

The Copyright Society of the USA

The Interplay Between Rights of Publicity and Copyright

Protecting the Rights of Publicity of Michael Jordan, Pele, and Muhammad Ali

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I. Jordan v. Dominick's

A. Michael Jordan

1. The NBA's Most Valuable Player – 5 times.
2. An NBA All Star – 14 times.
3. Still the highest career scoring average in the history of the NBA.
4. Led the Chicago Bulls to 6 NBA championships.
5. A member of the 1984 and 1992 United States gold medal Olympic basketball teams.
6. Inducted into the Basketball Hall of Fame.
7. Named the greatest North American athlete of the 20th century by ESPN.

B. After a lifetime of work and accomplishment, what is Michael Jordan's most valuable asset? The use of his identity.

1. In 2015 (the year we tried this case), he earned in excess of \$100 million from licensing the use of his identity.
 - a. That's more than he earned from all of his basketball contracts over his entire career.

C. The Ad

1. Commemorative issue of *Sports Illustrated* celebrating Michael's induction into the Basketball Hall of Fame.
2. Dominick's name, its logo, photo of its "Rancher's Reserve" steak, and a coupon.

3. Michael's name, his number (23), the black and red colors of the Chicago Bulls, and a silhouette that resembles the Jumpman logo used for the Jordan Brand at Nike.
4. And a message linking him to the steak: "YOU ARE A CUT ABOVE."

D. The Lawsuit

1. Why did he bring this case?
 - a. If you don't protect the use of your identity, its value disappears.
 - b. The purpose of the case was to protect Michael Jordan's right to control who can use his identity and how they use it.

E. The Defense

1. Didn't take that much and so shouldn't have to pay that much.
 - a. 146,630 copies distributed and 41,513 sold.

F. Michael's Case

1. If you want the Hope Diamond, you have to buy the whole thing. You can't just chip off a little piece because if you can everyone will, you'll lose control, and there will be nothing left.
2. Only contracts in the range of \$10 million – no one off small contracts.

G. Jury

1. \$8.9 million.

II. Jordan v. Jewel

A. The Ad

1. Uses the JEWEL-OSCO trademark with the design Jewel uses as its brand logo
2. Uses the national advertising slogan: "Good Things Are Just Around The Corner."
3. Incorporates the advertising slogan into the ad's statements about Michael Jordan by describing him as also being "just around the corner."

B. The District Court

1. Granted summary judgment for the Defendants holding that the ad was non-commercial speech protected by the First Amendment.
 - a. In holding that the ad was not commercial speech, the district court focused on the fact that that the ad did not refer to any specific product or service.
 - b. The district court stated that “readers would have been at a loss to explain what they have been invited to buy.”

C. The Seventh Circuit

1. Reversed holding that the ad was image or brand advertising.
2. There are many ads that don’t refer to any specific product or service, but that are clearly commercial speech.
3. Recognizing that brand advertising is commercial speech, the Seventh Circuit stated: “An advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.”
4. Responding directly to the district court’s statement that it is difficult to explain what readers were invited to buy, the Seventh Circuit stated: “What does it invite readers to buy? Whatever they need from a grocery store – a loaf of bread, a gallon of milk, perhaps the next edition of *Sports Illustrated* – from *Jewel-Osco*, where ‘good things are just around the corner.’”
5. The Seventh Circuit concluded that to view the ad “as constitutionally immune non-commercial speech would permit advertisers to misappropriate the identity of athletes and other celebrities with impunity.”

D. Settled

1. After the verdict in the Dominick’s case.

III. Pele IP Ownership v. Samsung

A. The Ad

1. The ad contains a Pele look alike and shows a Samsung TV with a soccer player executing a version of the “scissors” or “bicycle” kick for which Pele is famous.
2. Less than two years before Samsung ran the ad, Samsung nearly entered into a license agreement for the use of Pele’s identity, but it backed away at the last minute.

3. The ad was published in *The New York Times*, *Fortune*, *Forbes*, *the Economist*, and *The Wall Street Journal*.

B. Recently settled.

IV. Muhammad Ali Enterprises v. Fox Broadcasting Company

A. A video Fox broadcast in its pregame show before the 2017 Super Bowl and in its post-game show.

1. The first half of the video is a tribute to Muhammad Ali and his accomplishments stressing the theme of “greatness.”

2. The second half – while continuing the theme of “greatness” – celebrates a series of NFL legends.

3. And it ends with the Super Bowl logo and some final footage of Muhammad Ali.

B. Fox moved for judgment on the pleadings on the grounds that the video is not commercial speech.

1. Fox initially characterized the video as a mere tribute to Muhammad Ali.

2. Fox, however, eventually acknowledged that the video promotes Fox’s broadcast of the Super Bowl. But Fox argued that, as a broadcaster, it has a blanket license to promote its products and services using any individual’s identity without their consent.

3. We argued that although a broadcaster has the right to show the players in a sports event, that does not give a broadcaster the right to use the identity of someone who is not part of the event or related to it to promote it. And it is undisputed that Muhammad Ali had nothing to do with the Super Bowl or football.

C. Fox also argued that Muhammad Ali’s rights of publicity were preempted by federal copyright law.

1. We argued that because federal copyright law does not preempt publicity claims based on commercial speech and because when a right of publicity claim is directed at the use of an individual’s identity the claim is not preempted, there was no preemption.

D. After a hearing that lasted several hours on Fox’s motion in which the judge was not receptive to Fox’s argument on commercial speech, the case settled.