

# The Right of Publicity

By Brian Wassom, Honigman Miller Schwartz and Cohn LLP

I recently told an experienced Michigan attorney about a case I was handling involving the right of publicity. He listened politely, then said, “That’s great! . . . I have no idea what that is.”

That is not an uncommon reaction, even among seasoned litigators. But, like the overlooked heroines of fairy tale fame, Right of Publicity litigation, properly understood, can be sexy—figuratively and (sometimes) literally. At the very least, it is an area of law that deserves our attention. Here are some basic facts about the Right of Publicity under Michigan law.

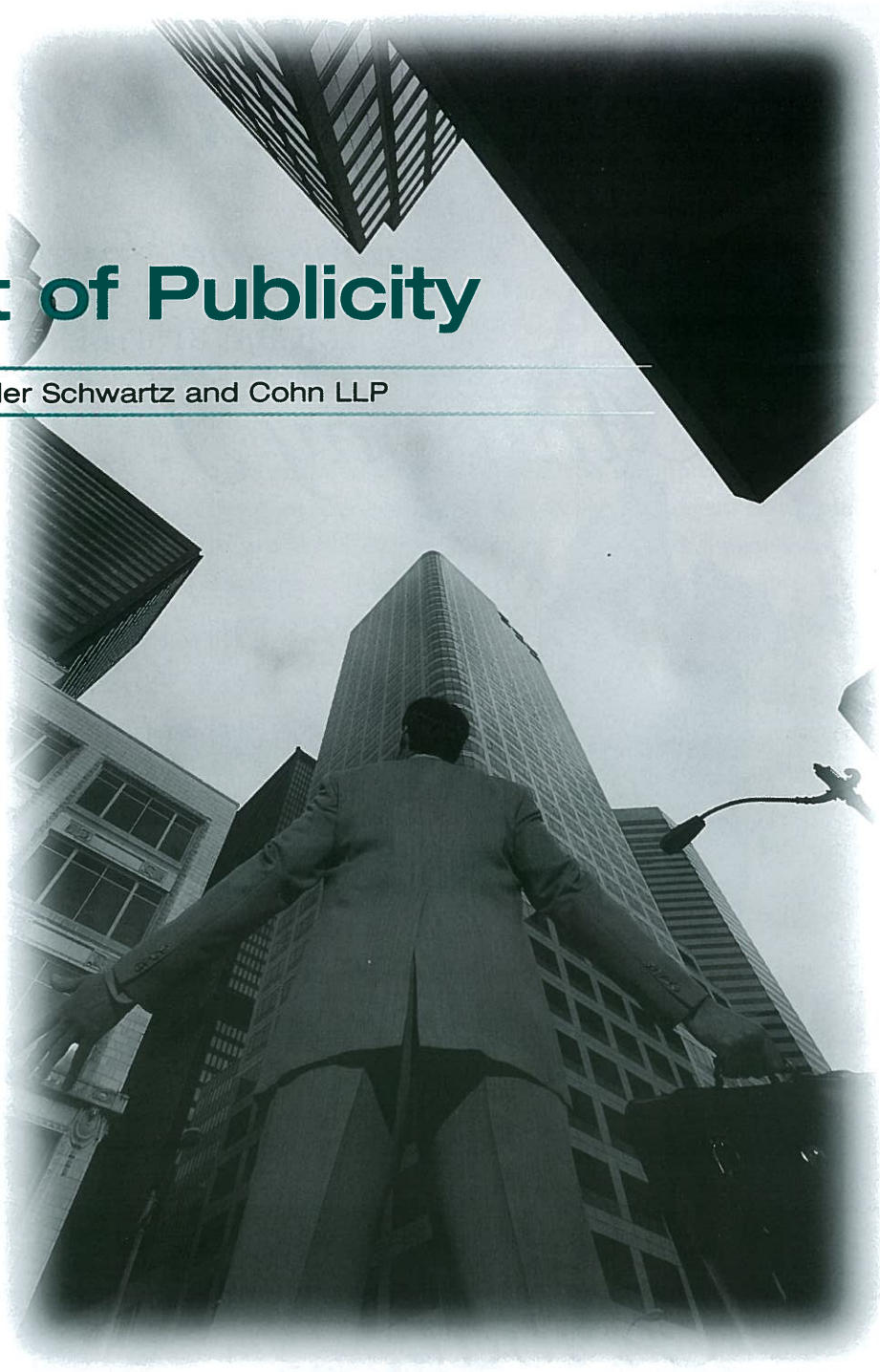
\* It fills an important gap in federal IP protections. The Right of Publicity is a state common law right to commercially exploit a person’s likeness. The typical dispute involves a retailer who uses the image, name, or other personally signifying attribute of a famous individual for the purpose of selling goods or services. For example, Johnny Carson used the Right of Publicity to enjoin the advertisement of “Here’s Johnny Portable Toilets.” Rosa Parks stopped the band Outkast from using her name as the title of a song having nothing to do with her. Models have prevailed against the unauthorized use of their photographs on merchandise and advertising. Neither copyright nor trademark law offer remedies for these injuries.

\* It requires different proofs. A

lawyer cannot simply rely on general IP or tort principles to litigate a Right of Publicity case. There are two basic components to the claim: that (1) the plaintiff’s likeness has commercial value—in other words, that plaintiff is a “celebrity”—and (2) defendant used the likeness for “commercial purposes.” “Celebrity” is not easy to define. Granted, most IP lawyers will not find themselves representing the likes of Johnny Carson and Rosa Parks. But, as discussed further

below, the jury is still out in many ways on what constitutes “commercial value.”

“Commercial purposes,” also called “use in trade,” is trickier. This element has been defined much more narrowly than it would be in a trademark or unfair competition context—lest Right of Publicity liability impinge on the broad freedoms of expression guaranteed by the First Amendment. Generally, if the work is expressive and has any redeeming social value (such as newsworthiness,



entertainment value, or political speech), it is not a “commercial use.” Posters, T-shirts, and billboards, on the other hand, are fair game. Where the line between these uses falls, though, is sometimes still blurry.

\* Its parameters are still fluid. Right of Publicity law is a lot like the Wild West of old—many of the boundary lines have yet to be drawn. Courts are also still deciding which defenses apply. There is a lot of room left in Right of Publicity law for creative lawyering—and especially here. Commentators have noted that, despite (or perhaps because of) being geographically distant from the nation’s entertainment hotbeds, our Sixth Circuit Court of Appeals has balanced the competing considerations in publicity law in a more careful and nuanced manner than other jurisdictions. It has even done more to shape Michigan’s common law on the subject than the state courts have, which leaves many seemingly resolved issues open to potential reinterpretation by Michigan courts (and/or the Michigan Legislature, which has considered codifying the right in recent years, and may do so again soon).

\* It shows up in unexpected places. Section 230 of the federal Communications Decency Act exempts internet service providers from most tort liability arising out of

user-generated content. That immunity does not apply, however, to “intellectual property” claims. Chances are that most legislators who debated this provision were thinking about patent, copyright, and trademark infringement. But guess what? The Right of Publicity is also IP, and recent court decisions have split over whether such claims are covered by this statute.

Licensors of photographs and videos make the same mistake when they fail to address the publicity claims of those depicted in the works. Experienced media professionals will be sure to have model releases in addition to a license from the copyright owner.

Even more troublesome are the potential tax ramifications. Publicity rights can be licensed, but what are they worth? Complicating things further, several state statutes, and even Sixth Circuit common law, recognize a post-mortem Right of Publicity. Who owns the right, and for how long?

\* It can be worth big money. Granted, many successful Right of Publicity plaintiffs end up settling for a relatively modest royalty. But with great infringement comes great liability. Hockey player Tony Twist secured a \$15 million verdict—upheld on appeal—against the publisher of the Spawn comic book, which used his name

for one of its villains. And a relatively unknown model in California won an even larger sum from Nestle after learning that his face had appeared for 16 years, without permission, on packages of Taster’s Choice coffee.

\* It has found new life online. As with other areas of IP, the internet allows anyone to be an infringer. People identify themselves online using icons and avatars, which may incorporate the likenesses of famous people. Retro nostalgia and mash-up videos drive the reuse of iconic photographs. In a competitive business environment where customers are increasingly scarce, it is difficult for many companies to resist piggybacking on the drawing power of recognizable celebrity identities.

It can also be hard to ignore the billions of photographs available for instant download. In 2007, a 16-year-old Texas girl sued Virgin Mobile after learning that the company had found an unflattering picture of her on Flickr and used it in an Australian ad campaign. In June 2009, a Missouri couple discovered that a Christmas family portrait they had shared with relatives online had become an advertisement for a grocery store in the Czech Republic.

\* It offers a shield against prurient publicity. Although the case law is mixed, some plaintiffs—including girls who regret

having gone wild, a news anchor filmed on vacation participating in a wet t-shirt contest, and celebrities who misplaced their sex tapes—have used the Right of Publicity to keep the embarrassing footage out of the public eye. These decisions suggest the controversial, but interesting, theory that sex appeal has commercial value, and unauthorized distribution of provocative performances infringes the individual’s right to profit from that appeal. In many ways, this line of cases take the Right of Publicity full circle—back to its roots in privacy law, which operates to keep information out of the public eye rather than controlling the right to profit from its exploitation. But however this theory of recovery fares, human nature combined with steady advances in cell phone cameras and online video sharing technology will ensure that it remains a relevant legal issue.

This article is only a thumbnail sketch of the Right of Publicity—an area of law that is young and still evolving. But Michigan litigators should at least be sure they are able to spot these issues for their clients. ■

*\* A longer version of this article appears in the September 2009 issue of the Michigan IP Law Section’s journal, IPLS Proceedings.*