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# Introduction: Tiger Woods and the First Amendment

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# INTRODUCTION: TIGER WOODS AND THE FIRST AMENDMENT

TYLER TRENT OCHOA\*

The story of Tiger Woods' rise to fame is by now a familiar one. In 1991, he became the youngest player ever to win the U.S. Junior Amateur Championship, an event he won two more times.<sup>1</sup> In 1994, he became the youngest player ever to win the U.S. Amateur Championship.<sup>2</sup> Immediately after winning his third consecutive U.S. Amateur Championship in 1996, Woods joined the PGA Tour and won two tournaments in his first four months of competition.<sup>3</sup> In 1997, at age 21, he became the youngest player ever to win the Masters Tournament, setting records for low score (18 under par) and largest margin of victory (12 strokes).<sup>4</sup> Since then, Woods has completed a career grand slam, winning the PGA Championship in 1999 and 2000, and the U.S. Open and British Open in 2000.<sup>5</sup>

Sports artist Rick Rush witnessed the 1997 Masters and saw history being made. To commemorate the event, he painted a picture entitled "The Masters of Augusta."<sup>6</sup> The picture depicts Woods in three different positions, accompanied by his caddie.<sup>7</sup> In the

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1. *All About Tiger. Biography*, <<http://cbs.sportsline.com/u/fans/celebrity/tiger/about/index.html>> (accessed Nov. 26, 2000).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *ETW Corp. v. Jireh Publg., Inc.*, 99 F. Supp. 2d 829, 830 (N.D. Ohio 2000), *appeal filed*, No. 00-3584 (6th Cir. 2000).

7. Rick Rush, *The Masters of Augusta* (Limited Edition Print (1998)) (available at

background are the ghostly figures of six golfing legends: Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus.<sup>8</sup> Rush's exclusive distributor, Jireh Publishing, Inc., reproduced the painting in a limited edition of 5000 lithographs for sale to the public.<sup>9</sup>

In 1998, Tiger Woods' exclusive licensing agent, ETW Corp., sued Jireh for trademark infringement and violation of Woods' state-law right of publicity.<sup>10</sup> The case immediately attracted national attention as another example of the commercialization of sports and the battle between artists, celebrities, and the media for control over their intellectual property.<sup>11</sup>

After discovery, both parties moved for summary judgment.<sup>12</sup> The district court issued its decision on April 10, 2000, holding that no trademark violation had occurred, and that Jireh had not infringed Woods' right of publicity.<sup>13</sup> Regarding the trademark claim, the court held that "there is no evidence that plaintiff actually used the allegedly infringing image of Tiger Woods as a trademark,"<sup>14</sup> and that the use of Woods' name was "descriptive of and used fairly and in good faith only to describe" the print.<sup>15</sup> Regarding the right of publicity claim, the court held that "paintings and drawings are protected by the First Amendment."<sup>16</sup> The court found that "the print at issue herein is an artistic creation seeking to express a message,"<sup>17</sup> and it rejected ETW's

<[www.jirehpub.com/indexb.html](http://www.jirehpub.com/indexb.html)> (accessed Nov. 26, 2000).

8. *Id.*

9. *ETW Corp.*, 99 F. Supp. 2d at 830, 835.

10. *Id.* at 830-31.

11. See e.g. Editorial, *The Bullying of a Painter*, Denver Rocky Mt. News 28A (Feb. 23, 1999); Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. Times D3 (Feb. 16, 1999); Stan Hochman, Philadelphia Daily News, *Painting Controversy Raises Privacy Issues*, reprinted in Pitt. Post-Gaz. D11 (Mar. 28, 1999); Reggie Rivers, *Selling of Woods' Likeness by Artist Goes Out of Bounds*, Denver Rocky Mt. News 4C (Feb. 28, 1999); James Warren, *Painter Lets Loose a Tiger with Woods Lithos*, Chi. Trib., Tempo Mag. 2 (May 28, 1999); ABC World News Tonight, *The Battle Over Tiger Woods Right of Publicity Laws*, (Feb. 20, 1999) (available in 1999 WL 8588564).

12. *ETW Corp.*, 99 F. Supp. 2d at 829-30.

13. *Id.* at 834, 836 n. 4.

14. *Id.* at 832.

15. *Id.* at 833 (quoting 15 U.S.C. § 1115(b)(4) (1999)).

16. *Id.* at 835.

17. *Id.* at 836.

argument that the prints were “‘merely sports merchandise’ not entitled to First Amendment protection.”<sup>18</sup>

At its heart, the Tiger Woods case presents a stark example of the inherent conflict between two seemingly reasonable legal positions. On the one hand, if Rick Rush and Jireh are making money from selling images of Tiger Woods, shouldn't Woods be entitled to a cut of the profits? On the other hand, shouldn't the First Amendment protect Rush's right as an artist to paint any subject he wants and to disseminate his artistic creations as widely as possible without government interference?<sup>19</sup>

Although the right of publicity has been recognized as a distinct common-law doctrine since 1953,<sup>20</sup> only in recent years have courts begun to take the First Amendment seriously as a limit on the extent to which sports figures and other celebrities can use the doctrine to control the use of their images.<sup>21</sup> It is widely recognized that the government may prohibit false and misleading speech, such as an advertisement that falsely implies an endorsement of a product by an individual, without violating the First Amendment.<sup>22</sup> Similarly, it is generally acknowledged that the First Amendment protects the depiction of celebrities in news reports and in movies and television

18. *Id.* at 834.

19. The U.S. Supreme Court has made it clear that the First Amendment (as applied to the States by the Fourteenth Amendment) applies to private lawsuits to enforce state and federal laws as well as to direct governmental censorship. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the [state] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press . . . . The test is not the form in which state power has been applied but, whatever the form, whether that power has in fact been exercised.”).

20. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). In formulating the doctrine, *Haelan* drew upon several right of privacy cases from the early part of the twentieth century. *Id.* See Diane Leenheer Zimmerman, *Amicus Curiae Brief of 73 Law Professors in Support of Defendant/Appellee Jireh Publishing, Inc., for Affirmance*, 22 Whittier L. Rev. 389, 402 (2000).

21. Zimmerman, *supra* n. 20, at 404-06.

22. See e.g. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992) (using radio commercial with imitation of Waits' singing voice); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461-62 (9th Cir. 1988) (using television commercial with imitation of Midler's singing voice); *Allen v. Natl. Video, Inc.*, 610 F. Supp. 612, 616 (S.D.N.Y. 1985) (using celebrity “look-alike” in television commercial).

“docudramas.”<sup>23</sup> But in between these two paradigms, less agreement exists. Who is entitled to profit from the depiction of celebrities in a variety of non-advertising, non-news reporting and non-narrative contexts, such as baseball cards,<sup>24</sup> collectible plates,<sup>25</sup> T-shirts,<sup>26</sup> figurines,<sup>27</sup> calendars,<sup>28</sup> and posters?<sup>29</sup> Should control rest with the artist who creates the image, or the celebrity who is being depicted?

Another recent case that raises this issue is *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>30</sup> which is currently pending before the California Supreme Court. Saderup is an artist whose medium is charcoal on paper.<sup>31</sup> Saderup created a charcoal picture of the Three Stooges, and reproduced it in lithographs and T-shirts for

23. See e.g. *Gugliemi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979) (Tobriner, Manuel & Newman, JJ., concurring) (involving television biography of Rudolph Valentino); *Taylor v. Natl. Broad. Co.*, 22 Media L. Rep. 2433, 2433 (Cal. Super. 1994) (involving television biography of Elizabeth Taylor).

24. *Compare Haelan*, 202 F.2d at 668-70 with *Cardtoons, L.C. v. Major League Baseball Players Assn.*, 95 F.3d 959, 962 (10th Cir. 1996) (holding that the First Amendment protects trading cards featuring parodies of baseball players).

25. See e.g. *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1022-29 (C.D. Cal. 1998) (granting motion to dismiss right of publicity claim, based on British law, for “England’s Rose Heirloom Collector Plate” featuring picture of Diana, Princess of Wales).

26. See e.g. *Rosemont Enters., Inc. v. Choppy Prods., Inc.*, 347 N.Y.S.2d 83, 83-85 (1972) (holding that T-shirts bearing name and picture of Howard Hughes violate Hughes’ right of publicity).

27. See e.g. *Cairns*, 24 F. Supp. 2d at 1022 (involving claims for “Diana, Princess of Wales Porcelain Portrait Doll”); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (upholding right of publicity in suit to enjoin sale of plastic busts of Martin Luther King, Jr.).

28. See e.g. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 581, 586 (2d Cir. 1990) (holding that calendars featuring cover photograph of Babe Ruth did not violate plaintiff’s trademark).

29. *Compare Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221-22 (2d Cir. 1978) (holding posters of Elvis Presley with caption “In Memory 1935-1977” are a commercial product) with *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 639, 643 (App. 6th Dist. 1995) (holding reproduction of newspaper sports page as a poster is immune under the First Amendment).

30. 80 Cal. Rptr. 2d 464 (App. 2d Dist. Div. 2 1998), *review granted*, 973 P.2d 512 (Cal. 1999). In California, the grant of review vacates the Court of Appeal opinion. See Cal. R. Ct. 976(d) (West 2000) (“Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review . . . shall be published.”); Cal. R. Ct. 977(a) (West 2000) (prohibiting citation of unpublished opinions except in limited circumstances).

31. *Comedy III Prods., Inc.*, 80 Cal. Rptr. 2d at 466.

sale to the public.<sup>32</sup> The California Court of Appeal rejected Saderup's First Amendment defense, stating that although the First Amendment protects "political, religious, philosophical or ideological messages" on T-shirts,<sup>33</sup> "there is neither contention nor demonstration that defendants sought to convey or sell a message of any type in or on their T-shirts, or for that matter their prints."<sup>34</sup> More succinctly, it held that "reproductions of an image, made to be sold for profit, do not per se constitute speech."<sup>35</sup> Given the U.S. Supreme Court's express recognition (albeit in dicta) that paintings are entitled to First Amendment protection even if they do not contain a "message,"<sup>36</sup> the reasoning of the California Court of Appeal is obviously deficient. Paintings and drawings *are* speech, and are entitled to some measure of constitutional protection. Moreover, given that federal copyright law gives artists the exclusive right to reproduce and sell their works,<sup>37</sup> there is a lurking issue of federal preemption that has not yet been adequately addressed.<sup>38</sup>

One possible resolution of these issues might lie in copyright law's distinction between the work being reproduced and any "useful

32. *Id.*

33. *Id.* at 469 (quoting *Gaudiya Vaishnava Soc. v. City & County of S.F.*, 952 F.2d 1059, 1063 (9th Cir. 1990)).

34. *Id.*

35. *Id.* at 470.

36. See *Hurley v. Irish-Am., Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock.") (citation omitted).

37. 17 U.S.C. § 106 (1994) (granting exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute the copyrighted work to the public, and to publicly perform and publicly display the copyrighted work). These rights are subject to a number of exemptions and limitations, including fair use. See 17 U.S.C. §§ 107-122 (1994).

38. See *Wendt v. Host Intl., Inc.*, 125 F.3d 806 (9th Cir. 1997) (using animatronic robots resembling actors who portrayed characters on television show "*Cheers*"), *reh'g denied*, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, Kleinfeld & Tashima, JJ., dissenting from denial of rehearing en banc), *cert. denied, sub nom. Paramount Pictures v. Wendt*, 68 U.S.L.W. 3631, 2000 WL 343466 (Oct. 2, 2000). Judge Kozinski's opinion argues that the decision in favor of Wendt and Ratzenberger (1) conflicts with and is preempted by Paramount's right to create derivative works under the Federal Copyright Act; (2) violates the Dormant Commerce Clause; and (3) violates the First Amendment. *Wendt*, 197 F.3d at 1286-89.

article” on which the work is reproduced.<sup>39</sup> It could be argued, for example, that federal copyright law preempts the right of publicity in ordinary reproductions of the work, but that state law may grant celebrities a share of the profits when the artist depicts them on “useful articles” such as T-shirts and coffee mugs.<sup>40</sup> While such a compromise might be satisfactory from an economic point of view, it is difficult to understand why T-shirts and coffee mugs should not be considered equally legitimate as vehicles for First Amendment expression as lithographs and posters.<sup>41</sup> The content is the same; only the medium of expression is different.<sup>42</sup>

Beyond the issue of depictions of celebrities in paintings, prints, and drawings lies the realm of advertising. It is clear that the First Amendment does not shield a false representation or implication that a celebrity endorses a product.<sup>43</sup> But other advertising uses raise troubling issues about the use of the right of publicity to suppress criticism of the celebrity’s “image.”<sup>44</sup> In one familiar (perhaps even

39. 17 U.S.C. § 101 (1994). The Copyright Act defines a “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”

40. See e.g. J. Thomas McCarthy, *The Rights of Publicity and Privacy*, § 7.22, 7-44 (2d ed. 2000).

41. See Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DePaul-LCA J. Art & Ent. L. 35, 63 (1998) (“Furthermore, the mere fact that information appears on a utilitarian object does not deprive it of its identity as speech. Many products carry such significant communicative freight that they are clearly purchased by consumers for what they ‘say’ rather than for what they do.”).

42. *But cf.* McCarthy, *supra* n. 40, at § 7.20, 7-39 (arguing that “what is crucial is the medium, not the message.”) Prof. McCarthy contends that “if the line is drawn on the basis of content rather than medium, the result . . . is that no one would, as a practical matter, ever have a successful claim for unpermitted use of their identity in a ‘commercial setting.’” *Id.* at §7.20, 7-39 to 7-40. Prof. McCarthy’s argument is weak; it assumes that the absence of successful claims would be a bad thing, and therefore concludes that any First Amendment analysis that leads to that result is deficient. Moreover, his premise is false: a celebrity would still have an action for any false representation of endorsement. What Prof. McCarthy wants to preserve is a cause of action based solely on the potential for economic gain to the celebrity, and not based on any harm to the public.

43. See *supra* n. 22 and accompanying text.

44. See David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. Intell. Prop. L. 67, 95-100 (1995) (arguing that celebrities sometimes use the right of publicity to bypass the limits on defamation imposed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny).

notorious) example, the Ninth Circuit rejected a First Amendment defense for an advertisement that appeared to parody game-show hostess Vanna White.<sup>45</sup> In another example, an advertisement that satirized New York Mayor Rudolph Giuliani was held to be protected.<sup>46</sup> To the extent these cases depend on the judgment that some celebrity depictions contain a “message” while others do not, they would appear to be inconsistent with both recent Supreme Court precedent<sup>47</sup> and with the Court’s oft-repeated admonition that “[i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves the final judges of the worth of pictorial illustrations.”<sup>48</sup> And to the extent that these cases depend upon the lesser protection accorded “commercial speech”—which the Supreme Court has defined as “speech that does *no more than* propose a commercial transaction”<sup>49</sup>—they raise the question of whether otherwise protected speech should lose its protection simply because it appears in an advertising context,<sup>50</sup> a question that goes beyond the issues raised in the Tiger Woods case.

45. See *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, O’Scannlain & Kleinfeld, JJ., dissenting from denial of rehearing en banc). The advertisement featured a photograph of a robot wearing a blond wig, turning letters on a “Wheel of Fortune” game board, thereby implying that Vanna White could be replaced by a robot. *Id.* at 1396. The decision has been criticized in numerous articles. See e.g. Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 *Tort & Ins. L.J.* 635 (1995); Welkowitz, *supra* n. 44.

46. See *New York Magazine v. Metropolitan Transit Auth.*, 136 F.3d 123, 125 (2d Cir. 1998) (advertisement containing text “Possibly the only good thing in New York Rudy hasn’t taken credit for.”). While this advertisement could be considered political speech, First Amendment limits on defamation depend on whether the subject is a “public figure” and on whether the speech is a “matter of public concern,” not on whether the speech can be characterized as “political speech.” See e.g. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333-34 (1974) (public figures); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-59 (1985) (matters of public concern).

47. See *Hurley v. Irish-Am., Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (“a narrow, succinctly articulable message is not a condition of constitutional protection”).

48. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.). Immediately after the above statement, however, Holmes added the qualifier “outside of the narrowest and most obvious limits,” *id.*, leaving a modern observer to wonder just what those limits are and how “obvious” they can be.

49. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (emphasis added).

50. See *Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391, 1400-01 (9th Cir. 1996)

Shortly after the decision in *ETW*, I was contacted by Jireh's counsel, Dennis Niermann, asking me for my thoughts on the district court's opinion.<sup>51</sup> I responded that I thought the district court had reached the proper result; and in the event that *ETW* decided to appeal, I offered to contact other professors to join an amicus brief on Jireh's behalf. When *ETW* appealed the case to the Sixth Circuit, Dennis accepted my offer of assistance. I needed someone to write the brief, and at the suggestion of my colleague Professor David Welkowitz, I turned to one of the nation's leading authorities on the conflict between the right of publicity and the First Amendment: Professor Diane Leenheer Zimmerman of New York University Law School.<sup>52</sup> Diane graciously agreed to draft the brief if I would help edit it and recruit additional signatories. After we were confident that the draft was in good shape, Diane posted the draft on the NYU website, and I circulated the draft by e-mail to other faculty members around the country. I was aided in this effort by Prof. Edward P. Richards of the University of Missouri at Kansas City, who posted the draft brief to his own website and forwarded my messages to the LAWPROF discussion list; and Professor Eugene Volokh of the University of California at Los Angeles,<sup>53</sup> who forwarded the draft and my messages to his Constitutional Law discussion list.

(rejecting argument that "newsworthy" information remains protected when used in an advertisement); Stephen R. Barnett, *The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy*, 18 *Hastings Commun. & Ent. L.J.* 593 (1996). While most advertising uses might be perceived as an implied endorsement by the celebrity depicted, surely uses in which the celebrity is criticized or mocked would not carry such an implication. *Id.* at 594-95, 597-99. Such uses therefore ought to remain protected by the First Amendment. *Id.* at 597-99. *Cf.* Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 *J. Copy. Socy.* 546, 615-620, 626-28 (1998) (discussing First Amendment interest in permitting criticism of public figures and corporations through the vehicle of copyright and trademark parody).

51. Mr. Niermann contacted me because of comments I had made about the case on CNI-Copyright, a copyright discussion list sponsored by the Coalition for Networked Information. Those comments are archived at <<http://www.cni.org/Hforums/cni-copyright/1999-01/0547.html>> (accessed Nov. 26, 2000).

52. See Zimmerman, *supra* n. 41, at 53-82 (discussing the need to rethink rights of publicity in light of developments in the Supreme Court's treatment of commercial speech).

53. Professor Volokh has argued persuasively elsewhere that the generous standard for granting preliminary injunctions in intellectual property cases creates a serious risk of enjoining constitutionally protected speech. See Mark A. Lemley and Eugene

What follows is the product of our efforts. While I would like to be able to take credit for the amicus brief itself, my own contribution was limited to proofreading, cite-checking,<sup>54</sup> and a handful of editorial suggestions. The brief bears the distinct stamp of its creator, Diane Zimmerman, and it is appropriate that she receive sole authorship credit.<sup>55</sup> I am pleased, however, to have played a role in recruiting her to draft the brief, and in recruiting a total of seventy-three law professors from around the country to join in her work. Although *amicus curiae* briefs were also submitted on behalf of many interested parties,<sup>56</sup> we sincerely hope that our view, untainted as it is by any economic interest in the outcome, will be of assistance to the Sixth Circuit in resolving this appeal, and to other courts facing similar issues in future cases.

Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).

54. I would like to thank my research assistant, Gary Schneider, for cite-checking the draft; and my secretary, Mary James, for preparing the table of authorities.

55. Cf. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (actress who recruited playwright and provided research and editorial suggestions was not a "joint author" of the resulting copyrightable work).

56. *Amicus Curiae* briefs in support of ETW were submitted by (1) Elvis Presley Enterprises, Inc.; The Autry Survivor's Trust (Gene Autry); Sheffield Enterprises, Inc. (Frank Sinatra); Wayne Enterprises, LLP (John Wayne); Experience Hendrix, Inc. (Jimi Hendrix); Arnold Palmer Enterprises, Inc.; Jonesheirs, Inc. (Bobby Jones); and Global Icons, Inc. (numerous celebrities); (2) National Football League Players Association; (3) Major League Baseball Players Association; and (4) the Screen Actors Guild. *Amicus Curiae* briefs in support of Jireh were submitted by (1) the American Society of Media Photographers; Advertising Photographers of America; National Press Photographers Association; American Society of Picture Professionals; Picture Agency Council of America; Editorial Photographers; North American Nature Photography Association; Graphic Artists Guild, UAW Local 3030); and The Author's Guild, Inc.; (2) The New York Times Co.; Time, Inc.; and Newspaper Association of America; (3) Reporter's Committee for Freedom of the Press; and Society of Professional Journalists; and (4) Volunteer Lawyers for the Arts; Georgia Volunteer Lawyers for the Arts; and the Albany/Schenectady League of the Arts.

