

Spotlight on the Right of Publicity: Immunity and Preemption

Moran v. Edie Parker, LLC et al, No. 2:20-cv-12717 (E.D. Mich. Sept. 27, 2021); and
Hepp v. Facebook, 2021 WL 4314426 (3d Cir. Sept. 23, 2021)

By: Lisa Holubar & Victoria Hanson | October 1, 2021

On September 23, 2021, the Third Circuit reversed dismissal of a newscaster's statutory Pennsylvania Right of Publicity claim. It held that there was no immunity under the Communications Decency Act ("CDA") for said claim because the CDA's carve out for intellectual property protections are not limited to federal intellectual property laws, but can include state laws protecting intellectual property too (a.k.a. publicity rights). On the other hand, on September 27, 2021, the Eastern District of Michigan ("the District Court") dismissed a complaint based on the unauthorized use of the name of deceased fashion icon Frankie Edith Kerouac Parker, a.k.a. "Edie Parker." The district court determined that the Estate's Michigan right of publicity common law rights were preempted by the Heyman's federal trademark rights.

In the Third Circuit case, Karen Hepp, a newscaster, alleged that she had built an "excellent reputation as a moral and upstanding community leader" and amassed a large social media following such that her endorsements were valuable. She sued Facebook (and others) when she noticed her photo being used without her permission on Facebook to promote a dating app called FirstMet. The Eastern District of Pennsylvania dismissed Hepp's claims under Section 230 of the CDA, which immunizes websites from liability for content that is posted by others.

However, CDA Section 230 does not bar intellectual property claims against websites. Relying on Ninth Circuit precedent, Facebook argued that the "intellectual property" under the CDA meant only federal intellectual property laws. The Third Circuit disagreed and held that a state law can be a "law pertaining to intellectual property" too. The Third Circuit then reviewed the Pennsylvania right of publicity statute, found that it was analogous to a trademark law, and therefore outside of the CDA's immunity. The Third Circuit expressed no opinion as to whether other states' rights of publicity also qualified.

Turning to the District Court case, Edie Parker, first wife of writer Jack Kerouac and fashion icon became a celebrity in the 1950s and 1960s. Brett Heyman, a fan of Edie Parker, named her daughter Edie Parker, then started a handbag company named Edie Parker LLC without obtaining permission from the original Edie Parker's Estate. Heyman's Edie Parker, LLC has made tens of millions of dollars selling handbags and other products emulating Edie Parker's style. Moran, the Personal Representative of Edie Parker's Estate brought suit for unauthorized commercial use of the name "Edie Parker." Heyman filed a motion to dismiss in which she asked the court to take judicial notice of her eight federal trademark registrations for EDIE PARKER and argued that the Lanham Act preempted the Estate's Michigan common law right of publicity claim.

The Court recognized that the right of publicity protects a pecuniary interest in the commercial exploitation of an individual's identity and that such unauthorized use of that name or likeness is actionable even after an individual's demise. Nevertheless, the Court granted the motion to dismiss based on Heyman's preemption argument. This case appears to be the first time that a federal court has preempted a state right of publicity claim based on federal trademark registration under the Lanham Act.