Trayvon Martin and the Right of Publicity in Florida

By David Roy Ellis

Recently I was interviewed on Florida Public Radio about a situation in which shirts with pictures of Trayvon Martin were being made and sold in north Florida. Some of the shirts were sold as a promotional tool for a cause – repealing Florida's "stand your ground law." That was the law that figured prominently in the trial of George Zimmerman, who shot and killed the 17-year old Martin after following him around as a self-styled vigilante for a neighborhood watch group. Zimmerman was subsequently acquitted in a widely publicized trial in Sanford.

Although some of the shirts were being sold by groups like the Dream Defenders, an advocacy group that occupied the Florida Capitol for a month after Zimmerman was acquitted of the charges against him, other shirts with Martin's images were sold by ordinary retail shops. Some people felt that the retailers selling shirts with the teen's image were profiting from the tragedy, and that they should only do so if Martin's family approved of the sales and possibly benefited financially from the sales.

The question that was raised was whether the sellers of the shirts with Martin's image needed the family's permission before they could sell them. The answer can be found in Florida's right of publicity law, Section 540.08 of the Florida Statutes, which prohibits the unauthorized publication of a person's name or likeness for commercial purposes.

The law states that "no person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent" of that person, or certain others such as licensees to whom the individual has granted such rights, or to specific named survivors if the individual is deceased.

In Florida, a person's publicity rights do not automatically descend to his heirs or pass through his estate. This is different from most other states, such as California, home of a variety of deceased entertainers, and Tennessee, venue for numerous lawsuits involving a deceased entertainer named Elvis. See my article, "Is It Now Or Never? A Performer's Right Of Publicity May Endure Although He Has Left The Stage Forever" (with Sharon Ellis). http://pd.lawyers.com/%7E/media/Firm%20Galleries/Organizations/6/6/3/7/663736/IS%20IT%20NOW%20OR%20NEVER.ashx;http://c.ymcdn.com/sites/www.stpetebar.com/resource/resmgr/Docs/Paraclete_12-2003.pdf

Under the Florida statute, publicity rights possessed by a person at the time of his death can be exercised only by the decedent's surviving spouse or children if he was married or had children at the time of his death. The teenager Trayvon Martin did not have a widow or children at the time of his death, nor had he licensed his name or image while he was alive, so no one is entitled to assert Martin's post-mortem publicity rights.

As a result, it does not appear that the family can do anything about merchandise that has already been sold. It is possible, however, that family members can trademark his name or image as a "historical figure," and prevent such use without their permission. Also, perhaps they can claim copyright in photographs or other images of Martin that were reproduced on the shirts, either because they are family photos or because the family is able to obtain rights in the pictures from other photographers.

Under those circumstances, family members might be able to assert some measure of control over the future use of Martin's name or likeness and thereby stop stores from selling shirts with his name or image without their permission and financial gain.

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