UB Law Forum

Volume 24
Number 1 *Fall 2011*

Article 20

10-1-2011

Is the "Right of Privacy" Out of Control? When Linsday Lohan Can Intimidate the E*Trade Baby, Free Speech May Be at Risk

UB Law Forum

Is the 'right of privacy' out of control?

Associate Professor Mark Bartholomew

*When Lindsay Lohan can intimidate the E*Trade baby, free speech may be at risk*

By Charles Anzalone

American courts are significantly expanding the legal rights and privileges celebrities can command over others using their names or likenesses. And a UB Law professor is questioning whether these courts have gone too far.

Clearly, says UB Associate Professor Mark Bartholomew, the courts have taken a more liberal interpretation when it comes to celebrities suing others for the use or even the implication of their names, images or voices. This special legal privilege – known as the "right of publicity" – has expanded to what Bartholomew calls "very subtle celebrity references," and beyond the use of specific celebrity names or images.

But does the special protection the American judicial system has advanced in the country's golden age of celebrity worship gone too far?

"Celebrity references are important tools for speech or personal expression. They help us make important communicative points," says Bartholomew, an expert on intellectual property law. "If I say someone has a John Wayne-type political style, you know what I am talking about. Celebrity names and images are also key items for personal development."

So the issue is a matter of balance, Bartholomew says. Recent decisions expanding the rights and lawsuit prowess of celebrities come at a cost.

"We probably all went through that stage in high school where we put pictures of celebrities up in our lockers or wore them on T-shirts," Bartholomew says. "Sometimes the celebrity is reappropriated by audiences in an unforeseen way, like the gay community's embrace of Judy Garland. There is something disturbing about allowing the celebrity herself complete control over these important tools for communication and the ability to close off the ones she doesn't approve of."

The law is filled with easily recognized examples of this clash between celebrity rights and free speech, with elements and principals anyone from Super Bowl viewers to devotees of "OMG" and other celebrity Web sites would easily recognize.

Bartholomew's favorite: the "infamous" Lindsay Lohan lawsuit.

"Last year Lohan filed a lawsuit in New York against E*Trade, seeking $50 million in compensatory damages and $50 million in punitive damages for using her celebrity persona in a 2010 Super Bowl ad," Bartholomew says.

"Lohan's full name, picture and voice were not used. Instead, in the ad, an off-screen female voice asks the on-screen E*Trade baby through a video chat if 'that milkaholic Lindsay' was over when he didn't call her the night before. This prompts another baby, presumably 'Lindsay,' to step into the camera and ask 'milk-a what?' That's it.

"Lohan argued that she was famous on a single-name basis (like Oprah or Madonna) and also that 'milkaholic' was a reference to her troubled past and would allow viewers to identify her. People were upset with this case, angrily describing it in the blogosphere as completely frivolous. But E*Trade settled the case for an undisclosed financial sum, showing that E*Trade's lawyers at least thought the law gave Lohan a chance of winning her case."

Lohan is only the latest Hollywood celebrity whose name coincides with key court decisions on this relatively new legal phenomenon called the right of publicity. A landmark decision involved an icon of baby boomer American celebrity, *Wheel of Fortune* game show hostess Vanna White.

"White sued Samsung Electronics for its advertisement featuring a robot dressed in a blond wig, gown and jewelry standing next to a letter board resembling the one used on *Wheel of Fortune*," says Bartholomew. "Samsung never mentioned White's actual name or used her photograph. Nevertheless, a court in California held that Samsung indeed did violate Vanna's right of publicity."

The White case is important for two reasons, according to Bartholomew. First, it provided a very generous legal precedent to the definition of "What is use of a celebrity?" Second, the decision gave what Bartholomew calls "short shrift" to First Amendment concerns.

Bartholomew's article, "A Right is Born: Celebrity, Property and Postmodern Lawmaking," will be published in December in the *Connecticut Law Review.*