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It's My Name and My Name Alone: How Chad Ocho Cinco Affects the Right of Publicity

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COMMENTS

IT'S MY NAME AND MINE ALONE: HOW CHAD OCHO CINCO AFFECTS THE RIGHT OF PUBLICITY

What's in a name? that which we call a rose
By any other name would smell as sweet;
So Romeo would, were he not Romeo call'd,
Retain that dear perfection which he owes
Without that title.¹

I. INTRODUCTION

What is in a name? Companies spend millions of dollars to use professional athletes' names to promote a given product.² Professional athletes, actors, and other celebrities³ are not only known for their athletic or acting talents, but also for what they wear, eat, drive, and generally use. They are hired as spokespersons to endorse and market products that in turn, will hopefully increase a company's sales. In exchange for the endorsements, companies pay their spokespersons handsomely, based on the value of the endorsement: the more famous the celebrity, the higher the endorsement value. However, as companies continue to use celebrity endorsements, these endorsements can create significant issues. For example, an issue can arise when a company uses a celebrity's name or likeness without his or her

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2 (Jonathan Bate ed., WILLIAM SHAKESPEARE COMPLETE WORKS 2007) (1594).

2. In 2007 the following were the top ten highest paid American professional athletes according to their estimated endorsement income: (1) Tiger Woods, \$100 million; (2) Phil Mickelson, \$47 million; (3) LeBron James, \$25 million; (4) Dale Earnhardt Jr., \$25 million; (5) Michelle Wie, \$19.5 million; (6) Kobe Bryant, \$16 million; (7) Jeff Gordon, \$15 million; (8) Shaquille O'Neal, \$15 million; (9) Peyton Manning, \$13 million; and (10) Dwyane Wade, \$12 million. *Top 10 Endorsement Superstars*, CNN.COM, <http://money.cnn.com/galleries/2007/fortune/0711/gallery.endorsements.fortune/index.html> (last visited Feb. 20, 2009).

3. This is not to say that professional athletes are not celebrities in and of themselves, rather to separate professional athletes out as a class of celebrity that is the focus of this Comment.

consent. The solution to this and other issues is in the right of publicity, which is the right of a person to control the commercial use of his or her name or likeness.⁴

Another issue that can impact the right of publicity is when a person, celebrity or athlete, changes his or her name. Over the years, athletes have changed their names for multiple reasons: some religious or personal, and others for publicity. Whatever the reason, once a professional athlete changes his or her name, it raises issues regarding the rights that he or she maintains in the old and new names.

This Comment begins with an overview of the right of publicity. It examines the history of cases that define the scope of the right of publicity and how it has been applied to professional athletes. Then, this Comment applies the right of publicity to Chad Johnson's name change to Chad Ocho Cinco. It also discusses how the name change has affected his contractual obligations. Furthermore, based on right of publicity precedent, this Comment determines that Chad Johnson's name change does not affect his control over his name and likeness as both Chad Johnson and Chad Ocho Cinco and that the effect on his current contractual obligations is minimal. Lastly, this Comment concludes that a safeguard is needed to stop athletes from repeatedly changing their names to gain increased media attention and thereby monopolizing the commercial rights to the names.⁵

II. THE RIGHT OF PUBLICITY

The right of publicity is the inherent right of a person to control the commercial use of his or her identity.⁶ In many states, such as California, the right of publicity is defined by statute, but courts have also recognized many common law rights.⁷ While there is no federal law, both the statutory and the common law rights of publicity protect a person's commercial interest in the use of his or her name or likeness.⁸ There are approximately thirty states that recognize some form of the right of publicity, with the remaining states recognizing some or all of the privacy torts.⁹ Under the right of publicity, a

4. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:3 (4th ed. 2010).

5. This argument also applies to other celebrities who are not the focus of this Comment.

6. MCCARTHY, *supra* note 4, § 28:3.

7. SHUBHA GHOSH ET AL., INTELLECTUAL PROPERTY: PRIVATE RIGHTS, THE PUBLIC INTEREST, AND THE REGULATION OF CREATIVE ACTIVITY 630 (2007).

8. *Id.*

9. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) [hereinafter RESTATEMENT]; see Natalie Grano, Note, *Million Dollar Baby: Celebrity Baby Pictures and the*

person can bring a claim when someone else uses the person's identity for commercial purposes without the person's consent.¹⁰ One of the privacy torts is the misappropriation of a person's name or likeness.¹¹ While this appears to be similar to the right of publicity, there is a key distinction.

The right of publicity is different than the privacy tort for misappropriation because the right of publicity protects a person's "pecuniary and proprietary interests [rather than] emotional interests."¹² The right of publicity is therefore a property right, and any damage is measured by the value of the person's identity and what he or she would have been compensated if his or her identity had been used in a commercial manner.¹³ In comparison, privacy rights are personal rights and any damage is measured primarily by the existence of mental distress or degree of mental distress.¹⁴ Like the privacy torts, there are several elements to a right of publicity cause of action. Under the common law right of publicity, a cause of action has the following four elements: "(1) the defendant's use of the 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."¹⁵

In addition to the four elements of a right of publicity claim, a court will also need to determine two additional factors that are essential to an intellectual property claim. The first is validity: the plaintiff must prove that he or she owns an enforceable right to the identity.¹⁶ Second is infringement: the plaintiff must prove that the defendant has used the plaintiff's identity without his or her permission and that the plaintiff is identifiable from the defendant's use.¹⁷ A court will determine whether there has been an infringement of a person's name or likeness using the four elements discussed above.

There is also some debate whether courts should even recognize a claim

Right of Publicity, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 609, 615-16 (2010).

10. See RESTATEMENT, *supra* note 9, § 46 (1995).

11. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984) (citing RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977)).

12. *MJ & Partners Restaurant Ltd. P'ship v. Zadikoff*, 10 F. Supp. 2d 922, 930 (N.D. Ill. 1998).

13. See *id.*

14. See MCCARTHY, *supra* note 4, § 28:3.

15. *Montana v. San Jose Mercury News*, 40 Cal. Rptr. 2d 639, 640 (Cal. Ct. App. 1995) (quoting *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983)).

16. Ezra D. Landes, Comment, *I Am the Walrus. – No. I Am!: Can Paul McCartney Transpose the Ubiquitous "Lennon/McCartney" Songwriting Credit to Read "McCartney/Lennon?" An Exploration of the Surviving Beatle's Attempt to Re-Write Music Lore, as it Pertains to the Bundle of Intellectual Property Rights*, 34 PEPP. L. REV. 185, 202 (2006); see also Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 25 (1999).

17. Landes, *supra* note 16, at 202.

for the right of publicity.¹⁸ One side argues that the enforcement of the right of publicity allows individuals to protect the commercial value of their fame and thereby prevent the unjust enrichment of people who would use a their identity without their consent.¹⁹ Thus, companies cannot receive the value and benefit of a person's identity without paying for it.²⁰ The other side argues that there are policy concerns against the right of publicity, such as the "recognition of broadly applicable rights of publicity [that] can restrict or raise uncertainty about the legitimacy of valuable types of subsequent intellectual works involving the use of features of a party's identity."²¹ There are also concerns that the right of publicity infringes on the right to free speech.²² However, a majority of courts recognize the right of publicity and mandate that the fame of the person affects the scope of the damages when a person's name or likeness has been used without his or her consent.²³

As demonstrated by case law and possibly because many celebrities live there, California has been one of the leading states in the right of publicity litigation.²⁴ California Civil Code Section 3344 is the statute governing the right of publicity, as well as the postmortem right of publicity.²⁵ Cases that have dealt with this statute, and the right of publicity in general, have had to deal with defining the scope of the right of publicity and how and when it can protect the athlete.²⁶ In particular, the cases consider the scope of a "name or likeness."²⁷ Furthermore, there are particular instances when the First Amendment will create a defense to a right of publicity claim.²⁸ The following case law history demonstrates the scope of the right of publicity and how it has been applied in various situations involving professional athletes and celebrities. The common thread is a growing expansion of the right.

18. See generally ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 268 (2003).

19. GHOSH ET AL., *supra* note 7, at 630.

20. *Id.*

21. *Id.* at 631.

22. J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 197-98 (2001).

23. GHOSH ET AL., *supra* note 7, at 630.

24. Eric Farber, *U-La-La, What's Happened to Our California Right of Publicity?*, 11 CHAP. L. REV. 449, 449 (2008).

25. CAL. CIV. CODE § 3344 (2009).

26. Farber, *supra* note 24, at 450.

27. *Id.*

28. *Id.*

III. CASE LAW HISTORY

Professional athletes have a right to protect their names and likenesses from being used without their permission for another party's commercial gain.²⁹ Professional athletes have an interest in protecting their public image, also known as their "marketable identity," because consumers associate products with an athlete's public image.³⁰ The right of publicity is the athlete's protection against the use of his or her public image.³¹ The following cases show how and why professional athletes have an interest in protecting their names and likenesses from being used without their consent.³²

In the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a dispute existed between chewing gum manufacturers as to who had the exclusive right to use a baseball player's photograph in connection with gum sales.³³ The plaintiff had a contract for the exclusive right to use the baseball player's photograph in connection with the sale of its gum for a certain time period.³⁴ The defendant, a rival chewing gum manufacturer, that knew of the plaintiff's contract, induced the player to enter into a contract authorizing the defendant to use the player's photograph in connection with the sale of its gum also.³⁵ The court found that, in addition to an independent right of privacy, "a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such grant may validly be made 'in gross,' *i.e.*, without an accompanying transfer of a business or of anything else."³⁶ In finding that a person has a right of publicity in his or her photograph, the court recognized the "right of publicity" and for the first time used that phrase to designate the right.³⁷ Since this first right of publicity case, there have been numerous cases that define the scope of the right of publicity and the concept of one's identity.³⁸

The right of publicity and the concept of a person's identity was further

29. See Stapleton & McMurphy, *supra* note 16, at 23-24.

30. See *id.* at 25.

31. Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998).

32. "The sports world not only created the right of publicity but has also contributed a number of interesting cases regarding the scope and limits of such a right." PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW*: 425 (2d ed. 1998).

33. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953).

34. *Id.*

35. *Id.*

36. *Id.* at 868.

37. *Id.*

38. See generally *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979).

defined in *Hirsch v. S.C. Johnson & Son, Inc.* to include a nickname.³⁹ Elroy Hirsch was a well-known college football player with the nickname "Crazylegs."⁴⁰ The defendant, who admitted that it knew that Hirsch was nicknamed "Crazylegs," used the nickname, without Hirsch's consent, on a shaving gel that the company manufactured.⁴¹ The court, in finding that Hirsch had stated a cause of action, went even further by stating that "[t]he fact that the name, 'Crazylegs,' used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person."⁴² After weighing the plaintiff's endorsement activities and considering the likelihood of confusion, the court found enough evidence to show that the nickname did identify Hirsch and could be considered part of his name and likeness.⁴³

The right of publicity was expanded to include a person's commentary in *Ventura v. Titan Sports, Inc.*⁴⁴ Jesse "The Body" Ventura brought an action against a wrestling association that coordinated live events and distributed videotapes of such events that included the wrestler's commentary.⁴⁵ Ventura alleged, among other things, fraud and the misappropriation of publicity rights.⁴⁶ The Court of Appeals for the Eighth Circuit found in favor of Ventura.⁴⁷ Accordingly, Ventura was able to recover for unjust enrichment based on the violation of his right of publicity because the early contracts between the parties did not encompass rights to videotape royalties.⁴⁸

The *Ventura* case was similar to an earlier case brought by a celebrity that expanded the right of publicity to include a person's voice. In *Midler v. Ford Motor Co.*, the defendant used popular songs of the 1970s to market its cars in television commercials.⁴⁹ The company received the appropriate copyright approval to use one of Bette Midler's songs, but the well-known singer and actress decided not to sing in the commercial.⁵⁰ Undeterred, the defendant hired Midler's backup singer to duplicate her voice.⁵¹ The court found that

39. *Hirsch*, 280 N.W.2d at 137.

40. *Id.* at 131.

41. *Id.* at 130.

42. *Id.* at 137.

43. *Id.* at 140.

44. *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 728 (8th Cir. 1995).

45. *Id.*

46. *Id.*

47. *Id.* at 736.

48. *Id.* at 728.

49. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

50. *Id.* at 461-62.

51. *Id.* at 461.

“when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs . . .[.]” and that Midler had made a showing sufficient to defeat summary judgment.⁵² The court also pointed out that Midler’s voice had a value; otherwise, the defendant would not have duplicated her voice.⁵³ The value was what the company would have paid Midler to sing the song in the commercial.⁵⁴ Therefore, in *Midler*, a name or likeness in a right of publicity claim was expanded to include a person’s voice.⁵⁵

The right of publicity to a person’s birth name was recognized in *Abdul-Jabbar v. General Motors Corp.*⁵⁶ Even though Abdul-Jabbar had not used the name for many years, the Court of Appeals for the Ninth Circuit held that the defendant, General Motors Corporation (GMC), did not have the right to use Kareem Abdul-Jabbar’s birth name, Lew Alcindor, in a commercial.⁵⁷ The court held that the plaintiff had alleged sufficient facts to state a claim under both the California common law and Civil Code section 3344 stating, “[t]he statute’s reference to ‘name or likeness’ is not limited to present or current use. To the extent GMC’s use of the plaintiff’s birth name attracted television viewers’ attention, GMC gained a commercial advantage.”⁵⁸ The dispute arose when GMC aired a commercial during the 1993 National Collegiate Athletic Association men’s basketball tournament that involved trivia questions.⁵⁹ The answer to one of the questions was “Lew Alcindor, UCLA, ‘67, ‘68, ‘69” and the words appeared on the screen as part of the commercial.⁶⁰

At birth, Kareem Abdul-Jabbar was named Ferdinand Lewis (“Lew”) Alcindor.⁶¹ Under that name, he played basketball in college and in the early years of his professional basketball career.⁶² In 1971, after converting to Islam, Lew Alcindor legally changed his name to the Muslim name Kareem Abdul-Jabbar, and thereafter played basketball and endorsed products under

52. *Id.* at 463.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996).

57. *Id.* at 415-16.

58. *Id.* at 415.

59. *Id.* at 409.

60. *Id.*

61. *Id.*

62. *Id.*

that name.⁶³ At the time of this case, Kareem Abdul-Jabbar had not used the name Lew Alcindor for commercial purposes in over ten years.⁶⁴ After *Abdul-Jabbar*, a plaintiff has a protectable right of publicity in his or her birth name, even if he or she is no longer using that name.⁶⁵

An important issue in determining whether a cause of action for the right of publicity exists is whether the person can actually be identified.⁶⁶ In the cases discussed above, the defendants used the athletes' photographs, nicknames, voices, or birth names. However, there are cases in which a court has to determine whether the athlete or celebrity can be identified even though no name is used. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the question of identification centered on a television commercial that showed numerous race cars, including one owned by the plaintiff, a well-known professional race car driver.⁶⁷ In the commercial, the plaintiff could not be identified, but his distinctive race car could be inferred from the features and coloring of the race car used in the commercial.⁶⁸ The court held that although the plaintiff's likeness was unrecognizable, the "distinctive decorations" that appeared on the car "were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was [the] plaintiff's and to infer that the person driving the car was the plaintiff."⁶⁹ Thus, the plaintiff does not need to have his name or photograph used to succeed in a right of publicity claim; it is sufficient that the plaintiff can be identified.⁷⁰

As these cases show, the right of publicity has quickly become a known intellectual property right that professional athletes can use in order to protect the property interest behind their names or likenesses. The cases also demonstrate that the right of publicity has been expanded to protect not only a name or likeness, but also a person's identity. This offers professional athletes additional protection against the use of their names or likenesses without their consent. Using a particular professional athlete as an example, this Comment will demonstrate how the right of publicity can protect an athlete even after he has changed his name.

63. *Id.*

64. *Id.*

65. *Id.* at 415.

66. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974).

67. *Id.*

68. *Id.*

69. *Id.* at 827.

70. *Id.*

IV. CHAD JOHNSON, NOW CHAD OCHO CINCO

As shown by case history, the right of publicity affects all celebrities, including professional athletes. Therefore, professional athletes and their attorneys need to be aware of the rights and protections available under the right of publicity. In particular, Chad Johnson, who recently legally changed his name to Chad Ocho Cinco, should be aware of his rights in both his past and present name. He should also be aware of what effect, if any, that name change has on his contractual obligations.

A. Who is Chad Ocho Cinco?

Chad Johnson was born Chad Javon Johnson in 1978 in Miami, Florida.⁷¹ Chad legally changed his last name from Johnson to Ocho Cinco, which means “eight five” in Spanish and reflects his uniform number as a professional football player with the Cincinnati Bengals.⁷² Chad Ocho Cinco had long referred to himself as “Ocho Cinco” prior to the legal name change, which was granted on August 28, 2008.⁷³ In response to speculations about the reasons for the name change, Chad Ocho Cinco stated on the team’s website “[h]ave I ever had a reason for why I do what I do? I’m having fun.”⁷⁴

Over his career, Ocho Cinco has been known for his unusual activities. For example, “[i]n addition to touchdown celebrations, [he] has squabbled with his quarterback, Carson Palmer, show[n] up with a blond Mohawk haircut[,] and won a footrace with a horse for charity.”⁷⁵ But, Ocho Cinco maintains that most of his activities have been in “good fun” compared to other professional football players.⁷⁶ While Ocho Cinco’s love of media attention is the likely reason for the new name, it will not change his rights under the right of publicity for either his past or present name. Based on case law precedent, Ocho Cinco will have a right of publicity cause of action if another person misappropriates his name or likeness as either Chad Ocho Cinco or Chad Johnson.

71. *A Bengal Changes His Stripes*, THE SMOKING GUN.COM, Sept. 5, 2008, <http://www.thesmokinggun.com/archive/years/2008/0905081ocho1.html>.

72. *Id.*

73. *Bengals Wide Receiver Changes Last Name to Ocho Cinco*, ESPN.COM, Aug. 31, 2008, <http://sports.espn.go.com/nfl/news/story?id=3560377>.

74. *Id.*

75. Joe Lapointe, *Ocho Cinco Is Creative On Field and Off*, N.Y. TIMES, Sept. 18, 2008, at D3, available at <http://www.nytimes.com/2008/09/18/sports/football/18giants.html>.

76. *Id.*

B. Chad Ocho Cinco and the Right of Publicity

If Chad Ocho Cinco brings a claim for the right of publicity for either his birth name or his current name in Ohio, where he currently plays football, the state has a right of publicity statute.⁷⁷ The statute that recognizes a right of publicity for living persons and a postmortem right for sixty years.⁷⁸ Specifically, the statute provides in part that “a person shall not use any aspect of an individual’s persona for a commercial purpose during: (1) [d]uring the individual’s lifetime; (2) [f]or a period of sixty years after the date of the individual’s death.”⁷⁹

Depending on the conduct that created the claim and the person or company that committed the unauthorized use, there are also several other jurisdictions available where he can bring a claim.⁸⁰ Since some jurisdictions are more favorable to claims than others, an analysis of the right of publicity statutes is necessary prior to bringing a claim. Knowing the right of publicity statutes is one of the first steps in bringing a right of publicity claim, particularly when a legal name change is involved; in particular, knowing which states recognize the right of publicity and which states only recognize the privacy tort for the misappropriation of one’s name or likeness. But, does a legal name change affect a professional athlete’s right of publicity claim, and if so, how?

The reason for Chad’s name change is not relevant to his rights to control the commercial use of his name and likeness, and it is not a factor that the court will consider in its analysis. Pursuant to *Abdul-Jabbar*, Chad has a right to control the commercial use of his identity as both Chad Johnson and Chad Ocho Cinco.⁸¹ The fact that Kareem Abdul-Jabbar changed his name for religious reasons, and Chad changed his name for media attention, does not affect their rights under the right of publicity.

C. If Chad Johnson or Chad Ocho Cinco Brings a Claim

The ability of professional athletes and other celebrities to change their names raises the policy concerns that surround the right of publicity. By becoming known as Ocho Cinco, first as a nickname and later as a last name, Chad has effectively removed that phrase from the public domain, since

77. OHIO REV. CODE ANN. § 2741.02 (2010).

78. *Id.*

79. *Id.*

80. See Farber, *supra* note 24, at 449 n.6.

81. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415-16 (9th Cir. 1996).

companies will not be able to associate that phrase with their products.⁸² The removal of “Ocho Cinco” from the public domain is similar to the prohibited use of “Crazylegs” for shaving gel.⁸³ Now, any company promoting its product can use neither his name or the phrase “Ocho Cinco,” even if it does not intend to associate the product with Chad, because it will violate his rights of publicity.

There is a further concern of whether a company would be able to use the words “Ocho” or “Cinco” individually. Depending on how the words are used, either separately or collectively, there may be some concern about whether the words are associated with Chad Ocho Cinco to the point that the words cannot be used in a commercial manner without his consent because a consumer would associate the words with him as a professional athlete. Therefore, this furthers the concern behind the ability of the right of publicity to remove words from the public domain.

However, if a professional athlete can change his or her name and remove phrases from the public domain,⁸⁴ what will stop the athlete from changing his or her name repeatedly? Reason demands that there should be some limits on professional athletes and celebrities being able to repeatedly change their names, yet control the rights to their past and present names and thus remove them from the public domain. While this has not become an issue to date, it is likely to be one in future cases because of the increase in players who are known by two different names.⁸⁵

One may ask why a professional athlete would change his or her name more than once; but then again, why do people change their names at all? Common reasons are religious conversion, media attention, or simply marriage.⁸⁶ However, who is to say that a professional athlete should not have

82. See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 133 (Wis. 1979).

83. *Id.*

84. Keep in mind that Hirsch did not even legally change his name, “Crazylegs” was his nickname and it was effectively removed from the public domain through the right of publicity. *Id.*

85. Examples of well-known players in professional sports using two names are: Larry Jones, also known as Chipper Jones; Vincent Edward Jackson, also known as Bo Jackson; Edson Arantes do Nascimento, also known as Pele; Edward Charles Ford, also known as Whitey Ford; Lloyd Bernard Free, also known as World B. Free; Bobby Moore also known as Ahmad Rashad; James Bell, also known as Cool Papa Bell; George Herman Ruth also known as Babe Ruth; Cassius Clay, also known as Mohammad Ali; and Eldrick Woods, also known as Tiger Woods. *Sporting Heroes*, FAMOUSNAMECHANGES.NET, www.famousnamechanges.net/html/sports.htm (last visited Apr. 12, 2010).

86. Another recent example of a name change is Tampa Bay Buccaneer Greg White who legally changed his name to Stylez G. White in December, 2008, simply because he liked the character Stiles from the 1985 movie “Teen Wolf.” *Bucs Player Changes Name to Stylez G*, SPORTINGNEWS.COM, Dec. 16, 2008, <http://www.sportingnews.com/nfl/article/2008-12-16/bucs-player-changes-name-stylez-g>.

the ability to change his or her name more than once should any of these, or other, situations occur?

Furthermore, is there really any difference between Chad Johnson changing his name for media attention, Lew Alcindor changing his name for religious purposes, or someone changing her name after a marriage? One could answer yes, because the media attention is driven by a self-serving purpose that the public may not respect. But, there is also a strong argument that there is little difference in the reasoning. A woman does not have to change her name when she gets married; it is an elective custom. Not everyone changes their name when they convert to a religion, and most obviously, not many people even have the reason or opportunity to change their name to further media attention. Irrespective, the reason for the name change will not currently affect a professional athlete's rights under the right of publicity and Chad Johnson, now Chad Ocho Cinco, is not significantly different from those athletes who have changed their names in the past. The only difference is the reason why, and under the current right of publicity, Chad Ocho Cinco maintains the right to control the commercial use of his past and present name, regardless of the reasons for the name change.

D. Chad Ocho Cinco and His Contractual Obligations

Although Chad Johnson legally changed his name to Chad Ocho Cinco at the beginning of the 2008 regular football season, there were still issues that needed to be resolved concerning his jersey and prior contractual obligations.⁸⁷ The National Football League (NFL) refused to recognize the name change until Ocho Cinco resolved his contractual obligation to Reebok.⁸⁸ Reebok sells football jerseys to fans and requires players to pay for unsold jerseys when a player wants to alter his jersey.⁸⁹ His response was to wear "Johnson" on the back of his jersey for the 2008 NFL season.⁹⁰ He waited until the 2009 season to change the name on his jersey, to avoid his obligation to pay for unsold jerseys bearing the name "Johnson."⁹¹ In an interview, Chad Ocho Cinco said, "We've just left it alone . . . I'll just wait

87. James Walker, *NFL: 'Financial Obligation Remains' Before Ocho Cinco on Jersey*, ESPN.COM, Sept. 7, 2008, <http://sports.espn.go.com/nfl/news/story?id=3574151>.

88. *Id.*

89. In 2008 Reebok asked that Keith Rivers, a Cincinnati Bengals linebacker, pay \$10,000 in unsold jerseys because of his number change from 58 to 55. *Ocho Cinco to Stick With Old Jersey for Rest of Season*, ESPN.COM, Oct. 23, 2008, <http://sports.espn.go.com/nfl/news/story?id=3659972>.

90. *Id.*

91. *Id.*

and do it next year.”⁹²

However, that did not stop his team from changing his name above his locker and on official statistics and notes before the beginning of the Bengals’s 2008 regular season.⁹³ Thus, while his team recognized the name change right away, Ocho Cinco had to wear a jersey with his old name, and commentators and sports analysts were left confused as to which name to use during the 2008-09 season.⁹⁴ While this fact pattern may be unusual, it illustrates how both names can be associated with one athlete even after an athlete changes his or her name, and why the athlete has an interest in protecting the commercial use of both.

Sure enough, during the 2009-10 season, it was Chad Ocho Cinco: Ocho Cinco on his jersey, Ocho Cinco in interviews, and Ocho Cinco in the media. Further, his 2009-10 regular season boosted 72 receptions for 1047 yards; putting his career at 684 receptions for 9952 yards.⁹⁵ Therefore, one can say Ocho Cinco has had a solid career as a wide receiver in the NFL. Although in an interesting turn of events, during an interview with Bob Costas before the Bengals played the New York Jets in the 2009-10 post-season, Ocho Cinco said “[i]f Revis shut me down I would change my name back to Johnson. That’s how confident I am in what I do.”⁹⁶ At the time, Darrelle Revis was a cornerback for the Jets, and the Bengals ended up losing that game 24-14.⁹⁷ Therefore, one can only wait and see what Ocho Cinco’s name will be next.

One can even compare Ocho Cinco’s endorsement potential and value to Dennis Rodman’s. When Dennis Rodman played with the Chicago Bulls, he appeared to receive endorsement deals based on his flamboyant personality and his overall athletic talent. It is this type of standout personality that can often attract endorsement deals and promotional opportunities.⁹⁸ Even though consumers may not agree with some of an athlete’s view, conduct, or both, they are aware of the athlete and his or her fame and, in theory, will buy the

92. *Id.*

93. *Id.*

94. See Steve Simmons, *Another Playoff Strikeout for Ace; Halladay Must Wonder if He’ll Ever See Post-Season*, OTTAWA SUN, at S18 (Sept. 28, 2008).

95. *Chad Ocho Cinco Profile*, ESPN.COM, <http://espn.go.com/nfl/players/profile?playerId=2584> (last visited Mar. 24, 2010).

96. Interview with Chad Ocho Cinco, Cincinnati Bengals Wide Receiver, in Cincinnati, Ohio (Jan. 3, 2010), available at <http://youbeenblinded.com/no-more-ochocinco-chad-johnson-is-back/5433>.

97. *Chad Ocho Cinco Profile*, *supra* note 95.

98. For instance, Dennis Rodman still has celebrity appeal as he was selected to participate in the television show *Celebrity Apprentice*. Donald J. Trump, *Why I Selected Dennis Rodman for The Celebrity Apprentice*, THE TRUMP BLOG, Mar. 13, 2009, <http://www.trumpuniversity.com/blog/post/2009/03/why-i-selected-dennis-rodman-for-the-celebrity-apprentice.cfm>.

product in question. Therefore, athletes like Chad Johnson and Dennis Rodman need to be aware of their rights under the right of publicity. They also need to be proactive in policing the market to make sure that their names, past or present, are not used without their consent. Once the athlete finds that his or her name has been used without his or her consent and there is a commercial advantage for the user, an athlete should not hesitate to take the appropriate legal action. Based on the commercial use, and the value of the athlete's identity, he or she may be able to receive compensation that is based on the value of the use of the name.

Similarly, today's companies need to be aware of the repercussions of using a professional athlete's name or likeness without the athlete's consent. As case history demonstrates, companies that failed to acquire the consent of an athlete have had to pay significant damages based on the value behind the celebrity's image.⁹⁹ Therefore, companies need to be cautious of how and when they use a professional athlete's name, likeness, or identity without the appropriate consent. If a company were to use a professional athlete's or celebrity's identity without the proper authorization, it could lead to many negative consequences, such as lengthy and costly litigation and negative publicity.

V. CONCLUSION

The right of publicity has rapidly become an important legal issue that professional athletes and their legal counsel need to be aware of. Courts have recognized that a person has a right of publicity in his or her photograph, nickname, commentary or voice, and even a birth name that the athlete has not used for many years. In fact, the athlete merely needs to be identified, such as by a distinctive race car, to have a cause of action for the right of publicity. The case history establishes that the right of publicity has become an intellectual property right that professional athletes can use to protect the property interest in their name, likeness, or identity.

Companies are willing to spend large sums of money in order to use a particular athlete's name in order to sell a product; therefore, the athlete has to be aware of this protected interest. More importantly, should a professional athlete change his or her name, like Chad Ocho Cinco, the courts have determined that the athlete has not lost the right to control the use of the prior name. Ocho Cinco is protected from the misuse of his name as Chad Ocho Cinco and as Chad Johnson. Moreover, with the exception of the delay in changing his name on his jersey because of the NFL's contract with Reebok,

99. Stapleton & McMurphy, *supra* note 16, at 32-33.

Chad's contractual obligations were not affected by his name change.¹⁰⁰ However, just because Chad maintains the rights in both names and his contractual obligations were not significantly affected, is there a disincentive for Chad to change his name again? Currently, there is no prohibition in place and the courts have not considered the reason for the name change.

There should be a safeguard in place to prevent athletes and other celebrities from repeatedly changing their names and in the process, removing the names and phrases from the public domain. This is further supported by the fact that Chad has now mentioned changing his name back.¹⁰¹ There should be restrictions on such flip-flopping of names, and even if he does change his name back or change to a new name, "Ocho Cinco" will now be removed from the public domain. For example, "Ocho Cinco" means "eight five" in Spanish and whenever a company uses that number in promoting its products, arguably, it refers to Chad Ocho Cinco. One way to accomplish such a restriction on name flip-flopping is for the courts to add an additional factor to their analysis: the reason for the name change. This is likely to become more prominent in the future, as the use of athletes as products endorsers increases.

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100. *Ocho Cinco to Stick With Old Jersey for Rest of Season*, *supra* note 89.

101. Interview with Chad Ocho Cinco, *supra* note 96.

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