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Recent Development

RECENT DEVELOPMENTS IN THE RIGHT OF PUBLICITY[d1]

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One case merits discussion for the law recited and the persona involved:

I. Third Circuit: "Spanky" Is Not Just a Part of "Our Gang"

In *McFarland v. Miller,*[1] the Third Circuit reversed a grant of summary judgment against George "Spanky" McFarland[2] and held that Spanky and his estate "have a right of publicity superior to that of the interloper, Miller, in exploiting the name and image of Spanky McFarland."[3] George McFarland "played a lovable but mischievous urchin under the nickname 'Spanky"' in the "Our Gang" and "Little Rascals" series.[4] McFarland appeared as Spanky in ninety-five "Our Gang" films from 1937 through 1942.[5] He also appeared in a number of full length feature films not including the Gang in which he was referred to as Spanky McFarland,[6] and received income from the licensing of his name "Spanky" and other commercial activities conducted under the name "Spanky McFarland."[7]

In 1989, Miller began using the name "Spanky McFarland's" for a restaurant that featured two four by six foot murals of "Our Gang" including Spanky[8] and a number of menu items such as "Spanky's Steak Sandwich," "Rascal's Choice," "Buckweet's Basket," and "Alfalfa's Sprout Burger."[9] Miller claimed that when picking the restaurant's name, he selected "Spanky" because it was his son's nickname and "McFarland" because it sounded Irish.[10]

Spanky signed five year contracts with Hal Roach Studios in 1931 and 1936 to perform in the Our Gang series.[11] The terms of the contracts were not recited and were not entirely clear, but appeared to transfer Spanky's right of publicity during the term of the contracts and for one year thereafter.[12] The Third Circuit also explained:

> In addition, paragraphs 19 and 20 transfer certain rights regarding the use of the nickname and image of the character 'Spanky,' but the restaurant, by using the name 'Spanky McFarland's' appears to be commercially exploiting the image not only of the character 'Spanky' but of the actor known through most of his life as George ***304** 'Spanky' McFarland.[13]

In 1990, Spanky filed suit. On cross-motions for summary judgment, the district court granted summary judgment to Miller in 1992 reasoning that "whatever right George McFarland ever had to exploit the name 'Spanky McFarland' passed to the Studio in 1936" as part of Spanky's contract to perform in the Our Gang series.[14] Spanky appealed,[15] but died during the pendency of the appeal.[16] Spanky's wife, Doris, was substituted as Plaintiff in her capacity as personal representative of Spanky's estate.[17]

The Third Circuit reversed and remanded for trial,[18] holding:

> only that there exists at least a triable issue of fact as to whether McFarland had become so inextricably identified with Spanky McFarland that McFarland's own identity would be invoked by the name Spanky. . . . On the record now before us, there is evidence of identification between the name Spanky and the actor McFarland sufficient to show that he, and now his estate, have a right of publicity superior to that of the interloper, Miller, in exploiting the name and image of Spanky McFarland.[19]

Although others may be able to claim some rights by virtue of the contracts with the studio, "Miller has no such claim or defense."[20]

After an extended discussion of other cases from the forum, New Jersey, as well as other states,[21] the Third Circuit succinctly summarized its opinion as follows:

> In summary, we hold that in New Jersey, the right of publicity is a proprietary right based on the identity of a character or defining trait that becomes associated with a person when he gains notoriety or fame. The right to exploit the value of that notoriety or fame belongs to the individual with whom it is associated and a cause of action for its infringement that took place during the lifetime of the individual with whom the fame is associated descends to the personal representative of the holder in New Jersey. We conclude that by virtue of his on-screen portrayal of a cherubic boy in the Our Gang comedy series, McFarland developed an exploitable interest to which he may lay claim if he can persuade a fact finder that he has become identified with the name Spanky. There is no individual or entity presently before this court that has superior claim to the publicity value of the nickname Spanky. Accordingly, we will remand to the district court with instruction to vacate the summary judgment entered in favor of Miller and Anaconda and for further proceedings consistent with this opinion.[22]

Footnotes

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1 14 F.3d 912, 29 U.S.P.Q.2d (BNA) 1586 (3d Cir. 1994).

2 *McFarland,* 14 F.3d at 923.

3 *Id.* at 921.

4 *Id.* at 914.

5 *Id.* at 915.

6 *Id.* at 915 n.4.

7 *Id.* at 915.

8 *Id.* at 916.

9 *Id.* at 916 n.8.

10 *Id.* at 916.

11 *Id.* at 914-15.

12 *Id.* at 922.

13 *Id.*

[14] *Id.* at 916.

[15] *Id.*

[16] *Id.* at 917.

[17] *Id.* at 914 n.1.

[18] *Id.* at 923.

[19] *Id.* at 921.

[20] *Id.*

[21] *See generally id.* at 917-23.

[22] *Id.* at 923.