

Update to the Commercial Value of Rights of Publicity

A Picture Is Worth a Thousand Words . . . or Sometimes a Million Dollars

BY ROBERT C. O'BRIEN AND BELA G. LUGOSI

The publicity surrounding the death of Michael Jackson has again brought to the forefront issues regarding rights of publicity, such as what law applies, who owns the rights, what contracts or wills govern use of the rights, what value the rights have, and so forth. This article updates the article published in the summer 2005 issue of *Entertainment and Sports Lawyer* covering the dollar amounts obtained from infringers of the right of publicity.

Right of publicity disputes involving celebrities and noncelebrities continue to find their way into courts. The evaluation of right of publicity cases is often difficult for both plaintiff and defense counsel. While many factors must be considered in evaluating individual cases, jury verdicts and settlements from past right of publicity cases can be instructive. The commercial value juries have placed on infringement of rights of publicity for both celebrities and noncelebrities show that while the rights of celebrities have more value, the rights of noncelebrities also have substantial value. This article reviews jury verdicts and settlements in right of publicity cases that have been reported in official reports as well as cases noted in various jury verdict search publications.

Pursuant to California Civil Code Sections 3344 and 3344.1, if liability for right of publicity infringement is found, the usual measure of damages for even deceased celebrities is: (1) any damage actually sustained or \$750, whichever is greater; (2) any profits attributable to the use and not taken into account in computing the actual damages; (3) punitive damages; and (4) attorneys' fees and costs. Other state statutes and common law decisions use similar measures of damages. Damages have also been awarded for emotional distress.

We review verdicts and settlements reported where celebrity plaintiffs brought actions in California and other states. We also review verdicts and settlements involving noncelebrity plaintiffs in California and other states.

Not included in this article are right of publicity cases resolved on legal grounds before damages were awarded. However, cases where damages were assessed but the case was later reversed are included. Cases where the defendant prevails can, in fact, result in an award in favor of the defendant for attorney fees. Some right of publicity statutes contain attorney fees provisions in favor of the prevailing party. For example, in *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002), the court awarded attorney fees of \$2.3 million and costs of \$150,000 to the defendant of the prevailing party in a right of publicity case involving Franklin Mint's use of the likeness of Princess Diana on commemorative plates and other products.

There are, of course, many cases not included in this article because they have not yet been resolved, were resolved by confidential settlements, or went to the jury but were not reported in an official report or jury verdicts publication.

CELEBRITIES

Juries have awarded a wide range of damages from very moderate amounts to multi-million-dollar verdicts based on the unauthorized use of a celebrity's image. The awards do not include punitive damages unless otherwise indicated.

California Cases

- (1) *Joyner v. Aktarzad*, Los Angeles Superior Court, 2007 WL 5156910; 19 Trials Digest 11th 21. (Unauthorized newspaper ad depicting track and field star Florence Griffith Joyner and her daughter.) \$18,000
- (2) *Unnamed Recording Artist v. Confidential Record Label*, Los Angeles Superior Court, 2006 WL 3932865. (Plaintiff's former record label's unauthorized use of a Web site, the domain name of which was the plaintiff's stage name, to sell record albums of competing artists.) \$80,000 settlement

- (3) *Sixx v. Vans Inc.*, Los Angeles Superior Court, 2005 WL 2155300; 31 Trials Digest 8th 15. (Unauthorized use of photographs of musician Nikki Sixx in magazine advertisements. Damages awarded based on expert testimony regarding the plaintiff's lost licensing fees and opportunities. \$488,555 also awarded for prejudgment interest, fees, and statutory costs.) \$600,000
- (4) *Stone v. Calabria*, Los Angeles Superior Court, 2005 WL 3334648. (Defendant posted magazine article, in which he implied that he had performed plastic surgery on Sharon Stone, on his Web site and in press kits promoting his business.) (Settlement whereby defendant agreed to perform free facial reconstructive surgeries on underprivileged children with deformities.)
- (5) *Oak Productions, Inc. v. Ohio Discount Merchandise, Inc.*, Los Angeles Superior Court, No. 081563 (filed Apr. 30, 2004); Lynda Gledhill, *Governor's Bobblehead Says Farewell to Arms*, S.F. CHRONICLE, Aug. 3, 2004, at A2. (Defendant produced bobblehead dolls that featured a gun-wielding Arnold Schwarzenegger in a business suit.) (Settlement whereby defendant agreed to produce the doll without the gun and to share profits from the doll with Schwarzenegger's charity.)
- (6) *Sirico v. Best Buy Co., Inc.*, Joint Stipulation for Dismissal of All Claims Pursuant to Settlement; Order, *Sirico v. Best Buy Co., Inc.* No. CV-01688 (C.D. Cal. 2003). (Unauthorized newspaper ad depicting cast of the television series *The Sopranos*.) \$1,500,000 settlement

THE COMMERCIAL VALUE JURIES HAVE PLACED ON INFRINGEMENT OF RIGHTS OF PUBLICITY FOR BOTH CELEBRITIES AND NONCELEBRITIES SHOW THAT WHILE THE RIGHTS OF CELEBRITIES HAVE MORE VALUE, THE RIGHTS OF NONCELEBRITIES ALSO HAVE SUBSTANTIAL VALUE.

Cases in Other States

- (7) *Woody Allen v. American Apparel, Inc.*, Stipulation of Settlement and of Dismissal Pursuant to Fed. R. Civ. P. Rule 41, and Order, *Woody Allen v. American Apparel*, No. 08-3179, (S.D.N.Y. May 18, 2009). (Unauthorized use of Woody Allen's image by retail clothing company on two billboard advertisements.) \$5,000,000 settlement
- (8) *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); Peter Slevin, *Settlement Commits Music Producers to Honor Rosa Parks*, WASH. POST, Apr. 15, 2005, at A03. (Civil rights icon sued record producer and musicians for using her name as a title for a song.) (Settlement of undisclosed, substantial cash amount and creation of educational programs about the life of Rosa Parks.)
- (9) *Tony Twist v. Todd McFarlane*, 2004 WL 1857796, aff'd sub nom. *Doe v. McFarlane*, 207 S.W.3d 52 (Mo. App. E.D. 2006). (Retired hockey player's action against publisher of the comic book *Spawn* for unauthorized use of his name, Tony Twist, for a character in the comic book who is also portrayed as an enforcer. In 2000, a jury found the defendant liable and awarded Twist \$24.5 million, but the judge overturned the verdict on First Amendment grounds. However, on appeal, after the appellate court affirmed the trial judge's decision, the Missouri Supreme Court vacated the trial judge's decision and remanded the case for a new trial. The jury in that new trial relied upon expert testimony regarding plaintiff's lost endorsement opportunities and plaintiff's entitlement to royalties from the use of his name in assessing damages.) \$15,000,000

NONCELEBRITIES

California and out-of-state juries have been willing to return significant verdicts even in cases where noncelebrities, including models, were involved and the unlicensed use was very limited.

California Cases

- (10) *Sahelian v. Orexis*, 2009 WL 1587039 (C.D. Cal.). (Unauthorized use of his name and trademark infringement of plaintiff's registered trademark.) \$75,000
- (11) *Del Amo v. Baccash*, 2008 WL 2780978 (C.D. Cal.). (Unauthorized use of 14 photographs of models on adult Web site. Court held plaintiff, who held right of publicity to the photographs, was entitled to statutory recovery of \$750 for each of the 14 photographs misappropriated.) \$10,500
- (12) *Christoff v. Nestle USA, Inc.*, Los Angeles Superior Court, 2005, Case No. EC 36163, rev'd 62 Cal. Rptr. 3d 122 (2d Cir. 2007). (Unauthorized use of photograph of noncelebrity model on instant coffee jars and ads for six years. Jury awarded actual damages of \$330,000 plus 5 percent of defendant's profits, which the jury found were attributable to defendant's use of plaintiff's photograph. Award overturned in 2007 after finding that Christoff's suit was governed by the state's single-publication rule. The California Supreme Court's opinion just came down. It is the final word in California at this time on the statute of limitations for right of publicity. The Supreme Court reversed the Court of Appeal and held that the single publication rule applies in California but affirmed the Court of Appeal in other respects. Thus, the Supreme Court affirmed the Court of Appeal's other holding that the two-year limitations period in Code of Civil Procedure Section 339 is applicable to right of publicity infringement claims brought under California Civil Code Section 3344 (the right of publicity statute).) \$15,000,000 (reversed)
- (13) *Ghafourpour v. Guindi*, Marin County Superior Court, 2004 WL 2160799. (Damages awarded for unauthorized use of both the name

and image of Ghafourpour on a Web site, for breach of contract, and for breach of fiduciary duty.)

\$2,931,901

- (14) *Campbell v. Van Nieulande*, San Diego Superior Court (June 26, 1997), 1997 WL 695162; 36 Trials Digest 2d 39. (Unlicensed use of noncelebrity person's photograph in local newspaper advertisement for hair company. Punitive damages of \$25,000 were also awarded.)
\$111,943
- (15) *Adoptante v. Mike Russel Enterprises Inc.*, Orange County Superior Court, 2003 WL 23309403. (Defendant advertised its products using plaintiff's name and image after expiration of contract with plaintiff.) \$78,164
- (16) *Monterrosa v. Genre Publishing Inc.*, 1995 WL 554701 (Cal. Super. Ct.); 9 Trials Digest 2d 40. (Plaintiff sued for commercial misappropriation claiming that defendants published a provocative photograph of plaintiff without his knowledge and consent. Plaintiff was Robert Monterrosa, a 26-year-old noncelebrity actor/model. Attorney fees of \$8,336 also awarded.) \$39,500
- (17) *Banks v. Charter Hospital*, Los Angeles County Superior Court, 1992 WL 681331; 12 Trials Digest 60. (Unlicensed use of noncelebrity patient's image in hospital advertisement.) \$269,500

Cases in Other States

- (18) *Courtright v. Youngblood*, 2004, Superior Court, Fulton County, Georgia; VERDICTSEARCH. (Heterosexual man's photograph used in advertisements for a gay establishment. Defendants were the photographer, the publisher of the newspaper, and the owner of the gay bar.) \$17,500 settlement ❖

Robert C. O'Brien is the managing partner of the Los Angeles office of Arent Fox LLP. Bela G. Lugosi is Of Counsel to the firm in Los Angeles. Lugosi and O'Brien have represented numerous plaintiffs and defendants in right of publicity cases and have served as counsel in several of the cases cited in this article.