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FEATURE

The Right to Do It for the 'Gram

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Celebrities are different from us in many ways, but there is one thing that celebrities and the rest of us undoubtedly have in common: social media. On social media, not even celebrities are protected from lawsuits. There have been several cases in recent years where celebrities have been sued for posting a photo of *themselves* on their social media pages. While it may be the celebrity's face and body in the picture, most of the time the photo is owned by the paparazzi who took the picture (or the paparazzi's employer). And when the celebrity posts the photo, well, that just gives the photographer an extra way to make some money.

This article reviews the right of publicity, its crossover with copyright law, and the implications of using photos—even if you are the main subject—on social media. Most of the time, we hear about celebrities suing others over the use of their pictures, such as when a celebrity's picture is used in an advertising campaign without the celebrity's permission. Here, we will be talking about situations where the celebrity is the one getting sued. Specifically, Instagram has been the medium for many of these lawsuits. But while Instagram has been around for the last decade, the right of publicity and copyright law have been around for much longer.

The Right of Publicity (California)

The right of publicity in California is governed by statute and common law.¹ The statute is pretty specific: every person has a right to their name, likeness, voice, photograph, and signature, in any manner, and the statute is in place to protect against the unauthorized use of any of the foregoing.²

Every person has a “likeness,” but a celebrity’s likeness is naturally more relevant when discussing the right of publicity. In entertainment contracts, it is quite customary for the celebrity to request approval over the use of the celebrity’s likeness. Note that a person’s likeness is *not* the equivalent of a photo of that person: “likeness, in the legal sense, means a representation of us used to promote ideas, products, services, or things.”³

In order to violate the statute, the use has to be for commercial gain (i.e., for advertising purposes)—for example, when a company uses a photo of someone without permission in order to sell a product.⁴ This is why a fan can take a selfie with a celebrity and post it online without getting into trouble, because while the fan may get an uptick in popularity, the fan did not gain anything commercially.

Furthermore, the person’s name, likeness, voice, photograph, and/or signature (as applicable) has to be so “directly connected” to the pursuit for commercial gain.⁵ If a company places a celebrity in the background of a party scene in the company’s advertisement and, with permission, places a different celebrity at the front of the scene for purposes of selling the company’s new brand of lipstick, then the celebrity in the background has less of an argument that the use of that celebrity’s picture was directly connected to the company’s commercial gain. On the other hand, if what the company was trying to advertise and sell with that party scene was high-end liquor, and the background celebrity was holding a glass, then that celebrity has a better argument—the photo was used to show potential consumers that this particular celebrity likes to attend parties that serve this type of liquor, and even further, that this celebrity drinks that liquor.

The use must result in an injury to the subject, such as financial injury.⁶ The background celebrity with the glass would have undoubtedly required compensation for the use of that celebrity’s photo in the advertisement.

Additionally, the person has to be “readily identifiable” in the photo.⁷ A celebrity who is unrecognizable in an artsy picture used to sell clothing will not have a strong case, nor will a celebrity in a picture used to sell shampoo with the celebrity’s back to the camera and unrecognizable hair. On the other hand, for someone like Kylie Jenner, who is known for her colorful neon wigs, her hair might be more readily identifiable in a photo.

Finally, it has to be a “knowing” use; i.e., the party using someone else’s likeness must have known they did not have that person’s consent.⁸ In some cases, the determination as to whether an individual’s permission was received is clear, such as where the company never reached out to the

celebrity (and the picture is not in the public domain), or very clear, such as where the company did reach out to the celebrity and the celebrity explicitly did not grant consent. Other times, that line gets a bit tougher to draw.

If the statute is violated, the calculation of monetary damages is the greater of (1) the plaintiff's actual damages or (2) \$750 for each unauthorized use, in addition to the defendant's profits that are attributable to the unauthorized use.⁹ Punitive damages are also possible.¹⁰

The statute does contain a few exceptions: no consent is needed for "news, public affairs, or sports broadcast or account, or any political campaign."¹¹ Exempting these uses likely allows for the ease of dissemination of these matters to the general public.

The common-law right of publicity in California is not as intricate. It involves whether one's identity was used without permission, and for an advantage that resulted in an injury, regardless of whether the identity was used commercially.¹²

To summarize, if I write a Facebook post stating that "I love Leonardo DiCaprio," I likely have not violated the California statute because even though I have used DiCaprio's name, I did not gain anything commercially. I also probably did not violate the California common law, because even though I used DiCaprio's name without his permission, I did not gain any advantage by posting that status (unless DiCaprio happened to see it and called me).

Crossover between the Right of Publicity and Copyright Law

It is typical for the right of publicity and copyright law to be related.¹³ The most common overlap may be found with respect to pictures—the person in a picture may not own the picture itself. Under copyright law, the creator of the piece of work such as a picture is the owner rather than the person in the picture: "The Copyright Act provides the creator of a work, not its 'subject,' with certain exclusive rights to exploit that copyrighted work."¹⁴ So while each person has a right of publicity under the California statute, each photographer typically has copyright rights over the photos. This crossover, coupled with social media, makes for a very litigious area.

The Right of Publicity and Social Media

Not everyone is familiar with copyright law, and even if people are aware of it, the ease and accessibility of social media make copyright law easy to ignore. With Instagram, the right of

publicity is now as vulnerable as ever. People post and repost photos all the time with no understanding and/or care about who owns the photo. In fact, tons of people have built accounts around doing just that—fan accounts are a popular attraction, where fans of celebrities dedicate entire accounts to photos, videos, and general posts about their favorite celebrities. However, very often, fans do not have the right to post or repost these photos. This is because if the fan did not take the photo, then the fan does not own the photo, and it is usually too burdensome for the fan to seek out the owner and pay for a license. If the fan even cared to try to obtain a license, it may not be clear who the owner is, or how to contact the owner, and the owner may not even respond. Instagram's own community guidelines prohibit people from sharing these types of photos: "Share only photos and videos that you've taken or have the right to share."¹⁵

As the number of fan accounts skyrocketed, Instagram caused some outrage when, a few years ago, it began deleting fan accounts.¹⁶ Some celebrities, like Ruby Rose, were against the deletions and expressed their discontent, aligning themselves with the fan account owners.¹⁷ Celebrities tend to like these fan accounts because they help celebrities promote their image and increase their status. And, when a celebrity is caught up in a scandal, fan accounts usually rise to the celebrity's defense.

Fans are not the only ones posting photos that they do not have the right to share. When finding a photo of themselves that they like, celebrities too post these photos—and sometimes get sued for it. These celebrities typically feel that if the photo is of them, then they should have the right to use it. However, copyright law often takes the opposite side and dictates that their use of these photos is an unauthorized use.

Popular Cases

A number of celebrities have been the targets of these lawsuits. Gigi Hadid, for example, has already faced a few lawsuits, mainly in New York. In New York, the right of publicity is governed only by statute and not by common law.¹⁸ The statute covers a person's name, portrait, picture, and voice, and the use needs to be for advertising or trade purposes.¹⁹ Note that the statute is missing the word "likeness." "Courts have construed the portrait/picture provisions of the statute somewhat broadly, to include 'any recognizable likeness, not just an actual photograph.'"²⁰

In 2019, Hadid was sued by Xclusive-Lee, a paparazzi agency that took a picture of Hadid that she later posted on her Instagram account.²¹ Hadid's lawyer argued that because Hadid had made contributions to the picture, such as smiling for the picture, her use of the picture was fair use—

i.e., a defense to the copyright law such that Hadid could use the picture without owning it or having the owner's permission.²² "Making coveted celebrity photos 'fair use,' as Hadid's lawyers argued, would open the field for who can repost certain photos and could breathe new light into popular fan accounts that have thus far been limited in what they can post because of copyright claims."²³ Hadid herself expressed frustration with the lawsuit, joining a number of other celebrities who have spoken against the copyright law. Her frustration lies in the fact that it is a photo of *her*, and as such, she strongly believes that she should have the right to post it. Before deleting the photo from her Instagram account, the photo received 1.6 million likes.²⁴ This particular lawsuit ended up being dismissed; Xclusive-Lee did not register the picture for copyright by the time it filed the lawsuit,²⁵ which seems to be a technical, material point that judges are looking for in order to side with the copyright owner.

In 2017, Curtis "50 Cent" Jackson was sued by photographer Christopher Pasatieri for reposting a photo of himself that Pasatieri took in 2014, while 50 Cent was performing in concert.²⁶ Here, 50 Cent was specifically using the photo for advertising purposes—to promote his brand of headphones, SMS Audio, and to promote his show on BET, *50 Central*.²⁷

At the end of 2019, Splash News and Picture Agency sued Jennifer Lopez in California for posting a photo of her and Alex Rodriguez out to breakfast that a photographer from Splash had taken.²⁸ Splash argued that by Lopez posting the photo to her Instagram account with 102 million followers (at that time, which has since increased to 129 million followers at the time of this writing), she caused the photo to lose its value, as paparazzi photos are most coveted when they are fresh: "Because of the subjects' celebrity status, and the photograph's quality and visual appeal, (Splash and its photographer) stood to gain revenue from licensing the photograph. But (Lopez's) unauthorized use harms the existing and future market for the original photograph."²⁹ It is worth noting that the photo in question was taken around two years before Splash filed the lawsuit,³⁰ which raises questions as to Splash's true intentions. While Splash originally sought \$150,000 in damages and an injunction against Lopez to keep her from using Splash photos, in early 2020, the agency voluntarily dismissed "with prejudice the entire action as to all claims asserted against all parties," presumably meaning that the parties reached a settlement agreement.³¹

Kim Kardashian has put a different twist on the conflict. Photographer Saeed Bolden sued Kardashian for reposting Bolden's picture of Kardashian and her husband Kanye West on her Instagram account.³² Bolden is seeking the amount of profits Kardashian received from her post and is even going so far as to seek punitive damages.³³ To avoid this problem in the future,

Kardashian hired her own personal photographer and informed her fans that unless Kardashian tags a third-party photographer, they can repost her photos and face no issues.³⁴

Overall, photographers base their argument on the fact that their livelihoods are threatened by the reposting of their photos by celebrities online to their millions of followers, since photographers' jobs depend on taking novel photos of celebrities. If celebrities post the photographers' photos online themselves, then the photos become less valuable to the actual photographers. Celebrities, on the other hand, are frustrated with the fact that these are literally pictures of themselves that they are not allowed to share and/or use and feel that they should have such right given the stress they endure from having to deal with the paparazzi. While copyright law is clear, the right of publicity and the rampage of these kinds of lawsuits in recent years may call for a new exception with respect to the entertainment industry, although that has not happened yet.

So the next time we want to *do it for the 'gram*, let's make sure we have the right to.

Endnotes

1. See CAL. CIV. CODE § 3344; *California Right of Publicity Law*, DIGITAL MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/california-right-publicity-law> (last visited Aug. 21, 2020).

2. See CAL. CIV. CODE § 3344.

3. *When Photographers Need a Photo Release or Use of Likeness*, ROCKET LAW., <https://www.rocketlawyer.com/article/when-you-need-a-photo-release.rl> (last visited Aug. 21, 2020).

4. CAL. CIV. CODE § 3344(a).

5. *Id.* § 3344(e).

6. *Id.* § 3344(a).

7. *Id.* § 3344(b).

8. *Id.* § 3344(a).

9. *Id.*; see also *What Is the “Right of Publicity”?*, ADLIL GROUP, <https://www.adlilaw.com/what-is-the-right-of-publicity> (last visited Aug. 21, 2020).
10. CAL. CIV. CODE § 3344(a); see also *California Right of Publicity Law*, *supra* note 1.
11. CAL. CIV. CODE § 3344(d).
12. See *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992); *California Right of Publicity Law*, *supra* note 1.
13. Kathryn J. Fritz & Michael Davis-Wilson, *Litigation Alert: Ninth Circuit Rules on Copyright Preemption of Right-of-Publicity Claims*, FENWICK (Apr. 10, 2017), <https://www.fenwick.com/publications/pages/the-ninth-circuit-finds-right-of-publicity-claims-preempted-by-copyright-when-likeness-not-used-in-advertising.aspx>.
14. *Id.*
15. *Community Guidelines*, INSTAGRAM HELP CTR., <https://help.instagram.com/477434105621119> (last visited Aug. 21, 2020).
16. Taylor Lorenz, *Chaos Ensues as Instagram Deletes Millions of Accounts*, BUS. INSIDER (Dec. 18, 2014), <https://www.businessinsider.com/chaos-ensues-as-instagram-deletes-millions-of-accounts-2014-12>.
17. See, e.g., Alex Bruce-Smith, *Ruby Rose Slams Instagram for Deleting Fan Accounts, Not Cyber Bullies*, PEDESTRIAN (Mar. 9, 2016), <https://www.pedestrian.tv/entertainment/ruby-rose-slams-instagram-for-deleting-fan-accounts-not-cyber-bullies>.
18. See N.Y. CIV. RIGHTS LAW art. 5; *New York Right of Publicity Law*, DIGITAL MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/new-york-right-publicity-law> (last visited Aug. 21, 2020).
19. N.Y. CIV. RIGHTS LAW § 50; see also Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481 (2012).
20. *New York Right of Publicity Law*, *supra* note 18 (quoting *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 451 (S.D.N.Y. 2008)).

21. Paige Leskin, *The Copyright Lawsuit Accusing Gigi Hadid of Posting a Paparazzi Photo She Didn't Have the Rights to Has Been Thrown Out*, BUS. INSIDER (July 18, 2019), <https://www.businessinsider.com/gigi-hadid-copyright-infringement-lawsuit-over-instagram-paparazzi-photo-dismissed-2019-7>.

22. *Id.*

23. *Id.*

24. Michelle Kaminsky, *Gigi Hadid Sued over Unauthorized Publication of Paparazzi Photo on Instagram*, FORBES (Jan. 29, 2019), <https://www.forbes.com/sites/michellekaminsky/2019/01/29/gigi-hadid-sued-over-unauthorized-publication-of-paparazzi-photo-on-instagram>.

25. Leskin, *supra* note 21.

26. Carl Lamarre, *50 Cent Sued by Photographer for Posting Unlicensed Photos on Instagram: Report*, BILLBOARD (Oct. 3, 2017), <https://www.billboard.com/articles/columns/hip-hop/7982031/50-cent-lawsuit-unlicensed-photos-instagram>.

27. *Id.*

28. Maria Puente, *Jennifer Lopez Sued by Paparazzi Agency for Copyright Infringement*, USA TODAY (Oct. 7, 2019), <https://www.usatoday.com/story/entertainment/celebrities/2019/10/07/jennifer-lopez-sued-paparazzi-copyright-infringement/3900908002>.

29. *Id.*

30. *Id.*

31. Ryan Naumann, *Jennifer Lopez Settles \$150,000 Legal Battle over Alex Rodriguez Days before Super Bowl*, BLAST (Jan. 31, 2020), <https://theblast.com/c/jennifer-lopez-dating-alex-rodriguez-super-bowl-performance-shakira-settles-lawsuit-over-instagram-photo-days-before-half-time-miami>.

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33. *Id.*

34. *Id.*

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