

NOTABLE RIGHT OF PUBLICITY CASES – 2018

CASE	PARTIES	KEY ISSUE(S)	SYNOPSIS	REASONING	DISPOSITION
<p><i>Monk Jr. v. North Coast Brewing Co. Inc.</i>, 3:17-cv-05015 (N.D. Cal. Aug. 29, 2017)</p> <p>[1/31/2018]</p>	<p>Plaintiff: Thelonious Sphere Monk, Jr.</p> <p>Defendant: North Coast Brewing Co., Inc.</p>	<p>Whether the “Brother Thelonious” artwork and promotional materials constitutes a right of publicity violation.</p>	<p>The estate of jazz artist Thelonious Monk initiated suit over a brewery’s “Brother Thelonious Belgian Style Abbey Ale,” alleging trademark infringement and common law right of publicity violations, among other things. Plaintiff had verbally agreed Defendant could use Monk’s likeness in exchange for charitable donations to the Thelonious Monk Institute of Jazz, but later terminated the agreement. Defendant continued to sell the beer.</p>	<p>Plaintiff sufficiently pled that Defendant is using an identifiable likeness of Monk without permission for commercial purposes in a way likely to cause damage to the commercial value of Monk’s persona.</p>	<p>Pending. The California district court rejected brewery’s motion to dismiss the complaint.</p>
<p><i>Daniels v. FanDuel, Inc.</i>, 884 F.3d 672 (7th Cir. 2018), certified question accepted, 94 N.E.3d 696 (Ind. 2018)</p> <p>[3/7/2018]</p>	<p>Plaintiffs-Appellants: Akeem Daniels; Cameron Stingily; Nicholas Stoner</p> <p>Defendants-Appellees: Fanduel, Inc.; DraftKings, Inc.</p>	<p>Whether NCAA athletes had standing to sue under Indiana’s right of publicity statute for use of their likenesses and statistics in online contests.</p>	<p>Plaintiffs, former college football players, sued Defendants for using their names, pictures, and on-field statistics on fantasy sports websites without their permission. The district court found the statistics are “newsworthy” and of “general or public interest.”</p>	<p>The statute exempts material with “political or newsworthy value” or “in connection with the broadcast or reporting of an event or a topic of general or public interest,” but the Court questioned whether the potential illegality of paid fantasy sports is material to the statute.</p>	<p>Question was certified to the Supreme Court of Indiana regarding interpretation of Indiana’s right of publicity statute.</p>

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<p><i>Martin v. Wendy's International, Inc., et al.</i>, 714 F. App'x 590 (7th Cir. 2018)</p> <p>[3/9/2018]</p>	<p>Plaintiff-Appellant: Johannes T. Martin</p> <p>Defendant-Appellees: Wendy's International, Inc; Guinness World Records Ltd.</p>	<p>Whether Plaintiff's footbag kick performance came within an exception to the Illinois right of publicity statute.</p>	<p>Plaintiff was the holder of the record for most consecutive kicks in footbag singles category. Wendy's ran a campaign that included six "record-breaking" toys in its kids' meals. One such toy was a footbag and an accompanying instructional card containing the words "Guinness World Records" and "Can You Break The Record?" on one side. The other side of the card read, "Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours!"</p> <p>Plaintiff sued fast food corporation Wendy's and the Guinness Book of World Records under, inter alia, the Illinois right of publicity statute.</p>	<p>The Court concluded that the Illinois right of publicity statute does not apply to the "use of an individual's name in truthfully identifying the person as the author of a particular work or program or the performer in a particular performance."</p>	<p>Seventh Circuit affirmed the dismissal of the complaint.</p>
<p><i>de Havilland v. FX Networks, LLC</i>, 21 Cal. App. 5th 845 (Ct. App. 2018)</p> <p>[3/26/2018]</p>	<p>Plaintiff-Respondent: Olivia de Havilland</p> <p>Defendants-Appellants: FX Networks, LLC, et al.</p>	<p>Whether the portrayal of Plaintiff in a docudrama was protected by the First Amendment.</p>	<p>Actress Olivia de Havilland brought suit against the creators and producers of the television miniseries <i>Feud: Bette and Joan</i>, which depicted her as a character.</p> <p>The lower court decision suggested that a realistic portrayal of de Havilland was not transformative, and therefore not entitled to First Amendment protection.</p> <p>The court held that <i>Feud</i> "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays."</p>	<p>The court employed the "transformative" test between the First Amendment and the right of publicity to decide that <i>Feud</i> added significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.</p>	<p>The Court reversed the lower court's denial of Defendants' special motion to strike under the anti-SLAPP statute.</p> <p>De Havilland has submitted a petition of appeal to the California Supreme Court.</p>

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<p><i>Lohan v. Take-Two Interactive Software, Inc.</i>, No. 24, 2018 WL 1524714 (N.Y. Mar. 29, 2018);</p> <p><i>Gravano v. Take-Two Interactive Software, Inc.</i>, No. 23, 2018 WL 1524996 (N.Y. Mar. 29, 2018)</p> <p>[3/29/2018]</p>	<p>Plaintiffs-Appellants: Lindsay Lohan; Karen Gravano</p> <p>Defendants-Respondents: Take-Two Interactive Software, et al.</p>	<p>Whether a narrative video game is a creative work and therefore not “trade” or “advertising” under the New York statute.</p> <p>Whether Plaintiff was recognizable from the image and voice of the avatar in question.</p>	<p><u>Lindsay Lohan</u></p> <p>Actress Lindsay Lohan filed suit against the makers of the video game Grand Theft Auto V over a character which featured in some advertising and which Lohan argued constituted her portrait. Lohan objected to the depiction of a blonde woman being frisked by a police officer, and in another wearing a red bikini and jewelry, while taking a selfie and displaying a peace sign.</p> <p><u>Karen Gravano</u></p> <p>“Mob Wives” star Karen Gravano also initiated suit over the “Andrea Bottino” avatar in the video game.</p>	<p>A graphical representation of a person – or an avatar – can constitute a “portrait” for purposes of New York’s right of publicity statute, but the video game did not use Lohan’s voice or portrait. The character was simply a generic artistic depiction of a “twenty something” woman without any particular identifying physical characteristics.</p> <p>Defendants did not refer to Plaintiff, use Plaintiff’s name, or use a photograph of Plaintiff in the video game. Moreover, “the ambiguous representations in question are nothing more than cultural comment that is not recognizable as plaintiff and therefore is not actionable.”</p> <p>The Gravano claims were dismissed for like reasons.</p>	<p>The Court of Appeals affirmed the Supreme Court’s dismissal of the complaint.</p>
<p><i>Brophy v. Almanzar</i>, 8:17-cv-01885 (C.D. Cal.)</p> <p>[3/30/2018]</p>	<p>Plaintiff: Kevin Michael Brophy, Jr.</p> <p>Defendants: Belcalis Almanzar AKA Cardi B; KSR Group LLC; Washpoppin Inc.; Does 1-20</p>	<p>Whether use of the tattoo constitutes a use of Plaintiff’s likeness.</p> <p>Whether album cover art is a “commercial” use as required by right of publicity.</p>	<p>Defendant, rapper Cardi B, released a mixtape with album artwork featuring a man’s back with a large, elaborate tattoo of a tiger battling a snake. Plaintiff recognized the cover art as “his unique back tattoo and likeness.” Plaintiff is suing for right of publicity violations and invasion of privacy (false light). Defendants have moved to dismiss the case.</p>		<p>Pending.</p>

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<p><u>Sheets v. Mixer, 2:18-cv-03204 (C.D. Cal.)</u> [4/17/2018]</p>	<p>Plaintiff: Brittany Alexandria Sheets AKA Mars Argo Defendants: Corey Michael Mixer AKA Titanic Sinclair; Titanic Sinclair Productions Inc.; Moriah Rose Pereira AKA Poppy; I Am Poppy Inc.</p>	<p>Whether Defendant and Plaintiff collaborated to create the Mars Argo persona, and whether such collaboration impacts the right of publicity claim. Whether the Mars Argo and Poppy personas are similar enough to constitute a right of publicity violation.</p>	<p>Plaintiff, a YouTube celebrity and musician known as Mars Argo, sued her former creative partner, Titanic Sinclair, and another YouTube celebrity and musician, Poppy, for copyright and right of publicity violations, among other things. Plaintiff alleges Defendants appropriated her carefully cultivated persona to “calculatedly transform [Poppy] into a Mars Argo knockoff.” Alleged similarities include platinum blonde hair, clothing, and distinctive speaking voice, among other characteristics.</p>		<p>Pending.</p>
<p><u>Estate of James Oscar Smith v. Cash Money Records, Inc., 1:14-cv-02703 (S.D.N.Y.)</u> [5/15/2018]</p>	<p>Plaintiffs: Estate of James Oscar Smith; Hebrew Hustle, Inc. Defendants: Cash Money Records, Inc.; Aubrey Drake Graham, et al.</p>	<p>Whether use of a celebrity’s likeness without consent is to the unauthorized user’s commercial advantage as a matter of law.</p>	<p>Plaintiff, a music production company, unsuccessfully sued rapper Drake for copyright infringement over a song sample. Defendant asserted counterclaims for Lanham Act and right of publicity violations. Plaintiff had displayed a photograph of Drake on the homepage of its website and, elsewhere on the site, claimed that the production company’s owner “has played a heavy hand with his clients in the creation of hit songs for the likes of Eminem, Jay-Z, Kanye West, Lil Wayne, Drake, Nicki Minaj and others,” though Drake has never worked directly with Plaintiff. Both parties filed motions for summary judgment on the issue.</p>	<p>Plaintiff does not deny using Drake’s likeness and name without his consent, but it cannot be said that this appropriation gave Plaintiff a commercial advantage as a matter of law. Though such unauthorized use is <i>likely</i> to the Plaintiff’s commercial advantage, this remains a jury question. It is irrelevant that the use of Drake’s likeness was not “central” to the website because the photograph was one of many celebrity photographs on the website homepage, nor can such use be considered “incidental” as a matter of law.</p>	<p>The district court denied both parties’ motions for summary judgment.</p>