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Right of Publicity: Lessons from Paris Hilton v. Hallmark Cards

by Meaghan Hemmings Kent

A recent right of publicity case in California is not only interesting in its subject matter, involving a celebrity heiress and mega card company, but is legally interesting. In particular, the right of publicity is central to the case and the decision provides good lessons for artists such as yourselves.

Caricature by Court Jones

Right of Publicity Background

As a refresher, the right of publicity is a person's exclusive right to benefit from and control the commercial use of their name, likeness or persona. It provides that to use someone else's name, likeness or persona in a commercial way, you need their permission.

The right of publicity varies from state to state, with some states having statute and some relying on common law (case law). For more background, take a look back at your Winter 2009 *EF* "Legal Matters for the Artist" for a primer on right of publicity law. California has a fairly in-depth right of publicity statute, as do other entertainment industry-centric states, such as New York and Tennessee. Another interesting tidbit is that California (and Washington state, with others to likely follow) recently revised their statutes to strengthen the right of publicity for post-mortem rights. Remember that in some states, the right of publicity extends beyond death, so with these states amending their statutes (retroactively) to increase those post-mortem rights, you will need to be even more careful if you are using the image or likeness of a dead celebrity.

Case Background

The recent California right of publicity case of interest to caricaturists is *Paris Hilton versus Hallmark*. The case centers around a birthday card that features a picture of Hilton imposed on a cartoon waitress' body with the headline "Paris's First Day as a Waitress." The card depicts Hilton telling the customer, "Don't touch that, it's hot," the customer asking, "What's hot?" and Hilton responding with her trademarked catchphrase, "That's hot™." (It really is a registered trademark, by the way). The inside of the card reads, "Have a smokin' hot birthday."

In this case, Paris Hilton sued Hallmark for, among other things, breach of the right of publicity for their use of her image on a birthday card as well as trademark infringement of her catchphrase. Hallmark attempted to have the case dismissed essentially arguing that the card was protected by free speech. To defend this way, Hallmark had to show, among other things, that the card's use of Hilton's likeness/image was "transformative."

You may recall that in California, arguing that a work is "transformative" can be a defense to violation of the right of publicity. There are several ways that this test has been stated, including whether the product is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" or whether the artist's skill and talent has been used to create a transformed work (not a violation) or a conventional portrait of a celebrity (a violation). Take a look at the Winter 2009 EF "Legal Matters for the Artist Article" for a further discussion of transformative and the spectrum from non-transformative (the charcoal lifelike drawing of Three Stooges) to definitely transformative (the comic book depicting half-worm/half-human Autumn Brothers).

In this Paris Hilton case, the California Court found that the case could go forward because the card was not definitely transformative. The court held that it was ultimately up to a judge or jury as to determine whether the use of her image, in combination with a theme that resembled the theme of her *The Simple Life* reality television show, was sufficiently transformative to fall under First Amendment protection. Hallmark appealed and the Ninth Circuit agreed with the lower court that the case could move forward. Hallmark is further appealing within the Ninth Circuit and may take it to the Supreme Court if necessary. Stay tuned for any new rulings.

Lessons Learned

In the meantime, even where the First Amendment, be it parody, social commentary, or lampooning, is an arguable defense, which is often the case with caricatures, if you or another party are using someone else's image, name or likeness it in a commercial way you may be in hot water. Recall that a commercial use may include advertisements, use on products, such as t-shirts, cards, or mugs, or mass sales of your artwork. Although your defense may ultimately be successful, ask yourself whether you really want to have to use it. Defending yourself may involve litigation and will likely have to be determined by a jury or judge, leaving you to defend the case through trial – a costly endeavor.

In order to protect yourself, get permission. If you plan to use a person's image in a commercial way, be sure that you have permission to use the likeness of anyone who appears in the work. In addition, if you are commissioned to create the work for another party, be sure that the commissioning party will defend and indemnify you if there is any litigation. And, as always, get any agreements in writing!

Stay tuned for next issue's article on your rights and ways to protect yourself when a commissioning party or licensee goes into bankruptcy.

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