

MLRC Media Law Conference
Oct. 4-6, 2023
Lansdowne Resort Hotel, Leesburg, VA

Right of Publicity and Privacy Developments
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A. AI and Right of Publicity/Proposed Federal Legislation

- a. The Senate Judiciary Committee IP Subcommittee held a hearing July 12 purportedly on artificial intelligence and copyright. However, much of the discussion at the hearing was about potential enactment of a “federal right of publicity” bill. The scope of such a right seems quite different from that of state right of publicity laws, which are focused on “commercial” uses of NIL (*i.e.*, in advertisements and on merchandise) and often explicitly exclude uses in expressive works. *See* https://rightofpublicityroadmap.com/news_commentary/federal-right-of-publicity-takes-center-stage-in-senate-hearing-on-ai/
- b. There has been a sudden groundswell of interest in enacting a federal right of publicity bill, from record labels, actors, and others, including their allies in Congress (though “right of publicity” isn’t really the right label for what proponents want). *See* https://www.judiciary.senate.gov/artificial-intelligence-and-intellectual-property_part-ii-copyright
- c. The concern of most of the proponents is digital recreation of performances, such that the law would apply in expressive works and would need to be carefully distinguished from “traditional” statutory or common law ROP.

¹ Special thanks to Leslie Minora of Ballard Spahr LLP for her assistance in preparing these materials.

B. State Legislative Updates

- a. **New York’s Post-Mortem Right of Publicity.** New York’s right of privacy statute, N.Y. Civ. Rights Law §§ 50, 51, had existed almost unchanged since 1903. In the summer of 2020, after years of lobbying and negotiations, New York enacted a new privacy statute, N.Y. Civ. Rights Law § 50-f. Key provisions include:
 - i. **Post-mortem right of publicity.** The right applies to individuals who died while domiciled in NY and right extends for forty years after death. It covers uses of the deceased’s “name, voice, signature, photograph, or likeness” for advertising purposes, if and only if, those attributes “ha[d] commercial value at the time of his or her death, or because of his or her death.” *Id.* § 50-f(2)(a).
 - ii. **Expressive works exemption.** The law excludes from the scope of the new right uses in an extensive list of literary, musical, political, education, and newsworthy works. *Id.* §50-f(2)(d)(i).
 - iii. **Digital Replicas of Deceased Performers.** The law includes a novel right against deceptive uses of a digital replica of a deceased performer who died domiciled in New York. *See id.* § 50-f(2)(b). This right is more accurately described as a consumer-fraud provision than an intellectual property right.
 - iv. **Sexually Explicit Deep Fakes.** The bill also creates a right against unauthorized sexually explicit deep fakes, which closely resembles a law enacted in California in 2019. N.Y. Civ. Rights Law § 52-c; *see also* Cal. Civ. Code § 1708.86.
- b. **Louisiana’s Allen Toussaint Legacy Act.** This 2022 Louisiana statute includes both a “traditional” ROP and a digital replica provision. La. Rev. Stat. §§ 51:470.1, *et seq.*
 - i. The statute creates a transferrable, inheritable property right in one’s identity, regardless of “whether such rights were commercially exploited by the individual during the individual’s lifetime.” La. Rev. Stat. § 51:470.3.
 - ii. The definition of “identity” includes digital replicas, defined as “computer-generated or electronic reproduction of a professional performer’s likeness or voice that is so realistic as to be indistinguishable from the actual likeness or voice of the professional performer.” La. Rev. Stat. § 51:470.2(4), (6).
 - iii. The digital replica provision applies to a “use [of] a digital replica in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work, if the use is intended to create, and creates, the clear impression that the professional performer is actually performing in the role of a fictional character,” *id.* § 470.4(C), thus creating a new form of protection for actors against unauthorized uses of their digital replicas in movies and television shows.

- iv. The Act also generally exempts newsworthy, political, educational, and expressive works. La. Rev. Stat. § 51:470.5.

C. *Vidal v. Elster*, No. 22-704 – Upcoming Supreme Court Case

- a. The Supreme Court granted certiorari in this Lanham Act case challenging the U.S. Patent and Trademark Office’s denial of a trademark registration for “Trump too small.”
- b. Steve Elster sought to register the phrase for use on t-shirts, claiming that it was a reference to Sen. Marco Rubio’s comments about former President Trump during a 2016 presidential debate. The USPTO denied the registration under 15 U.S.C. § 1052(c), which prohibits registrations of marks if a mark “[c]onsists of or comprises a name...identifying a particular living individual except by his written consent,” and 15 U.S.C. § 1052(a), which bars registrations that “falsely suggest a connection with persons, living or dead.”
- c. Elster challenged the Office’s denial on First Amendment grounds, as his intended t-shirts were political commentary. The USPTO’s Appeal Board affirmed the denial under Section 1052(c), involving names of living individuals, and concluded the provision was not an unconstitutional restriction on speech.
- d. The Federal Circuit disagreed, ruling that Elster was engaged in protected speech and rejecting the government’s argument that its interest in protecting individuals’ rights of publicity could outweigh the First Amendment interests, at least where criticism of public officials was involved. See *in re Elster*, 26 F.4th 1328, 1337 (Fed. Cir. 2022) (“The right of publicity does not support a government restriction on the use of a mark because the mark is critical of a public official without his or her consent.”).
- e. The Supreme Court granted cert on June 5, 2023, to decide whether the denial of Elster’s registration was a mere condition on a government benefit, or instead a restriction on speech, subjecting it to heightened First Amendment scrutiny. Depending on how it analyzes this question, the Court may opine on the right of publicity for the first time in nearly 50 years, when it decided *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, in 1977.

D. *Raterman v. Pierre Fabre USA*, No. 22-cv-00325 (S.D.N.Y).

- a. **Overview.** Plaintiff, Patty Ratermann, is a fashion model. In 2020, she signed a single-use license with QuickFrame, Inc., which gave QuickFrame the right to use her likeness on Instagram and “only” on Instagram. A year later, she discovered that her likeness was also being used to advertise Pierre Fabre’s Avène skin care products on the Avène website, on the websites of Amazon, Ulta, and Walmart, and in physical advertisements.
- b. **Claims.** Ratermann sued QuickFrame, Pierre Fabre USA, Inc., Amazon, Inc., Walmart, Inc., Ulta Salon, Cosmetics & Fragrance, Inc., and Walgreen Co. for,

among other claims, violation of her right of privacy under Section 51 of the New York Civil Rights Law.

- c. **Defenses.** Relevant here, several of the online retailers, Amazon, Walmart, and Ulta, argued that they are immune from liability under Section 230 of the Communications Decency Act. Ratermann disputed this, both on the elements and by arguing that Section 51 is an intellectual property right.
- d. **Ruling.** The court agreed, ruling that all three elements of Section 230 were satisfied:
 - i. **First**, the court held that Amazon, Walmart, and Ulta all “fall comfortably within” the definition of “interactive computer service,” based on the allegation that they operate websites to sell products and that plaintiff’s likeness was published in connection with sales of Avène products.
 - ii. **Second**, the court concluded, these defendants were not information content providers, as plaintiff’s “likeness” was obtained from other companies and that the complaint did not allege “that Amazon, Walmart, or Ulta ‘materially contributed to what made the content itself unlawful.’”
 - iii. **Finally**, the court rejected Ratermann’s argument that her claim did not arise out “publishing” but rather, “exploiting her likeness for advertising purposes’ and ‘commercial gain,’” describing this as a “meaningless distinction” for purposes of a right of publicity claim.
 - iv. **Intellectual property claim.** The analysis did not end there, however. Ratermann argued that Sections 50 and 51 fall within Section 230’s exception for intellectual property claims. Defendants argued that this was an incorrect categorization and that “Sections 50 and 51 establish a statutory right to privacy and do not protect intellectual property.” Whether Sections 50 and 51 could be considered intellectual property claims was an issue of first impression.

Ultimately, the court agreed with the defendants that that the intellectual property exception did not apply here. It observed that “New York courts have long construed Sections 50 and 51 to provide a statutory right to *privacy*, not property.”
- e. **Order.** The court dismissed the claims against Amazon, Ulta, and Walmart. The court allowed Ratermann to proceed on her contract claim against QuickFrame and her Section 51 claim against Pierre Fabre and allowed her to amend her complaint (for the *fourth* time) with respect to her Section 51 claim against Walgreens and QuickFrame and her unfair competition claim against Pierre Fabre. She filed an amended complaint in February. Motions to dismiss have been filed, and the court’s decision remains pending.

E. *Huston v. Hearst Commc'ns, Inc.*, 53 F.4th 1097, 1104 (7th Cir. 2022).

- a. Overview.** Plaintiff, a *Good Housekeeping* subscriber, alleged that the inclusion of her name on mailing lists that Hearst sold was a violation of Illinois's right of publicity statute, 765 Ill. Comp. Stat. 1075/30(a). The District Court granted Hearst's motion to dismiss, ruling that "IRPA liability is limited to instances where a person's identity is used or held out to sell a separate product, and the mailing lists are not separate from Huston's identity." 53 F.4th at 1100. Plaintiff appealed.
- b. Ruling.** The Seventh Circuit affirmed the dismissal, although on different grounds. The Seventh Circuit ruled that Plaintiff had not stated a claim because she "did not allege that Hearst solicited mailing list purchasers by publicizing her information." *Id.* As her information was simply part of the information sold, she could not state a claim under IPRA. *Id.* at 1101 ("A person's identity cannot be employed to sell a product if their identity is only revealed after the sale is completed.").

F. *Doe v. Netflix*, Case No. 1:22-cv-01281-TWP-MJD, 2023 U.S. Dist. LEXIS 98011 (S.D. Ind. June 6, 2023).

- a. Overview.** Children of Dr. Donald Cline, a physician who fathered dozens of children by using his own semen to inseminate fertility patients, sued Netflix and others for privacy claims based on *Our Father*, a documentary about Dr. Cline. The documentary makers took care to protect the plaintiffs' identities, but Plaintiffs contend that the documentary disclosed their identities as Dr. Cline's biological children during a scene when an individual is pictured scrolling through names of her half siblings on an online DNA testing service's website.
- b. Claims.** Plaintiffs asserted claims for (1) public disclosure of private facts, (2) deception, (3) intentional infliction of emotional distress, (4) identity deception, and (5) theft.
- c. Defenses.** Defendants moved for judgment on the pleadings, arguing that the "the disclosed information was not private in nature" and that the First Amendment protected the documentary, which addressed newsworthy matters. They further argued that the use of plaintiff's information was "*de minimis*."
- d. Ruling.** Regarding whether the information was "private in nature," defendants had argued that plaintiffs had "voluntarily shared" their identities on the online testing services' websites. Plaintiffs, on the other hand, argued that their identities were only "shared with a select and authorized group of people," specifically their biological relatives. The court ultimately sided with the plaintiffs, holding that it was plausible under the circumstances that their identities were "private in nature."

On the public concern element, the court again sided with the plaintiffs, ruling that the "newsworthy story was the general topic of fertility fraud" and plaintiffs' identities were not "substantially relevant and directly related to the newsworthy story, nor a matter of public record."

The court rejected defendants’ “incidental use” argument, explaining that, while the doctrine is recognized in other jurisdictions, it is not currently recognized in Indiana.

- e. **Order.** The court allowed plaintiffs’ claims for public disclosure of private facts, deception, and intentional infliction of emotional distress to proceed but dismissed the claims for identity deception and theft.

G. Up and Coming Concerns:

- a. **Influencer issues.** What new challenges, claims, misunderstandings are arising out of the influencer space?
- b. **Celebrities and strip clubs.** Carmen Electra and other models and actors have filed a series of lawsuits against strip clubs across the country (including in New York, North Carolina, and Florida), alleging that those clubs had used their images in advertisements without their permission. Plaintiffs have sued for invasion of privacy (under common law and state statutes) as well as for federal trademark violations, with varying degrees of success.
- c. **Video Privacy Protection Act.** Statute originally enacted to protect individual video rental histories is now being used to sue online news outlets and streaming services. A flurry of new lawsuit have alleged that the use of Meta Pixel by various news websites, streaming services, and other online publishers allows for the identification of plaintiffs without their consent, in violation of the VPPA.

H. Updates on Cases from 2021 Breakout:

- a. **Elden v. Nirvana**, No. 21-cv-06836-FMO-AGR, 2022 U.S. Dist. LEXIS 159390, *12 (C.D. Cal. Sept. 2, 2022).
 - i. **Overview.** Plaintiff, whose photograph as an infant was used on the iconic cover of Nirvana’s Nevermind album, sued Nirvana, Universal Music Group, Inc., Warner Records, Inc., the David Geffen Company, and the individual art director and members of Nirvana (or their estates), claiming that the photograph constituted child pornography and an invasion of his right of privacy.
 - ii. **Dismissal.** After several opportunities to amend, the District Court dismissed the claim on statute of limitations grounds. Plaintiff has appealed, and argument is scheduled for October 18, 2023. *Elden v. Nirvana*, No. 22-55822 (9th Cir.).
- b. **Knapke v. PeopleConnect**, No. 2:21-cv-00262-MJP, 2021 U.S. Dist. LEXIS 150249 (W.D. Wash. Aug. 10, 2021).
 - i. **Overview.** Knapke sued PeopleConnect, the operator of Classmates.com, for using her name and photograph in advertisements on its website without her consent. She asserted a single claim under Ohio’s Right of Publicity statute,

Ohio Rev. Code Ann. § 2741.02. Classmates argued for dismissal on several grounds, including that Plaintiff's claim was barred by the CDA and that Plaintiff did not have a viable claim under the Ohio Right of Publicity law; that her claim fell within an exemption to the Right of Publicity law; that Classmates was protected under the First Amendment; and the dormant Commerce Clause. 2021 U.S. Dist. LEXIS 150249, at *3.

- ii. Order.** The trial court denied Classmates' motion to dismiss, ruling that Classmates was a content producer and outside the scope of the CDA, rejecting several arguments about the applicability of the Ohio Right of Publicity law, and ruling that the Ohio law did not violate the First Amendment. The court did exclude some of the challenged advertisements as involving literary works (yearbooks) but did not extend this to advertisements for Classmate's subscription services.
- iii.** This case has since been dismissed, but several similar cases remain pending and in the midst of disputes over whether the Court should compel arbitration.