



## **Dr. X Will Build a Creature**

By: Jim Astrachan

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The right of publicity is the right of every human being to control the commercial use of his or her identity. Commercial use normally requires some attempt on the part of the infringer to sell a product or service. It does not mean, for example, use of someone's name or photo in connection with political commentary. Professor McCarthy asserts that this right is not the province of the celebrity, but belongs to every person, celebrity or not.

But the cases are far more interesting, and the damages are exacerbated, when a celebrity's likeness is used without permission, because there is often a comparable market against which to measure the celebrity's value. A few years ago, while defending the unauthorized use of the deceased Orson Welles' name in an ad campaign I discovered he was paid the pittance of \$25,000 to be the voice-over in Eastern Airline's WINGS OF MAN campaign decades before. I was able to use that payment to establish damages where liability was not contested, and the case settled.

These cases can take strange twists and turns, and one reason is two opinions of the Ninth Circuit Court of Appeals in a case in which the game show hostess Vanna White sued

Samsung over its use of a Vanna-like robot in an ad. In an often criticized decision, the Court recognized a cause of action when the Vanna robot "conjured up" the image of the real Vanna even though the robot was clearly not a likeness of Vanna.

That case came to mind recently as I viewed for clearance an advertisement intended for national TV depicting the Frankenstein monster and his lovely bride, each played by actors in what I hope was very heavy make-up. The commercial use of the creatures, both he and she, had been properly licensed from Universal Studios, the owner of all necessary rights to the depictions under service mark laws. My eye was drawn to a sentence in the license admonishing the licensee that Universal, though it was conveying rights to depict the creatures, was not conveying any rights to use the likeness of any actor. I shivered as lightening flashed outside my windows and cold rain probed under the eaves like skeletal fingers.

Hmm? In view of the Vanna White decision and a subsequent Ninth Circuit decision relating to the use of robotics resembling CHEERS' Norm and Cliff, I was well aware of the problem. Universal was allowing use of the make-up, but was warning that if the actors as made-up "conjured-up" images of Elsa Lancaster and Boris Karloff, the rights of publicity of these two actors would be violated. The day turned dark, thunder crashed, and the basement stairs creaked under an unknown weight.

How, then, to provide assurances that an expensive commercial, already in the can, would not violate these rights? The starting point was a side-by-side comparison of a photograph of Boris Karloff, made-up as the monster, and the actor of the ad also made up as the monster. It was immediately clear, to me at least, that Boris' face was gaunt, his eyes

sunken and his lips thin and drawn. Boris looked homicidal and was frightening. Our man had a round, fat face, much unlike that of Boris Karloff and looked like Bosley from CHARLIE'S ANGELS, a man incapable of murder or mayhem.

I wasn't so sure of the monster's bride as I watched the movie, BRIDE OF FRANKENSTEIN, several times. The comparisons of Elsa and our actor in a side-by-side viewing were too close to call with comfort. Eventually, I distinguished our actor as being in her 40s with a low forehead. Elsa was in her early 20s and had a high forehead. Each actress had the white hairstreak going for her. The sound of leafless branches blown by the wind scraping my windows broke my focus, and I heard a noise outside the door to my room.

Any legal opinion had to bear the caveat, caused by the Ninth Circuit's rulings, that if the ad conjured up images of Boris and Elsa in the minds of viewers, a violation of their rights of publicity might exist. Trouble was that this determination was so subjective that no one person could possibly substitute his or her judgment for the thousands of persons whom might be surveyed in a manner similar to a trademark case where the legal issue is likelihood of confusion.

Nineteen states recognize the right of publicity by statute; almost every other state recognizes this right under common law. And, as almost every state treats this right as an inheritable property right, it came as no surprise to learn that the rights of Mr. Karloff and Ms. Lancaster had been left to legatees or heirs and were registered to provide notice of this under the California statute. I was aware, also, that licensing fees for each could be in six figures. A shadow crossed my door's keyhole.

So it came as little surprise that soon after the ad began national broadcast on its 13 week flight, Ms. Lancaster's legatee claimed a violation of her publicity rights, and demanded that the use cease or that payment be made. Fortunately, the Studio, a financial supporter of the legatee, intervened and added sanity to the debate and the ads ran their course without payment. The sun emerged as did I from my room to find large, wet footprints outside my door.

This experience reinforced the lesson taught by the Sixth Circuit Court of Appeals that a person's "identity may be appropriated in various ways." Regardless of whether it is by look-alike, picture, name or nickname, the ultimate question, always one of fact, is identifiability. The Ninth Circuit has held, "It is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant had done so." Yesterday's laundry list of methods of infringement are simply not exhaustive.

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