

WHAT IS MISAPPROPRIATION OF NAME OR LIKENESS OR RIGHT OF PUBLICITY IN CA?

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A plaintiff whose name or likeness has been misappropriated for profit may have a cause of action for misappropriation or violation of right of publicity. Statute and Common Law govern Right of Publicity or Misappropriation of Name or Likeness in California. In this article, we explore in some depth such statute and case law and seek to shed some light on what is protectable and what is not.

STATUTE

California Civil Code Section 3344:

Use of Another's Name, Voice, Signature, Photograph, or Likeness in Advertising or Soliciting Without Prior Consent. (Discussion of Statute To Follow)

(a) 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, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals, rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to create a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

DISCUSSION OF THE STATUTE

CA Civil Code Section 3344 protects the following from misappropriation:

- Person's Name;
- Person's Likeness;
- Person's Voice;
- Person's Signature; and
- Person's Photograph

The term "photograph" encompasses still and moving pictures; however, the person in the photograph must be "readily identifiable". Similarly, pictures of crowds of people generally do not violate the statute as long as people in the pictures are not "singled out as individuals". *CA Civil Code Section 3344(b)(3)*.

The term "voice" here applies only to a person's actual voice.

The term "likeness" is not as easy to define or ascertain. Courts use "readily identifiable" test (i.e. someone could reasonably determine that the likeness depicts plaintiff). For instance, courts have held drawings could constitute likeness, if sufficiently detailed. See, *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692-93 (9th Cir. 1998). In another case, the court held that a robot could constitute likeness, if sufficiently detailed. See, *Wendt v. Host Intern., Inc.*, 125 F.3d 806, 810 (9th Cir. 1997).

VIOLATION OF THE STATUTE

Even though the statute generally protects against the use of a person's likeness for advertising purposes, the mere fact that a person's likeness has been used in connection with a person's likeness does not violate the statute. In other words, violation of statute:

shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required[.] (*Cal. Civ. Code § 3344(e)*)

Hence, courts have interpreted the statute to impose a three-step test:

1. Was there a "knowing" use of the plaintiff's protected identity?
2. Was the use for advertising purposes?
3. Was there a direct connection between the use and the commercial purpose?

See, e.g., *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998). If the answer to all three questions is "yes," then the statute has been violated.

COMMON LAW

In California, Misappropriation of Name or Likeness (Right of Publicity) cause of action could be grounded in statute and common law. The defendant's liability is usually based on the use of another's name or likeness for commercial purposes. See, *e.g.*, *Motschenbacher v. R.J. Reynolds Tobacco Co.* (9th Cir 1974) 498 F2d 821; *Fairfield v. American Photocopy Equip. Co.* (1955) 138 CA2d 82.

Furthermore, a Misappropriation claim may be based on commercial use of words or images, even if the person's name or likeness was not used. See *Carson v. Here's Johnny Portable Toilets, Inc.* (6th Cir 1983) 698 F2d 831.

Importantly, the claim of right of publicity extinguishes when the person in whom the right arose dies.

Courts generally describe California's common-law right as a four-step test, in which a plaintiff must allege and prove:

1. The defendant's use of plaintiff's "identity";
2. The appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise;
3. Lack of consent; and
4. Resulting injury.

See, *White v. Samsung*, 971 F.2d 1395, 1397 (9th Cir. 1992).

PROTECTION UNDER COMMON LAW RIGHT OF PUBLICITY

The operative word and protection is often accorded to "identity". Identity, under the common law, has a much broader definition than "likeness" does in the Statute. For instance, imitating someone's voice is not a violation of the statute, but it may violate the common law right. See *Waits v. Frito-Lay*, 978 F.2d 1093, 1098-1100 (9th Cir. 1992). A picture of a distinctly-decorated race car can be a common-law violation, even if the driver himself is not visible. *Motschenbacher v. R.J. Reynolds Tobacco*, 498 F.2d 821, 827 (9th Cir. 1974). A robot can constitute a common-law violation, even if not sufficiently detailed to violate the statute. *White v. Samsung*, 971 F.2d 1395, 1397-99 (9th Cir. 1992).

VIOLATION OF COMMON LAW RIGHT OF PUBLICITY

Violation of Common Law Right of Publicity is not explicitly limited, as opposed to the statutory violation, to merely commercial use of "identity". However, the less commercial use, the more First Amendment concerns or protections might come into play. Hence, if a defendant's use of plaintiff's "identity" falls outside the commercial realm, there is less likelihood that the Common Law Right of Publicity applies.

DAMAGES UNDER THE STATUTE AND COMMON LAW

A plaintiff can simultaneously pursue claims for violations of both the common law and the statute. *Cal. Civ. Code Section 3344(g)*. The statute entitles a winning plaintiff to:

- “Actual damages suffered”;
- Defendant’s profits that “are attributable to the use”;
- Punitive damages “may” also be awarded under the statute; California law limits punitive damages to cases of “oppression, fraud, or malice.” *Cal. Civ. Code Section 3294*; and
- The winning side in a statutory case “shall” receive his/her attorney’s fees and costs.

Damages are not limited strictly to the financial harm suffered by a plaintiff. Courts may also take into account “injury to peace, happiness, and feelings,” as well as “injury to goodwill, professional standing, and future publicity value.” See, *Waits v. Frito-Lay*, 978 F.2d 1093, 1102-03 (9th Cir. 1992).

SALIENT NOTE

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article ONLY provides a rudimentary synopsis of such esoteric subject matter.

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