IM 450-01
Intellectual Property Law and New Media
Fall 2022
Oct. 20, 2022
Day 16

Tort Cases
&
NIL

Traditional Media Privacy of the Persona Cases with New Media Implications

- **A number of cases (and laws) set the rules for wiretapping. The courts now try to apply them, or obviate them, depending on the jurisdiction and the case and Patriot Act and other new law implications. Esp., for example:**
- **United States v. Smith, 978 F.2d 171 (5th Cir. 1992).**
  - **United States v. Smith illustrates some of the complexities that accompany the development/deployment of new media technologies. In this case, the status of intercepting and recording telephone conversations that are conducted using wireless (rather than hardwired) equipment modified both the federal protection of phone calls and the assumption that wireless calls cannot be private.**
- **McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).**
  - **One of the hallmarks of online communication is that often, contributions cannot be tracked to particular individuals. McIntyre v. Ohio Elections Commission is the case that validated the right to anonymous speech standard. [sometimes this comes up in cases over identifying a 3rd party poster]**
- **Riley v. California, 134 S.Ct. 2473 (2014).**
  - **Contestations over laws relating to search and seizure and self-incrimination have long struggled with materials and objects gathered during encounters between citizens and law enforcers. New media technologies can up the ante during these confrontations. Digital devices contain vast collections of records about their owner/holder.**
- **there is a TON of active litigation and lawmaking over what law enforcement can and cannot do with smart phone data. Outcomes are all over the map.**

New Media Privacy of the Persona

- **Generally: YOUR EMAIL DOES NOT BELONG TO YOU; SOCIAL MEDIA POSTS CAN AND WILL BE USED AGAINST YOU; DIGITAL LEAVES TRACKS. EVERYWHERE. ALWAYS. FOREVER. AND THE COURTS TEND TO THINK THAT *YOUR BEHAVIOR MITIGATES PRIVACY RIGHTS*… A LOT.**
- **Generally, any information that has been gathered from submission to a 3rd party IS NOT PRIVATE to the PERSONA.**
- **CDA 230 gives providers a LOT of protection from liability for 3rd party content.**

New Media Privacy of the Persona

- **“Steve Jackson Games v. U.S. Secret Service, 816 F.Supp. 432 (W.D. Tex. 1993).”**
  - **Jackson was working on a book**
  - **“In effect, a person’s intellectual property can’t implicate them in something that might be a crime if published, prior to the actual commission of the crime (publication).”**
- **“Nieman v. Versuslaw, Inc., 512 F. App’x 635 (7th Cir. 2013).”**
  - **“Public info” [court docs and the like] isn’t private (even if it hurts reputations).**

Traditional Media Defamation Cases with New Media Implications

- New York Times v. Sullivan, 39, 376 U.S. 254 (1964).
  - Established the “actual malice” standard in defamation cases involving public officials.
  - THE SCOTUS MAY REVIEW THIS LANDMARK CASE!
  - Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling
  - https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html
- Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
  - SCOTUS unanimously held that the First Amendment free-speech guarantee in most cases prohibits awarding damages to public figures to compensate for emotional distress intentionally inflicted upon them.
- Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
  - SCOTUS established that it is more difficult for publishers to avoid liability for defamation based on opinion if published statements are sufficiently factual.

Traditional Media Defamation Cases with New Media Implications

- Procter & Gamble Mfg. Co. v. Hagler, 880 S.W.2d 123, 128–29 (Tex. App.
- 1994).
  - shows that publishing the truth is generally an adequate defense against claims of defamation.
- Robert Thomas v. Bill Page et al., No. 04 LK 013, Circuit Court for the Sixteenth
- Judicial Circuit, Kane County, Ill. (2007).
  - reminds one that public officials can win defamation cases when they are able to support the higher, actual malice, standard.

New Media-Related Cases in Defamation Law
While CDA 230 safe-harbor for providers, Defamers ARE NOT IMMUNE

- **Dendrite International, Inc. v. John Doe No. 3., Superior Court of New Jersey, Appellate Division. 342 N.J. Super. 134, 2001.**
  - **In order to bring legal action against an accused defamer, their identity must be known. Posters of online UGC are often anonymous or use a pseudonym. Plaintiffs sometimes initiate legal action against ISPs to discover the identity of potential defendants.**
- **Sue Scheff , Parents Universal Resource Experts vs. Carey Bock and Ginger Warbis, Case Number: 03–022937 (18), Circuit Court, Broward County, Fla. (Sept. 2006).**
  - **1Although ISPs are protected from liability for third party content, the accused defamers themselves are not. Defamation can be as expensive in the online environment as it is in print.**

New Media-Related Cases in Defamation Law
While CDA 230 safe-harbor for providers, Defamers ARE NOT IMMUNE

- **Johns-Byrne Company v. TechnoBuffalo LLC, No. 11 L 009161 (Cir. Court of Cook County, Illinois), Order, Jul. 13, 2012.**
  - **The question of whether bloggers are to be treated as reporters, and are thereby able to claim protection from revealing their sources under state shield laws, is a frequent issue in defamation cases.**
- **"McKee v. Laurion, 825 N.W.2d 725 (Minn. 2013).**
  - **example of a spate of lawsuits against people who write and post, online, negative reviews about products or services. Negative online reviews provide fodder for significant amounts of defamation litigation."**
  - **Defendant wins, but at great cost in time, effort, and money.**

Traditional Media Right of Publicity Cases with New Media Implications

- **Haelan Laboratories, Inc. v. Topps Chewing Gum. Inc., 202 F.2d 866 (2nd Cir. 1953).**
  - **The Court found that whether or not such a right was a "property" right was immaterial and coined the term "right of publicity" to describe the legal right.**

- **Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).**
  - **Zacchini v. Scripps-Howard Broadcasting US Supreme Court decision holding that the media does not have an unfettered right, under federal law, to appropriate a person's name or likeness due to the First or Fourteenth Amendments of the Constitution. To this date, it is the only case the US Supreme Court has considered that is specific to the right of publicity.**

Traditional Media Right of Publicity Cases with New Media Implications

- **Cardtoons, L.C. v. Major League Baseball Players' Ass'n, 95 F.3d 959 (10th Cir. 1996).**
  - **Cardtoons, L.C. v. Major League Baseball Players' Ass'n indicates that parody is an appropriate defense to a claim of misappropriation of the right of publicity.**
- **Toney v. L'Oreal USA, 406 F.3d 905 (7th Cir. 2005).**
  - **The right of publicity is distinct from and not preempted by federal copyright law.**

Traditional Media Right of Publicity Cases with New Media Implications [I have NO IDEA why sophisticated advertising/marketing/legal companies/department do silly shit. But they do.]

- **Henley v. Dillard Department Stores, 46 F. Supp. 2d 587 (N.D. Tex. 1999).**
  - **Playing on the name of a rock star, without permission or license, is enough to trigger a successful right of publicity claim under Texas law, regardless of whether the use produces and/or increases profit.**
- **Newcombe v. Adolph Coors Co., 157 F.3d 686 (9th Cir. 1998).**
  - **A violation of the right of publicity may occur even without identifying the claimant by name but merely using a photograph that resembles the claimant without permission.**
- **Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).**
  - **Unauthorized use of a slogan associated with a celebrity may give rise to a claim for misappropriation of the right of publicity.**

Traditional Media Right of Publicity Cases with New Media Implications [I have NO IDEA why sophisticated advertising/marketing/legal companies/department do silly shit. But they do.]

- **WHEN CELEBRITIES RUN FOR PUBLIC OFFICE, THINGS CHANGE A BIT**
  - **Stern v. Delphi Internet Servs. Corp., 626 N.Y.S. 2d 694 (1995).**
    - **A prominent radio talk show host could not claim misappropriation of his right of publicity over a full-page ad challenging his candidacy for governor. Being a famous celebrity and running for public office (even if the run is a parody) raises the bar for what might count as misappropriation of the celebrity's image.**

New Media Cases in Right Of Publicity Law

- **Brown v. ACMI Pop, 873 N.E.2d 954 (Ill. App. 1st. Dist. 2007).**
  - **A stock photo service may be liable for misappropriating the right of publicity of the subjects of the photos it licenses and by displaying thumbnails of the photos on its website. Note the way that this case changes the outcome one comes to expect from cases about copyright (Kelly v. Arriba Soft) where use of thumbnails or degraded/watermarked images for search is not infringement. The right of publicity can change the infringement equation.**
- **CBC. Distribution and Marketing, Inc. v. Major League Baseball Adv. Media, L.P., F.3d (8th Cir. 2007).**
  - **Baseball players' names and statistics as used in fantasy baseball are not protected under the right of publicity. The outcome of this ruling can be extended across a variety of fantasy league activities.**

New Media Cases in Right Of Publicity Law

- **KNB Enters. v. Matthews, 78 Cal. App. 4th 362 (Cal. Ct. App. 2000).**
  - **The right of publicity belongs to everyone, not just famous people, and is not preempted by federal copyright law.**
- **Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996).**
  - **A little known model, who served as inspiration for video game character, could not prevail on claim for misappropriation of his right of publicity.**
    - **[GET PROPER MODEL RELEASES SIGNED]**
- **Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).**
  - **Celebrities can invoke rights of publicity to enjoin the unwanted distribution of personal sex tapes.**

New Media Cases in Right Of Publicity Law: section 230 protections

- **Carafano v. Metrosplash.com Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002).**
  - **A dating website was not liable for misappropriating the identity of an actress who was the victim of a third party's false profile on the site.**
- **Perfect 10, Inc. v. CCBill LLC, 481 F.3d 751 (9th Cir. 2007).**
  - **Section 230 of the CDA offers immunity to interactive computer service providers for claims of misappropriation of the right of publicity arising from content posted by users.**
- **Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011).**
  - **A group of consumers was able to pursue claims under California law that their rights of publicity had been misappropriated by Facebook's "Sponsored Stories" program**
    - **The Court stated that in the context of the claims at issue, Facebook was playing the role of an information content provider, not an interactive computer service and thus was not immune under CDA Section 230. After the court ruled that the claims could proceed, the parties settled the class action case. Under the terms of the settlement, Facebook was to pay $20 million into a settlement fund for distribution to members of the class of plaintiffs.**

New Media Cases in Right Of Publicity Law: section 230 protections

- **Perkins v. LinkedIn Corp., 2014 U.S. Dist. LEXIS 81042 (N.D. Cal. June 12, 2014).**
  - **When participants in online social media claim that companies use personal data to invade privacy, those claims are often dismissed out of hand. The ToS and EULA for social media rule out privacy claims. Further, users provide personal information to the websites/services. However, there may be limitations to the uses social media services can put that data and users' right of publicity provides constraints.**

ON THE OTHER HAND:

- **Joude v. WordPress Found., 2014 U.S. Dist. LEXIS 91345, 2014 WL 3107441 (N.D. Cal. July 3, 2014).**
  - **Two individual citizens of France sued WordPress and its owner, Automattic, Inc., to compel them to take down an anonymously-written blog post about them and their family. The court found that the defendants were immune from suit for misappropriation of their rights of publicity under CDA Section 230.**

Athletes and the NIL economy

- **“As Americans, we all have rights to use our NIL to make money, but college athletes did not due to the NCAA’s amateurism rules that were meant to differentiate between college and pro sports — and keep money in the pockets of the schools.” [https://www.latimes.com/sports/story/2022-06-27/nil-what-is-next-name-likeness-image-college-high-school, J Brady McCollum, *LAT* June 27, 2022]**
- **In 2013 “Ed O'Bannon Jr., a former basketball standout at UCLA, is the lead plaintiff in a lawsuit that argues that the NCAA illegally prevents players from sharing in the revenue flowing in to college sports. The lawsuit is seeking class-action status, affecting potentially thousands of current and former players and threatening to disrupt the concept that college athletes are students first and amateurs. [Brad Wolverton, *Chronicle of Higher Education*, June 18, 2013. Since then Mr. O'Bannon's complaint has broadened to include potentially thousands of current and former football and men's basketball players, all laying claim to a share of the billions of dollars in broadcast revenue flowing into the game. Among their allegations is that the NCAA, through its antiquated concept of amateurism, has illegally prevented players from earning their fair share of the money.**

Judge rules against NCAA

- **Major college football and men's basketball student-athletes could be in line for paydays worth thousands of dollars once they leave school after a landmark ruling Friday that might change the way the NCAA does business.**
- **A federal judge ruled that the NCAA can't stop players from selling the rights to their names, images and likenesses, striking down NCAA regulations that prohibit players from getting anything other than scholarships and the cost of attendance at schools.**
- **U.S. District Judge Claudia Wilken, in a 99-page decision that followed a contentious three-week trial in June, ruled in favor of former UCLA basketball star Ed O'Bannon and 19 others who sued the NCAA, claiming it violated antitrust laws by conspiring with the schools and conferences to block the athletes from getting a share of the revenues generated from the use of their images in broadcasts and video games. [ESPN.com August 8, 2014]**

In year two of NIL, expect boosters and schools to clash on ‘collective’ efforts

- **[https://www.latimes.com/sports/story/2022-06-27/nil-what-is-next-name-likeness-image-college-high-school, J Brady McCollum, *LAT* June 27, 2022]**
- pfd

St. John Bosco football players signs historic NIL deal worth $400 per person

- https://www.msn.com/en-us/sports/more-sports/st-john-bosco-football-signs-historic-nil-deal-worth-400-per-player/ar-AA10Y2mB
- **St. John Bosco football players, who are a part of one of the top high school programs in the nation, have reached a name, image and likeness (NIL) agreement with a Dallas-based sports performance and wellness group that might be the first ever to pay all members of a high school team.**
- **The deal was announced Monday by KONGiQ Sports Performance, which said it will "provide an NIL opportunity to each member of the St. John Bosco High football team for the 2022 season …"**
- **Sources told the Southern California News Group that the deal, which is optional for each player on the varsity team, is worth $400 per player, made in two payments ($200 per semester).**
- **Bosco's 70-plus varsity players will have the opportunity to become what's known as an "influencer" for the KONGiQ App as part of the iNPOWERiQ program. They will be contractually obligated to post personal experiences using the KONGiQ Sports Performance system on their own personal social media accounts and also on the KONGiQ App.**

St. John Bosco football clarifies that it's not involved in NIL agreement

St. John Bosco issued a "clarification statement" at about 5 p.m. Monday after media reports noted that a team-wide NIL deal seemed to violate California Interscholastic Federation (CIF) bylaws, which don't allow teams to enter into NIL deals.

The afternoon statement from the school stated: "Prior to any student-athlete executing a Name, Image, and Likeness agreement, we ensured that it was within the following CIF rules:

"1. Neither St. John Bosco nor the football program is a part of any NIL agreement; 2. KONG IQ entered into agreements with individual players who will promote the KONG IQ technology as individuals not on behalf of St. John Bosco or the St. John Bosco Football Program; 3. St. John Bosco does not receive any revenue for endorsing KONG IQ."

. . . KONG IQ technology's products will be used by St. John Bosco, but that is as far that agreement goes. KONG IQ technology will also offer a NIL deal to every varsity football player at St. John Bosco; players have the option to sign the deal or turn it down.

https://www.msn.com/en-us/sports/more-sports/st-john-bosco-football-signs-historic-nil-deal-worth-400-per-player/ar-AA10XXIL

'Different era': Bradley men’s basketball players sign with Home of Brave NIL collective

Dave Eminian, PJS, August 22, 2022.
https://www.pjstar.com/story/sports/college/basketball/bradley-hoops/2022/08/22/bradley-basketball-players-join-home-of-brave-nil-collective/65406204007/

pdf.