

MICHIGAN CASE LAW ON THE RIGHT OF PUBLICITY

Michigan Courts

- *Pallas v Crowley, Milner & Co.*, 322 Mich 411 (1948). First Michigan case to recognize misappropriation of likeness as one of the four elements of the invasion of privacy tort. Plaintiff was a woman whose photo was used in advertising for defendant's products. Court vacated dismissal of claim and remanded for trial. But also recognized First Amendment limitations, noting a "fundamental difference" between use of likeness in advertising and in a legitimate news story.
- *Pallas II*, 334 Mich 282 (1952). Affirmed jury verdict for defendant. Plaintiff lost because she was a model who consented to her photograph being taken.
- *Edwards v. Church of God in Christ*, 2002 Mich App Lexis 390 (March 8, 2002). Plaintiff was member of church choir whose performance was recorded and published on a CD. Distinguishing federal cases that held in favor of Tom Waits and Bette Midler for use of their voices, the court refused to recognize a right of publicity in an *unknown* singer's voice. Although the court did not put it in these terms, it essentially found that plaintiff's voice had no commercial value. The court did, however, allow a claim of "negligent recording" to survive.
- *Eadara v. Henry Ford Health Systems*, 2004 Mich App Lexis 384 (February 10, 2004). Defendant doctor cited the plaintiff doctor's name in a grant proposal. Plaintiff's right of publicity claim was dismissed because his name was not used for pecuniary gain.
- *Battaglieri v. Mackinac Center for Public Policy*, 261 Mich App 296 (2004). Plaintiff was president of the Michigan Education Association. Defendant think-tank quoted (and criticized) plaintiff in a fund-raising letter. Although defendant used plaintiff's image for pecuniary gain, it did so in the course of speech on matters of legitimate public concern. Therefore, relying on the Restatement and an assortment of cases from other states, the court held the letter privileged by the First Amendment as "newsworthy" speech rather than a "use in trade."
- *Bowens v. Aftermath Entertainment*, 2005 Mich. App. Lexis 988 (April 19, 2005). Plaintiffs were Detroit police officers and city officials who suppressed a video that Defendants had intended to play during their concert at Joe Louis Arena. Defendants caught the exchange on film, and used the footage to create a documentary on the incident. Following *Battaglieri*, *Nichols*, and *Ruffin-Steinbeck*, the court dismissed Plaintiff's right of publicity claim, finding the documentary to be newsworthy speech privileged by the First Amendment. (Note: Subsequent appeals were on separate issues.)

- *Arnold v. Treadwell*, No. 283093 (Mich. App. July 16, 2009). Plaintiff was a stripper and aspiring model who posed for a photo shoot with Defendants, who later submitted some of the pictures for publication in a men's magazine. Although her publicity claim was dismissed by the trial court, the Court of Appeals reversed. It found a genuine question of fact as to whether Plaintiff's image had commercial value, supported by (1) the fact that Defendants submitted the photos for publication, and (2) Plaintiff's past work as a fashion model, extra in a music video, and a stripper.

Sixth Circuit

- *Memphis Development Foundation v. Factors ETC, Inc.*, 616 F.2d 956; 1980 (6th Cir. 1980). Held as a matter of first impression, based on public policy and Tennessee law, that the right of publicity is not descendible.
- *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). Seminal case that found a right of publicity in Michigan common law. Plaintiff Johnny Carson sued over use of the phrase "Here's Johnny" in association with toilets. The court found the phrase sufficiently evocative of Carson's identity. Notes that the right is only for celebrities.
- *Carson II*, 1983 U.S. App. Lexis 30004 (6th Cir. March 2, 1983). Denies rehearing, confirms that *Pallas* recognizes a right of publicity.
- *Reeve v. United Artists Corporation*, 765 F.2d 79 (6th Cir. 1985). Plaintiff was the estate of a boxer whose famous bout was recreated in the film *Raging Bull*. Court dismissed on the basis that the right is not descendible in Ohio, thus avoiding "difficult First Amendment issues."
- *Carson III*, 810 F.2d 104 (6th Cir. January 26, 1987). Upholds damages award in the amount of defendant's profits, and a nationwide injunction.
- *Elvis Presley Enterprises, Inc. v. Elvisly Yours Inc.*, 817 F.2d 104 (6th Cir. April 28, 1987). Acknowledged that Tennessee courts had rejected *Memphis Dev. Found.* and held the right of publicity to be descendible.
- *Cawley v. Swearer*, 1991 U.S. App Lexis 13536 (6th Cir. June 20, 1991). Defendant plagiarized plaintiff's work. But publicity claim was dismissed because plaintiff did not allege that defendant exploited his likeness for commercial gain.
- *Elvis Presley Enterprises II*, 936 F.2d 889 (6th Cir. 1991). The Court narrowed an injunction against "all uses" of Elvis's image to prohibit only commercial uses (and specifically exempting protected speech activity) and limited the global scope to "the United States and its possessions." On the facts of the case, the court also rejected the defenses of laches and acquiescence.

- *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000). Plaintiff was a character actor who appeared in the movie *Predator*. Defendant published a set of “Micro Machine” toys based on the movie, including one based on Plaintiff’s character. Citing *Carson*, the court held that the right is only for celebrities, and that Plaintiff had not proven that his likeness had commercial value. The Court rejected a copyright preemption defense. It also commented that case law from all jurisdictions should be considered, although it rejected a 9th Circuit case that permitted actors to assert rights in the characters they play. Also rejected a Lanham Act false designation of origin claim.
- *Ruffin-Steinback v. de Passe*, 267 F.3d 457 (6th Cir. 2001). Plaintiff, a member of the Temptations, sued over his portrayal in a TV mini-series about the band. Adopting the district court’s reasoning and its reliance on the Restatement, the court found the mini-series to be First Amendment privileged speech rather than a use in trade.
- *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298 (6th Cir. 2001). Defendant violated plaintiff’s right to use the “Eames” name with chairs. The court noted that the right of publicity limits what might have otherwise been “fair use” under the Lanham Act. The opinion contains a lengthy rejection of the laches and acquiescence defenses on the facts of the case. Tracing the evolution of common law since *Memphis Dev. Found.*, the court found a descendible right of publicity in Michigan. The court followed *Elvis Presley Enterprises* in restricting the scope of the injunction to commercial, non-speech uses, but excepted states that explicitly refuse to recognize a post-mortem right of publicity.
- *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003). Found a genuine question of fact regarding whether Defendants violated Rosa Parks’ right of publicity by naming a song that had nothing to do with her “Rosa Parks.” The court noted that, because the right of publicity is broader than the rights protected by the Lanham Act, it is more likely to impinge on a defendant’s First Amendment rights. But, after lengthy analysis, the court was not convinced that Defendants’ use of the name was commentary or that it had artistic relevance to the song.
- *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003). Defendant painted a montage of various events in Tiger Woods’ career. The court found the paintings to be non-commercial speech privileged by the First Amendment. It also rejected a Lanham Act false endorsement claim (which, for the purposes of this case, it treated as virtually equivalent) on First Amendment grounds, noting that the expressive quality of the work made likelihood of confusion irrelevant. The case contains a lengthy explanation of the public policy behind the right of publicity, and the reasons for its transfer from the Restatement of Torts to the Restatement of Unfair Competition. The court found an “inherent tension” between the right of publicity and the First Amendment, and undertook a broad examination of relevant case law from across the country.

- *Andretti v. Borla Performance Industries, Inc.*, 426 F.3d 824, (6th Cir. 2005). Refused to award damages where plaintiff could not prove injury. But upheld a worldwide injunction.
- *Hauf v. Life Extension Foundation*, 09-1938 (6th Cir. Dec. 27, 2011). Upheld dismissal of plaintiff's publicity claims on the ground that they had signed a valid release. (Note: This may answer the district court's observation in *Armstrong*, infra, that there is no 6th Circuit law defining "consent" in the right of publicity context.)

Eastern District of Michigan and Western District of Michigan

- *Janda v. Riley-Meggs Inc.*, 764 F. Supp. 1223 (E.D. MI 1991). Defendant used name of Plaintiff researcher in a manner that suggested he endorsed Defendant's product. Court allowed right of publicity claim to proceed. Opinion is short on analysis, but it does note that use of plaintiff's name increased defendant's sales.
- *Ruffin-Steinback v. de Passe*, 17 F. Supp.2d 699 (E.D. MI 1998). First Amendment prohibits TRO or preliminary injunction against publication of TV mini-series.
- *Ruffin-Steinback II*, 82 F. Supp. 2d 723 (E.D. MI 2000). Goes into greater detail than the 6th Circuit (which adopted the district court's reasoning) as to why the unauthorized depiction of a person's life story is protected by the First Amendment. Relies heavily on the Restatement.
- *Nichols v. Moore*, 334 F. Supp. 2d 944 (E.D. MI 2004). Plaintiff James Nichols sued Michael Moore over use of Nichols' image in the movie *Bowling for Columbine*. Citing *Pallas*, among other cases, the court held the claim barred by First Amendment because subject matter was matter of legitimate public concern. Same privilege extends to advertising for the movie.
- *Neal v. Electronic Arts, Inc.*, 374 F. Supp. 2d 574 (W.D. MI 2005). Athlete sued over his depiction in the *Madden NFL* video game. Claim was barred, because plaintiff had licensed the rights to his likeness to another entity that had approved the use.
- *Ouderkirk v. People for the Ethical Treatment of Animals, Inc.*, 2007 U.S. Dist. Lexis 29451 (E.D. MI March 29, 2007). PETA activists gained access to a chinchilla ranch under false pretenses, took video footage, and used it to expose alleged animal cruelty. Plaintiff ranchers sued over use of their likeness in the video. Following *Battaglieri*, the Court found the video to be advocacy speech on matters of legitimate public concern protected by the First Amendment.

- *Hauf v. Life Extension Foundation*, 547 F. Supp. 2d 771 (W.D. MI 2008). Plaintiffs were a mom and son. The son had overcome cancer using Defendant's supplements. The mom then became an activist for cancer patients. Defendant used plaintiffs' recovery story in its membership campaign literature. The court allowed the claim to proceed, despite a lack of evidence supporting damages, finding it possible that the plaintiffs could demonstrate that their likenesses had commercial value among the cancer patient or alternative medicine communities. (Note, though, that the court applied the "no set of facts" interpretation of Rule 12(b)(6). The claim might not have survived under the stricter *Twombly/Iqbal* standard.)
- *Romantics v. Activision Publishing, Inc.* 532 F.Supp.2d 884 (ED MI 2008) (denying preliminary injunction); 574 F. Supp. 2d 758 (E.D MI 2008) (granting summary judgment). Plaintiff band sued over use of their song "What I Like About You" in the video game *Guitar Hero*. Plaintiffs did not own the song copyright, but claimed that the performers in the game sounded so much like Plaintiffs as to infringe their "unique sound." Citing *Edwards*, the court doubted whether Michigan recognized a right of publicity in a person's voice. Regardless, such a right could only extend to the Plaintiffs' actual voices, not their "style" of singing the song. Additionally, the court found the claim barred by both the First Amendment and copyright preemption. It also found no confusion to support a false endorsement claim.
- *Armstrong v. Eagle Rock Entertainment, Inc.* 655 F.Supp.2d 779 (E.D. MI 2009). Plaintiff was one of more than a dozen members of the jazz-fusion band Mahavishnu Orchestra. Defendants released on DVD a 35-year-old recording of a performance by the band that included Plaintiff. Plaintiff was also visible in a photo on the DVD packaging. The court found it possible that Plaintiff could establish commercial value. It found a material question of fact as to whether the plaintiff consented to the recording. The court held the use of Plaintiff's picture on the packaging to be protected by the First Amendment, but that under *Zacchini v. Scripps-Howard*, 433 US 562 (1977), the First Amendment allowed the claim to proceed as to the performance itself. Nevertheless, the court found that claim preempted by the Copyright Act. Finally, the court treated plaintiff's "false designation" claim as one for "false endorsement," and held this claim barred by the First Amendment under *ETW*.