“Fit” and “Justification” for the Right of Publicity

Introduction

In this essay I argue the decision in *Cardtoons v. Major League Baseball Players Association* (“MLBPA”) is untenable.[1] Utilizing Dworken’s principles of “fit” and “justification”[2] I defend the right of publicity against the *Cardtoons* court’s analysis. Specifically, preventing Barry Bonds’ and others’ likenesses from entering the free market in the form of “parody” trading cards “fits” the existing case law established by the right of publicity. Such a position is also justifiable on deontological bases.

I. The Right of Publicity Generally

Before critiquing the *Cardtoons* decision, I would like to provide a brief explanation regarding the right of publicity. The right of publicity builds on the principles established by the right of privacy.[3] In 1890, Warren and Brandeis formulated the right of privacy as a principle protecting any production of the intellect or emotion, as against the rest of the world.[4] Such a description transcended traditional notions of private property and embraced rights that were more abstract, though no less essential or personal.[5] Under this view, the protection of the law ought to extend beyond material items to include intangible and uniquely personal harms.

The right of publicity encompasses both material and personal harms by defending against the appropriation of the commercial value of another’s identity.[6] It preserves not only an individual’s personal dignity and autonomy, but also protects the commercial interest in one’s

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[1] Packet 23 (10th Cir. 1996).
[2] Lawrence Solum, Legal Theory Lexicon, Packet 4 (2004).
[3] *See* Restatement (Third) of Unfair Competition, Packet 3 (1995) (describing the right of privacy as the “principal historical antecedent” of the right of publicity).
[4] Samuel Warren & Louis D. Brandeis, *The Right of Privacy*, Packet 76 (1890).
[5] *See id.* at 77 (noting “the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense”).
[6] Restatement (Third) of Unfair Competition, Packet 3 (1995).

likeness.[7] Notably, fame is not dispositive for applying the right of publicity; in particular, celebrities are not precluded from establishing non-economic injury and non-celebrities may well establish there is commercial value in their identity.[8]

II. *Cardtoons v. MLBPA*: Holding and Analysis

The decision in *Cardtoons* addressed the tension in celebrity "parodies" between the right of publicity and the First Amendment.[9] In particular, the holding represented a departure from "the only other circuit court decision addressing the constitutional tensions inherent in a celebrity parody,"[10] *White v. Samsung Electronics America, Inc*.[11] In *White*, the court defended the right of publicity against the claim that Samsung's advertisement represented Constitutionally protected speech. The court noted that the cases in which the First Amendment had protected third parties' uses of celebrity likenesses were parodies.[12] In *White*, the primary purpose was not to poke fun at Vanna, but rather to sell Samsung VCRs.[13] Given its commercial emphasis, Samsung's advertisement missed the First Amendment protection often afforded non-commercial expressions.[14] The court found the use of Vanna's image to be commercially driven and not a requirement of free speech—the difference between "profit" and "fun."[15]

However, in *Cardtoons* the court held the trading cards were unlike the "parody" in *White*.[16] In particular, they opined that the uses of celebrity likenesses on the trading cards did

[7] *Id*.
[8] *Id*.
[9] *Cardtoons v. MLBPA*, Packet 23, 25 (10th Cir. 1996).
[10] *Id*. at 24-5.
[11] Packet 17 (9th Cir. 1992).
[12] *Id*. at 20
[13] *Id*.
[14] *See id*., n.1 (explaining that though the first amendment hurdle will bar most right of publicity actions against expressive uses of identity, the first amendment hurdle is not so high in the area of commercial advertising).
[15] *Id*.
[16] *Cardtoons v. MLBPA*, Packet 23, 24 (10th Cir. 1996).

not constitute commercial speech.[17] They noted the Supreme Court had defined commercial speech as an "expression related solely to the economic interest of the speaker and its audience."[18] The court found the trading cards had broader parodic purposes and provided useful social commentary on public figures; accordingly, after weighing the effects of infringing upon the right of publicity with the effects of infringing upon the right to free speech, the court granted Cardtoons full protection under the First Amendment.[19] Although the balancing test might cause the decision to appear fair and well reasoned, *Cardtoons*' holding is untenable.

III. Criticism of the Court's Arguments

Though the *Cardtoons* court has its own methodology for defending the trading cards as an appropriate use of free speech, I believe Dworkin provides a superior test for assessing the wisdom of a respective decision in his criteria of "fit and justification."[20] Though his use of the terms appears intended primarily to provide a descriptive explanation of how judges make decisions, I will be using these concepts normatively to critique the *Cardtoons* court's arguments.

A. "Fit"

First, Dworkin claims that when judges decide hard cases, they first attempt to choose an interpretation of the law that "fits" the existing legal landscape.[21] In the context of *Cardtoons*, the question of "fit" is not a question of whether the trading cards utilized celebrity likenesses for profit and without authorization. The court observes that these elements of the statute are clearly

[17] *Id*.
[18] *Id.*
[19] *Id*. at 24-5.
[20] Lawrence Solum, Legal Theory Lexicon, Packet 4 (2004).
[21] *Id*. at 5.

met.[22] Rather, the salient question of "fit" is one regarding whether Cardtoons' use of celebrity likenesses corresponds with other uses that have been protected by the First Amendment.

In particular, the pertinent question is "Are the facts of *Cardtoons* like *White*—in which the parody claim was found to be laughable at best—or more like *Hustler Magazine v. Falwell* and *L.L. Bean, Inc. v. Drake Publishers, Inc.*,[23] where the advertisements were run for the very purpose of poking fun at Jerry Falwell and L.L. Bean, respectively?" As noted above, the *Cardtoons* court tries to distinguish its facts from the absence of parody in *White*, implicitly alleging greater similarity to the *Falwell* and *L.L. Bean* decisions. Their attempt is hardly successful.

The cardtoons appear to utilize celebrity images more for sales than poking fun at athletes like Barry Bonds. One might well question if he would feel criticized by his portrayal as "Treasury Bonds" or if a collector would view the cards as social criticism. Realistically, would *anyone* view the cards as social commentary? In the case of Bonds, the court attempts to cast the use of his caricature as a "modern-day personification[] of avarice."[24] This effort is no more compelling than the claim of parody in *White*. Here, as with most sports cards, the cardtoons are likely marketed to appeal to adolescents. But few children and teens are interested in social commentary on a home run hero. If *Cardtoons* were truly interested in parodying major league baseball players, they would have marketed their caricatures to socially conscientious adults—not children.

Cardtoons' efforts to sell these trading cards (and make a profit) are much more readily apparent than any attempt to provide "social criticism" or facilitate needed self-expression.[25] In

[22] *Cardtoons v. MLBPA*, Packet 23, 24 (10th Cir. 1996).
[23] *White v. Samsung Electronics America, Inc.*, Packet 17, 20 (9th Cir. 1992).
[24] *Cardtoons v. MLBPA*, Packet 23, 25 (10th Cir. 1996).
[25] *Id*.

fact, the cards seem to do no more than propose a commercial transaction, the criterion for commercial speech advanced by the Supreme Court.[26] *Cardtoons* seems much more like *White*, where parody is incidental to the commercial goal of sales, than *Hustler* and *Falwell*, two cases characterized by "advertisements run *for the purpose* of poking fun."[27] (emphasis added). Accordingly, *Cardtoons* does not appear to "fit" the existing legal landscape.

Even so, assuming these arguments regarding *Cardtoons*' "fit" are not clearly established, the *Cardtoons* court's decision is still unwarranted on the basis of deontological considerations.

B. "Justification" on Deontological Grounds

Second, Dworkin claims that when judges decide hard cases, if more than one interpretation "fits," they choose an interpretation of the law that "justifies" the existing legal landscape. He further posits two different kinds of arguments that can be used to justify a law: Arguments of *principle*—loosely associated with deontology—and *policy*, entailing consequential calculations. Here, I will be restricting my focus to deontological factors since the decision in *Cardtoons* is predicated largely on considerations of principle, fairness, and rights.[28]

i. First Amendment Rights: A Guarantee of Self-Expression?

One deontological argument that potentially counsels against the players' right of publicity is the First Amendment's right to free speech. Indeed, the *Cardtoons* court characterizes its decision as one about whether to infringe upon this right. It claims that preventing Cardtoons from selling its cards would "likely prevent distribution of the parody

[26] *See supra* note 18 and accompanying text.
[27] *White v. Samsung Electronics America, Inc*., Packet 17, 20 (9th Cir. 1992).
[28] *See* Lawrence Solum, Legal Theory Lexicon, Packet 4 (2004) (noting that arguments of principle appeal to ideas about fairness and rights, while arguments of policy appeal to consequences).

trading cards" and "have a chilling effect upon future celebrity parodies."[29] Yet it is unclear this would result from protecting the players' right of publicity. Cardtoons could still distribute the cards; they simply could not turn a profit on the distribution. A lack of profit would also strengthen the claim that their use of celebrity likenesses was truly intended as social commentary and not "commercial speech."[30]

In more recent scholarship, the right to free speech has been described as a type of "cultural recoding," in which the public should be free to manipulate celebrity images, "investing [them] with new and often oppositional significance."[31] A reversal of *Cardtoons* would still foster this "recoding"—it would simply be extricated from financial incentives. Future artists could still talk about, write about, reinvent, reassemble, and discuss to death celebrity images.[32] The primary "recoding" threatened by the assertion of publicity rights is that associated with businesses and commercial exploitation.[33] The archetypal independent artist, fighting for the right to provide valuable social criticism, has lost little to no ground.[34] The right of free speech is not threatened nearly enough to warrant infringing upon the property rights of those depicted in the trading cards.

ii. Property Rights: Access to the Fruit of One's Labor

A strong deontological justification for protecting against the dissemination of Cardtoons is the Lockean argument that individuals ought to enjoy the right to the fruit of their labor.[35] In this context, property rights should extend to those accomplishments born out of one's efforts.

[29] *Cardtoons v. MLBPA*, Packet 23, 25 (10th Cir. 1996).
[30] *See id*. at 24 (noting "commercial speech is best understood as speech that merely advertises a product or service for business purposes").
[31] Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, Packet 46, 48 (1999).
[32] *Id*. at 49.
[33] *Id*.
[34] *Id*.
[35] *See* John Locke, Second Treatise on Government, Packet 6 (1690) (postulating "[t]he 'labour' of [a man's] body and the 'work' of his hands . . . are properly his").

The court claims this right is inapplicable in the case of parody since "there is little right to enjoy the fruits of socially undesirable behavior."[36] While this claim might seem convincing in the abstract, it is patently untrue. Greed may not be socially desirable, but if someone develops a reputation from avarice that allows him to market his image, he has every right to do so. Donald Trump might be considered a case in point. Other celebrities such as Madonna and Dennis Rodman have made a living out of marketing behavior that is often described as socially offensive.

Similarly, the *Cardtoons* court claims denying MLBPA's publicity right does not allow Cardtoons any unjust enrichment. They claim that Cardtoons adds a substantial creative component to the trading cards. However, this argument rests largely on the claim that Cardtoons is providing significant social commentary. As noted above, the commercial context of these trading cards strongly militates against this conclusion.[37] Accordingly, the more Cardtoons' trading cards look like "commercial speech," the more it appears Cardtoons is indeed "hitching its wagon to a star."[38]

Conclusion

The *Cardtoons* court, despite its great zeal for free speech, fails to effectively rebut the players' right of publicity. For the court to build its argument around an alleged parody, it is forced to diverge from First Amendment-protected precedents, where the advertisements had been run for the very purpose of parodying their respective targets.[39] In addition to a lack of "fit," the court fails to provide deontological "justification" despite its emphasis on rights and fairness. In a country that so heavily values hard work and access to the fruit of one's labor, the

[36] *Cardtoons v. MLBPA*, Packet 23, 26 (10th Cir. 1996).
[37] *See supra* Part A: "Fit."
[38] *Cardtoons v. MLBPA*, Packet 23, 27 (10th Cir. 1996).
[39] *See supra* note 23 and accompanying text.

court ought to consider how it could protect the rights of those who have worked to establish a marketable image. Such efforts would encompass not only respect for the right to the fruit of one's labor, but also ground the right of publicity in the values of autonomy and personal dignity.