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MATLOCK WOULD HAVE GAGGED

By: Jim Astrachan

Andy Griffith is a famous motion picture and television actor. Perhaps he is best known for one of history's longest running sitcoms, The Andy Griffith Show, created by Sheldon Leonard in 1960, in which he played down-home sheriff Andy Taylor, a dispenser of kind and heart-felt wisdom to the gentle folk of Mayberry. Next, he played for 6 years on NBC television savvy trial lawyer, Matlock. His courtroom performances were brilliant.

Griffith goes simply by his name, "Andy Griffith" and he transferred all rights associated with his personal intellectual property to his company, Mayberry Enterprises. These rights include merchandising and licensing rights and his right of publicity, a right that prevents another from using his persona for commercial purposes without his authorization. Griffith, it would appear, is so sensitive to how his name is used that, although he granted Viacom all merchandising rights associated with The Andy Griffith Show, he retained the right to approve all uses associated with his name and the show. These personal intellectual property rights gross in excess of \$100,000 each year.

William Fenrick is a man with political aspiration, whose unfortunate path crossed Griffith's in a United States courthouse in Wisconsin. Fenrick, you see, moved to his mother's home in Platteville, Wisconsin so that he could run for sheriff of Grant County, Wisconsin. Good work, if he could get it, but to get the upper hand in that election he needed an advantage. And that advantage was handed to him by a circuit Court judge in Milwaukee County. If you haven't put the pieces together yet, Fenrick legally changed his name to Andrew Jackson Griffith.

Fenrick, er Griffith, did not name himself as Andrew Jackson Griffith on the ballot; nor did he call himself A. J. Griffith. No, Mr. Fenrick called himself Andy Griffith. Needing a platform to run on, Fenrick attacked speed traps, stating "[t]hey never did that in Mayberry! They never did unethical stuff like that in Mayberry. "See," he said,

“that’s the thing about Andy Griffith. He was honest and straight forward and people respected him for that.”

During the campaign he was quoted, to the effect that he wanted to bring attention to the sheriff’s race, and the best way he could do so was to change his name to Andy Griffith. Mr. Fenrick, er Griffith, used his name, Andy Griffith on T-shirts and on letterhead for his campaign literature. He even had a campaign website with the domain www.AndyGriffithforSheriff.com that was designed to enable supporters to make campaign contributions.

Alas, Mr. Griffith lost his campaign to be the sheriff of Grant County. But in TV interviews, he vowed to run in the 2008 election under the name Andy Griffith. And that was his undoing.

The **real** Andy Griffith learned of his namesakes’ escapades and was not amused. Lickity split-like, he filed suit in a federal court to prevent use of his name by Fenrick in the 2008 election. The theories of Plaintiff’s case were first, that Fenrick used the name in commerce causing blurring and tarnishment, violating the federal Lanham Act, second, that use of his name violated his right of privacy under state law, and third, that his use of the name in connection with his sheriff campaign will cause people to believe that the real Andy Griffith sponsored or approved the campaign, also a violation of the Lanham Act.

One might think that after playing the TV role of lawyer Matlock for so many years, Plaintiff would have cobbled together a better suit, as the court thought very little of his Lanham Act counts, and held,

The purpose of trademark law (setting to one side dilution cases) is to prevent confusion by consumers concerning the courses of the products they buy, knowing or thinking that a product is a pirate is not confusion about source; you know who the source is, whether you think him a good guy or a bad guy.

The court was a little mixed up on this account because the purpose of trademark law is also to prevent confusion among consumers concerning affiliation and endorsement which was a count in Griffith’s suit. Plaintiff, however, failed to produce even a scintilla of evidence to establish that people believed he was associated with, or sponsored, Fenrick.

As to the blurring and tarnishment dilution claims, the court correctly held that these claims can only apply to commercial uses of famous marks – non-commercial uses may be protected by the First Amendment. Non-commercial uses are not reached

under the Lanham Act's dilution provisions. Because this was political speech advocating for public office it came under the First Amendment's protective shield.

The court dispatched the remaining state invasion of privacy claims by holding that there was a genuine issue over whether the amount in controversy exceeded \$75,000, a burden which is the plaintiff's to establish. Griffith just couldn't get there on any basis including loss of merchandising fees, unjust enrichment or damage to reputation. The case was dismissed.

Maybe Griffith has become a little crotchety in his older years. Certainly he was miffed, but a man of his stature has access to lawyers who know or should have known this case was going no where as pled in a federal court. I think he simply decided to throw a suit case at Mr. Fenrick just to make him step sideways. I think Andy Taylor might have been appalled. Now, Barney, on the other hand.....

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.