What Good Is Fame if You Can't Be Famous in Your Own Right?: Publicity Right Woes of the Almost Famous

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I. INTRODUCTION

Television programming changed drastically over the last few years. Reality television erupted on every major network, while the popularity of sitcoms and other daytime television shows diminished. Reality television stars and amateur athletes (hereafter referred to as “Emerging Celebrities”) play a large role in the billions–of–dollars generated from television

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airplay each year. Unfortunately, industry standard contracts force these Emerging Celebrities to give up significant control of their image, which leads to the loss of potential income. Current law forces Emerging Celebrities to attribute these major losses to the cost of fame, often because they knowingly signed and entered into agreements that expressly forfeited certain rights to their persona.

If this major gap in American contract law and mainstream entertainment continues to exist, Emerging Celebrities will continue to forfeit millions-of-dollars of potential income. This Comment will discuss the potential legal injustice of standard contracts used in the reality television and amateur sports industries, and propose a potential statutory solution. Part II will discuss the history and development of publicity rights in the United States. Next, Part III will briefly discuss the various statutes currently in effect to protect publicity rights. Then, Part IV will discuss how current industry standard contracts force Emerging Celebrities to forfeit a substantial and valuable portion of their publicity rights. Finally, Part V will discuss a proposed statute that would prohibit enforcement of publicity rights clauses that force Emerging Celebrities to assign excessive portions of a their publicity rights to another person or entity.

II. THE LAW OF RIGHT OF PUBLICITY

Modern right of publicity law consists of a dichotomy of privacy law and property law. The right to privacy is grounded in the belief that individuals reserve the right to be free from having their image ruined by “idle gossip” or negative statements published in the press. The economic basis for the right of publicity recognizes an individual’s right to own a property-type interest in his or her marketable image, which includes his or her name, picture, likeness, voice, and other personal


6. MERGES, supra note 5.
characteristics. Modern legal trends led to various state statutes and cases that give this area of law more defined standards.

A. Right to be Let Alone

Legal Scholars first discussed the right of publicity in the nineteenth-century under the guise of the right of privacy. The invention of the printing press and flash photography brought about issues of men wishing “to be let alone” in their private lives. In the late 1800s, legal scholars Samuel Warren and Louis Brandeis noted that the unauthorized circulation of private photographs along with gossip was becoming a trade in the newspaper industry, and necessitated legal protection for an individual’s privacy. They asserted that the protections afforded to the intellectual property of every person are the same types of protections that each person should be afforded for his or her publicity. Ultimately, Warren and Brandeis felt that the invasion of an individual’s privacy constituted an actionable tort claim, and to date a majority of legal scholars and professionals have agreed with them.

Despite the majority eventually following Warren and Brandeis’ theory, everybody did not immediately accept their position. Only twelve years after the publication of their privacy theories, a New York appellate court found that a right to privacy was not actionable absent libel (malicious gossip). At the time of the decision, New York law recognized libel as a tort. In Roberson v. Rochester Folding Box Co., a flourmill company knowingly printed and circulated the likeness of an infant child on its packages of flour without receiving permission from

7. Id.
8. See id.
10. See id. at 195–96.
11. Id.
12. See id. at 197–200.
15. Id.
the child’s parents. Soon thereafter, the child’s parents sought monetary damages, as well as an injunction to prevent further circulation of the image. Though the majority found that these events did not lead to a cause of action, the dissent argued that the right to privacy gave rise to a cause of action and should be a legally accepted principle. In the aftermath of this case, the New York legislature decided to enact a privacy statute that followed the dissent’s argument and made it a tort to use a person’s image for commercial purposes without that person’s consent. This case became the precursor to several other states and jurisdictions that would later enact laws to protect one’s personal image.

B. Distinguishing Publicity from Privacy

As publicity law developed, a murky line appeared between the difference of privacy law and publicity law. A federal court drew a distinction between the two in the 1953 case *Haelen Laboratories, Inc. v. Topps Chewing Gum*. There, a federal circuit judge distinguished publicity rights of an individual from privacy rights by focusing on the economic interests of the plaintiff’s persona. The lawsuit between the two rival chewing gum companies arose from a dispute regarding the use of a well-known, professional baseball player’s (“Player”) photograph for advertising and selling purposes. The plaintiff, Haelen Laboratories, Inc. (“Haelen”), sold, manufactured, and distributed chewing gum. Haelen had entered into a contract with the Player in which he authorized Haelen to use his photograph in connection with the advertising and selling of Haelen’s products. As a condition of the contract, the Player agreed not to grant other rival companies the right

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16. *Id.* at 542.
17. *Id.* at 542–43.
18. *Id.* at 560.
19. BEVERLEY-SMITH, supra note 5 at 50; N.Y. Laws 1903, ch. 132, §§ 1–2. The statute enacted in 1903 still exists in the same form under NEW YORK CIVIL RIGHTS LAW §§ 50–51 (McKinney 2011).
22. See *id.*
23. *Id.*
24. *Id.* at 867.
25. *Id.*
to use his photograph to advertise or sell the rival companies products.\textsuperscript{26} With full knowledge of the contract between the Player and Haelen, Haelen’s rival and the defendant in the case—Topps Chewing Gum (“Topps”)—deliberately induced the Player to enter into a contract that allowed Topps to also use the Player’s photograph in connection with advertising and selling.\textsuperscript{27} Haelen brought suit against Topps alleging that it deliberately invaded Haelen’s right to exclusively use the Player’s photograph for its business purposes.\textsuperscript{28}

In court, Topps argued that by inducing the Player to enter into a contract with Topps, the only actionable tort would be a statutory invasion of privacy, which was a personal interest and not an assignable property interest.\textsuperscript{29} Therefore, Topps argued that Haelen did not have an actionable claim because it could not have received a property interest from the contract it entered into with the Player.\textsuperscript{30} A majority of the court rejected this argument and determined that every person has a right of publicity independent of his or her right of privacy.\textsuperscript{31} More specifically, the right of publicity consisted of the person’s value in his photograph, image, or likeness.\textsuperscript{32} The court further noted that the value of a person’s publicity right rested in each person’s right to exclusively grant the use of his publicity as he so chooses.\textsuperscript{33} Essentially, this ruling distinguished the difference between a person’s right to be left alone to his private affairs and his right to benefit from granting others the right to use his image for commercial purposes.

\textbf{C. Right of Publicity in the Light of Public Policy}

Recent case law shows that courts have acknowledged that certain contract terms containing publicity rights clauses should be considered unenforceable as a matter of public policy. For example, in 2006 a Missouri court determined that when parties enter into an agreement granting a party the right to use a celebrity’s publicity rights, courts might find certain provisions of a licensing agreement unenforceable because of public policy considerations.\textsuperscript{34} There, in \textit{C.B.C. Distribution}
and Marketing v. MLB Advanced Media, the court found that public policy considerations made two provisions, a no-challenge provision and a provision that prohibited C.B.C. Distribution and Marketing (“CBC”) from using the name and certain information of Major League Baseball players, unenforceable and void.\(^{35}\)

The plaintiff in this instance, CBC, markets, sells, and distributes fantasy sports products online, including fantasy baseball games.\(^{36}\) The defendant, Advanced Media, operates the interactive and Internet aspect of Major League Baseball (MLB).\(^{37}\) Prior to the beginning of the professional baseball season, participants “draft” or select players for their fantasy baseball teams.\(^{38}\) CBC provides the participants with a list of actual MLB players that the participants may draft for their team.\(^{39}\) The overall outcome and success of a fantasy player’s team depends on the selection of these MLB players.\(^{40}\) CBC also provides the most up-to-date information on MLB players, which is comprised of statistics, injury reports, player profiles, and player information.\(^{41}\)

In 2002, the MLB Players’ Association (Association) entered into a licensing agreement with CBC on behalf of active professional baseball players in the National and American Leagues.\(^{42}\) This agreement contained two clauses, which later became the center of the legal dispute.\(^{43}\) The first provision, the no-challenge provision, provided that the CBC could not dispute or attack the title or any rights of the Association, or the license’s validity.\(^{44}\) The second provision provided that CBC should refrain from use of the licensed rights and any direct or indirect reference to them upon the expiration of the licensing agreement.\(^{45}\)

Between 2001 and 2004, Advanced Media operated a fantasy baseball league on the MLB website.\(^{46}\) In 2005, Advanced Media and the Association entered into a licensing agreement where Advanced

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35. Id. at 1106-07.
36. Id. at 1080.
37. Id.
38. Id.
39. Id.
41. Id. This information may usually be found in the sports section of any newspaper.
42. Id.
43. See id. at 1081.
44. Id.
45. Id.
Media obtained the right to use the players’ publicity rights for the purpose of exploitation through interactive media.\(^{47}\) In January 2005, Advanced Media solicited proposals from various fantasy league operators to enter into an agreement to participate in Advanced Media’s fantasy baseball licensing program.\(^{48}\) In February 2005, Advanced Media offered CBC a license where it could use MLB marks to promote fantasy games on MLB.com to CBC customers, and CBC would receive a ten percent share of revenues from MLB’s fantasy games.\(^{49}\)

A few days after receiving the above offer, CBC filed a Complaint for Declaratory Judgment in federal district court claiming that it reasonably apprehended Advanced Media suing it if CBC continued to operate its fantasy baseball league.\(^{50}\) CBC also alleged that Advanced Media maintained all players’ statistics and information and could preclude all fantasy sports operators from offering products to the consuming public.\(^{51}\) CBC also requested an injunction from Advanced Media or any of its affiliates from interfering in CBC’s business operations.\(^{52}\) Advanced Media counterclaimed, stating that CBC breached its contract agreement by operating its fantasy baseball league without a license because CBC was using the publicity rights of players beyond the scope of their agreement.\(^{53}\)

The court acknowledged that the language of the 2002 agreement contained a no-challenge provision, and noted the agreement restricted CBC from using players’ rights of publicity after the termination of the agreement.\(^{54}\) CBC contended that the provisions of the agreement were void as a matter of public policy.\(^{55}\) CBC also argued that no-challenge provisions were contrary to the Lanham Act’s public policy.\(^{56}\) The court agreed, and held that a certification mark could not be prohibited by licensee estoppel.\(^{57}\)

Advanced Media argued that CBC had permission to use players’
records, just not the players’ names. However, the court determined that a player’s record without a name would be pointless and meaningless in this instance. To determine whether the publicity provisions of the contract were enforceable, the court relied on authority that stated, “strong federal policy favoring the full and free use of ideas in the public domain outweigh[ed] the public interest against the competing demands of patent and contract law.” This case is important because it shows that courts are willing to consider public policy factors when determining the validity of a contract that involves publicity rights.

III. STATUTORY PROTECTION OF PUBLICITY RIGHTS

In the United States, publicity rights are governed by states. Even though the right is commonly associated with celebrities, some states allow protection for non-famous individuals as well. Accordingly, several states have enacted statutes in order to codify their particular protections of individuals’ publicity rights. Currently, nineteen states recognize the right of publicity by statute. And the subject matter of these statutes covers a broad range of topics.

For instance, Indiana has an extremely extensive and detailed right of publicity statute. Indiana is significant to student athletes because The National Collegiate Athletic Association (NCAA), which governs most major intercollegiate athletics programs, is headquartered in Indianapolis and complaining parties can sue the NCAA in Indiana’s courts. Indiana extends the protection of publicity rights to include not only a person’s name and likeness, but also a person’s mannerisms,

59. Id.
60. Id.
63. Statutes, supra note 61.
64. Id.
65. Id.
signatures, gestures, pictures, and distinctive appearance. Furthermore, Indiana specifically prohibits enforcing agreements in which student-athletes grant publicity rights to sports agents in certain situations. Additionally, some states, like California and Indiana, place a high emphasis on the property value of publicity rights as evidenced by the statutes, which allow for the descent and devise of property rights to a deceased’s heirs. Currently, New York is in the process of attempting to amend its right of publicity statute to add additional protections to individuals, but the statute has not survived the recent legislative sessions. Overall, the right of publicity law is continually and rapidly evolving, and expanding in several of the states.

IV. SIGNING THEIR LIVES AWAY

For celebrities and Emerging Celebrities alike, the proprietary interests associated with their names, likenesses, and personas prove to be extremely valuable. However, in order to participate as a student athlete in college sports or as a personality on a reality television show, participants must sign industry standard, non-negotiable contracts that include clauses giving up large amounts of those rights. With these standard contracts, participants have no opportunity to negotiate the terms, including the contractual language related to publicity rights. As a result, Emerging Celebrities give up an unfathomable amounts of their ability to control or use their own publicity.

A. The NCAA Swindle

The NCAA governs athletic competition between sports teams at a majority of collegiate institutions in the United States. In order for college athletes to participate in NCAA athletic programs, the student athletes must enter into a contractual relationship with their respective university by way of the National Letter of Intent, the Statement of Financial Assistance, and other documents. Through this contractual

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68. Id.
70. R.O.P., supra note 62; IND. CODE ANN. § 32-36-1-6 (West 2011); CAL. CIV. CODE § 3344.1(1)(a) (West 2012).
71. Statutes, supra note 61.
72. DI MANUAL, supra note 4, § 12.5; Halbert, supra note 4 at 44.
74. MATTHEW J. MITTEN & TIMOTHY DAVIS, SPORTS LAW AND REGULATION:
relationship, the student athlete promises to attend the university and participate in its athletics program, and the university agrees to provide financial aid for the cost of attending its university along with the opportunity for the student athlete to receive an education at that institution. In this contractual relationship, the student athlete agrees to follow all rules of that particular institution’s athletics program, athletic conference, and athletic association.

The NCAA contends that one of its main missions is to foster amateurism in college sports, thereby offering a justification for its severe limits to the activities of student athletes both on and off of the field. Under the NCAA’s Constitution and Bylaws, student athletes are prohibited from profiting or benefiting in any way from fame generated from their athletic abilities and achievement as an athlete. Not only do NCAA rules prohibit student athletes from personally using their own names or the publicity from their achievements, the NCAA mandates that student athletes grant permission to the NCAA, the students’ institutions, and the institutions’ respective conferences to use the students’ images, names, and likenesses for any and all of their promotional activities. Given the seemingly unequal consideration in the relationship between student athletes and their universities, it is not surprising that the National Letter of Intent has been criticized for the adhesive nature of the contractual relationship.

In recent years, former student athletes have begun to fight this exploitation of publicity rights. For instance, the class action case of O’Bannon v. NCAA arose out of frustrated former athletes who felt as though the NCAA should not control their publicity rights in the collegiate licensing industry; an industry whose profits are estimated to be at about four–billion dollars per year. Ed O’Bannon (O’Bannon) and other former athletes complained, among other things, that the NCAA was intentionally depriving them of their right of publicity.
Currently, the NCAA controls the publicity rights of current and former athletes in various commercial ventures including the sale and distribution of commemorative DVD’s, the broadcast of past games, and sports-related video games.\footnote{McCann, supra note 82.}

The main point of contention in \textit{O’Bannon} is form 08-3a (Student Athlete Statement).\footnote{Id.; see generally Form 08-3a, UNIVERSITY OF KENTUCKY ATHLETICS COMPLIANCE, http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited Mar. 21, 2011).} This form is one of many forms student athletes are required to sign in order to participate in collegiate athletics.\footnote{Id.} The form essentially grants the NCAA the right to use the athletes’ names and images in perpetuity.\footnote{Id.} The former athletes contend that without signing these documents they would not have otherwise been able to receive a scholarship for a college education, while the NCAA continues to maintain that its only purpose in diverting the funds from the athletes is to keep college sports pure.\footnote{Id. § 12.5.}

\textit{O’Bannon} and other NCAA athletes rightly believe that the NCAA has taken away too much of their publicity rights. Most NCAA college athletes have a maximum of five years to participate in athletics for four seasons before they exhaust their athletic eligibility.\footnote{D1 Manual, supra note 4, at § 14.1.8.2.1.3.} However, in order to participate in a competitive sports program, the NCAA forces these college athletes to agree to give up their publicity rights for the rest of their lives.\footnote{Id.} Even though it may be argued that the athletes have the option of either not participating in sports or going to a school in a different athletic conference, those alternatives are not really reasonable or fair, especially when comparing the NCAA to a non-NCAA athletic conference.\footnote{Why Should I Consider an NAIA School?, ATHLETICRECRUITINGMENTOR.COM, http://athleticrecruitingmentor.com/WhyShouldIConsideranNAIASchool.aspx (last visited Nov. 13, 2011).}

Student athletes should not be forced to choose between retaining their publicity rights and attending an institution that may best fit their future goals. This especially holds true for student athletes who aim to become professional athletes. Student athletes who wish to go pro have a better opportunity to enter into a professional draft by playing for a NCAA member institution than any other athletic conferences.
Overall, the NCAA is basically manipulating NCAA student athletes into giving up the right to take ownership in their identity as student athletes.

**B. The Reality Is . . . the T.V. Networks Own You**

Like student athletes, reality television personalities also have to give up a substantial portion of their publicity rights. Anyone who wants to participate in a reality television show must sign a series of documents, which includes agreements, releases, and waivers.\(^92\) These documents essentially allows the production company to have complete control over the soon-to-be reality stars.\(^93\) In addition to the stack of documents that releases the company from almost any or all liability should an accident arise; at some point, the up-and-coming reality star will sign a document that will give his publicity rights in association with the show entirely to the production company into perpetuity.\(^94\) Ironically, the production company’s control over the reality star’s publicity lasts longer than the Emerging Celebrities fifteen minutes of fame.

The popularity of reality television personalities grew with the popularity of reality television. This phenomena of “reality” television emerged as television producers began placing real life people on television shows in order to portray the drama of every day life.\(^95\) In most reality television series, the television network takes ownership of the reality stars’ personas for a period of time that usually extends through the end of the stars’ popularity.\(^96\) In addition, the network retains the right to continue to air reruns and utilize footage of the reality stars forever.\(^97\)

Take for example, the CBS series *Survivor*. *Survivor* participants agree to allow CBS to control their publicity rights for three years following the airing of the program.\(^98\) In the past, television networks commonly took ownership of the publicity rights of the characters that

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93. *Id.*
94. See Halbert, *supra* note 4, at 44.
95. See *id.* at 37.
96. See *id.* at 44.
97. *Id.*
98. *Id.* at 37.
an actor portrayed on a sitcom or other daytime show. However, since reality stars essentially portray themselves on screen this method no longer works. Previously, sitcom and other television stars sliced away pieces of their personas for use by the television networks. However, this new group of reality stars has no ownership whatsoever over their publicity rights and cannot control their public images after releasing their publicity rights.

Like Survivor, shows like MTV’s The Real World and NBC’s America’s Got Talent are continually expanding their contractual language in order to ensure that they do not miss opportunities to control and exploit the participants’ television rights. Contracts for shows like these include language such as “to perpetuity and throughout the universe” and “including the rights to your life story,” when describing the television network retaining the publicity rights of the shows’ participants. In discussing the ridiculousness of these exaggerated contractual terms, Lucasfilm’s Lynne Hale commented that television networks have actually “had very few cases of people trying to exploit rights on other planets.” However, that has not stopped the television networks and production companies that are determined to ensure that they control any and all rights.

Following their brief appearances on television, reality stars soon discover just how limited they are in using their own publicity. For example, following his appearance on Survivor, Richard Hatch wanted to capitalize on his fame as “The Survivor” and allow a childhood friend, Peter Lance, to ghost write his life experiences. However, due to the language of contracts signed between Hatch and CBS, the project was prevented.

99. Id. at 38.
100. Halbert, supra note 4, at 38.
101. Id. at 42.
102. Id.
104. Id.
105. Id.
107. Id.
contestants from sharing experiences at any public venues without prior approval from the network. Hatch is virtually silenced forever from sharing his experiences and stories with other people.

The same agreement prevented Survivors Jenna Lewis and Gervase Peterson from appearing at the grand opening of a retail establishment following their appearance on the show. A retail establishment offered the pair $10,000 each to appear at its grand opening. However, the appearance would potentially conflict with CBS sponsor, Target, so they were forced to decline the offer.

Television networks, such as CBS, prevent reality stars not only from profiting from their publicity commercially, but also from talking about their lives. Neither a television network nor any other entity should be able to prevent individuals from talking about a life experience forever. Essentially, the television networks take away the right of a person to speak freely about himself or herself. The television network may argue that participants have the option of not joining the casts of these reality shows; but for those that do join these casts there may not be any other viable option for stardom and fame. Television networks and the NCAA choose to take advantage of, and exploit Emerging Celebrities who are eager for the once in a lifetime opportunity of stardom.

V. POTENTIAL FOR STATUTORY INTERVENTION

Contracts that ultimately force a person to sign away his or her publicity rights for an excessive amount of time should be considered void and unenforceable. In particular, the law should protect Emerging Celebrities like student athletes and reality television actors from being exploited by the major industries. Legal professionals in the sports and entertainment industry should work together to develop a uniform statute that will limit the amount of publicity rights that an Emerging Celebrity can contract away. If states like Indiana—the home of the NCAA—and New York and California—entertainment hubs—adopted this uniform statute the college sports and reality television industries may begin to see fairness for their new stars.

108. Id.
110. Id.
111. Id.
A. Proposed Statute

The proposed uniform statute should specifically address the amateur sports and reality television industries. For each industry, the statute should specify the number of years that an entity can contract to utilize a person’s publicity. The statute should also specify the amount of the person’s publicity rights that the entity may exploit.

For amateur athletics, the statute should take into account that amateur athletes usually participate in college sports for somewhere between four to five years, and a small percentage of college athletes actually go pro. Keeping this in mind, the statute should prohibit collegiate institutions, athletic associations, and athletic conferences from exploiting a student athlete’s images for more than two years after that student athlete stops participating in amateur athletics. Additionally, the entities should be allowed to enter into an agreement whereby the student athlete may grant exclusive licensing rights to only one institution, one athletic association, and one athletic conference. However, the athlete should not be contractually barred from entering into agreements with other organizations in other industries. Thereby, the athlete should be allowed to benefit from executing his own licensing agreements with other parties, such as videogame and memorabilia companies.

Some reality television stars only appear on a television show once, while others repeatedly appear on reunions, network specials events, and other shows on the network that gave them the initial stardom. However, it should be noted that many reality stars do not continue to act outside of their particular reality show or network. Keeping this in mind, after two years from a reality star’s last recorded season on a network, the reality star should begin to receive 10% of royalties from any profits that the television network earns from continually exploiting that star’s persona into “perpetuity.” Additionally, reality stars should not be forced to sign contracts that take away their right to tell their “life stories.” Furthermore, the stars should be allowed to use their fame in any economic interest they so choose and should not be prohibited from participating in moneymaking ventures that do not directly relate to the television industry.

VI. CONCLUSION

In enacting the proposed statute, future amateur athletes and reality stars may begin to enjoy having control over their own personas and publicity rights, which is not currently the case in the industries today.
The proposed statute will keep the various organizations from essentially trying to take complete control over and ownership of Emerging Celebrities’ identities. The collegiate institutions, athletics associations, athletic conferences, and television industry have been taking advantage of vulnerable athletes and aspiring stars for too long, and it is time for the legislatures to step in.

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