

Case Study: Apple Corps, Ltd. (The Beatles) v. ADPR, Inc.

Topic: Publicity (Personality or Image) Rights

Introduction: This case a lawsuit brought by [Apple Corps, Ltd.](#) ("Apple"), a company formed by [The Beatles](#), against a performing group which imitated The Beatles. Apple sued under two statutes: (1) the [Lanham Act](#) which contains the federal statute; and (2) the [Tennessee Personal Rights Protection Act](#). One thing this case illustrates is that the exact wording of statutes can be very important since the application of the facts of this dispute results in a different outcome under the two statutes. The court also looks at cases under New Jersey's common law right of publicity and New York's right of publicity statute which although similar to the Tennessee statute is not identical.

Case Decision:

APPLE CORPS LIMITED v. A.D.P.R., INC.

U.S. District Court for the Middle District of Tennessee, Nashville Division
843 F. Supp. 342 (1993)

[Plaintiff](#) is the owner of the rights of publicity, trade names and trademarks at [common law](#) of The Beatles music group and of its former members individually. Plaintiff is solely authorized to exploit the unique elements and features of The Beatles.

[Defendants](#) are members of a performing group known as "[1964 as the Beatles](#)," which performs throughout the United States and Canada. The group seeks to recreate a Beatles concert from the years 1964 to 1966. The group's objective is to look and sound as much like The Beatles as possible. Toward that end, the group imitates the overall appearances, hairstyles, dress, mannerisms, voices, equipment and musical performances of The Beatles. On stage, the group's members refer to each other as "John," "Paul," "George" and "Ringo," adopt Liverpool accents, and perform only songs which The Beatles recorded or performed. In addition, Defendants have placed The Beatles' logo on the group's bass drum, with "1964 as" written above the logo in small print.

It is undisputed that Defendants engage in these performances as a commercial endeavor. That is, the group employs agents, who negotiate [contracts](#) with venue owners, and pursuant to these contracts, the group receives money in exchange for its performances. In advertising these performances, Defendants publish posters and flyers in which they are photographed to look like The Beatles on the cover of the album, "A Hard Day's Night." Although they are not now, Defendants did, for approximately two years, market t-shirts, window decals, buttons, pictures and posters, featuring the group name "1964 as the Beatles." The group derived income from this source as well.

Defendants distribute promotional and advertising materials which, Plaintiff contends, imply that the performances are sponsored, endorsed, approved or otherwise authorized by Apple Corps. Defendants disagree that their advertising and promotional materials create confusion as to sponsorship of their performances. However, it is undisputed that Defendants have not

received any sort of approval from, or endorsement by, Apple Corps.

Plaintiff contends that Defendants' performances, and the advertisement and promotion thereof, violate [§ 43\(a\) of the Lanham Act](#) and Tennessee's Personal Rights Protection Act (Tenn. Code Ann. § 47-25-1105(a)). Therefore, Plaintiff seeks a permanent [injunction](#) "which would prohibit the Defendants from performing, producing, promoting, publicizing, advertising or booking performances as a Beatles sound-alike, look-alike band, and from incorporating the name "The Beatles" or the distinctive combination of the names "John," "Paul," "George," and "Ringo" in any performances or on any products or publications for purposes of trade or advertising."

Section 43(a) of the Lanham Act, provides: "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which: (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or; (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." Simply put, the Act prohibits one from using in advertising names and symbols which are so similar to those of another entity that they will likely confuse or mislead the public into believing that the other entity endorses or sponsors the product or service. It prohibits false descriptions of products or of their origins.

It is undisputed that Defendants are using in advertising names which are identical, and symbols which are similar, to those of "The Beatles." However, the only proof which Plaintiff has submitted on the issue of public confusion is an affidavit of the Plaintiff's General Manager, which makes the wholesale allegation that there is, or is likely to be, public confusion. The only proof from the Defendants on that issue is the affidavit of Mark Benson, a member of the group, which states that the group has never intended to mislead the public into believing that the group is sponsored or approved by Apple Corps or the Beatles.

The issue of the [likelihood of confusion](#) is key in making out a claim under the Lanham Act. The parties have not submitted credible, or even relevant, proof on that issue. The parties' assessment of whether they deem the use of the names and symbols confusing is not relevant or probative on the issue of whether the public is likely to be confused. The Court finds that there is a genuine dispute regarding this material fact, and the question must be decided by a jury. Accordingly, Plaintiff's Motion for Summary Judgment seeking a permanent injunction under the Lanham Act is hereby denied.

Tennessee's Personal Rights Protection Act provides that: "any person who knowingly uses or infringes upon the use of another individual's name, photograph or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual's prior consent . . . shall be liable to a civil action." Tenn. Code Ann. §

47-25-1105(a). Plaintiff contends that Defendants' use of the name "The Beatles" and of the combination of the names "John," "Paul," "George" and "Ringo" in their publicity materials and their performances violates this statute. In addition, Plaintiff claims that the use of Defendants' promotional poster modeled after the album cover of "A Hard Day's Night" is also a violation.

Defendants claim that the [First Amendment](#) to the [Constitution](#) protects their use of these names in the title and context of an artistic performance. Generally, it is accurate to say that entertainment enjoys First Amendment protection. However, First Amendment rights are not absolute. In certain circumstances, the interests protected by the First Amendment will inevitably conflict with another individual's right of publicity. See [Estate of Elvis Presley v. Russen](#), 513 F. Supp. 1339, 1359 (D.N.J. 1981).

In the *Presley* case, the estate of the late [Elvis Presley](#) sued an Elvis impersonator under New Jersey's common law right of publicity.¹ In that case, the court was faced with determining the relation between the estate's right of publicity and the performer's First Amendment right of free speech and expression. The court determined that the "scope of the right of publicity should be measured or balanced against societal interests in free expression." It reasoned that "the purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be entitled to First Amendment protection and immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted.

The court found that although 'THE BIG EL SHOW' contains an informational and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society. Entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment. The public interest in entertainment will support the sporadic, occasional and good-faith imitation of a famous person to achieve humor, to effect criticism or to season a particular episode, but it does not give a privilege to appropriate another's valuable attributes on a continuing basis as one's own without the consent of the other.

The facts of the *Presley* case are directly on point with the facts of this case. This Court is persuaded by the reasoning of the *Presley* court, and likewise finds that Defendants are not entitled to First Amendment protection for their use of the names and likenesses of The Beatles.

Defendants claim that their use of the combination of the names "John," "Paul," "George," and "Ringo" cannot violate the statute because the names are used only in their

¹ New Jersey's common law right of publicity prohibits the unauthorized, commercial appropriation of an individual's name or likeness. New Jersey's common law right is much broader than that articulated in § 47-25-1105. New Jersey's version prohibits any unauthorized commercial use of another's name or likeness. Conversely, Tennessee's legislature, by enacting § 47-25-1105, has narrowed the common law prohibition, proscribing only the unauthorized use of another's name or likeness in advertising.

performances, and not in advertisements or promotions. They contend that the use of personal names in a performance does not fall within the proscription of Tennessee's Personal Rights Protection Act. This Court agrees. The statute does not prohibit all unauthorized uses of another's name or likeness. Rather, the statute is narrowly drawn, so that it only prohibits the unauthorized use of another's name or likeness "as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of solicitation of purchases of products, merchandise, goods, or services." Tenn. Code Ann. § 47-25-1105(a). Indeed, its legislative history indicates that the statute was intended to "create an inheritable property right for those people who use their names or likenesses in a commercial manner, such as an entertainer or sports figure - someone who uses his or her name for endorsement purposes."

However, Plaintiff submits proof that the Defendants also have used the combination of the individual names in advertising. Tennessee's statute is clearly directed at preventing the use of another's name or likeness, without consent, for advertising purposes. The combination of the four names "John," "Paul," "George," and "Ringo" has acquired a secondary meaning and is another term for the group The Beatles. Where the distinctive combination of these four names is used in the Defendants' performances, rather than in their advertising, the use of these names is not violative of Tennessee's statute. However, the use of the combination of these individual names in advertising or promotional materials does violate § 47-25-1105(a).

The Court now turns to the use of the advertising posters which are modeled after "A Hard Days' Night" album cover. The posters contain photographs of the faces of Defendants, photographed from the middle of their noses up. In these photographs, the Defendants' hair is styled as the Beatles wore their hair in the mid-1960's. By their own admission, the Defendants are attempting to look as much like the members of the Beatles as possible. The four photographs are then arranged to form a block. This format is identical to that used on the American version of the cover of the record "A Hard Day's Night." Indeed, Defendants admit that they modeled their poster after that album cover.

Apparently, there are no Tennessee cases on this issue. However, the New York case, *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (1984), interpreting a New York statute which is very similar to § 47-25-1105,² is instructive. In that case, the defendant used a Jacqueline Onassis look-alike in a clothing advertisement. The defendant claimed it had not violated the New York statute because the photograph was not of Ms. Onassis herself, but was of someone who looked very much like her. That is the same argument made by Defendants in this case.

The New York Supreme Court held that Christian Dior had violated New York's privacy statute, which was "intended to protect the essence of the person, his or her identity or persona from being unwillingly or unknowingly misappropriated for the profit of another." The court further stated:

² Section 50 of the New York Civil Rights Law provides: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person is guilty of a misdemeanor." N.Y. Civil Rights Law § 50 (Consol. 1993). Section 51 of that same statute provides civil remedies for any such violation.

We are dealing here with actuality and appearance, where illusion often heightens reality and all is not quite what it seems. Is the illusionist to be free to step aside, having reaped the benefits of his creation, and permitted to disclaim the very impression he sought to create? If we were to permit it, we would be sanctioning an obvious loophole to evade the statute. The essential purpose of the statute must be carried out by giving it a common sense reading which bars easy evasion.

This Court is persuaded by the logic of the court in the Onassis case. It is important to note that § 47-25-1105(a) is more broadly worded than the New York statute; § 47-25-1105 prohibits the use of another's likeness in an advertising context, not just the use of portraits or photographs of another.

It is undisputed that the goal of Defendants' group is to look and sound as much like The Beatles as possible. In fact, Defendants admit that in the poster photographs, they were attempting to show their close resemblance to The Beatles in order to persuade people to attend their shows. In other words, Defendants were using the likenesses of the Beatles to promote their shows. This is exactly what Tennessee's statute, like the New York statute, is designed to prevent. This Court concludes that the Defendants' use of these photographs violates § 47-25-1105(a).

Having found that Defendants' actions violate Tenn. Code Ann. § 47-25-1105(a), this Court must next consider whether injunctive relief is appropriate. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." In determining the propriety of issuing an injunction, courts have held that a plaintiff will suffer irreparable injury when plaintiff is unlikely to be made whole by an award of damages or other relief at the end of trial.

Plaintiff contends that it cannot be made whole by an award of damages, and this Court agrees. Plaintiff alone owns the right to control the use of the names and likenesses of The Beatles. Defendants' unauthorized use thereof infringes on Plaintiff's rightful use and detracts from the value of the marks and names which Plaintiff alone has the right to commercially exploit. Furthermore, the recurrent nature of Defendants' misappropriations indicates that legal remedies alone would be inadequate.

Defendants have misappropriated the names and likenesses of The Beatles, using them for Defendants' own commercial gain. It is desirable that the law protect an individual's right to control the commercial use of his or her name or likeness. Clearly, enjoining the Defendants' activities would serve the public interest by protecting this right.

For the foregoing reasons, the Defendants are permanently enjoined from: (1) using the distinctive combination of the names "John," "Paul," "George," and "Ringo" in advertising or promoting the Defendants' performances or products; (2) using any likeness of the group The Beatles, or the individual members thereof, in advertising or promoting the Defendants' performances or products; and (3) using the name "The Beatles" in advertising or promoting the Defendants' performances or products. The third prohibition necessarily includes a prohibition on using the name "The Beatles" in the name of Defendants' performing group.

Questions:

1. Why does the court find that the Beatles imitator group did not violate the Lanham Act?
2. How is the application of the Tennessee Personal Rights Protection Act different than the application of the Lanham Act in this case?
3. Why does the court decide that the First Amendment does not apply to this case?
4. What is the ultimate practical result in this case? Do you think this is a good result? Why or why not? Is there any alternative for The Beatles imitator group that might avoid this result?
5. Assume that I want to imitate rap artist [50 Cent](#) by performing some of my favorite 50 Cent songs in comedy clubs. Assume further that I advertise my performances in local newspaper listings and by posting flyers on telephone poles. However, I bill myself as 55 Cent and use a picture of myself wearing big, fake gold jewelry (since I can't afford the real thing). I need some good legal advice and who better to ask than Belmont students so advise me. Would this violate the Tennessee Personal Rights Protection Act? How is this the same or different than the situation from the situation in *Apple Corps, Ltd. V. A.D.P.R., Inc.*?

Additional Resources on Publicity Rights:

- [Wikipedia Personality Rights](#)
- [Publaw: Right of Publicity](#)
- [Caslon Analytics: Intellectual Property](#)
- [Practitioner's Guide to California Right of Publicity Law](#)
- [Preslaw.net](#) - Elvis Presley, after his death, was the King of publicity rights and this site provides a summary of Elvis publicity rights & other cases.
- [Links to State Publicity Rights Statutes](#)