PUBLICITY RIGHTS AND RATIONAL VALUATION

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1. INTRODUCTION

"THE SKY'S THE LIMIT!" says Indiana University law professor Marshall Leaffer regarding the legal enforcement of publicity rights in celebrity names and likenesses that are used in advertising, promotions, and other marketing activities.[1] And Prof. Leaffer has a happy prognosis for any litigator with an aggressive instinct, lots of time, and a wealthy client: "Rights of publicity are seemingly impeded only by a lawyer's imagination".[2]

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[1] Quoted in E. Gardner, "What's in a Name?", Nov. 10, 2010, at http://www.abajournal.com/magazine/article/whats_in_a_name/

[2] Id.

The professor's remarks beg an economist's distinction. First, there are many good reasons to protect both celebrities and their fans from misuses of names and likenesses that may displace professional earnings or create false or misleading endorsements. On the other hand, publicity rights may be the tactical instruments for claims and contrivances that are simply aimed to garner more rents for the already rich and famous, with little extra benefit for the rest of us.

With regard to the potential harms to professional careers, human cannonball Hugo Zacchini prevailed in 1977 when the U.S. Supreme Court upheld his publicity right against a television news channel that aired news footage of his fairgrounds act in a manner that presumably reduced the viewing audience for his live performance.[3] And from Tinseltown, Bette Midler and Tom Waits won court awards (respectively in 1988 and 1992) from two unauthorized voice impersonations that appeared on nationally broadcast television commercials.[4]

Turning to the dubious, rent-seeker Vanna White prevailed in 1992 against Samsung for a VCR commercial that depicted a faceless letter-turning robot standing before a *faux* Wheel of Fortune.[5] Subsequently, rapper 50 Cent settled with Taco Bell over an

[3]Zacchini v. Scripps-Howard Broadcasting, Co., 433 US 564 (1977).

[4]Midler v. Ford Motor Co., 849 F. 2d 460 (9th Cir. 1988); Waits v. Frito-Lay. 978 F. 2d. 1093 (9th Cr. 1992).

[5]White v. Samsung, 971 F. 2d 1395 (9th Cir. 1992). See also Wendt v. Host International, 125 F.3d 806 (1997), which award rights of publicity to actors in the television show *Cheers* for use of their likenesses in

unlicensed promotion where the food chain publicly asked him to change his name to 79 Cent,[6] and hockey tough guy Tony Twist punched out a $15 million award from a comic book publisher for its use of a gangster character bearing the same name.[7] And in matters that enforced the rights of the ungrateful dead, the Estates of Laurel and Hardy and the Marx Brothers prevailed against theatrical productions that imitated the mannerisms of their famed comedy groups,[8] while the family of Martin Luther King busted American Heritage Productions for the manufacture and sale of MLK's image in a line of head statues sold for home display.[9]

While there may be no end to lawyerly arguments that use statute, precedence, and imaginative biology to extend the publicity rights to robots, the deceased, and the terminally vain, a sensible economic expert may yet provide hope to defendants that battle Righteous Celebrities over minor transgressions of a personal likeness. As a testifying economist who has worked in several such matters, I will below suggest two

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robots affixed in airport bars.

[6]S. W. Ware, Taco you very much, 50 Cent wins suit, New York Post, November 24, 2009, http://www.nypost.com/p/news/business/taco_you_very_much_cent_wins_lawsuit_co2OpNhz4C2Iqp1gAOtsWI#ixzz1hO7tEog9 (retrieved December 22, 2011).

[7]Associated Press, Tony Twist wins $15 million in brawl with comic-strip creator, July 12, 2004, at http://www.firstamendmentcenter.org/tony-twist-wins-15-million-in-brawl-with-comic-strip-creator (retrieved December 22, 2011).

[8] Price v. Hal Roach Studios, Inc. 400 F. Supp. 836 (S.D.N.Y. 1975); Groucho Marx Productions, Inc., v. Day & Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981).

[9]Martin Luther King Center v. American Heritage Prods., .296 S.E. 2d 697 (Ga. 1982).

reasonable procedures that can be used to determine just desserts for those celebrities able to prevail on the liability part of a right of publicity claim.

2. RESIDUAL VALUE FROM ENDORSEMENT CONTRACTS

In a recent valuation matter, an Academy Award winning actress sued the producer of a clothing accessory for its use of her image on an interior page of its commercial website. The producer imprinted the image by reproducing fully a licensed shot taken from a movie in which the actress wore the company's product as apparel prop. The actress attempted to argue that the proper valuation of the publicity right should be equal to the amount she earned on a recent worldwide magazine campaign that was based on a product endorsement for a beauty product in which she had become engaged. The allowable publicity base in the endorsement was all international women's fashion magazines.

Our friend from the Red Carpet is comparing apples and oranges. In an endorsement contract, the licensee generally acquires the right to display over a specified multi-year period the licensor's visual image in a variety of powerful broadcast and/or print media, as well as personal appearances. In exchange for monetary consideration, the licensor agrees to devote a number of service days for photo shoots, personal

appearance, and travel. Payment to a celebrity in an endorsement thus implicates the value of the celebrity's time.

The value of each service day for a movie star can be established from the common practice in the film industry for compensating actors per diem for time spent in post-production.[10] When multiplied by the number of service days required in the endorsement contract, this imputed payment for professional time should be deducted from any total consideration to the celebrity paid under the proffered endorsement contract. Only the remaining payment after deduction for service time is properly viewed as due compensation for use of the implicated publicity right.

Once determined, the residual publicity right should be adjusted to reflect differences in channel size, as measured by the reader or viewer count. Comparing the engaged magazine subscribership with the audience of the specific website at issue, many more viewers viewed the magazine ads. Consequently, it is improper to impute equal values to publicity rights on two alternative venues of such differing scopes. Rather, valuations on any channel should be adjusted proportionally by relative viewership.

It is arguably proper also to adjust valuations of publicity rights for differences in ad efficacy. This is presumably measured by the advertisement rate, expressed as cost per thousand (or CPM). For example, the expected CPM for a four-color full page ad in

[10] For example, if an actor is paid a sum of $24 million in a film production period lasting forty eight days, the per diem for an additional service day in post-production would be $500,000 (= $24 million/48 days).

Glamour – an implicated periodical for the actress' endorsement -- is around $60.[11] The comparable CPM for a standard display ad on a beauty/fashion website is around $3.[12]

Based on reasonable numbers, a very rough adjustment of hypothetical celebrity payments from a global endorsement to a limited website equivalent is illustrated as follows.

Initial endorsement amount:	= $10.0 million
Minus: *Value of service time: 8 days x $500,000 per diem*[13]	= $4.0 million.
Remainder:	= $6.0 million
Times: *Expected Web Impressions*[14]/*Expected Magazine Readers*[15]	= 1/100
Times: *Ad Efficacy (as measured by Relative CPM*[16])	= 1/20
Result:	= $3,000

[11] Rates for 2013 appear in https://m.condenast.com/sites/all/files/pdf/media_kit_print_3299.pdf. The estimate of $50 is based on a rate card price for a full page four color ad ($240,511) apportioned over a rate base of 2.25 million. I then imputed a reasonable discount based on a hypothetical adjustment for negotiations, agency commission, volume discount, etc.

[12]Data for website advertising are reported by Adify in each year. Publicly available numbers for 2009 are reported at http://www.labnol.org/internet/average-cpm-rates/11315/; retrieved December 28, 2013)

[13]Supra note 12.

[14] Data on website impressions and unique visitors are made available by Google Analytics.

[15]Audited data on magazine readership can be found at FIPP (http://www.fipp.com) is a U.K. based concern that characterizes itself as the worldwide magazine media association for companies and individuals involved in the creation, publishing, or distribution of quality content. FIPP now has more than 700 member companies, which include 56 national magazine associations, 502 publishing companies with international interests, and 146 suppliers to the industry and associated organizations, in 60 countries. FIPP represents more than 6,000 member magazine titles, which include almost all of the world's leading magazine brands.

[16]Supra notes 13 and 14.

Once the necessary adjustments are taken into account, the residual valuation for website use of a celebrity likeness is some fraction of the full endorsement.

3. VALUING A TRADEMARK EQUIVALENT

Zooey Deschanel is a film actress and singer who has appeared in movies, television programs, and music concerts. As a plaintiff in the matter of *Zooey Deschanel v. Steven Madden, Ltd. et al.,* (Los Angeles Division, Superior Court of California), Ms. Deschanel put on a different kind of show. The actress contended that her agency Creative Artists in August, 2010 entered an oral contract on her behalf with Steven Madden Retail, a wholly owned subsidiary of Steven Madden Ltd. Under the terms of this purported contract, Madden was to pay to Ms. Deschanel for the right to use the actress' name and likeness in connection with the manufacture, marketing, and sale of shoes and accessories. Prior to her execution of any designated task, Madden apparently repudiated the agreement.

Among other grievances, the Plaintiff's suit contended that Madden – along with co-defendants Kohl's Department Stores and Iconix Brand Group (a/k/a Candies) – came improperly to manufacture, distribute, advertise, and sell a line of girls' shoes with the name *Zooey* affixed thereto. This use of her first name alone was apparently

unconscionable to Ms. Deschanel, who saw it, *inter alia,* as a violation of her presumably *exclusive right* to use the name *Zooey.*

As a matter of invasiveness, Defendants here made no personal reference to the actress other than using the first name *Zooey* to represent a line of shoes. It is then safe to say that the Defendants' use of *Zooey* is comparable in an economic sense to that of using a hypothetical trademark in the same first name. Indeed, first names alone can indeed be trademarked and so registered.[17]

An economic expert in a valuation of either a publicity right or a trademark damages would then need to determine actual damages based on a hypothetical market exchange that might have transpired in a "but for" world. This is the amount that a willing buyer would actually pay a willing seller in arms-length negotiation for the right to license and use – in this case -- the hypothetically trademarked first name *Zooey.*

Ms. Deschanel's own history here betrayed her notion that her first name had any such commercial value in the world of merchandising. The actress had made no efforts to register a trademark for any part of her legal name until August 25, 2011 (*after* the beginning of litigation with Madden). At this late point, the actress sought protection for

[17]For example, singer Cher Bono in July, 2011 registered for the fourth time her trademarks for use of her first name *Cher* in connection with entertainment services and personal fragrances, while Barbra Streisand registered in 2008 for similar rights for the use of her name *Barbra* in jewelry, tote bags, and stationery.

the full name *Zooey Deschanel* in entertainment services. *At no point did the actress herself even attempt to register a trademark for her first name alone.*

To attempt to do so could have been problematic indeed, as others beat her to the punch. A full list of uses of the name *Zooey* appears in the website Trademarkia.[18] In particular, HMX Poland has owned since the year 2006 a trademark in the name *Zooey* for use in connection with its line of assorted clothing, *which included footwear*. The name *Zooey* now appears in other commercial connections made by Relic, Elliott Lucca, Cole Haan, Moda Spana, and EZ Freeze Water Bottles, *inter alia.*

The question for an economic expert is to determine the price that a willing buyer would actually pay Ms. Deschanel (or some other willing agent) for use of the first name *Zooey* in connection with a line of shoes. Any buyer would so understand that the name currently has a registered trademarked use by another party (HMX Poland) in a related apparel line. Moreover, the buyer would understand that Ms. Deschanel herself had never attempted to register a trademark for her first name alone.

So the question is clear. How much would a willing buyer pay for the right to use a name that is already trademarked independently? And the answer for Ms. Deschanel is quite clear as well. **ZERO.**

[18] http://www.trademarkia.com/trademarks-search.aspx?tn=zooey. (Retrieved October 14, 2010)

4. CONCLUSION

Over the recent course of time, prominent celebrities (including acting Govs. Arnold Schwarzenegger and Jesse Ventura) have brought legal actions against private parties alleged to have caused great economic harm by using their image in some relatively limited commercial manner. While celebrity plaintiffs may understandably inflate the value of their images beyond any reasonable measure, it is not acceptable for economic experts to commit the same errors.

ABOUT THE AUTHOR

Michael A. Einhorn (mae@mediatechcopy.com, http://www.mediatechcopy.com) is an economic consultant and expert witness active in the areas of intellectual property, media, entertainment, damage valuation, licensing, antitrust, personal injury, and commercial losses. He received a Ph. D. in economics from Yale University. He is the author of the book *Media, Technology, and Copyright: Integrating Law and Economics* (Edward Elgar Publishers), a Senior Research Fellow at the Columbia Institute for Tele-Information, and a former professor of economics and law at Rutgers University. He has published over seventy professional and academic articles and lectured in Great Britain, France, Holland, Germany, Italy, Sri Lanka, China, and Japan.

In the technology sector, Dr. Einhorn worked at Bell Laboratories and the U.S. Department of Justice (Antitrust Division) and consulted to General Electric, AT&T, Argonne Labs, Telcordia, Pacific Gas and Electric, and the Federal Energy Regulatory Commission. He has advised parties and supported litigation in matters involving patent damages and related valuations in semiconductors, medical technologies, search engines, e-commerce, wireless systems, and proprietary and open source software.

Litigation support involving media economics and copyright damages has involved music, movies, television, advertising, branding, apparel, architecture, fine arts, video games, and photography. Matters have involved Universal Music, BMG, Sony Music Holdings, Disney Music, NBCUniversal, Paramount Pictures, DreamWorks, Burnett Productions, Rascal Flatts, P. Diddy, Nelly Furtado, Usher, 50 Cent, Madonna, and U2.

Matters involving trademark damages have included the Kardashians/BOLDFACE Licensing, Oprah Winfrey/Harpo Productions, Madonna/Material Girl, CompUSA, Steve Madden Shoes, Kohl's Department Stores, *The New York Observer*, and Avon Cosmetics. Matters in publicity right damages have involved Zooey Deschanel, Arnold Schwarzenegger, Rosa Parks, Diane Keaton, Michelle Pfeiffer, Yogi Berra, Melina Kanakaredes, Woody Allen, and Sandra Bullock.

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This biography is also available at *http://www.jurispro.com/MichaelEinhorn*