

MERCHANDISING THE LATE GREAT JOHNNY GOODLICKS: A DIALOGUE ON THE RIGHT OF PUBLICITY

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March 2003

An individual's right of privacy can be violated in a number of ways: by intrusion into the individual's private affairs, by disclosure of private facts about the individual, by portraying the individual in a false light, and by appropriating the individual's identity in a way that damages the individual's dignity and peace of mind, measured by emotional distress damages. But a well-known individual--a celebrity for example--is not afforded the same right of privacy as private individuals. By having voluntarily injected themselves into the public eye, celebrities cannot as readily assert that their affairs and information are private or that they have been emotionally damaged by an appropriation of their identity. From this was born the right of publicity--the right of an individual to control the use of his or her identity in a commercial setting, irrespective of whether the individual is a private or public figure. Like the right of privacy, the right of publicity is personal; however, it is also assignable and, in some instances, will survive the individual's death. The law in this area is still developing, and a number of issues will arise when someone other than the individual is looking to assert that individual's right of publicity.

A DIALOGUE

Johnny Goodlicks and his band, The Bowling Trophies, are widely credited for reintroducing the New York sound into the 21st century's musical mainstream. Goodlicks' Bowling Trophies combined sophisticated arrangements and layerings with raw energy and pop sensibilities to create a sound that was infectious and yet complicated--a welcome relief from the girl and boy bands that ruled the airwaves during the early part of the era. Goodlicks was the front man, a good-looking vocalist, songwriter, and guitar player. It was clear that the Trophies was his band. After developing a cult following by playing the downtown club circuit, the Bowling Trophies moved to much larger venues, with Goodlicks becoming embraced by critics and the musical mainstream. His genius was as unquestionable as his death was untimely. After only three albums, and two U.S. tours, Goodlicks was found on the floor of his Nolita apartment. He was 26, survived by his wife, Bianca. His band, the Bowling Trophies, broke up soon thereafter.

The death of Johnny Goodlicks resonated throughout the nation. Unauthorized paraphernalia started popping up everywhere--online and off-line, on streets and in stores. T-shirts, hats, buttons, books, videos, all bearing Goodlicks' likeness or his name appeared. Goodlicks' photo started appearing in print ads, too. His widow, Bianca, was beside

herself, unable to control the flow of goods, she felt helpless. Some of the merchandise was shoddy, too, and with its sheer volume, she felt like she was losing control of a market that was rightfully hers to exploit. She didn't know what to do. So she called her lawyer.

"I'm being ripped off," Bianca said. "I was with Johnny when he was a nobody. These vultures don't care about him. They just want to make a buck. I loved him."

"I see," said her lawyer sagely. "And so you should be making the buck."

"You're goddam right," she said.

"We-ell..." said the lawyer in a way we've grown to accept from lawyers, "it's not quite that cut and dry. You see, it's hard to come up with a definitive answer when you're dealing with the post-mortem right of publicity."

"Huh?"

"You see," said the lawyer, "celebrities like your husband have the right to control the commercial use of their identities. This is called the 'right of publicity.' It is intended to prevent someone from using another's name, voice, or likeness in an advertisement or in merchandising without first getting a license."

"Well," said the widow, "isn't that exactly what's happening here? They're putting Johnny's face and name on hats and T-shirts without my permission. From what you're saying, I should be able to stop them."

"Probably," the lawyer replied. "But the right of publicity is complicated. You see, it is governed by state law, and the law of each state is different. First, we have to figure out what law applies, and then we have to figure out whether the law was violated."

"I don't understand."

"Let me try to explain it by way of comparison," the lawyer continued. "When we're dealing with a copyright infringement, we're dealing with federal law. So, if someone were infringing the copyrights in Johnny's songs anywhere in the United States, one law would apply. It would not matter where the infringements were taking place or where the lawsuit was brought to stop the infringements and collect damages. The right of publicity, on the other hand, is a different animal. Figuring out whether a right of publicity has been violated is a two-step process, which actually can

involve an investigation into the laws of more than one state. If you were to sue for a violation of Johnny's right, the first thing the court will do is decide what law applies to define the scope of the right. Then, the court will decide what law applies to determine whether the right, if there is one, was violated."

"What do you mean 'if there is one'?" worried the widow.

"That's going to be the problem here," the lawyer explained. "You see, Johnny lived in New York when he died. And in performing the first step of the analysis, most courts will look to the law of the celebrity's domicile to determine the scope of the celebrity's right of publicity. Under New York law, there is no post-mortem right of publicity; that is to say, the right of publicity does not survive the death of the individual. Johnny had the right to control the commercial exploitation of his name, voice and likeness when he was alive, but under New York law, when he died, he lost that right and you didn't inherit it."

"So you're telling me that I'm screwed?"

"If New York law applies, you are."

"Well then," said the widow in a most lawyerly fashion, "we've got to make it so that New York law--or any other law that doesn't recognize a post-mortem right of publicity--will not govern my claims."

"And we may be able to, too," rejoiced the lawyer. Then, calming down, he said, "But whether we can will depend on where the source of the goods is located and where the goods are being distributed. If the company manufacturing and distributing the goods is located in New York and is doing its manufacturing and distributing only in New York, we will have a hard time suing that company outside of New York, and arguing that a law other than that of New York applies to it. On the other hand, if the company is operating out of another state, or is distributing the goods into another state, then we have some options."

"Like what?" wondered the widow.

"Well, like suing in a place that will not look to the law of the celebrity's domicile to determine whether the celebrity has a post-mortem right of publicity. New Jersey courts, for example, will apply the law of the state having the greatest interest in the defining the scope of the right of publicity. The domicile of the deceased celebrity will be a factor the court will consider, but courts in states like New Jersey will look to a number of other factors as well."

"What good does that do me?" questioned the widow. "Before I spend the money in bringing a lawsuit in a state outside of New York, I want to know for sure that the state will recognize my rights."

"You want more certainty?" the lawyer waxed rhetorically.

"There's always Indiana and Nevada. The Indiana statute, one of the broadest in the country, specifically provides that if an unauthorized good or advertisement comes into the state, the source of the good or advertisement becomes subject to the Indiana courts and to Indiana law. Likewise, the Nevada statute protects against violations of a deceased person's right of publicity regardless of that person's domicile. Both of these states recognize a post-mortem right of publicity; so, if any of the T-shirts or ads using Johnny's name and likeness are going into either of the states, we can sue the infringers there."

"A bit of a schlep though, isn't it?" noted the widow.

"How about this, then?" suggested the lawyer. "We create an entity for the purpose of licensing and marketing Johnny's publicity rights, and set up offices in a state that recognizes a post-mortem right of publicity. Then, we argue that because of the licensing agent's presence in that state, that state's law should be applied to determine whether you have the right to bring an action for infringement of Johnny's rights."

"That'll never work," protested the widow.

"But it has," explained the lawyer. "In at least two cases, courts have found that the presence of a marketing agent in a state was enough to recognize a right of publicity under the laws of that state, even though under the law of the celebrity's domicile there would have been no such right. One of these cases was decided, ironically, by a court located in New York. But because Johnny was a New York domicile when he died, a New York court would probably not look outside of its own body of law. The other court's decision should apply to courts located in Maine, New Hampshire, Connecticut, Massachusetts, and Rhode Island."

"And if we can't sue in one of those places?"

"It will be a roll of the dice. No guarantees as to how the court would react to this theory."

"So, I guess what I need to do is digest all of this information and come up with an enforcement strategy, huh? I'll get back to you in a couple of days. You know," said the widow, "I think I'm feeling a lot better about this now."

"You haven't seen my bill," said the lawyer.

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