"We're All Born Naked, and the Rest Is Drag": Protection of Drag Queen Performers' Stage Personae Under the Right of Publicity

By Kyle R. Kroll[1]

In the past decade, drag queen fame has skyrocketed due to increased exposure and the proliferation of fandom social media, where many drag 'performers glitter and thrive. Drag performers are booming, building increasingly-valuable entertainment personae. One of the most successful of these drag queens is RuPaul, founder, host, and lead judge on the eponymous hit TV-show Drag Race.

With success comes imitation and appropriation by free riders—and there are some indications that misappropriation of drag queen creativity has already started to occur.[2] For many drag performers, being on stage forms a substantial part of their livelihood, not to mention it is a necessary outlet for self-expression. When your image pays the bills, you need to protect it.

Intellectual property law provides limited protections against those who would misappropriate and infringe upon a drag queen's image; a drag performer can't rely on copyright law, for example, because copyright is limited to protecting against copying expressions fixed in tangible media (e.g., books, pictures, motion pictures, etc.).[3] Patent law is clearly out; although there is no doubt that drag performers are incredibly inventive, patent law only protects an inventive *concept*—not a persona. And trademark law provides limited protection for confusingly-similar sources of goods and services[4]—not readily applicable to drag queens' runway looks. There may be certain unfair competition and false advertising laws, but those are often limited to situations involving factual misrepresentations and false endorsements—not mere misappropriation of a persona.[5]

Filling this void, however, is a patchwork of lesser-known state-law intellectual property rights clocked as the "right of publicity." But no court has addressed whether the right of publicity extends to drag queen personae. Nevertheless, precedent to-date provides a strong basis for extending legal protections to all aspects of a drag performer's stage identity and persona.

1. The right of publicity enables an artist to protect her identity and persona from commercial exploitation without her consent.

The right of publicity is recognized in over 30 states,[6] but the scope and breadth of the right varies widely, in part because states have differing views on whether the right should be grounded in privacy interests, intellectual property considerations, or both.[7]

Many key entertainment states—including California—recognize a broad right of publicity that entitles performers to protect their identity in the form of their name, likeness, and overall persona from being used in commercial advertising without their permission.[8] One's persona can encompass many traits and characteristics. As a leading treatise recognizes:

> Use of a name that distinguishes plaintiff is only the most familiar and obvious method. A photograph, picture or other likeness is equally obvious. However, other attributes may also suffice to identify plaintiff. For example, a unique vocal style, body movement, costume, makeup or distinguishing setting may also be sufficient. Any one of these, or several in combination, may serve to make up the "persona." That is, they are capable, depending upon the facts, of serving to identify and distinguish one person from all others.[9]

Advertisers who misappropriate or infringe upon a performer's image can be liable for damages for mental suffering, invasion of privacy, indignity, commercial loss, and even punitive damages.[10] Thus, the right of publicity is a potent and valuable legal right that could provide drag performers with comprehensive legal protection for their stage identities and personae.

2. Move over, Cher. Groucho Marx is drag queens' legal Judy.

Given that the right of publicity protects various aspects of one's identity, and drag queens are especially known for having unique likenesses and personalities, it would seem at first blush that the right would protect drag queens. But there is a potential philosophical hurdle to overcome: if the right of publicity protects one's identity, and a drag queen has a different likeness than the performer out of drag, then does the performer have a right to prevent others from using the drag queen persona—which is not necessarily the same as the out-of-drag persona?

No one has answered this particular question, but one commentator has suggested drag performers might not have the ability to use the right of publicity to protect their drag queen identities.[11] However, multiple courts have addressed a similar question: whether an actor may use the right of publicity to protect the persona of a fictional character portrayed by the actor.[12]

The answer first depends on the scope of the state law right. But assuming that the state law at issue protects one's entire persona, the inquiry turns on whether the actor has shown that the actor and character's identities are closely related. As one court has held, the test is whether the actor's identity is "inextricably intertwined" with the character's.[13] Even so, a majority of courts have held that "although exploitation of a fictional character may, in some circumstances, be a means of evoking the actor's identity as well, the focus of any right of publicity analysis must always be on the actor's own persona and not the character's."[14] Thus, the test comes down to whether the actor is merely *playing* a character (among

others), or is the character.[15]

Enter Groucho Marx—or should I say, Julius Marx—of the comedic trio the Marx Brothers. In media, Julius almost exclusively played his over-the-top vaudeville-inspired character Groucho, sporting spectacles, a cigar, a thick greasepaint mustache, and bushy eyebrows. Readers may recognize this description as a popular humorous disguise. His unique persona was beloved by millions, but incredibly dissimilar from his out-of-character likeness. In public, Julius was reportedly "impossible for fans to recognize [as] Groucho"[16]—not unlike the many drag performers who are unrecognizable for their drag queen persona when out of drag.

The Southern District of New York, reviewing a right of publicity claim based on all three Marx Brothers' likenesses, found that their distinct stage personae were so unique and connected to their individual identities that the stage personae were protected under California's right of publicity:

> As a common sense matter, it must be noted that Leo and Adolph Marx, no less than Julius, earned their livelihoods by exploiting the unique characters they created. . . . [T]he Marx Brothers' fame arose as a direct result of their efforts to develop instantly recognizable and popular stage characters, having no relation to their real personalities. . . . [T]here can be no question of intent to capitalize on the commercial value of artificial personalities created for entertainment purposes. Every appearance, contract and advertisement involving the Marx Brothers signified recognition by the performers of the commercial value of unique characters they portrayed.[17]

Although the court did not apply the now well-known "inextricably intertwined" test, the Marx Brothers undoubtedly would have met that test.

The facts that supported a right of publicity for Julius in his Groucho persona (and likewise for his brothers Leo and Adolph, for their Harpo and Chico personae) are analogous to those that could be said of most drag performers. Drag performers earn a substantial part of their livelihoods by creating and exploiting unique stage characters. This is particularly true as to well-known drag queens, such as RuPaul, Alyssa Edwards, Trixie Mattel, Alaska, and many others. Drag performers are not typically famous independent of their drag queen personae. Although drag performers may share similar demeanors with their drag queen characters, there are usually differences in appearance and personality. And drag performers develop their drag queen characters for entertainment and artistic purposes, garnering increased recognition through regular performances in local venues—and sometimes on national TV, such as on Drag Race, and in movies.

RuPaul is famous for the saying, "we're all born naked, and the rest is drag." For drag performers, their drag queen personae are integral parts of their identities in and out of drag. The reasoning in Julius Marx's case, as applied in other more recent cases, strongly suggests that drag performers possess rights of publicity over their stage personae. They can then use these rights to prevent and remedy misappropriation and infringement of their personae in commercial advertising, to protect and further grow their personal brands.

Endnotes

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[2] See, e.g., Kyle R. Kroll, Cardi B, You (Probably) Can't Trademark "Okurrr," Okay?, DuetsBlog (Mar. 28, 2019), https://www.duetsblog.com/2019/03/articles/trademarks/sound/cardi-b-you-probably-cant-trademark-okurrr-okay/.

[3] See 17 U.S.C. § 102.

[4] See 15 U.S.C. § 1125.

[5] See 1 Rights of Publicity and Privacy § 5:18 (2d ed. 2020).

[6] Kevin L. Vick & Jean-Paul Jassy, Why a Federal Right of Publicity Statute Is Necessary, 28 Comm. Lawyer 14, 15 (Aug. 2011), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf; Statutes & Interactive Map, Right of Publicity, http://rightofpublicity.com/statutes (last visited Oct. 18, 2020).

[7] Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995) (discussing the underlying policy interests in the context of Minnesota law); Emily Hoenig, Why Can't We All Just Cher?: Drag Celebrity Impersonators Versus an Ever-Expanding Right of Publicity, 38 Cardozo Arts & Ent. L.J. 537, 544–45 (2020); David Fagundes & Aaron Perzanowski, Clown Eggs, 94 Notre Dame L. Rev. 1313, 1330–31 (2019) (noting several differences, in the context of other makeup-clad performers).

[8] See 1 Rights of Publicity and Privacy § 4:46 (2d ed. 2020).

[9] Id.

[10] See 2 Rights of Publicity and Privacy §§ 11:26-37 (2d ed. 2020).

[11] Eden Sarid, Don't Be A Drag, Just Be A Queen- How Drag Queens Protect Their Intellectual Property Without Law, 10 FIU L. Rev. 133, 157 (2014) ("However, it is very doubtful--and no case law indeed supports such an assertion--that the courts will go as far as interpreting the right to include protection to a fictional stage character.").

[12] E.g., Wendt v. Host Int'l, Inc., 125 F.3d 806, 811 (9th Cir. 1997) ("While it is true that appellants' fame arose in large part through their participation in Cheers, an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character.").

[13] McFarland v. Miller, 14 F.3d 912, 920 (3d Cir. 1994).

[14] Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 625 (6th Cir. 2000).

[15] See 1 Rights of Publicity and Privacy §§ 4:68-73 (2d ed. 2020).

[16] Groucho Marx, Wikipedia, https://en.wikipedia.org/wiki/Groucho_Marx (last visited Oct. 23, 2020).

[17] Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 491–92 (S.D.N.Y. 1981), rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982).