Chicago Daily Law Bulletin®

Volume 162, No. 224 Serving Chicago's legal community for 162 years

While Edison couldn't dunk, today's athletes owe him

SPORTS TORTS

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Everyone remembers Thomas Edison as the Father of Invention. But, who knew that his advocacy in the early 1900s paved the way for the development of robust legal precedent regarding celebrities' rights to publicity and privacy?

Early in his career, prior to achieving worldwide fame for his inventions of electrical instruments and processes, Edison compounded a medicinal preparation intended to relieve neuralgic pains with external application. *Edison v. Edison Polyform & Manufacturing Co.,* 67 A. 392 (1907).

The compound, which he called "Polyform." was first made for his personal use and not for sale, but its formula was later sold. Id. In 1903, Edison sued to restrain the unauthorized usage of his name and image on the commercial product's bottle.

The bottle contained a label with a picture of Thomas Edison and the caption: "Edison's Polyform. I certify that this preparation is compounded according to the formula devised and used by myself. Thos. A. Edison." Id.

Edison testified that he had never authorized the use of his picture and that he never made or authorized this certificate. Id. The New Jersey Court of Chancery granted Edison the injunction and stated "[i]f a man's name be his own property ... it is difficult to understand why the peculiar cast of one's features is not also one's property and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it." Id. at 141.

The right to publicity was born. "For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways." *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2d Cir. 1953).

Athletes enjoy a "right to control and to choose whether and how to use an individual's identity for commercial purposes." *Trannel v. Prairie Ridge Media Inc.,* 2013 IL App (2d) 120725 (2d Dist. 2013). In Illinois, the right of publicity is codified in the Right of Publicity Act. See 765 Ill. Comp. Stat. 1075/1 (2015).

The most famous Illinois case involving the right of publicity involves arguably the most famous basketball player of all time, Michael Jordan. When Jordan was inducted into the Naismith Memorial Basketball Hall of Fame in September 2009, Sports Illustrated produced a special commemorative issue devoted exclusively to Jordan's remarkable career. *Jordan v. Jewel Food Stores Inc.,* 743 F.3d 509 (7th Cir. 2014).

Jewel accepted free advertising space in the issue in exchange for agreeing to stock the magazine in its stores. Sports Illustrated ran a full-page ad from Jewel on the inside back cover congratulating Jordan on his induction into the Hall of Fame. Id. Jordan filed suit, alleging that the ad was a misappropriation of his identity for the supermarket chain's commercial benefit. Id. Eventually, Jordan's suit was settled for an undisclosed amount.

Even amateur athletes may have recourse if their image and likeness is misappropriated for another's commercial gain. In *Keller v. Electronic Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litigation*), the 9th U.S. Circuit Court of Appeals held that video game developer Electronic Arts could be found liable for the right-of-publicity claims of former college football player, Samuel Keller. 724 F.3d 1268 (9th Cir. 2013).

Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features and school year as Keller.

In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not match, presumably because Keller changed his number right before the season started. 724 F.3d 1268, 1272 (9th Cir. 2013). Keller, as class representative, settled the case against the video game manufacturer and the NCAA for misappropriation of his and other college athletes' image and likeness.

In addition to an athlete's right to publicity, athletes are often forced to turn to the legal system for relief when their rights of privacy have been intruded upon. The distinction between one's right of privacy and one's right of publicity is that:

Privacy rights are personal rights. Damage is to human dignity. Injury caused by an invasion of privacy is measured primarily by "mental distress" and damages causally connected to mental distress.

On the other hand, the right of publicity is a property right. Damage is commercial injury to the business value of personal identity. For example, damages for infringement of the right of publicity can include the fair market value of the plaintiff's identity; unjust enrichment and the infringer's profits; and damage to the business of licensing plaintiff's identity. J. Thomas McCarthy, "The Human Persona as Commercial Property: The Right of Publicity," 19 Colum. - VLA J.L. & ARTs 129, 134 (1995).

Recently, former professional wrestler Hulk Hogan prevailed in his lawsuit against the blogging website, Gawker. Hogan's cause of action stems from the unauthorized publication of Hogan engaging in extramarital sex. It resulted in a $140 million verdict ($115 in compensatory damages and $25 in punitive damages) in favor of the multimedia star.

While certainly powerful, right to publicity cases are not limitless — Illinois courts subscribe to the majority rule that privacy rights are personal and extinguished upon a person's death. See *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209 (1st Dist. 1965) ("[T]here can be no cause of action for right of privacy on behalf of decedent's estate."); see also *Maritote v. Desilu Productions Inc.*, 345 F.2d 418, 420 (7th Cir. 1965) (Al Capone's widow and son had no cause of action for invasion of Al Capone's privacy in the television show, "The Untouchables" — "It is anomalous to speak of the privacy of a deceased person ... Comment, fictionalization and even distortion of a dead man's career do not invade the privacy of his offspring, relatives or friends, if they are not even mentioned therein.").

Looking ahead, as the public's desire for insight into athletes' personal lives grows, so too will tort claims regarding the invasion of one's right to privacy and publicity.

While Thomas Edison was not much of an athlete, his contribution to American jurisprudence still serves as a playbook for athletes exercising their legal rights.