

## The Promise and Perils of Commercial Partnering with a Personality

By Jonathan Faber

Commercial use of a person's name, image and likeness permeates advertising, co-branded products, merchandise, reality shows and social media. Bob Dylan has a licensed whiskey line,<sup>1</sup> and Willie Nelson, Bob Marley, Snoop Dog, and Kathy Ireland have branded CBD oils.<sup>2</sup> Mathew McConaughey goes ice fishing in Lincoln commercials,<sup>3</sup> and cycling legend Major Taylor was brought to life in Hennessy's *Wild Rabbit* campaign.<sup>4</sup> Social media influencers are compensated for something seemingly as innocuous as a social media post.

These are examples of licensed use of a personality, but some uses of a personality occur without permission. Companies may be one social media post away from potential liability, like when Katherine Heigl filed a \$10 million claim after Duane Reade reposted on Twitter a picture of Heigl walking out of one of their stores.<sup>5</sup> Michael Jordan was awarded \$8.9 million for a congratulatory advertisement by a Chicago-area grocery store.<sup>6</sup> The COVID-19 outbreak has spawned licensed and unlicensed facemasks from Jimi Hendrix to Marilyn Monroe, thanks to the fluidity of and lack of oversight on maker marketplaces.<sup>7</sup> Even the breakout figure of the pandemic has been memorialized via Dr. Fauci doughnuts.<sup>8</sup>

Whether a negotiated license or an unauthorized use, there is value in affiliating with notable personalities. What are the benefits? How does one go about doing so? Is there a difference between living and deceased personalities? And what's it worth? Great questions, but answers are elusive. The licensing industry, as well as the process of serving as an expert witness to value an unauthorized use, is secretive by design and usually bound by contractual confidentiality and protective orders. Nevertheless, illumination can be provided by considering the benefits of partnering with a personality, understanding best practices, and analyzing publicly-available sources of information concerning valuations.

### *Commercial Partnering With A Personality*

The business and process of partnering with a personality or valuing an unauthorized use, whether through advertising, endorsement, sponsored posts, merchandise, collectibles involves a multitude of variables. The experience and skill of the person handling the assessment is critical, as is that person's diligence in preparing, researching and studying the matter at hand. There is no *Kelley Blue Book* for licensing rates. Still, there are standard customs and practices in the industry, and deals get done all the time.

Aligning with a personality occurs so frequently for a simple reason: it works. Advertising and manufacturing is expensive. Promotional campaigns and consumer products benefit from differentiation. By tapping into the attributes and qualities a personality is (or was) known for, or by directly communicating with the audience of that personality, a product, service or advertising campaign can achieve greater traction and stand out in a competitive environment. This in turn creates a better return on the investment. Companies partner with notable personalities, living or deceased, to bring credibility or attention to a campaign, to make a product seem more relevant, or to reach a target demographic or that personality's audience:

Manufacturers seek recognizable personalities to be associated with their product, and advertisers want the magnetic power of a celebrity image to draw consumers' attention to their advertisements. The combination of these elements explains the emergence of celebrity licensing as a growth industry for the new millennium.<sup>9</sup>

That was stated almost twenty years ago, and has proven true.

From the personality side of the equation, engaging in commercial use can be beneficial both financially and strategically. Many personalities (or their advisors) have become aware of the benefit of seeking federal trademark registration on some aspect of the personality's name or persona. A trademark must be supported through actual use, so engaging in commercial use of a personality can help substantiate trademark applications, which serve as valuable holdings in the intellectual property portfolio of a personality.

To be clear, a personality need not have registered trademarks to engage in licensing, or to have a viable claim for unauthorized use. In general, licensing generates revenue, strengthens the intellectual property and profile of the personality or his or her estate, and ensures a degree of control to the personality or estate. And nothing counteracts unauthorized goods better than supply meeting demand through licensed goods.

Some common reasons for granting a license, from either the personality or licensee's perspective, therefore include:

1. generating revenue from royalties or license fees;
2. using third-party experience and distribution to bring licensed goods to market;
3. achieving rapid market entry;
4. expanding into new markets, regions, products or fields;
5. obtaining the right to use others' intellectual property via cross-licensing;
6. providing a touchpoint with fans of the personality;
7. counteracting unauthorized goods;
8. substantiating or expanding intellectual property recognition
9. differentiating an advertising campaign or consumer product from competitors;
10. aligning with the reputation, attributes, or audience of the personality.

The tradeoff is that licensing can cause a loss of direct control over a product, forfeiture of contact with customers, or create dependence on a licensee for exploitation. Nevertheless, these are navigable risks. When done well, licensing can also reinforce advertising and other initiatives of either the personality or the licensee partnering with the personality.

Illustrating that licensing and valuations are not exact sciences, one can quickly reference times when partnerships with personalities did not work out. A living personality can become embroiled in controversy that creates issues for the licensee or sponsor, such as those involving Lance Armstrong, Barry Bonds, Aaron Hernandez, Michael Vick, Brittany Spears, Kate Spade, and Madonna.<sup>10</sup> For these reasons, moral clauses often are a required element in agreements with a living personality. While these examples each involved distinct issues, the title of the *Business Week* article *Dead Men Don't Screw Up Ad Campaigns*<sup>11</sup> seems prescient.

Indeed, death is not the end for earnings from a person's name, image or likeness. Consider Forbes' annual *Top Earning Dead Celebrities* list.<sup>12</sup> In 2019, Michael Jackson held the top spot at a reported \$60 million, and George Harrison bookended the lowest slot at a reported \$9 million. Elvis, Arnold Palmer, Prince and John Lennon ranged from \$12 million to \$39 million. Often, the passing of a notable person leads to a surge in streams, downloads, or sales of goods, but then those personalities do not make the list again as may prove true of Nipsey Hustle or XXX Tentacion, both on the 2019 list. In contrast, certain personalities endure and continue to have commercial opportunity. In a *Huffington Post* article covering the 2017 Licensing Expo, I stated:

...There is a mystique that surrounds [departed celebrities], from an era in which every waking moment of a person's life was not broadcast and live-streamed. They were larger than life characters and figures...[they are] emblematic of things they were famous for—Marilyn Monroe is not just glamorous, she IS glamor; Babe Ruth is not just a great baseball player, he is THE greatest baseball player ever...; Jimi Hendrix wasn't just a great guitarist—he revolutionized almost every aspect of what it meant to be a guitar hero and rock star; Vince Lombardi isn't just the greatest coach of all time, his name is on the NFL trophy that every team quests toward...They personify these ideals and attributes, they take people back to a simpler, idealized time....<sup>13</sup>

While it is seemingly impossible to add to a deceased icon's resume, the CNBC campaign entitled *Winning*, which was licensed by my company, Luminary Group on behalf of Vince Lombardi's family, led to a posthumous Emmy nomination for Coach Lombardi. The licensing industry is full of surprises.

### *The Intellectual Property Rights of a Person*

All of these instances implicate the rights pertaining to a personality's name, image, likeness or other identifying elements. While trademark has a role, the common denominator in commercial use of a personality is the Right of Publicity. A personality does not need trademarks to have a viable Right of Publicity.<sup>14</sup> Michael Jordan has registered trademarks, but Mathew McConaughey and Dr. Fauci do not. The right is not just for celebrities, and any business with a website, social media, advertising, or even just customers or employees, might intersect with the Right of Publicity.

The Right of Publicity is the *right to control the commercial use of one's identity*. Identity, in turn, can include "name, voice, signature, photograph, image, likeness, distinctive appearance, gestures or mannerisms."<sup>15</sup> Perhaps the best way to think of this criteria is whether a specific person is *unequivocally identifiable* from a given use. The right generally survives after death and ensures that a rights owner can decide not only the terms by which a commercial use occurs, but *whether* it will occur. This principle connects to a hot-button issue regarding taxation of publicity rights in estates like those of Michael Jackson and Prince. On one side of the continuum, Robin Williams' will imposed a 25-year moratorium on commercialization of his publicity rights;<sup>16</sup> on the other, the estate of a figure like Michael Jackson faces issues addressed

in a February 1, 2017 *Bloomberg Businessweek* article which reported that the IRS says Jackson's Right of Publicity is worth \$434 million, but the estate says "it was worth a mere \$2,105."<sup>17</sup>

The Right of Publicity is a state-based doctrine<sup>18</sup> but has been affirmed by the Supreme Court of the United States.<sup>19</sup> South Dakota and Alabama are among the latest to enact Right of Publicity legislation, and in 2012, I was responsible for a critical amendment to Indiana's Right of Publicity statute.<sup>20</sup> The majority of Right of Publicity statutes include significant limitations and broad exemptions for First Amendment purposes.<sup>21</sup> Commentators seem to ignore these points when proclaiming that the Right of Publicity is a threat to the First Amendment or a too difficult to comprehend, but "[a]s much intellectual fun as it may be to assail right of publicity law as philosophically incongruous or incomprehensible, it is quite possible to analyze it in an organized, straightforward fashion that has practical value."<sup>22</sup>

### *A Primer for Licensing of People*

While any negotiation for a licensed use of a personality may take twists and turns, there are standards characterizing many negotiations or valuations. Licensing a personality can incorporate various forms of intellectual property such as the Right of Publicity, trademark, and copyright in some circumstances. Generally speaking, a license is a contractual allowance for a third party to use the rights owner's interest in one's name, image likeness or other aspects of persona. A well-drafted license will define the elements of the personality to be used, in what media, for how long, for what goods, and the compensation arrangements. As with any contract, a license to use a personality should provide a clear start and end date, payment provisions, how royalties (if applicable) are calculated, and other negotiable contract points.

A license for merchandise typically involves a royalty, whereas advertising typically involves a flat fee. This is a fundamental distinction upon which most transactions divide, but has proven to be an area of considerable debate in an expert context. The definition of gross sales and net sales can be outcome determinative. That said, it is less important whether a contract uses the term gross or net than it is how the contract defines permissible deductions from gross royalties. Most definitions of net begin with gross less the permissible deductions. Most license agreements only allow a few carefully defined deductions or adjustments. If not carefully defined, the result could be a license yielding no royalties at all. This phenomenon seems to show up in litigation over unauthorized uses with some regularity, along with the familiar infringer's refrain of "1) we didn't mean any harm; 2) we didn't benefit from it; 3) we think we did you a favor; and 4) everyone else is doing it, why are we being singled out?"

In general, a royalty will apply for sales of product that a personality is attached to, such as the person's name on the product. This distinction contrasts with advertising uses, which typically involve a flat fee. In a recent national advertising campaign for Jeep which featured Babe Ruth, my client was not paid a royalty on sales of Jeep products. Similarly, when Major Taylor, who died in 1932,<sup>23</sup> was the subject of a national advertising campaign for Hennessy, the arrangements were not based on a royalty on sales of Hennessy's goods. If the use is one that is appropriately royalty-bearing, additional elements come into play such as the possibility of an advance against expected royalties during a defined period of time, as well as the potential of a

guaranteed minimum royalty during the term of the license, renewal procedures, samples, and licensor's credit line.

Quality control should be explicitly outlined in a license to use a personality. While the Right of Publicity does not have the quality control requirements incumbent on a trademark owner when licensing a trademark to a third party, it is advisable for the rights owner to exercise careful review of mock ups, prototypes, and samples of the finished product. Unless by express agreement of the parties, the license should make clear that the licensor maintains ownership of all underlying intellectual property. A credit line designating the licensor should be included to the extent possible. Because the license is granting access to the licensor's intellectual property, it is logical that provisions like choice of law, jurisdiction, termination provisions or other boiler plate language be in the licensor's favor.

Those responsible for handling a personality's business interests must ensure that existing contractual obligations are understood and navigated when any new opportunity is being considered. These can involve obvious conflicts, such as endorsing a beverage company but appearing in public with a competitor's product, but also less obvious scenarios like complimentary goods and how certain brands may already be aligned. Similarly, if a particular keystone opportunity is being pursued, it would be a mistake to partner with a lesser brand or secondary product if doing so squelches the potential for the keystone program to be as significant, and optimized, as possible.

Ultimately, the goal for licensing of a personality should be *optimization*, which is driven by understanding the objectives of the person, or rightsholder, then understanding the marketplace and how the pieces fit together, what opportunities exist for a rightsowner, and what a fair market value compensation for a given use looks like. Optimization can be achieved by strategically implementing a robust branding program with each element of the program complimenting the program overall, and with the focus, support and cooperation of the rights owner(s). This can lead not only to maximized revenue streams, but also to creation of entirely new outlets. In an optimized state, the public has the opportunity to engage with a brand through social media, destinations, entertainment, and merchandise. As optimization is reached, other elements pertaining to the personality, perhaps including album sales or streams, and music publishing interests, book sales, on-demand movies, other licensed goods, concerts, or social media outlets also benefit.

An optimized licensing program would include intentionally targeted product categories, with market-leading companies. If appropriate and viable, an optimized licensing program may include a museum exhibit, an official documentary, a major motion picture biopic, a Broadway show, an integrated social media strategy, and a strategically developed merchandise and branding program that compliments each of these endeavors. But finding licensing and co-branding partners is a delicate process. It often takes time, and trust. When a potential partner senses that a rights owner is hard to deal with, that potential partner may simply go a different direction. No licensee wants to spend the time, effort, and investment wrestling with an uncooperative rights owner.

Under the heading of best practices, a use of a personality that has exclusivity attached typically will require a premium. If the use is unauthorized, a valuation may appropriately consider whether the unauthorized use precludes pursuit of an authorized use in the same airspace, or if the unauthorized use somehow damages the opportunities for authorized uses.

Policing and enforcement are important components in managing personality rights and licensing programs. Discernment is critical in conducting policing actions, sweeps of maker marketplaces (like Amazon, eBay, Etsy, Zazzle, RedBubble, to name a few).<sup>24</sup> Coupled with the dramatic rise in unemployment claims, infringements may be on the rise, but not all infringements are created equal. For example, in early 2019 a Girl Scout troop member repackaged *Samoas* as *Mamoas*, with Jason Mamoas as *Aquaman* on the packaging. It is not clear how many boxes were altered and sold, but the Mamoas boxes appeared to be fairly well-executed if one puts aside the potential trademark, trade dress, copyright and right of publicity issues involved. I submit this would have been a candidate for resolving amicably. Perhaps the aforementioned Dr. Fauci donuts fall in this category.

For a personality or representative, now may be a good time to conduct sweeps and take down notices, frustrating as such efforts can be since sellers often relist the goods, and the forum companies seem to consider that 1) identifying unauthorized goods is entirely the rights owner's responsibility, and 2) shutting a reported infringement down should be the extent of theirs.

These points are addressed in a Department of Homeland Security report from January 2020 on counterfeit goods. Among other things, the report stated: “[w]hile counterfeit and pirated goods have been sold for years on street corners, alleys, and from the trunks of cars, these illicit goods are now marketed to consumers in their homes through increasingly mainstream e-commerce platforms and third-party online marketplaces that convey an air of legitimacy.”<sup>25</sup> If a company is promoting, profiting from, and even producing infringing items, it makes sense for the facilitating forum to share in responsibility.

### *Valuing the Use of a Person*

What's it worth? It might be a potential license, a buy out or transfer of rights, or pending litigation. The inquiry alone ties to the enduring popularity of *Antiques Roadshow*, the usefulness of *Kelley Blue Book*, or the role of an expert witnesses in a litigation context. Lawyers have a vested interest in having a sense of a claim's value before launching litigation. A transactional attorney, business owner, or licensing executive may deftly handle this question on a daily basis, or may be over- or underestimating value. I have made a point of studying, teaching, and writing about the issues in this article. There are practical considerations in play, as well as limitations on the rights concerning individuals and exempted uses, exclusions that can exist or conflicts when a celebrity is endorsing competing brands, context, etc.).

Valuations typically are fact-specific. An expert typically will select a valuation approach to follow, and may consider income history of the personality or the potential licensee (or infringer), comparable transactions in the marketplace, and publicly available sources that speak to value in specific transactions. It is a good idea to understand the parties and examine the details closely. Who is the personality? What is (or was) he or she famous for? What is the

sweet spot for commercial utilization? What are the vulnerabilities? What are the governing plans for expansion or licensing or branding? What was going on at the time of the unauthorized use, or will be transpiring when the licensed use hits the market? A proposed use may be good in a vacuum but it may touch on something that the personality is planning to launch as an equity owner, and the proposed use is a shadow of what the big plans are. Conversely, a personality may not have much of an income history, but if an unauthorized use taps into the singular area that he or she is (or was) known for, the casualty effect of the unauthorized use could be higher than for a personality who seemingly has no limits on outlets or potential uses.

A framework for considering the value of a particular person in an advertising context involves looking at: 1) the extent of famousness of the person; 2) the degree of endorsement conveyed by the use or association; 3) the visibility, reach, and range of the use; and 4) the relationship between the personality and the brand or message of the campaign.<sup>26</sup> Beyond the preceding criteria, valuing a use requires understanding 1) the compensation levels a personality can command; 2) the compensation appropriate for a given use; and 3) whether personal obligations are involved. In a negotiation, asking for some form of Most Favored Nations can be a useful strategy to provide assurances.

There are various ways one might go about seeking comparables. The best sources often are other agreements involving the personality in question or on the other side of the equation, agreements for use of other personalities from the licensee (or infringer). External reference points can be useful, such as published data that may exist which requires industrious searching, information that has become public through litigation and court filings, or databases that catalog such information. As an example of a source that can provide context in relation to sponsored posts and influencers, the following data and figures has been reported:

	<u>Followers</u>	<u>Reported compensation per post</u>
1 Eleonora Pons	35,300,000	\$144,000
2 Huda Kattan	37,800,000	\$91,300
3 Cameron Dallas	21,200,000	\$86,600
4 Sommer Ray	21,200,000	\$86,600
5 Zach King	20,300,000	\$82,900
6 Felix Kjellberg	17,300,000	\$70,800
7 Logan Paul	16,000,000	\$65,400
8 Jake Paul	12,100,000	\$49,600
9 Joanna Gaines	11,000,000	\$45,000
10 Nash Grier	10,000,000	\$41,100 <sup>27</sup>

In contrast to so-called influencers, Michael Jordan has exhibited considerable staying power in a licensing context. In April 2020, ESPN released the Michael Jordan documentary *The Last Dance*, once again bringing Jordan into millions of living rooms. In 2009, when Michael Jordan was inducted into the Basketball Hall of Fame two Chicago-area grocery stores, Jewel and Dominick’s, ran advertisements congratulating Jordan. The Dominick’s advertisement featured Michael Jordan’s name, the number 23, Chicago Bulls coloration, a silhouette reminiscent of Jordan’s Jumpman logo, and the statement “You are a cut above” over a steak coupon.”<sup>28</sup>

I am frequently asked about the jury award of \$8.9 million in the Dominick’s case.<sup>29</sup> Many were surprised that a congratulations led to such a substantial award; however, a congratulatory message in a paid advertisement for a grocery store is not the same as a person congratulating Jordan in person. The argument that the advertisements were nothing more than a benign congratulations might carry more weight if the advertisements had not included the grocery stores’ names, logos, mottos, or coupons. In any event, the advertisements were professionally designed promotional campaigns in a prominent publication by businesses seeking to associate with Michael Jordan at a time when he was in the news for a career-defining accomplishment.

Jordan has a signature steakhouse restaurant and an online steak company based on his namesake, and the complaint specified that Jordan would not have agreed to such an advertising campaign, “especially not to sell steaks in direct conflict with his restaurants.” The value of such association has been consistently demonstrated through Jordan’s licensed uses and endorsements.<sup>30</sup> The starting fee for an authorized association with Jordan, based on testimony provided on August 12, 2015 is \$10 million.<sup>31</sup> In fact, a recent report indicates that Jordan once turned down a deal estimated to be worth \$100 million.<sup>32</sup>

While Michael Jordan holds many records, he no longer holds the record for the highest jury award for a Right of Publicity claim. In early 2020, I testified in a jury trial on behalf of the family of a business pioneer whose name and backstory became the centerpiece of a successful brand. The jury aligned with my valuation and awarded \$9.6 million, which I am told is the highest amount ever awarded for a Right of Publicity claim, surpassing Michael Jordan’s \$8.9 million grocery store award. This outcome was accomplished by citation and explanation of industry practices, reliable sources, and the context that working in this specialized industry relies on, including many of the points touched on above. Anytime I can claim to have broken one of Michael Jordan’s records, I will take it, even if the record will surely be broken again.

### *Seeing Around Corners*

Technology propels the growth of celebrity licensing into scenarios like live concerts with Tupac or Ronnie James Dio holograms,<sup>33</sup> new performances by deceased actors in *Star Wars* and *Hunger Games*,<sup>34</sup> or the 2019 announcement that a “new” James Dean movie was in development.<sup>35</sup> Other forms of technology, like the evolving realm of social media to DeepFakes technology,<sup>36</sup> will continue to create opportunities as well as pitfalls in relation to commercial use of a personality.

The need for a meaningful Right of Publicity is evident, and if there is value in associating with a personality, that value deserves to be protected. Professor J. Thomas McCarthy says “Perceptive legal commentators do not shy away from defending the right to control commercial use of identity as a self-evident natural right of every person.” Similarly, Professor Nimmer has stated:

It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.<sup>37</sup>



In dealing with these issues on a daily basis, I have the opportunity to consult with rights owners, understand their unique priorities and concerns, and navigate the challenges involved in developing a business around licensing these rights and protecting a rights owner's legacy. I also see market forces at work and how these rights are exploited—sometimes with, sometimes without permission. Professor McCarthy, citing a separate law review article, notes that "...the real policy choice is not between rich celebrities and the needy public, but between celebrities and corporate advertisers who want to use the aura of celebrity to help sell products...."<sup>38</sup>

As Vince Lombardi Jr. has stated: "Nothing anyone can do is going to enhance my father's reputation, but they certainly can detract from it."<sup>39</sup> His point is taken, but a posthumous Emmy nomination is a nice addition to anyone's resume.

Jonathan Faber is Managing Partner and General Counsel of Luminary Group LLC and an attorney with McNeelyLaw, LLP. Visit [www.LuminaryGroup.com](http://www.LuminaryGroup.com) and [www.RightOfPublicity.com](http://www.RightOfPublicity.com) for more information.

---

<sup>1</sup> *Heaven's Door Whiskey Is Here*, April 27, 2018. <https://www.bobdylan.com/news/heavens-door-whiskey-is-here/>.

<sup>2</sup> See *Celebrity Licensing and Litigation: The Times They Are A-Changin'*, Jonathan Faber, TOTAL BRAND LICENSING, May 14, 2019. [https://issuu.com/totallicensing/docs/total\\_brand\\_summer\\_19/58](https://issuu.com/totallicensing/docs/total_brand_summer_19/58). Also see *Iron Maiden beer passes sales of 20 million pints*, <http://ultimateclassicrock.com/iron-maiden-trooper-beer/>. Metallica whiskey: <http://www.metalsucks.net/2018/08/29/metallicas-blackened-whiskey-is-now-available-in-the-jar-oh-ah/>.

Motorhead beer, whiskey, wine and Slayer, Police, Grateful Dead, and the Pogues wine: <https://www.loudersound.com/features/iron-maiden-beer-motorhead-whisky-the-best-rock-and-metal-beers-wines-whisky-and-gift-ideas>. *Converse Unveils New Footwear Collection with Legendary Band Black Sabbath*, Nike News, January 6, 2014. <https://news.nike.com/news/converse-unveils-new-footwear-collection-with-legendary-band-black-sabbath>. *Suicidal Tendencies unveil Converse footwear*, Robert Ham, August 30, 2018.

<https://consequenceofsound.net/2018/08/suicidal-tendencies-converse-footwear-apparel-new-track/>. *Motorhead song featured in ad for Vans' Rowley Pro Lite shoes*,

[http://www.antimusic.com/news/13/November/ts08Motorhead\\_Song\\_Featured\\_In\\_TV\\_Commercial.shtml](http://www.antimusic.com/news/13/November/ts08Motorhead_Song_Featured_In_TV_Commercial.shtml).

<sup>3</sup> *2020 Lincoln Aviator Commercial With Matthew McConaughey Going Ice Fishing Is Visual Poetry*, Dan Mihalascu, CarScoops, December 30, 2019. <https://www.carscoops.com/2019/12/2020-lincoln-aviator-commercial-with-matthew-mcconaughey-going-ice-fishing-is-visual-poetry/>.

<sup>4</sup> See <https://www.shirtcity.us/jimi-hendrix-face-mask-535>, <https://brandingforum.org/advertising/hennessy-wild-rabbit-campaign/>.

<sup>5</sup> *Katherine Heigl Lawsuit to Explore Nature of Corporate Tweets*, THE HOLLYWOOD REPORTER, April 10, 2014 <https://www.yahoo.com/movies/s/katherine-heigl-lawsuit-explore-nature-corporate-tweets-analysis-050000350.html>

<sup>6</sup> Jordan says 'it was never about the money' after \$8.9M jury award, Kim Janssen, Chicago Tribune, August 21, 2015. <https://www.chicagotribune.com/business/ct-michael-jordan-dominicks-case-0822-biz-20150821-story.html>.

<sup>7</sup> Brand Owners Faced With Mask Conundrum, LICENSING INTERNATIONAL, April 11, 2020.

<https://licensinginternational.org/news/accessorizing-for-a-pandemic/>.

<sup>8</sup> See <https://rightofpublicity.com/dr-fauci-doughnuts>.

<sup>9</sup> *Licensing Deskbook*, Legal & Business Guide (2002 Cumulative Supplement).

<sup>10</sup> See *Athletes who've lost endorsements after scandals*, CBS News, October 23, 2012.

<https://www.cbsnews.com/media/athletes-who-ve-lost-endorsements-after-scandals/>; also see *Expensive mistakes: When celebrity endorsement deals go wrong*, Gillian West, The Drum, November 20, 2012.

<https://www.thedrum.com/news/2012/11/20/expensive-mistakes-when-celebrity-endorsement-deals-go-wrong>.

<sup>11</sup> Mark Hyman, *Dead Men Don't Screw Up Ad Campaigns*, BUSINESS WEEK, March 10, 1997.

<sup>12</sup> *The Top-Earning Dead Celebrities of 2019*, Zack O'Malley Greenburg, *Forbes*, October 30, 2019. <https://www.forbes.com/sites/zackomalleygreenburg/2019/10/30/the-top-earning-dead-celebrities-of-2019/#347fa51b4e5e>.

<sup>13</sup> *'Delebrities' (Dead Celebrities) Are Very Big Business*, Ben Arnon, *Huffington Post*, June 2, 2017. <https://www.huffpost.com/entry/delebrities-dead-celebrities-are-very-big->

---

[business\\_b\\_592fa717e4b00afe556b0b27?guccounter=1&guce\\_referrer=aHR0cHM6Ly9zZWZyY2gueWFob28uY29tLw&guce\\_referrer\\_sig=AQAAAE0K7GVJs1IT0WV6khyplGDPID1EQucCDdm8xIFj5mpgEklM6oS3fh8wSDg3czYJTXydzgsQEO4k1Mq7VUSe3c63N10dgryT0iLTLKJg1OT-ZYz7XOBPMdx1vPxn6Ko-wBWNHdekF2FIFfoekG9jR3s88HID5eMQ5u24uBmFBXc](https://www.gucccounter.com/?guccounter=1&guce_referrer=aHR0cHM6Ly9zZWZyY2gueWFob28uY29tLw&guce_referrer_sig=AQAAAE0K7GVJs1IT0WV6khyplGDPID1EQucCDdm8xIFj5mpgEklM6oS3fh8wSDg3czYJTXydzgsQEO4k1Mq7VUSe3c63N10dgryT0iLTLKJg1OT-ZYz7XOBPMdx1vPxn6Ko-wBWNHdekF2FIFfoekG9jR3s88HID5eMQ5u24uBmFBXc).

<sup>14</sup> These factors underscore why the Right of Publicity needs strong advocacy and educational efforts. Even copyright, trademark and patent often are referred to as if they are interchangeable terms. See *Trade-Wrongs: Misadventures in Un-Intellectual Property*, in RES GESTAE, October 2004.

<sup>15</sup> INDIANA CODE §32-36-1-7.

<sup>16</sup> *Robin Williams restricted use of his image for 25 years after his death*, Benjamin Lee, *The Guardian*, March 31, 2015. <https://www.theguardian.com/film/2015/mar/31/robin-williams-restricted-use-of-his-image-for-25-years-after-his-death>.

<sup>17</sup> *Michael Jackson Is Worth More Than Ever, and the IRS Wants Its Cut*, *Bloomberg Businessweek*, February 1, 2017. <https://www.bloomberg.com/news/features/2017-02-01/michael-jackson-is-worth-more-than-ever-and-the-irs-wants-a-piece-of-it>.

<sup>18</sup> For discussion of moving the Right of Publicity to a unified, Federal law, see *Coming of Age: The Right of Publicity Is Ready to Move to the Federal Level*, in RES GESTAE, November 2001.

<sup>19</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 564 (1977).

<sup>20</sup> Recent state legislatures to pass Right of Publicity legislation include South Dakota, Alabama, Hawaii, Indiana, Washington and California. Bills have been introduced in the last few years in Arkansas, Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York and North Carolina. See Jonathan Faber, A BRIEF HISTORY OF THE RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> Thirty-eight states have common law precedent, WESTON ANSTON, RIGHT OF PUBLICITY: ANALYSIS, VALUATION AND THE LAW (2015). Also see the American Law Institute's *Third Restatement of Unfair Competition* (1995) §46 - §49.

<sup>21</sup> See *View From the Trenches: Recent Right of Publicity Revelations*, SAVANNAH LAW REVIEW, Vol. 3, No. 1, 2016.

<sup>22</sup> Lind, *The Right of Publicity in New York: A Practical Analysis*, 7 COLUM. J. ART. & L. 355, 371 (1982).

<sup>23</sup> The official website of Marshall "Major" Taylor, the greatest cyclist in history. <http://majortaylor.biz/>

<sup>24</sup> See *Discernment in Licensing and Enforcement*, Licensing International, Jonathan Faber, May 6, 2020. <https://licensinginternational.org/news/discernment-in-licensing-and-enforcement/>.

<sup>25</sup> *Combating Trafficking in Counterfeit and Pirated Goods*, Department of Homeland Security, Office of Strategy, Policy & Plans, January 24, 2020.

<sup>26</sup> See <https://www.linkedin.com/pulse/accurate-pricing-negotiation-robert-strand/>. Also see RIGHT OF PUBLICITY: ANALYSIS, VALUATION, AND THE LAW, ABA (2015).

<sup>27</sup> <https://www.hopperhq.com/blog/instagram-rich-list/niche/influencer/>. But see *Influencer Metrics Expected to Sharpen*, LICENSING INTERNATIONAL, April 8, 2020. "Brands are going to need to demonstrate results, and influencers who sold cachet and general popularity now have to show a real ability to influence an audience...it reduces the amount of relationships that influencers are a good fit for. Brands need to demonstrate a return, so there's no room for activities that focus on plain visibility." <https://licensinginternational.org/news/influencer-metrics-expected-to-sharpen/>.

<sup>28</sup> *Michael Jordan Sues Two Grocery Stores*, NBC CHICAGO, December 23, 2009.

<http://www.nbcchicago.com/news/local-beat/Michael-Jordan-Sues-Jewel-and-Dominicks.html>.

<sup>29</sup> Michael Jordan to donate \$8.9 million awarded by jury, Ahiza Garcia, CNN Money, August 22, 2015. <https://money.cnn.com/2015/08/22/news/michael-jordan-trial-verdict/index.html>.

<sup>30</sup> *Jordan in court, not on it, for trial on his brand value*, YAHOO! SPORTS, August 11, 2015.

[http://sports.yahoo.com/news/jordan-court-not-court-trial-brand-value-140627482--spt.html;\\_ylt=A0LEVvbHlcpVkSoAt71jmolQ](http://sports.yahoo.com/news/jordan-court-not-court-trial-brand-value-140627482--spt.html;_ylt=A0LEVvbHlcpVkSoAt71jmolQ).

<sup>31</sup> *Jordan's Name Comes With A \$10M Price Tag, Jury Hears*, Law360, August 12, 2015.

[http://www.law360.com/ip/articles/689920?nl\\_pk=bb8aeb3e-4ab9-4ba4-a0af-b895a107fd8a&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=ip](http://www.law360.com/ip/articles/689920?nl_pk=bb8aeb3e-4ab9-4ba4-a0af-b895a107fd8a&utm_source=newsletter&utm_medium=email&utm_campaign=ip). Also see *Court Dispute Reveals Michael Jordan's Name to Be Worth \$480 Million or More*, BLEACHER REPORT, August 13, 2015

[//">http://bleacherreport.com/articles/2546920-court-dispute-reveals-michael-jordans-name-to-be-worth-480-million-or-more //](http://bleacherreport.com/articles/2546920-court-dispute-reveals-michael-jordans-name-to-be-worth-480-million-or-more) and *Air Jordan In This Court, Not On It*, Associated Press,

<http://tablet.olivesoftware.com/Olive/Tablet/IslandPacket/SharedArticle.aspx?href=ISP%2F2015%2F08%2F12&id=Ar01402>.

---

<sup>32</sup> Michael Jordan turned down \$100 million for two-hour appearance, Greg Joyce, New York Post, April 30, 2020. <https://nypost.com/2020/04/30/michael-jordan-turned-down-100-million-for-two-hour-appearance/>.

<sup>33</sup> *Hollywood Hologram Wars, Vicious Legal Feud Behind Virtual Mariah, Marilyn and Mick*, THE HOLLYWOOD REPORTER, May 28, 2015. <http://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401>. The 2012 *Coachella Festival* featured an encore performance of deceased rapper Tupac Shakur.

<sup>34</sup> Kim Masters, *Philip Seymour Hoffman Death Leaves One Major 'Hunger Games' Scene Unfilmed*, THE HOLLYWOOD REPORTER, February 3, 2014. <http://www.hollywoodreporter.com/news/philip-seymour-hoffman-death-leaves-676836>.

<sup>35</sup> *A C.G.I. James Dean? Some in Hollywood See 'an Awful Precedent,'* Laura Holson, NEW YORK TIMES, November 7, 2019. <https://www.nytimes.com/2019/11/07/arts/james-dean-cgi-movie.html>. Also see Jenny Montgomery, *Hologram performance by Tupac creates legal question for IP lawyers*, INDIANA LAWYER, May 9, 2012. <http://www.theindianalawyer.com/-hologram--performance-by-tupac-creates-legal-questions-for-ip-lawyers/PARAMS/article/28758>.

<sup>36</sup> *The Future of Digital Actors & Musicians, Ripped Off Merchandise, Economic Justice for All, and the Fake News & Porn We Should All Be Appalled By*, Sarah Howes, February 23, 2018. <https://rightofpublicity.com/wp-content/uploads/2008/11/The-Future-of-Digital-Actors-Sarah-Howes-3-7-18-1.pdf>.

<sup>37</sup> Nimmer, *The Right of Publicity*, 189 LAW & CONTEMP. PROBS 203, 216 (1954).

<sup>38</sup> McCarthy, THE RIGHTS OF PRIVACY AND PUBLICITY, 2014 Edition, §2:2, citing Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 871 (1995).

<sup>39</sup> Vince Lombardi Jr., in conversation with the author on November 18, 2014. Also see Mark Hyman, "Dead Men Don't Screw Up Ad Campaigns," BUSINESS WEEK, March 10, 1997.