

Trump Card: The Right of Publicity vs. The First Amendment

I. Introduction

Since the right of publicity emerged in the American legal system courts have been attempting to reconcile an individual's right to control the use of their identity with others' the First Amendment Freedom of Speech. Nearly all states recognize "a celebrity's identity can be valuable" and that one has a protectable interest "from unauthorized commercial exploitation of that identity."ⁱ Yet, the First Amendment to the Constitution clearly grants the Freedom of Speech and Press.ⁱⁱ Some academics posit the ordinary and plain meaning of "freedom" resolves any conflict.ⁱⁱⁱ Others point out there already exists certain limitations upon speech which may logically extend in certain circumstances to protect publicity.^{iv} This issue has plagued the American legal system for decades and continues to be problematic today.^{vi} Seeking to balance these rights, courts have implemented different judicial tests which has inevitably led to different, and often inconsistent, rulings. The case of Rogers embodies this clash between the right of publicity and the Freedom of Speech.

II. Background

Steve Rogers was a sniper in the 123rd Sniper Battalion. He joined the military in response to the terrorist attack on 9/11 when his father, who was aboard Flight United 93, was killed. Due to his remarkable talent as a sniper, Rogers earned himself the nickname "Hawk Eye" and got a unique tattoo on his trigger finger.

In 2009, Louis Lane, a reporter with the Daily News, wrote a story on Rogers. Eventually she was placed inside Rogers' unit as a reporter for six months. During that time, Rogers allowed Lane to mention him by name if the stories she wrote arose during Lane's time working within his unit. During these six months, Lane and Rogers exchanged personal stories. Specifically, Rogers told Lane his father's death prompted him to join to military, his

wife had a miscarriage while he was away at sniper training, and about his survival story in Afghanistan after a mission in the Arghandab Valley left him stranded, alone, and in a firefight for four days. Lane published three successful articles about her time spent with Rogers' unit.

Upon completion of service, Rogers returned home and built a dog rehabilitation center which he operated with his wife. A local paper published an article titled "From Hawk Eye to a Dog's Eye" about Rogers. The story soon spread on social media sites being shared over 100,000 times. Rogers' fame grew and he soon appeared on national talk shows and on a televised celebrity dance competition. Around this time, Rogers was approached by Black Canary Publishers to negotiate a book deal based upon his wartime experiences.

Concurrent with Rogers growing celebrity, Lane decided to write a screenplay based upon her experiences abroad. Lane had previously tried and failed to write movies, but believe her time spent as a wartime reporter provided her the experience necessary to try again. Her screenplay was about a sniper named Richard Grayson, nicknamed "Hawk Eye," with a tattoo on his trigger finger stationed in Afghanistan. The screenplay included the following three plot points: (1) Grayson joined the Army because his father died in 9/11; (2) Grayson's wife miscarried while he was in sniper school; and (3) Grayson fought his way out of the Arghandab Valley. The screenplay was purchased for \$5 million with additional profits if ticket sales reached a certain threshold.

When Black Canary Publishers learned of the film "Hawk Eye" and some of its major plot points, it cancelled its publishing deal with Rogers. Rogers successfully sued in a federal district court claiming an infringement upon his right of publicity. Lane has appealed decision claiming her film is protected speech under the First Amendment.

On appeal, the court should affirm the district court's holding. Lane's use of specific characteristics and stories belonging to Rogers' was commercially exploitive. Weighing the rights at issue, Rogers' right of publicity should be protected so he may reap the economic benefit of his wartime service, individual talents, and patriotic character.

III. Precedential Balancing Approaches

The first and only Supreme Court case balancing the right of publicity with the freedoms of the First Amendment arose in Zacchini v. Scripps-Howard Broadcasting Company.^{vii} In Zacchini, the court held broadcasting the human cannon ball's "entire act" posed a "substantial threat to the value of that performance."^{viii} Concerned with unjust enrichment and depriving the performer an ability to earn a living, the court ruled that individuals have the "right of exclusive control" over their identity and publicity.^{ix} Note, the phrase "entire act" qualifies this ruling to be quite narrow, applicable only when the entirety of a performance or act is used.^x Since Zacchini, the recognition of the tort has become more nuanced. Many courts recognize a right of publicity when the name or likeness or identifying characteristics lead to third persons to recognize a celebrity's appearance.^{xi}

Before analyzing Rogers' case, it is first imperative to understand the different approaches presently utilized by courts when balancing these rights. To determine this, three tests have been used: (1) The Relatedness Test, (2) The Transformative Test, and the (3) The Predominate Purpose Test.

A. The Relatedness Test

The Relatedness Test examines the relationship between the use and the product.^{xii} That is, if the use of a celebrity's identity is unrelated to the product, it is an infringement upon the right of publicity.^{xiii} In Parks v. LaFace Records, the court explained that when "the name or likeness" of an individual is "wholly unrelated to the content of the work or simply a

disguised commercial advertisement for the sale of goods or services," then the First Amendment affords no protection.^{xiv}

A major criticism of this test is that it only protects the right to publicity when the use is solely for commercial purposes.^{xv} When the identity is used almost exclusively for commercial purposes, but not entirely, this test affords no protection of publicity.^{xvi} Moreover, this test requires the court to make subjective determinations. First, a determination about whether a name or likeness was at least minimally related to the work.^{xvii} Second, the court must then decide if the purpose and motivation was solely for that reason.^{xviii}

B. The Transformative Use Test

The Transformative Use Test examines the work or product to determine whether sufficient alterations or additions have transformed the work into a new expression.^{xi} In order to do so, the artist "must contribute something more than merely trivial variation."^x Instead, the artist "must create something recognizably 'his own.'"^{xi} This test seeks to protect an artist's ability to use celebrity likeness for expressive purposes.^{xii} Moreover, it recognizes that a protectable right exists also in the artist who invests talent, time, and labor into the new work.^{xiii}

The Transformative Use Test requires a more circumspect and holistic appraisal of the specific aspects of a work.^{xiv} In doing so, a court determines whether the work is a unique expression or mere imitation.^{xv} This characteristic is the test's strength and weakness. On one hand, it "provides courts with a flexible—yet uniformly applicable—analytical framework."^{xvi} On the other, it requires a case-by-case evaluation by which judges make subjective evaluations to decide if a product has been sufficiently transformed.^{xvii} This offers minimal predictability to other artists since whether the work is transformed is circumstantial.^{xviii}

C. The Predominate Purpose Test

Realizing the inadequacy from a bright-line rule in the Relatedness Test and the potentially subjective, artistic judgments required in the Transformative Use Test, some courts have adopted the Predominate Purpose Test. This test is a fact-intensive inquiry which looks to the main thrust and reasoning behind appropriating a celebrity's identity.^{xxxix}

In Doe v. DCI Cablevision, a comic book producer named a character after Tony Twist, a famous hockey player.^{xxx} While not "about" Tony Twist, the comic book used Tony Twist's "tough guy" persona and specifically targeted, advertised, and promoted their merchandise to hockey fans.^{xxxi} Using the Predominate Purpose Test, the court was not concerned with whether the work was sufficiently transformed or whether it contained some expressive content.^{xxxii} Instead, the court looked to the primary purpose behind the appropriation.^{xxxiii} The court ultimately held that the use was primarily an exploitive ploy to increase sales and denied First Amendment protection to the comic book producer.^{xxxiv}

IV. Adopting the Inevitable

Having examined the legal tests implemented by different courts, the appeals court here should adopt and apply the Predominate Purpose Test to Rogers' case and affirm the lower court's holding. The Predominate Purpose test is the only test which most fairly examines and aptly balances the competing rights of the parties involved.

First, as mentioned above, the central issue in these cases is whether the right of publicity or the freedom of speech with triumph. Nearly all courts have recognized that individuals should have the right to reap the fruits of the labor, talent, and character.^{xxxv} Also at issue, however, is the freedom of speech - a fundamental right to a functioning democracy.^{xxxvi} Since both of these rights are of paramount importance, the only judicial approach which ought to be applied is one which scrutinizes every case individually.

By adopting a nuanced test, courts are able to carefully examine the specific facts of a case in order to ensure that neither the right of publicity nor the freedom of speech is permanently superseded by the other.

Second, the reasons for which this test draws criticisms is what makes this test preferential. It is a truism that it requires judicial subjectivity, but such subjectivity is inevitable and beneficial.^{xxxvii} Subjectivity is apart of almost every legal standard. For example, "whether reasonable minds could differ" might be touted as an objective standard, but requires a judge to make a subjective finding about how a "reasonable mind" might interpret the facts. This subjectivity, however, is beneficial. It permits courts to weigh the facts of each case which, as mentioned above, is especially important when fundamental rights are competing.^{xxxviii} Moreover, parties maintain the ability to appeal decisions which offers an ability to combat unfair or overly subjective decisions.^{xxxix}

V. Application to Rogers

The first step in applying the Predominate Purpose Test is to appreciate the rights at issue. The right of publicity is an attempt to allow individuals to reap the benefits of their talent, work, and character.^{x1} Here, Rogers was an extremely talented sniper in the Army. He fought bravely when stranded in the Arghandab Valley. This, along with his other wartime experiences, are a result of his work and talent. His post-war, self-started dog rehabilitation center also contributed to his public persona and character. Rogers undoubtedly has a recognizable publicity interest and should have exclusive control over it.^{xli}

It is also worth recognizing that Lane may have an interest outside her First Amendment defense. Lane's experiences in Afghanistan can be seen as a result of her hard work and talent.^{xlii} She first earned the position to be a reporter in Rogers' unit, and then risked her life for six months covering the war. Arguably, however, her fruit of her labor should be limited to only

the experiences during that six-month period. Three plot points included in her screenplay, those which mimic Rogers' life, were merely told to her - not a result of her work or talent.

Recognizing Rogers' talent and work should be protected, the court must balance this right against Lane's freedom of speech. Under the Predominate Purpose Test, it must be decided what Lane's primary motivation for using Rogers' identity.^{xliii} If Lane's screenplay was primarily expressive, then her freedom of speech trumps Rogers' right of publicity.^{xliv} However, her use of his identity appears to be more commercially motivated than expressive.

First, Lane's use of specific characteristics belonging to Rogers strongly suggest she wanted the audience to recognize her protagonist to be Rogers. Rogers' celebrity promulgated knowledge of his nickname as "Hawk Eye." The name of the Lane's screenplay and nickname of the protagonist is also "Hawk Eye." Lane also wrote and sold the screenplay after Rogers' celebrity identity grew to national levels. Additionally, Lane uses the unique tattoo for which Rogers' is known. The use of the exact nickname and placement of the tattoo are identifying features which third parties would certainly recognize immediately and, given Rogers' recent fame, induce them to see the film.^{xlv} These characteristics are immaterial to her story line. Lane could have chosen any nickname and precluded her protagonist from having tattoos without compromising the plot of a war story. The inclusion of these characteristics, absent any explanation, strongly suggest her motivations were to commercially exploit Rogers' fame.

Second, it is uncontested that Rogers shared those stories with Lane and that Lane uses the exact same stories in her screenplay. Alone, this would be a pure imitation. However, Lane did add variations to her story, including additional plot points and an ending dissimilar to Rogers' life. Yet, Lane has not argued that her screenplay, or her alterations to it, were for expressive purposes. No argument has been advanced that her screenplay

was meant to be a critique or social commentary about the war or a unique expression of her experiences. Lastly, even if her film was intended to be a unique expression, Lane has still failed to show her primary motivation for including Rogers' likeness was not commercial.

VI. Conclusion

In summation, the court should adopt and apply the Predominate Purpose Test. The use of the three plot points and unique characteristics strongly suggest Lane's predominate purpose was commercial. She sought exploit his fame and celebrity for her own enrichment, made manifest by her \$5-million-dollar deal. Her screenplay does not purport to express a social critique or commentary about the war. Nor does her screenplay attempt to sufficiently alter the work into a unique expression persuasive enough to be viewed as such. For these reasons, on appeal, the court should affirm the lower court's holding.

ⁱ Parks v. LaFace Records, 329 F.3d 437, 19 (6th Cir. 2003).

ⁱⁱ **U.S. Const.** amend. I

ⁱⁱⁱ **Theodore Schroeder, Free Speech for Radicals** 39 (Free Press Anthology, Enlarged Ed. 1916).

^{iv} Petition for a Writ of Certiorari, at 25, Elec. Arts Inc. v. Keller, <volume no.> <reporter> <first page> (S.Ct. 2013) (No. 13-377).

^v Wei-Huan Chen, Legal qualms lead to IndyFringe play's shutdown, **Indianapolis Star** (May 15, 2015, 6:01 AM),

<http://www.indystar.com/story/life/2015/05/15/legal-qualms-lead-indyfringe-plays-shutdown/27331099/>

^{vi} Yvonne Wingett Sanchez, Ex-Gov. Jan Brewer 'revenge makeover' ads taken down, **The Republic** (Sept. 3, 2015, 11:50 AM),

<http://www.azcentral.com/story/news/arizona/politics/2015/09/01/jan-brewer-beauty-makeover-ads/71496262/304>

vii Kevin L. Chin, Comment, The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity, 13 **Nw. J. Tech. & Intell. Prop.** 197, 200 (2015).

viii *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1976).

ix Id. at 576.

x Dora Georgescu, Note, Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity, 83 **Fordham L. Rev.** 907, 926 (2014).

xi *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo.2003) (en banc).

xii Parks, 329 F.3d 437 at 460.

xiii Id. at 461.

xiv Id. (internal quotations omitted).

xv Kevin L. Chin, Comment, The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity, 13 **Nw. J. Tech. & Intell. Prop.** 197, 212 (2015).

xvi Id. at 201.

xvii Id.

xviii Id.

xix *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 160 (3d Cir. 2013).

xx Id.

xxi Id. (citing another source).

xxii Georgescu, supra note x, at 932.

xxiii Id.

xxiv Hart, 717 F.3d 141 at 163.

xxv Id.

xxvi Id.

xxvii See Kevin Chin, supra note xv, at 213.

xxviii Petition for a Writ of Certiorari, supra note iv, at 5.

xxix Respondent's Brief in Opposition, at 13, Todd McFarlane, et al. v. Anthony R. "Tony" Twist, 110 S.W.3d 363 (Mo.2003) (No. 03-615).

xxx Doe, 110 S.W.3d 363 at 370.

xxxi Id.

xxxii Id.

xxxiii Id.

xxxiv Id. at 40.

xxxv Georgescu, supra note x, at 913.

xxxvi Hart, 717 F.3d 141 at 149.

xxxvii Georgescu, supra note x, at 934.

xxxviii Respondent's Brief in Opposition, supra note xxvii, at 13.

xxxix See Megan Carpentier, Hulk v Gawker: profound Consequences for free speech, **The Guardian** (Mar. 12, 2016, 7:00 AM), <http://www.theguardian.com/media/2016/mar/12/hulk-v-gawker-sex-tape-free-speech-first-amendment-privacy> (most cases won on appeal)

xl Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 **Cal. L. R.** 127, 178 (1993).

xli See Zacchini, 433 U.S. 562 at 567.

xlii See Id.

xliii Doe, 110 S.W.3d 363 at 371.

xliv Id.

xlv See Id. at 43. (noting the physical characteristics and typical clothing articles established a recognizable identity or likeness).