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## Can the New Collective Bargaining Agreement Save the NHL?

By Alexander A. Jeglic

On Wednesday, Feb. 16, 2005, the National Hockey League (NHL) became the first major North American sports league to cancel an entire season of competition because of a labor dispute.<sup>1</sup> Widespread speculation had predicted that last-minute negotiations between the National Hockey League Players Association (NHLPA) and the NHL owners would result in a resolution to the labor impasse.<sup>2</sup> Unfortunately, the NHLPA and owners could not agree on a new deal prior to the cancellation of an entire season of hockey.

After a long and bitter holdout, the NHLPA and owners finally reached an agreement on a new collective bargaining agreement (CBA) on July 21, 2005. Observers are now left to analyze where the NHL will go from here.<sup>3</sup>

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## Google Print: Snippets of Infringement

By Robert A. Preskill and Charles McCarthy

In early April, 2005, Random House issued the following brief statement: "*Random House Inc. has entered into a short-term pilot agreement with Google authorizing them to scan and store a limited number of books of our selection as a test to determine whether or not we will become an ongoing participant in their Google Print program.*"

The move placed Random House and their parent company Bertelsmann into the majority of large publishing houses who are currently enrolled in the Google Print program in one form or another. Google Print is an ambitious endeavor by the world's most popular search engine to scan and digitize published books and make them searchable online. The program, now in beta and accessible from Google's Web site, presents a range of new questions about the rights of authors relative to the distribution of their works online and the use of their works in electronic databases.

Google is under heavy fire from publishers, libraries and copyright holders regarding the execution of their plan. Google briefly stopped scanning to announce an "opt-out" procedure to copyright holders who make a direct request to Google, but Pat Schroeder, president of the Association of American Publishers, said that "Google's announcement does nothing to relieve the publishing industry's concerns. Google's procedure shifts the responsibility for preventing infringement to the copyright

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## The *Dastar* Legacy

By Mark S. Lee

In 2003, the U.S. Supreme Court issued a rare trademark opinion. *Dastar v. Twentieth Century Fox Film Corp.*<sup>1</sup> held that a motion picture studio could not stop, on "reverse passing off" grounds, a third party's distribution of a television series that the studio created but which had fallen into the public domain for copyright purposes.

Based on some of its language, the decision could be interpreted narrowly. But that is not how it is presently being applied in the lower courts. Instead, significant areas of federal unfair competition law are being ruled to no longer exist. This article discusses the *Dastar* decision and how the questions it raises are being answered by the lower courts.

### The *Dastar* decision

Twentieth Century Fox Film Corp. (Fox) produced a television series titled "Crusade In Europe" in the 1950s, based on a book written by Gen. Dwight D. Eisenhower. Fox failed to renew the series' copyright registration and it fell into the public domain for copyright purposes in 1977.<sup>2</sup>

In the 1990s, another company, Dastar Corp., obtained copies of the TV series, edited it, provided new opening, closing and chapter-title sequences and deleted all marks that would identify the original producers of the series. Dastar then resold its revised work as "World War II Campaigns in Europe." Dastar's videos did not mention either the original TV series or Eisenhower's book.<sup>3</sup>

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# A Picture Is Worth a Thousand Words or Sometimes a Million Dollars: *The Commercial Value of Rights of Publicity*

By Robert C. O'Brien and Bela G. Lugosi

Right-of-publicity disputes involving celebrities and noncelebrities continue to find their way into courts. The evaluation of those cases is often difficult for both plaintiff and defense counsel. While many factors must be considered in evaluating individual cases, jury verdicts and settlements in other right-of-publicity cases can be instructive.

The commercial value that juries have placed on infringement of rights of publicity for both celebrities and noncelebrities shows that, while the rights of celebrities have more value, the rights of noncelebrities also have substantial value. This article reviews jury verdicts and settlements in right-of-publicity cases that have been reported in official reports as well as cases noted in various jury-verdict search publications.

The right-of-publicity laws, if any, of the state where an injury, act or wrong occurs or where the subject person is domiciled, may govern a claim of infringement. In California, for example, in addition to the common law right-of-publicity, there are statutory right-of-publicity laws, Civil Code Sections 3344 applicable to any living person and 3344.1 applicable to deceased personalities.

The basic elements of a cause of action for infringement of the right of publicity are invasion by the defendant of the plaintiff's right of publicity by use of the name, likeness, etc. of the plaintiff or plaintiff's ancestor, on merchandise or in advertising; and the absence of consent. A defendant can raise affirmative defenses including defenses based on the statute as well as First Amendment defenses.

The usual measure of damages for right-of-publicity infringement, if liability is found for persons, including deceased celebrities, according to California Civil Code Sections 3344 and 3344.1, is (1) any damage actually sustained or \$750, whichever is greater; (2) any profits attributable to the use and not taken into account in computing the actual damages; (3) punitive damages; and (4) attorneys' fees and costs. Other state statutes and common law decisions use similar measures of damages. Damages have also been awarded for emotional distress.

We review verdicts and settlements reported where celebrity plaintiffs brought actions in California and other states. We also review verdicts and settlements involving noncelebrity plaintiffs in California and other states.

Not included in this article are right-of-publicity cases resolved on legal grounds before damages were awarded. Included, however, are cases where damages were assessed, but the case was later reversed. Cases where the

defendant prevails can, in fact, result in an award in favor of the defendant for attorneys' fees.

Some right-of-publicity statutes contain attorneys' fees provisions in favor of the prevailing party. For example, in *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002), the court awarded attorneys' fees of \$2,300,000 and costs of \$150,000 to the defendant as the prevailing party in a right-of-publicity case involving the use by the Franklin Mint of the likeness of Princess Diana on commemorative plates and other products.

There are, of course, many cases not included in this article because they were either resolved by confidential settlements or went to the jury but were not reported in an official report or jury verdicts publication.

## Celebrities

Juries have awarded a wide range of damages from very moderate amounts to multi-million dollar verdicts based on the unauthorized use of a celebrity's image. The awards in the right-hand column do not include punitive damages.

### 1. California cases

(1) <i>Schwarzenegger v. Fred Martin Motor Co.</i> , 2004 U.S. Dist. Ct., Los Angeles CV-06354; VERDICTSEARCH <sup>1</sup> (unauthorized newspaper ad depicting plaintiff.)	(Confidential, substantial settlement payable to plaintiff's charity and written apology.)
(2) <i>Ackerman v. Ferry</i> , 2002 WL 31506931 (Cal. App. 2 Dist.) (Well-known former horror magazine editor who had used a pen name sued the publisher for appropriation of right of publicity in connection with the magazine, conventions and other enterprises. Court held that a plaintiff's pseudonym, if widely known and associated with the plaintiff, is protected by the right of publicity. Damages awarded of \$77,000 for mental distress from the appropriation and \$342,000 punitive damages reduced to \$150,000.) (Not officially published.)	\$77,000
(3) <i>Irwin v. Fisher Space Pens</i> , San Diego Superior Court 2002 WL 31961659; 3 Trials Digest 6th 11 (Use of photograph of astronaut Jim Irwin on lunar surface on product packaging.)	\$50,000 (in addition to a confidential amount paid by certain settling defendants.)
(4) <i>Hoffman v. Capital Cities/ABC Inc.</i> , 33F.Supp. 2d 867, 873, 27 Media L. Rep. (BNA) 1527, 50 U.S.P.Q.2d (BNA) 1363 (9th Cir. 2001) (The fair market value of the use of actor Dustin Hoffman's name and picture in a one-time use to promote fashions in <i>Los Angeles Magazine</i> .) (verdict overturned on legal grounds.)	\$1,500,000

(5) <i>Lake v. Luke Ford</i> , 2000, Santa Monica Superior Court SC 059805; VERDICTSEARCH. (Publisher misidentified a female adult film star as the person in magazine photo depicting bestiality.)	Settlement of \$150,000 plus a retraction and apology.
(6) <i>Comedy III Productions v. Saderup</i> , Los Angeles Superior Court, 1997 WL 875120; 4 Trials Digest 3 <sup>rd</sup> 121 (Artist's unlicensed use of nontransformative painting of exact likeness of the Three Stooges on T-shirts and posters. Judgment for stipulated amount of damages in favor of plaintiff over objection by defendant based on the First Amendment.)	\$225,000
(7) <i>DeRita v. Scott</i> , Los Angeles Superior Court (Nov., 1994) Jury Verdicts Weekly (Combined judgment rendered for violation of rights of publicity re: The Three Stooges. Verdict also included punitive damages of \$1 million and additional intentional tort damages, as well as declaration of ownership of the rights to The Three Stooges.)	\$179,295
(8) <i>White v. Samsung</i> , 971 F.2d 1395, 1397 (9 <sup>th</sup> Cir. 1992) 1994 WL 849434; 32 Trials Digest 49 (Use of Vanna White robot "look-alike" in TV commercial.)	\$403,000
(9) <i>Sinatra v. National Enquirer Inc.</i> , 854 F.2d 1191, 1194, 15 Media L. Rep. (BNA) 1949 (9 <sup>th</sup> Cir. 1988) (Swiss Medical clinic planted a false story in the <i>National Enquirer</i> that Frank Sinatra had received treatment at the clinic. At trial, Sinatra presented expert testimony on the value of the unlicensed use of his name.) (Punitive damages of \$100,000 were also awarded.)	\$350,000
(10) <i>Ladd v. Superfilms Ltd.</i> , Los Angeles Superior Court (1983) Jury Verdicts Weekly (Use of Cheryl Ladd "look-alike" on movie poster. Also awarded \$750,000 punitive damages.)	\$300,000
(11) <i>Cher v. Forum Intern., Ltd.</i> , 7 Media L. Rep. (BNA) 2593, 213 U.S.P.Q.(BNA) 96 (C.D. Cal. 1982), aff'd in part, modified in part and rev'd in part, 692 F.2d 634, 8 Media L. Rep. (BNA) 2484, 217 U.S.P.Q. (BNA) 407 (9 <sup>th</sup> Cir. 1982) (Use of interview of Cher beyond the uses permitted by her. Damage amount arrived at based on the fact that another magazine had previously offered Cher \$100,000 for a multi-part exclusive series on her life. The court awarded \$69,117 general damages, \$200,000 for the value of the use of name and likeness and punitive damages of \$325,000.)	\$200,000
(12) <i>Lugosi v. Universal</i> , 25 Cal. 3d 813 (1979) (Studio licensed likeness of deceased celebrity actor on merchandise. Trial court awarded damages to plaintiff on the ground that there exists a descendable right of publicity. Reversed on legal grounds by the California Supreme Court which decision in turn was reversed when California adopted Cal.Civ.Code Sec. 990.)	\$53,000

2. Cases in other states	
(13) <i>Doe v. TCI Cablevision</i> , 2002 WL 1610972 (Mo. App.#.D.) (Retired hockey player's action against publisher of the comic book <i>Spawn</i> for misappropriation of his name, Tony Twist, for a character who is also portrayed as an enforcer. Defendant identified the plaintiff as the source of the name for the fictional character. There were comic book spin-offs, an animated series, a movie and a line of toys. The jury returned a verdict and damages but the court order granted defendant's motion for judgment notwithstanding the verdict, which order was affirmed on appeal.) (Not released for publication.)	\$24,500,000
(14) <i>King v. Ames</i> , 179 F.3d 370, 51 U.S.P.Q.2d (BNA) 1446 (5 <sup>th</sup> Cir. 1999) (The use of the name of blues music pioneer Freddie King in marketing compact discs of King's recordings.)	\$20,000
(15) <i>ASA Music Productions v. Thomsun Electronics</i> , 49, U.S. P.Q.2d (BNA) 1545, 1554, 1998 WL 988195 (S.D.N.Y. 1998) (The use of the name and image of one of the most popular singers in India on counterfeit and low-quality recordings, causing damage to his professional reputation.)	\$20,000
(16) <i>Ventura v. Titan Sports</i> , 65 F.3d 725 (8 <sup>th</sup> Cir. 1995). (The reasonable royalty rate to compensate former wrestler Jesse Ventura for doing commentary on 90 videotapes of wrestling matches. The jury awarded \$801,333.06 for causes of action relating to the sale of videotapes and \$8,625.60 for use name and likeness.)	\$809,959
(17) <i>Town and Country Properties Inc. v. Riggins</i> , 249 Va. 387, 457 S.E.2d 356, 23 Media L. Rep. (BNA) 2045 (1995) (The use of the name of former professional football star John Riggins by his former wife to sell their former residence as "John Riggins' former home." In addition to \$25,000 compensatory damages, the jury awarded \$28,608 punitive damages, reduced on appeal to \$25,000.)	\$25,000
(18) <i>Frazier v. South Florida Cruises Inc.</i> , 19 U.S.P.Q.2d (BNA) 1470, 1991 WL 24910 (E.D. Pa. 1991), order vacated in part, 945 F.2d 395, 20 U.S.P.Q.2d (BNA) 1951 (3d Cir. 1991) (A cruise ship line planned a special cruise for boxing fans and advertised that world heavyweight champion Joe Frazier would be on board to mingle. Frazier had rejected the proposal and had not authorized this use of his name in advertising.) (Punitive damages of \$32,000 were reversed on appeal.)	\$45,000
(19) <i>Neva Inc. v. Christian Duplications Intern. Inc.</i> , 743 F. Supp. 1533, 15 U.S.P.Q.2d (BNA) 1024 (M.D.Fla.1990) (The unauthorized commercial sale of audio tapes of the late radio announcer Alexander Scourby reading the King James version of the Bible. Verdict for the use of name \$120,209, plus \$275,001 punitive damages and various other amounts of damages against other defendants on other causes of action.)	\$120,209

(20) <i>Apple Corps Ltd., v. Leber</i> , 12 Media L. Rep. (BNA) 2280, 229 U.S.P.Q. (BNA) 1015, 1986 W.L. 215081 (Cal. App. Dep't Super. Ct 1986). (The "fair market value" of a license from the Beatles to present a live Beatles imitation performance: 12½ percent of gross. On a similar basis, \$2 million was also awarded for a movie of the performance.)	\$5,600,000
(21) <i>Jackie Collins Lerman v. Flynt Dist. Co. Inc.</i> , 745 F.2d 123 (2d Cir. 1984) (Plaintiff, a renowned author, was misidentified as subject of nude photograph printed from a movie film in one issue of a magazine. In two later issues of the magazine, a subscription solicitation was enclosed depicting in reduced size cover pages of prior issues one of which claimed to contain a photo of plaintiff "In the Nude from the Playmen archives." The jury verdict on the right of publicity claim included damages of \$7 million, plus \$33 million punitive damages (reduced to \$3 million).) (Reversed on legal grounds.)	\$7 million
(22) <i>National Bank of Commerce v. Shaklee Corp.</i> , 503 F.Supp. 1533 15 U.S.P.Q. (BNA) 1005 (W.D.) Tex. 1980. (The use of the name of writer Heloise Bowles, author of the "Hints from Heloise" column, to promote the sale of household products. Also awarding \$25,000 for mental suffering and \$35,000 punitive damages.)	\$75,000
(23) <i>Big Seven Music Corp. v. Lennon</i> , 554 F.2d 504, 512 (2d Cir. 1977) (Damages awarded over defendants' argument that Lennon's reputation was "virtually impervious." The unpermitted use of John Lennon's name on a "cheap looking" album of Lennon's recording which had "shoddy and fuzzy" sound quality, out of-tune tracks and indistinct voices, as a measure of damages to Lennon's reputation. \$10,000 punitive damages were also awarded.)	\$35,000
(24) <i>Hogan v. A.S. Barnes &amp; Com. Inc.</i> , 114 U.S.P.Q. (BNA) 314, 1957 WL 7316 (Pa. C.P. 1957) (The use of the name and picture of professional golfer Ben Hogan in a book purporting to disclose his golfing "secrets.")	\$5,000

## Noncelebrities

California and out-of-state juries have been willing to return significant verdicts even in cases where noncelebrities, including models, were involved and the unlicensed use was very limited.

### 1. California cases

(25) <i>Christoff v. Nestle USA Inc.</i> , Los Angeles Superior Court 2005 Case No. EC 36163 (Unauthorized use of photograph of non-celebrity model on instant coffee jars and ads for six years. Jury awarded actual damages of \$330,000 plus 5 percent of defendant's profits which the jury found were attributable to defendant's use of plaintiff's photograph.) (Case is still pending.)	\$15 million
(26) <i>Campbell v. Van Nieulande</i> , San Diego Superior Court (June 26, 1997) 1997 WL 695162; 36 Trials Digest 2d 39 (Unlicensed use of non-celebrity person's photograph in local newspaper ad for hair company. Punitive damages of \$25,000 were also awarded.)	\$111,943
(27) <i>Monterrose v. Genre Publishing Inc.</i> , 1995 WL 554701 (Cal. Superior); 9 Trials Digest 2d 40 (Plaintiff sued for commercial misappropriation claiming that defendants published a provocative photograph of plaintiff without his knowledge and consent. The plaintiff was Robert Monterrosa, a 26-year-old noncelebrity actor/model. Attorneys' fees of \$8,336 also awarded.)	\$39,500
(28) <i>Banks v. Charter Hospital</i> , Los Angeles County Superior Court, 1992 WL 681331; 12 Trials Digest 60 (Unlicensed use of noncelebrity patient's image in hospital advertisement.)	\$269,500

### 2. Cases in other states

(29) <i>Candiotto v. Calvin Broadus, a.k.a. Snoop Doggy Dog</i> , 2004 U.S. Dist. Ct., East District, Louisiana; VERDICTSEARCH (Two females photographed revealing their breasts claimed invasion of privacy and other claims when their photograph was featured on the cover of the videotape without their consent.)	Confidential settlement.
(30) <i>Courtright v. Youngblood</i> , 2004, Superior Court, Fulton County, Georgia; VERDICTSEARCH (Heterosexual man's photograph used in ads for a gay establishment. Defendants were the photographer, the publisher of the newspaper and owner of the gay bar.)	\$17,500 settlement

(31) <i>Felder v. Weinstein Design Group</i> , 2003, Palm Beach County Circuit Court CL99-7595; VERDICTSEARCH (Decorator who had been hired to redecorate a famous major league slugger's home used his client's name without consent in his firm's brochures and other promotional materials. Additional \$15,000 awarded as punitive damages.)	\$400,000
(32) <i>Morris v. Cirage Inc.</i> , 2002, State Court, Fulton County, Georgia; VERDICTSEARCH (Plaintiff model's picture appeared without her consent in an "X-rated" magazine ad placed by defendant.)	\$10,000
(33) <i>Doe v. Merck &amp; Co. Inc.</i> , 2001, New York Supreme Court; VERDICTSEARCH (Plaintiff, who is HIV positive, agreed to pose for an educational flip chart. Defendant used her photograph also on a sales brochure for its drug Crixivan. Awarded \$2 million, in addition, for punitive damages.)	\$1,001,000
(34) <i>Hernandez v. Wyeth-Ayerst Laboratories</i> , 2000, New York Supreme Court; VERDICTSEARCH. (Professional model's likeness used in advertising and packaging for vitamins beyond the terms of the license; punitive damages of \$100,000 also awarded.)	\$12,000
(35) <i>Thompson v. Perlman</i> , 2000, Harris County District Court; VERDICTSEARCH (Unauthorized use of a fashion model's photograph on a mailer for a local plastic surgeon. Award against designer of the mailer who claimed to have obtained the photo from "a girl at Kinko's.")	\$125,000
(36) <i>Brown, et al. v. Ames</i> , 201 F.3d 654 (5 <sup>th</sup> Cir. 2000). (Musicians recovered misappropriation damages against record company for use of their names and likenesses on cassettes and CDs that contained their musical works and also on posters. Damage amount was based on inferences from the amounts plaintiffs were paid to perform at blues festivals.)	\$27,000
(37) <i>Levin v. WJLA TV</i> , 2000, Circuit Court, Fairfax County, Virginia; VERDICTSEARCH (TV station used plaintiff doctor's name and picture in promotions for its report on doctors sexually assaulting patients. Plaintiff claimed damages for unauthorized use of his name and picture. Jury awarded an additional \$2 million for defamation.)	\$575,000
(38) <i>Fain v. Firestone Publishing</i> , 2000, Superior Court, Cobb County, Georgia; VERDICTSEARCH (Plus-size model who did not sign a model release was photographed at a fashion show. The photograph was published in defendant's magazine. An additional \$250,000 punitive damages also awarded.)	\$550,000
(39) <i>Robert Wagner v. Sun International Hotel</i> , 1999 WL 1567386 (Fla.Cir.Ct.); 100 Florida Jury Verdict Reporter 2-33 (Plaintiff was a noncelebrity model whose image appeared in marketing brochures used to promote the Sun Entities Hotel in the Bahamas. His photograph was used without his consent to promote the hotel beyond the permitted contractual usage period; punitive damages of \$250,000 also awarded.)	\$14,000

(40) <i>Susan Peluso v. Gene Hutnak, et al.</i> , 1992 WL 1474396 (Unknown State Ct.), 8 N. Eng. J.V.R.A. 2:8; 8 New England Jury Verdict Review and Analysis 2:8 (Action brought by the female plaintiff against the photographer hired to photograph a wedding in which she was a bridesmaid. Some time after the wedding, the defendant entered the photograph of the plaintiff and her son in a photo contest and won a prize. The defendant thereafter displayed the photograph with the prize ribbon in his store window.)	\$3,397
(41) <i>Staruski v. Continental Telephone Co. of Vermont</i> , 1991 WL 449043 (Vt. Super.); Jury Verdict Reporter No. 6949 (Female employee of the defendant phone company suffered emotional distress from invasion of privacy after the defendant without consent featured her picture in an advertising campaign.)	\$50,000
(42) <i>Felice v. Delporte</i> , 136 A.D.2d 913m 524 B.Y.S2d. 919 (4 <sup>th</sup> Dep't 1988) (Use of a photo of a model in a context held to be outside the scope of the model's release. The basis for the damage award is not disclosed. Punitive damages of \$500,000, reduced to \$200,000, also awarded.)	\$150,000
(43) <i>Jane Doe v. P.O.R. Inc., et al.</i> , 1987 WL 753811 (Mich.Cir.Ct.; JAS MI Ref. No. 30016 WL) (Plaintiff alleged that photographs of her below-the-knee amputation were used without her permission to advertise a prosthetic sleeve and gel made or sold by defendant. The photos used in the brochure were taken while she was in a training program within the Department of Prosthetics/Orthotics at the University of Michigan Hospital.)	\$5,000
(44) <i>Genesis Publications Inc. v. Goss</i> , 437 So. 2d 169, 9 Media L. Rep (BNA) 2149 (Fla. Dist. Ct. App. 3d Dist. 1983). (Unauthorized use of nude photo of professional model Anne Goss in ad for <i>Genesis Magazine</i> .)	\$100,000
(45) <i>Clark v. Celeb Pub. Inc.</i> , 530 F. Supp. 979, 8 Media L. Rep (BNA) 1261 (S.D. N.Y. 1981) (Use of the photo of professional model Lynda Clark in an ad for <i>Celeb</i> magazine, with the caption "Take off your pants and subscribe to <i>Celeb</i> ," California law applied. The court also awarded \$25,000 for emotional injury and \$25,000 punitive damages.)	\$13,750

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#### Endnotes

1. Copies of VERDICTSEARCH reports and Jury Verdicts Weekly reports referred to are on file with the authors.