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Intellectual Property Law - Newcombe v. Adolf Coors Co.

Nairi Chakalian

INTELLECTUAL PROPERTY

NEWCOMBE v. ADOLF COORS CO.

157 F.3d 686 (9th Cir. 1998)

I. INTRODUCTION

In *Newcombe v. Adolf Coors Co.*,[1] the United States Court of Appeals for the Ninth Circuit held that a Major League baseball pitcher, retired for over thirty years, had valid publicity infringement claims against defendants who created an advertisement using a drawing of his stance.[2] According to the court, a material factual issue existed as to whether the drawing of the stance in the advertisement conjured up images of the pitcher, even though the pitcher's face could not be identified from the drawing, and his name did not appear anywhere in the advertisement.[3] Thus, the court found a subtle image such as a stance may constitute likeness for claims under section 3344(a) of the California Civil Code[4] and common law.[5]

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1. 157 F.3d 686 (9th Cir. 1998). The appeal from the United States District Court for the Central District of California was argued and submitted on June 3, 1997 before Chief Judge Hug, Circuit Judge Fernandez and Circuit Judge Rymer. The opinion was filed on September 22, 1998. Chief Judge Hug authored the opinion.

2. *See id.* at 689, 694.

3. *See id.* at 689, 692.

4. *See* CAL. CIV. CODE § 3344(a) (West 1997), which states, in relevant part:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or for soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person injured as a result thereof.

Id. This section complements, rather than replaces or codifies, the common law cause of action for commercial misappropriation of the right of publicity. *See id.* at 3344(g). Section 3344(g) specifically provides that the statutory remedies of the section are cumulative and in addition to any others provided by law. *See id.*

5. *See Newcombe*, 157 F.3d at 692-93. Judge Jerome Frank created both the concept and the label "right of publicity" when he wrote the opinion in the seminal

II. FACTS AND PROCEDURAL HISTORY

Donald Newcombe was a Major League Baseball all-star player.[6] He pitched for the Brooklyn Dodgers and other teams from 1949 to 1960.[7]

The defendants, Killian's Irish Beer, owned by Coors Brewing Co., published an advertisement in the February 1994 Sports Illustrated "Swimsuit Edition," featuring a drawing of an old-time baseball game.[8] The drawing focused on a pitcher in the windup position, with two other players in the background.[9] Newcombe's face was not identifiable in the drawing, his name did not appear anywhere in the advertisement, the players' uniforms did not depict an actual team, and the background did not depict an actual stadium.[10] Nevertheless, Newcombe and his friends, family, and former teammates immediately recognized the pitcher featured in the advertisement as Newcombe.[11]

On March 10, 1994, Newcombe filed suit in California state court, alleging that his identity had been misappropriated in violation of his California statutory right of publicity and com-

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Haelan baseball trading card case, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953). *Haelan* held that under New York state law there was a "right of publicity," separate and apart from the right of privacy. *See id.* at 868. In *Eastwood v. Superior Court*, the California Court of Appeal fleshed out the elements of the common law right of publicity cause of action taken from Prosser's widely cited treatise on torts. *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983)(citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 385 (1960)).

6. *See* Newcombe v. Adolf Coors Co., 157 F.3d 686, 689 (9th Cir. 1998).

7. *See id.* Newcombe was one of the first African-American players to play major league baseball following Jackie Robinson. *See id.* Newcombe is also the only player in major league history to have won the Most Valuable Player Award, the Cy Young Award, and the Rookie of the Year Award. *See id.* Newcombe's baseball career ended because of his service in the Army and alcohol abuse. *See id.* He is a recovering alcoholic, who has devoted a great deal of time to speaking about the dangers of alcohol abuse, including serving as a spokesperson for the National Institute on Drug and Alcohol Abuse. *See Newcombe*, 157 F.3d at 689. Currently, Newcombe is the Director of Community Relations with the Los Angeles Dodgers, where he continues his active role in speaking against alcohol abuse. *See id.*

8. *See id.*

9. *See id.*

10. *See Newcombe*, 157 F.3d at 689.

11. *See id.*

mon law right of privacy.[12] Newcombe sought to enjoin the advertisement from future publication, and requested $100,000,000 in damages.[13] Coors denied that the drawing of the pitcher in the advertisement was a likeness of Newcombe, but admitted that the drawing was based on a newspaper photograph of Newcombe pitching in the 1949 World Series.[14] The drawing in the advertisement appeared to be nearly an exact replica of the newspaper photograph of Newcombe.[15]

On April 8, 1994, the district court granted defendants' motion for removal to federal court on the basis of diversity jurisdiction.[16] The district court then granted the defendants' motion for summary judgment on all of the claims.[17] Newcombe appealed.[18]

III. THE COURT'S ANALYSIS

The Ninth Circuit reversed the lower court's summary judgment order after analyzing the requirements of the statutory and common law publicity claims, finding that sufficient issues of material fact existed.[19]

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12. *See id.* Newcombe also alleged that the advertisement was defamatory since it showed him, a recovering alcoholic, as endorsing beer, and further alleged intentional infliction of emotional distress, negligence, and defamation. *See Newcombe*, 157 F.3d at 689, 694.

13. *See id.* at 689. Newcombe named Coors, Foote Cone & Belding Advertising (Belding), creator of the advertisement, and Time, Inc., publisher of Sports Illustrated, as defendants. *See id.*

14. *See id.* at 690.

15. *See Newcombe*, 157 F.3d at 690.

16. *See id.*

17. *See id.*

18. *See Newcombe*, 157 F.3d at 690. The Ninth Circuit affirmed the lower court's order denying Newcombe's motion to remand the case to state court. *See id.* at 691.

19. *See* Newcombe v. Adolf Coors Co., 157 F.3d 686, 692, 694 (9th Cir. 1998). The Ninth Circuit also reversed the order of summary judgment in favor of defendants Coors and Belding on the claim for equitable relief and constructive trust, but affirmed the judgment of the district court in all other respects. *See id.* at 696. The Ninth Circuit affirmed the lower court's summary judgment order in favor of defendant Time, Inc. *See id.* Time, Inc. was not liable under Newcombe's common law publicity claim because it did not directly benefit from the use of Newcombe's likeness. *See id.* Time, Inc. received only payment for the advertising space, which was unrelated to the contents of the advertisement. *See id.* at 693. Also, CAL. CIV. CODE Section 3344(f) (West 1997) expressly exempts from liability "owners of any medium used for

The first requirement for both the statutory[20] and common law[21] claims is use of the plaintiff's "likeness,"[22] According to the Ninth Circuit, the pitcher depicted in the advertisement had to be readily identifiable as Newcombe to constitute Newcombe's likeness.[23] The court found, however, that a pitcher's stance could be so distinctive as to make it readily identifiable as a likeness of the particular pitcher, regardless of the visibility of his face or the markings on the uniform.[24] Thus, stance alone may constitute a person's likeness under both the statute and common law.[25]

Based on the record, the Ninth Circuit found that Newcombe was the only pitcher to use the particular stance depicted in the advertisement's drawing.[26] Also, Newcombe, and those who knew him, immediately recognized the pitcher fea-

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advertising ... by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's ... likeness as prohibited by this section." *Id.* The court held Time, Inc. absolved from liability under Newcombe's statutory publicity rights infringement claim, as Newcombe "failed to allege that Time, Inc. knew that Newcombe had not authorized use of his likeness." *Newcombe*, 157 F.3d at 694. The Ninth Circuit affirmed the lower court's summary judgment order as to Newcombe's defamation, negligence, and intentional infliction of emotional distress claims in favor of all defendants. *See id.* at 696. The court held that Newcombe failed to establish the defamation claim, could not pursue claims for negligent creation or publication, and failed to establish an emotional distress claim. *See id.* at 695, 696.

20. The California statutory right of publicity claim requires that a plaintiff establish, "(1) a 'knowing' use; (2) for purposes of advertising, and (3) a direct connection between the use and the commercial purpose." CAL. CIV. CODE § 3344 (West 1997).

21. The common law cause of action for commercial misappropriation in California requires that a plaintiff prove: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." Eastwood v. Superior Court of Los Angeles County, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983), *quoted in* Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998). The common law right of publicity test, also known as the "Eastwood Test," is based on Dean Prosser's fourth category of invasion of privacy. *See Eastwood*, 198 Cal. Rptr. at 346.

22. "Likeness" is a visual image of a person other than a photograph. *Newcombe*, 157 F.3d at 692.

23. *See id.* The Ninth Circuit applied the test of CAL. CIV. CODE section 3344 (b) (West 1997) for photographs to likenesses, holding that a photograph and a visual image are sufficiently similar that the statutory test should apply to determining whether likeness exists, as well. *See Newcombe*, 157 F.3d at 692.

24. *See id.* at 693.

25. *See id.* at 692.

26. *See id.*

tured in the advertisement as Newcombe.[27] Accordingly, the court found that whether the stance in the advertisement's drawing was Newcombe's likeness presented a genuine issue of material fact.[28]

Second, both the statutory and common law claims required Newcombe to prove that a triable issue of fact existed as to whether the defendants used his likeness for their commercial advantage.[29] According to the court, "Newcombe's likeness was certainly used to Coors' and Belding's commercial advantage as the drawing which resembled Newcombe was a central figure in the advertisement and the purpose of the advertisement was to attract attention."[30]

Finally, Newcombe had to show that he did not consent to the use of his likeness and that injury resulted because he received no compensation for the use.[31] The court found that here too, issues of material fact existed.[32] Thus, Newcombe met the requirements for sustaining both the statutory and common law misappropriation claims against the defendants' motion for summary judgment.[33] Accordingly, the Ninth Circuit reversed the district court's summary judgment order.[34]

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27. *See Newcombe*, 157 F.3d at 689.

28. *See id.* at 693. In addition, the court examined other factors helping create a genuine material issue of fact as to whether the defendants used Newcombe's likeness. *See id.* The court discussed the similarities between the person depicted in the advertisement and Newcombe. *See id.* For example, both Newcombe and the pitcher in the drawing have moderately dark skin, and the uniform number in the advertisement ("39") is only slightly different than Newcombe's number ("36"). *See id.* According to the Court, these similarities, viewed together, could arguably conjure up images of Newcombe. *See Newcombe*, 157 F.3d at 693.

29. *See id.* This part of the common law test for the misappropriation claim was not met as against Time, Inc. *See supra* note 19 and accompanying text.

30. *Newcombe*, 157 F.3d at 693 (citing *Eastwood*, 198 Cal. Rptr. at 349 ("one of the primary purposes of advertising is to motivate a decision to purchase a particular product or service. The first step toward selling a product or service is to attract the consumers' attention")).

31. *See id.*

32. *See id.*

33. *See Newcombe*, 157 F.3d at 693. The statutory right of publicity claim required Newcombe to show that the use of his "likeness was ... directly connected with the commercial sponsorship" of the defendants. *Id.* This was a question of fact. *See id.* at 694. The Ninth Circuit, expressly disagreeing with the district court, stated that it

IV. IMPLICATIONS OF DECISION

In *Newcombe*, the Ninth Circuit broadened the definition of "likeness" in right of publicity cases to include a drawing of stance in an advertisement.[35] By so doing, the court increased the protection afforded to celebrities and creators through the "right of publicity."[36] *Newcombe* is one of a series of Ninth Circuit decisions expanding the rights of celebrities to control their images.

In *Motschenbacker v. R. J. Reynolds Tobacco Co.*,[37] the plaintiff, a famous race car driver, claimed that a cigarette advertisement using a car identifiable as one usually driven by him, infringed his publicity rights.[38] There, the defendants televised a commercial utilizing "a 'stock' color photograph" depicting plaintiff, whose "facial features [we]re not visible" in the car.[39] The car in the photograph displayed a distinctive narrow white pinstripe and an oval white background for the racing number, which, had exclusively appeared on plaintiff's cars for about four

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would not be unreasonable for a jury to find that there was a direct connection between Newcombe, as the central feature of the advertisement, and the commercial sponsorship of the beer. *See id.*

34. *See Newcombe*, 157 F.3d at 696. Also, the court held that Newcombe was entitled to proceed on his claim for equitable relief and constructive trust against Coors and Belding because he now had two valid claims against the defendants Coors and Belding. *See id.* at 694.

35. *See* Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998).

36. The right of publicity serves to prevent the unjust enrichment of commercial appropriators, to provide an incentive to creators, and to protect the public from deception. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573-76 (1977); *accord* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting). Essentially, "it makes advertisers pay for the attention-getting value of human identity." J. Thomas McCarthy, The Spring 1995 Horace S. Manges Lecture - *The Human Persona As Commercial Property: The Right Of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 148 (1995).

See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 135, 178-79 (1993). Madow questions whether the right of publicity "should exist at all" because "publicity rights exact a higher cost in important competing values (notably, free expression and cultural pluralism) than has generally been appreciated." *Id.* at 134.

37. 498 F.2d 821 (9th Cir. 1974).

38. *See id.* at 822.

39. *Id.*

years when the commercial aired.[40] In *Motschenbacker*, the court held that although the "'likeness' of plaintiff is itself unrecognizable," the distinctive decorations appearing on the car create a material issue as to whether the driver is "identifiable as plaintiff."[41] Then, with little discussion, the Ninth Circuit agreed that California law "afford[ed] legal protection to an individual's proprietary interest in his own identity," and reversed the lower court's summary judgment order in favor of the defendants.[42]

The 1997 case of *Wendt v. Host Int'l, Inc.*[43] also validated publicity infringement claims.[44] In *Wendt*, actors from the television show "Cheers" sued the creator of three dimensional animatronic figures (robots), which were placed in airport bars, modeled upon the Cheers set.[45] The plaintiffs alleged that the robots were based on the actors' "likenesses."[46] Interestingly, the court stated that "[t]he degree to which these robots resemble, caricature, or bear an impressionistic resemblance to" the plaintiffs was material to determining whether their "likeness" was appropriated.[47] The Ninth Circuit held that, whether the robots' "physical characteristics" looked sufficiently like the actors was a genuine issue of material fact, and reversed the lower court's summary judgment order in favor of the defendants.[48]

Newcombe affirms the Ninth Circuit's steady course toward increasing protection of publicity rights. In *Newcombe*, the Ninth Circuit extended the term "likeness" to include a depiction of a pitcher's stance, thereby affording it protection under both

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40. *See id.* Defendants changed plaintiff's number "11" into "71," attached a wing-like device known as a "spoiler" to plaintiff's car, added the word "Winston," the name of their product, to that spoiler, and removed other advertisements for other products from the spoilers of other cars in the televised commercial. *See id.*

41. *Motschenbacher*, 498 F.2d at 827.

42. *Id.* at 825, 827.

43. 125 F.3d 806 (9th Cir. 1997).

44. *See id.*

45. *See id.* at 809.

46. *See id.*

47. *Id.* at 810.

48. *Wendt*, 125 F.3d at 809-10.

California statutory and common law.[49] As the meaning of "likeness" expands to resemble that of "identity," section 3344 will, in effect, protect identity.[50] As Professor Welkowitz states, understanding the current state of the law is like trying to "catch smoke or nail JELL-O to a wall."[51] Instead of giving lawyers and their clients guidance, the court has added confusion by blurring the lines between "identity" and "likeness." As a result of cases such as *Newcombe*, understanding the difference between a person's "identity" and "likeness" has become a confusing puzzle.

Nairi Chakalian[*]

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49. *See Newcombe*, 157 F.3d at 692. Arguably, however, a person's stance could not constitute his "likeness" because it could never actually look like him. However, it may constitute his "identity," under the law, if it triggers thoughts of the celebrity in the public's mind. *See infra* note 51.

50. The depicted stance, arguably, may not constitute Newcombe's likeness because it does not "resemble, caricature, or bear an impressionistic resemblance" to Newcombe. *See Wendt*, 125 F.3d at 810. Newcombe's facial features were not identifiable in the advertisement's drawing and his name did not appear anywhere in the advertisement. *See Newcombe*, 157 F.3d at 689, 692. Instead, the depicted stance was, arguably, part of Newcombe's "identity," because it "evoke[d] the celebrity's image in the public's mind." White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1992) (Kozinski, J., dissenting from order denying rehearing en banc) (citing White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398-99 (9th Cir. 1992) (extending California's common law right of publicity to protect a celebrity's right to exploit the value of her identity)).

Section 3344 protects "name, voice, signature, photograph, or likeness" from unauthorized commercial appropriation, but not a person's "identity." *See* CAL. CIV. CODE § 3344 (West 1997), *supra* note 4. If the court had held the depicted stance an aspect of Newcombe's "identity," rather than his "likeness," Newcombe would have lost his statutory claim. *See id.*

51. *See* David S. Welkowitz, *Catching Smoke, Nailing Jell-O To A Wall: The Vanna White Case And The Limits Of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 101 (1995).

* Golden Gate University School of Law, Class of 2000.