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Sixth Circuit Decides "Right of Publicity" Claim is Preempted by Federal Law

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A recent decision by the Sixth Circuit addresses an often hazy aspect of the "right of publicity": the issue of whether a publicity claim is preempted by copyright law.

The right of publicity is a right protected under the common law and statutes of many states. Cases often involve a celebrity's claiming that a use of the celebrity's name or image violated the celebrity's right of publicity. There is a body of cases, however, that carves out a swath of these publicity claims and holds they are preempted by federal law – specifically, by the Copyright Act. Sometimes the line between the preempted and the enduring publicity claims is difficult to see.

The haziness of that line is illustrated by two appellate cases decided just one year apart. In the 2005 case *Toney v. L'Oreal USA, Inc.*,[1] the Seventh Circuit considered a fashion model's claim under the Illinois Right of Publicity Act for the use of a photograph of the model – a use by the owner of the copyright in the photograph, and thus a use that was authorized under copyright law, but not authorized by the model herself. According to the Seventh Circuit, the model's "identity" is not covered by the Copyright Act, therefore the Illinois claim was not preempted.[2]

Compare that with a 2006 decision by the Ninth Circuit. In *Laws v. Sony Music Entertainment, Inc.*,[3] the Ninth Circuit considered a singer's claim under California's right of publicity law for the use of her voice as recorded 25 years earlier in a 1981 song recording. The pop star Jennifer Lopez used samples from that 1981 recording in a 2002 release that went to Number 1 on the United States Billboard record chart. The Ninth Circuit, holding that the singer's publicity claim was preempted by the Copyright Act, explained that its decision was consistent with the Seventh Circuit's decision in *Toney*. According to the Ninth Circuit, the key difference between the fashion model's claim in *Toney* and the singer's claim in *Laws* was that the fashion model in *Toney* had sued the very persons who owned the copyright in the photograph of her, persons whom she had once authorized to use her identity, though no longer. The singer in *Laws*, however, had sued someone to whom the owner of the copyright in the 1982 recording had licensed the copyright, someone who had never before had any dealings with the singer.[4] A distinction without a difference, some might say – but not the Ninth Circuit.

Now add to this growing body of case law the opinion of the Sixth Circuit issued on August 21, 2019. The decision is unpublished, but the holding is noteworthy. In this case, called *Wright v.*

[1] 406 F.3d 905 (7th Cir. 2005).
[2] *Id.* at 910 ("Identity … is an amorphous concept that is not protected by copyright law; thus, the state law protecting it is not preempted.").
[3] 448 F.3d 1134 (9th Cir. 2006).
[4] *Id.* at 1142 n.4.

Penguin Random House,[5] the plaintiff claimed to be the real-life protagonist of the famous *Fifty Shades of Grey*. According to the plaintiff, since 1995 she had been publishing her memoir on a website, and her real-life adventures as told in her memoir were, without authorization, made into the story of the bestselling novel and hit movie. Unfortunately for her, she never registered the copyright in her memoir. So that left her with a claim (among others that she asserted) under Tennessee's right of publicity statute. According to the Sixth Circuit, the claim was preempted. The Sixth Circuit appeared to find it obvious that, because the online memoir was a specific expression of an idea, and because "unauthorized publication is a core and exclusive right safeguarded by the Copyright Act," the state law claim must be preempted.[6]

The Sixth Circuit's decision highlights the importance of the preemption issue in many right of publicity cases. In some cases, preemption is clear-cut. Often, however, it is not. In those cases, the issue must be handled with care.

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[5] --- Fed. Appx. ---, 2019 WL 3945632 (6th Cir. 2019).
[6] 2019 WL 3945632, at *4.