adequately consider the interests protected by the First Amendment’.⁶⁸

[272] [The Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.⁶⁹

Moreover, ‘the public interest in free expression should prevail if the use of the celebrity’s image has artistic relevance, unless it is used in such a way that it explicitly misleads as to the source of the work’.⁷⁰ The implication of this aphorism in the context of Woods’s claim was the recognition of the risk ‘that some members of the public would draw the incorrect inference that Woods has some connection with Rush’s print’.⁷¹ Because such a risk of misunderstanding is not ‘engendered by any explicit indication on the face of the print’, it is outweighed by the interest in artistic expression.⁷²

As to the state law claim based on the right of publicity — ‘an intellectual property right ... defined as the inherent right ... to control the commercial use of [one’s] identity’ — the appellate court observed that ‘its violation gives rise to a cause of action for the commercial tort of unfair competition’.⁷³ However, quoting from the *Restatement (Second) of Torts*, on which the Ohio Supreme Court relied in when it recognised the right of publicity (in *Zacchini*) in 1976, the appellate court refused ‘to adopt a broad construction of the publicity right’.⁷⁴ A broad right of publicity is not justified because its

⁶⁷ See *ibid* 925–6.

⁶⁸ See *ibid* 926; see also *Mattel, Inc v MCA Records, Inc*, 296 F 3d 894, 900 (9th Cir, 2002) (in case by manufacturer of Barbie Doll against producer of song ‘Barbie Girl’, the court held that the likelihood of confusion test ‘fails to account for the full weight of the public’s interest in free expression’).

⁶⁹ *Rogers v Grimaldi*, 875 F 2d 994, 999 (2d Cir, 1989). The *Rogers* court rejected the ‘no alternative means test’ — no First Amendment protection unless the author has no alternative means of protection — because it ‘does not sufficiently’ accommodate the public’s interest in free expression: see at 999; accord, *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 927 (6th Cir, 2003).

⁷⁰ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 928 (6th Cir, 2003).

⁷¹ See *ibid* 937.

⁷² See *ibid*.

⁷³ See *ibid* 928.

⁷⁴ See *ibid* 930, citing *Zacchini v Scripps-Howard Broad. Co*, 47 Ohio St 2d 224, 230, 351 NE 2d 454 (1976), and quoting *Restatement (Third) of the Law: Unfair Competition*, Ch 4, ‘46–7, to which the

rationales are 'generally less compelling than those that justify rights in trademarks ...' — celebrities already make money from their profession, the commercial value of their identity may be marginal and is otherwise 'largely fortuitous', and false endorsement claims can be pursued in a deceptive marketing claim.⁷⁵ Moreover, the right of publicity 'is fundamentally constrained by the public and constitutional interest in the freedom of expression' — 'communicating information or expressing ideas' about a celebrity is 'not generally actionable'.⁷⁶ News, creative fiction and non-fiction, and unauthorised biographies (as well as novels, plays, or movies) about celebrities are protected unless false or a celebrity's name or likeness is used merely to draw attention to the work.⁷⁷ Publicity rights are often not inheritable,⁷⁸ and while commercial exploitation of identity will be not be protected by the First Amendment,⁷⁹ freedom of expression is always in tension with rights of publicity.⁸⁰

[273] Since California is known for its expansive right of publicity due to the *Vanna White* case, the appellate court in *ETW* made clear its disagreement with *White* and its agreement with Judge Kozinski's dissent from the order rejecting an en banc rehearing of the case.⁸¹ In 2000, in their opinion in *Landham v Lewis Galoob Toys, Inc*, the appellate court rejected the claim that a 'fringe' actor's right of publicity had been violated by unauthorised production of an action figure of a character the actor had played.⁸² The Tenth Circuit Court of Appeals (the federal circuit for Kansas, Oklahoma, New Mexico, Colorado, Utah & Wyoming) also reaffirmed the weight of the First Amendment in *Cartoons, LC v Major League Baseball Players Association*, where caricatures of

exposition of the right of publicity was transferred (from *Restatement (Second) of Torts*) in 1995, at comment c.

⁷⁵ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 930 (6th Cir, 2003), quoting *Restatement (Third) of the Law: Unfair Competition*, 46 comment c.

⁷⁶ See *Restatement (Third) of the Law: Unfair Competition*, '47, comment c.

⁷⁷ See *ibid*, quoted in *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 931 (6th Cir, 2003).

⁷⁸ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 931 (6th Cir, 2003), citing *Memphis Development Foundation v Factors Etc, Inc*, 616 F 2d 956, 957 (6th Cir, 1980) (suit by heirs of Elvis Presley). Note, however, that Tennessee expanded the common law right of publicity to protect individuals beyond the grave, due to lobbying efforts of the Elvis Presley estate. Numerous other states have done the same.

⁷⁹ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 931 (6th Cir, 2003), citing *Carson v Here's Johnny Portable Toilets, Inc*, 698 F 2d 831, 835 (6th Cir, 1983) (suit by Johnny Carson for violating right of publicity by the commercial use of the phrase that introduced his television show — 'Here's Johnny').

⁸⁰ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 931 (6th Cir, 2003).

⁸¹ See *White v Samsung Elec. America, Inc*, 989 F 2d 1512, 1513–16 (9th Cir, 1993) (Kozinski J dissenting).

⁸² See 227 F 3d 619, 625–6 (6th Cir, 2000), discussed in *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 931 (6th Cir, 2003), ('Landham ... failed to show that his persona had significant value or that the toy invoked his persona as distinct from the fictional character he played').

professional baseball players were protected by the parody defense.⁸³ Even in California, Hoffman lost on appeal due to the magazine's freedom of expression (non-commercial speech can be defeated only by proof of actual malice; the commercial aspect of publishing was downplayed as intertwined with expressive elements),⁸⁴ and the California artist who made charcoal drawings of *The Three Stooges* for commercially-produced T-shirts would have been protected by the First Amendment if only his drawings were transformative, not literal portraits, and therefore analogous to fair use in copyright law.⁸⁵

Turning to the prints of the painting of Woods, the appellate court concluded that 'Rush's work had substantial informational and creative content which outweighs any adverse effect on ETW's market and that Rush's work does not violate Woods's right of publicity' under Ohio law.⁸⁶ In balancing Woods's rights against Rush's, the court noted that Woods has significant income 'unrelated to his right of publicity', and that his ability to profit from his image was intact.⁸⁷ In so doing, the court created a workable analytic framework for right of publicity cases, but in a dissenting opinion that is longer than the majority opinion, Judge Clay created a different framework.

An Alternative Framework

Judge Clay opined that, at the very least, a question of fact remained as to consumer confusion covering Woods's sponsorship or 'origin' of the print, so perhaps the image of his famous swing (but not, of course, every image of Woods) is an unregistered trademark.⁸⁸ The majority, Clay observed, ignored the jurisprudence regarding likelihood of confusion, which 'clearly indicates that a person's image or likeness *can* function as a trademark as long as there is evidence ... of consumer confusion ...'.⁸⁹ ETW offered substantial survey evidence of such confusion, which was ignored because of Rush's

⁸³ See 95 F 3d 959, 969 (10th Cir, 1996) (parody trading cards 'provide social commentary on public figures ... While not core political speech ... this type of commenting on an important social institution constitutes protected expression').

⁸⁴ See *Hoffman v Capital Cities/ABC, Inc*, 255 F 3d 1180, 1185 (9th Cir, 2001).

⁸⁵ See *Comedy III Productions, Inc v Gary Saderup, Inc*, 25 Cal 4th 387, 106 Cal Rptr 2d 126, 21 P 3d 797 (2001) (transformative use test).

⁸⁶ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 937 (6th Cir, 2003).

⁸⁷ See *ibid* 938.

⁸⁸ See *ibid* 939–40 (Clay J dissenting).

⁸⁹ See *ibid* 941–2 (Clay J dissenting).

artistic expression,⁹⁰ but trademark protection 'is not lost simply because the [alleged] infringing use is in connection with an artistic expression.'⁹¹ Moreover, as to the registered trademark — TIGER WOODS — 'a finding of likelihood of confusion forecloses a fair use defense';⁹² the majority's assumption, that Jireh's [274] 'use of the registered mark is fair use because the underlying work' (the painting) is not an infringement, is in Judge Clay's analysis simply erroneous.⁹³ The jury should therefore have been allowed to consider the federal claims of unauthorised use of registered and unregistered trademarks, unfair competition and false endorsement, and dilution of the trademark.

As to the right of publicity, while that right generally trumps freedom of expression in commercial advertisement cases, cases involving expressive works present a difficult balancing exercise. Depictions 'of celebrities which [amount] to little more than the appropriation of the celebrity's economic value' seem not to deserve protection,⁹⁴ but 'the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope'.⁹⁵ Celebrities have an economic right in their name and image, but not a right of censorship.⁹⁶ An analogy with copyright's 'fair use' is apparent with respect to newsworthiness and matters of public interest, and the freedom of expression defense is also available to the extent that new 'expressions' are transformative — a new work is not likely to be a substitute for the celebrity in the market.⁹⁷ Just as the drawing of *The Three Stooges*, printed on T-shirts, was not found to be sufficiently transformative of a literal or conventional image or portrait to be protected, the clear focus of Rush's painting of Woods:

... is Woods in full body image wearing his red shirt and holding his famous swing in the pose which is nearly identical to that in the Nike poster.⁹⁸

Rush's 'transformation' of Woods, in the view of the dissenting judge, was subordinate

⁹⁰ See *ibid* 942–3 (Clay J dissenting); see also at 946 ('62 per cent of the consumers polled ... believed that Woods had a ... "connection" with Rush's print').

⁹¹ See *Cliffs Notes, Inc v Bantam Doubleday Dell Publishing Group, Inc*, 886 F 2d 490, 493 (2d Cir, 1989), quoting *Silverman v CBS Inc*, 870 F 2d 40, 49 (2d Cir, 1989).

⁹² See *Paccar Inc v TeleScan Techs, LLC*, 319 F 3d 243, 255–6 (6th Cir, 2003).

⁹³ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 949–50 (6th Cir, 2003) (Clay J dissenting).

⁹⁴ See *ibid* 958 (Clay J dissenting).

⁹⁵ See *Comedy III Productions, Inc v Gary Saderup, Inc*, 21 P 3d 797, 807–8 (2001).

⁹⁶ See *ibid*.

⁹⁷ See *ibid*.

to his ‘goal of creating literal, conventional depictions’ of Woods ‘to exploit his ... fame’, so his right of free expression should have been outweighed by Woods’s right of publicity.⁹⁹

Australian Rights of Publicity

[I]t is perhaps surprising that a number of common law countries in which celebrity endorsement and merchandising are common, such as Australia and the United Kingdom, do not explicitly recognize a right of publicity. Nevertheless, even in those countries, an aggrieved celebrity may rely on various statutes and common law causes of action to attack the unauthorised commercial exploitation of the celebrity’s persona.¹⁰⁰

Because (1) copyright protection does not extend to images or nicknames, and (2) many facets of identity do not meet the definition or registration requirements for a trademark, protecting celebrity identity in Australia ‘is left largely to the realms of passing off and statutory misleading or deceptive conduct’.¹⁰¹ The latter actions traditionally require ‘a *misrepresentation* of approval, consent, or connection between the endorser and’ a product, such that ‘a clear disclaimer of association’ generally precludes liability.¹⁰² On the other hand, the Australian Federal Court: [275]

... has arguably recognised this injustice and [has even] relaxed the test for ‘misrepresentation’ in the *Crocodile Dundee* cases. [There,] the Court appeared to suggest that mere *identification* was enough to suggest an association and therefore a misrepresentation.¹⁰³

A right of publicity approach is thereby implied, and language in several other passing off cases suggests that it is not so much consumer confusion ‘as the celebrity’s

⁹⁸ See *ETW Corporation v Jireh Publishing, Inc*, 332 F 3d 915, 959 (6th Cir, 2003) (Clay J dissenting).

⁹⁹ See *Comedy III Productions, Inc v Gary Saderup, Inc*, 21 P 3d 797, 811 (2001).

¹⁰⁰ Robert U Shendrikar, *Intellectual Property & Technology Newsletter* (February 2002) Mitchell Silberberg and Knupp LLP.

¹⁰¹ See Ralston, above n 1, 9, citing *Copyright Act 1968* (Cth) ss 6, 17, 41, 44. ‘Under the *Trade Practices Act 1974* (Cth), the seemingly suitable [for protecting image and nickname] provisions of [ss 52 and] 53(c) and (d) have been interpreted narrowly to mean formal endorsement must be suggested before liability will follow’: at 9.

¹⁰² See *ibid* 9, citing *Newton-John v Scholl-Plough (Australia) Ltd* (1986) 11 FCR 233.

¹⁰³ See *ibid* 10, citing *Pacific Dunlop v Hogan* (1989) 12 IPR 225; *Hogan v Koala Designs* (1988) 20 FCR 314.

proprietary interest in exploiting' his or her identity that needs to be protected.¹⁰⁴ This trend leads some to suggest that an Australian law to guard against appropriation, not simply misrepresentation, would be 'consistent with the rationales underlying intellectual property law'.¹⁰⁵

Note that in the Tiger Woods case, the majority was, perhaps like Australian courts, not inclined to consider images or likenesses as trademarks. On the other hand, the dissenting judge (in the Woods case) was happy to do so if there is evidence of consumer confusion, which result is similar to the misrepresentation of a 'connection' (between endorser and endorsee) that is an element of a 'passing off' claim in Australia. Moreover, as in Australia, the connection between misrepresentation and identification, in the context of appropriation of a celebrity's persona, is present in some formulations of US rights of publicity. Indeed, the right of publicity was traditionally invoked when 'the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product'.¹⁰⁶ And while proof 'of deception or confusion is not required in order to establish an infringement of the right of publicity', the ability of an infringement to exploit a celebrity's persona is based upon the notion that association with a celebrity is valuable. The connection between identification and misrepresentation is, of course, clearest in the context of commercial advertising — an unauthorised use of a celebrity's image is meant to convey an association with a product. But even in the context of artistic expression, where the purchaser of a conventional or literal depiction of a celebrity does not really care whether the celebrity is 'associated' with or paid by the artist, a misrepresentation persists that the artist has done *something* other than steal and sell the [intellectual] property of the celebrity.

If that sounds strained, because half the states in the US explicitly acknowledge independent publicity rights (while Australia does not), the limitations on US rights of publicity should be kept in mind. Freedom of expression was given great weight in *ETW* and in the numerous cases relied upon to defeat Woods's claim. Transformative, creative appropriations of a celebrity's persona, as well as news, commentary, criticism, parody, and literary representations concerning celebrities will be protected, which leaves direct

¹⁰⁴ See *ibid* 10, citing *Henderson v Radio Corporation* (1960) SR (NSW) 576; *Talmax v Telstra Corporation* (1996) 36 IPR 46.

¹⁰⁵ See *ibid* 10–11; see also McMullan, above n 22.

¹⁰⁶ See *Comedy III Productions, Inc v Gary Saderup, Inc*, 21 P 3d 797, 802 (2001).

or associative implications of celebrity endorsement (without authorisation) and non-transformative commercial appropriations of a celebrity's persona (without permission) as in paintings or on T-shirts. If there is a gap in Australian law, it is in the failure to either expand the notion of 'misrepresentation' to encompass these narrow situations, or to expand copyright and trademark law to do the same.

For example, in a 1985 case out of New York, which has a statutory (but does not recognise a common law) right of publicity, Woody Allen sued National Video for using an Allen look-alike in an advertisement.¹⁰⁷ Allen's right of publicity claim failed, because while New York law 'does not prohibit one from evoking certain aspects of another's personality ... it does prohibit one from actually representing oneself as another person The look-alike situation falls somewhere in between.'¹⁰⁸ [276] However, the Court relied on the federal prohibition of misleading advertising (in the Lanham [trademark] Act) to conclude that there was a likelihood of confusion between the 'marks' of Woody Allen and his impersonator.¹⁰⁹ Rather than expanding the right of publicity, the court expanded traditional trademark analysis.

One might even argue, in light of the outcome in Tiger Woods' case, that he would have fared *better* in Australia — the evidence of consumer confusion would not have been so quickly eclipsed by First Amendment concerns. Rick Rush's painting of Woods involved some creativity, but so did (1) the television advertisement that was used to sell Grosby Leatherz shoes (a parody of the 'knife scene' from the film *Crocodile Dundee*),¹¹⁰ and (2) the image of a koala in bush hat and vest, carrying a knife, used to sell T-shirts and shopping bags,¹¹¹ both of which 'cashed in' on Paul Hogan's character in that film.

To be fair, of course, California cases are notoriously expansive with respect to rights of publicity, and their differences with Australian law are clearest. For example, in *Wendt v Host International*,¹¹² a California federal appeals court recognised rights of publicity held by two actors, who portrayed two characters (Norm and Cliff) on the television

¹⁰⁷ See *Allen v National Video, Inc*, 610 F Supp 612 (SDNY, 1985).

¹⁰⁸ See *ibid* 622–3.

¹⁰⁹ See *ibid* 628.

¹¹⁰ See *Pacific Dunlop* [1989] 14 IPR 398.

¹¹¹ See *Hogan v Koala Dundee Pty Ltd* [1988] 20 FCR 314.

¹¹² See 197 F 3d 1284 (9th Cir, 1999) (denial of rehearing *en banc*).

series 'Cheers', in their claim against a defendant who created *licensed* (from Paramount Pictures) animatronic figures of the characters. In his dissent on petition for rehearing, Judge Kozinski criticised the Appellate Court's (1) refusal to recognise copyright pre-emption, (2) refusal to recognise First Amendment rights (using 'dummies ... is a dramatic presentation ... like a play'), and (3) allowing the right of publicity to continue to extend 'not just to the name, likeness, voice, and signature of a famous person, but to anything at all that evokes that person's identity'.¹¹³ Moreover, the *Wendt* doctrine creates more variation among the states, further destabilising the analytical boundaries of US rights of publicity.

Conclusion

The right of publicity, in its simplest form, is the right to control the commercial use of one's persona.¹¹⁴

If *that* is 'the right of publicity', then Australian law does offer a version by way of copyright, trademark, statutory misrepresentation, or passing off. Moreover, US versions of the right of publicity do not really allow complete control, primarily because of the First Amendment to the US Constitution. 'Control' is a matter of degree — Tiger Woods could not control the use of his image by Jireh on commercially-sold limited edition prints of Rush's painting. And if Australia is beginning to recognise rights of publicity, the US may be beginning to recognise that California has perhaps gone too far.

¹¹³ See *ibid* 1287–8 (referring to the *Vanna White* case as beginning this trend).

¹¹⁴ See Smith, above n 7, 20.