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First Amendment foils Lohan's privacy right

Lindsay Lohan is in the legal news again, giving us an excellent opportunity to illustrate some legal principles about the unauthorized use of a celebrity's name (be it Lindsay Lohan or Rosa Parks) in a song or other artistic work.

Lohan has let her lawyers loose on the rap singer Armando Perez, better known as Pitbull. Pitbull has created a song that, according to Lohan, contains an "unwarranted, unauthorized and unfavorable" mention of her name in the lyrics. Unthinkable!

Specifically, Pitbull raps the following couplet: "So, I'm tiptoein' to keep flowin'/ I got it locked up like Lindsay Lohan."

Poetry and hip-hop enthusiasts will appreciate the triple rhyme of "flowin'" and "tiptoein'" and "Lohan," but Lohan did not appreciate the gratuitous allusion to her recent incarceration. She sued Pitbull under a New York statute protecting an individual's right of privacy. The law prohibits the non-consensual use of a person's name, picture, or voice "for advertising purposes or for purposes of trade."

Cases of this type bring the First Amendment into play. From political ditties of the colonial era to love songs by Paul Anka to "99 Problems" by Jay-Z, music has always been a means by which people express ideas. As such, it is a protected form of expression under the First Amendment.

Relying on this protection, the court dismissed Lohan's complaint, noting that "pure First Amendment speech in the form of artistic expression ... deserves full protection, even against another individual's statutorily protected privacy interests." See, *Lohan v. Perez,* (E.D.N.Y., Feb. 21, 2013).

The First Amendment is not snobbish — regardless of what anyone may think about whether Pitbull's music and lyrics are "art," they qualify as artistic expression in a First Amendment analysis.

An interesting contrast is seen in *Parks v. LaFace* (6th Cir. 2003), which informs us that the protection afforded by the First Amendment is not limitless. Again, the defendant was a rap group, Outkast, but the plaintiff could not have been more different — instead of Lindsay Lohan, the suit was brought by civil rights icon Rosa Parks.

The case was decided just a few years before her death in 2005. Parks objected to the fact that Outkast released without her consent a song entitled "Rosa Parks." The record contained a parental advisory notice warning of "explicit content" and it was understandable that Parks was upset that her name appeared right next to the explicit content advisory on the record cover.

The legal theories she asserted were somewhat different than those in the Lohan case. Parks made a claim for false advertising under Section 43(a) of the Lanham Act, but the case still turned on whether the First Amendment trumped her right to prevent the use of her name in an expressive work.

The 6th U.S. Circuit Court of Appeals analysis in the Parks case is far more nuanced than the opinion in the Lohan case and led to a completely different result. Acknowledging the role of the First Amendment in protecting freedom of expression in artistic works, the court nevertheless found that Parks' claims could not be summarily dismissed.

The court explained that Section 43(a) permits celebrities to vindicate rights in their identities against allegedly misleading commercial use by others. Under this theory, Woody Allen has been able to prevent commercials containing a Woody Allen look-alike and raspy-voiced singer Tom Waits has successfully sued Frito-Lay for use of a sound-alike commercial. Each of these cases implied a false endorsement. Likewise, Parks claimed that the "Rosa Parks" song would mislead consumers into believing that it was about her or that she approved of it.

The key to the court's rejection of Outkast's First Amendment defense is that the song was not about Rosa Parks. The hook of the song consisted of the following lines: "Ah ha, hush the fuss/ Everybody move to the back of the bus/ Do you wanna bump and slump with us/ We the type of people make the club get crunk."

For readers unfamiliar with rap patois, the court referred to the following explanation that had been put into evidence: "Be quiet and stop the commotion. Outkast is coming back out (with new music) so all other MCs step aside. Do you want to ride and hang out with us? Outkast is the type of group to make the clubs get hyped up/excited."

In short, the song is all about Outkast and, other than the title and the references to the "back of the bus," has nothing to do with Rosa Parks or civil rights. Any arguments to the contrary were foreclosed by the fact that in interviews Outkast admitted that they never intended the song to be about Rosa Parks.

The court said the First Amendment argument was to be analyzed under the test devised in *Rogers v. Grimaldi* (2d. Cir. 1989).

That case held that the use of a celebrity's name in an artistic work is permitted under the First Amendment unless it has "no artistic relevance" to the underlying work. In Parks' case, the court found that the title "Rosa Parks" had no relevance to the song, and even the "back of the bus" phrase, when considered in the context of the lyrics (a paean to Outkast's greatness as rapmasters) had "absolutely nothing to do with Rosa Parks."

Given the lack of artistic relevance, the First Amendment did not trump Parks' right to prevent false advertising. Quoting Rogers v. Grimaldi, the court concluded that "Poetic license is not without limits. The purchaser of a book [or song], like the purchaser of a can of peas, has a right not to be misled as to the source of the product."

This is not to say that preventing songwriters from making unwanted use of your name depends on whether you are Rosa Parks or Lindsay Lohan.

Outkast's little trick smacked of commercial exploitation and was likely to confuse the public, while Pitbull's quip was simply a pop cultural reference unlikely to cause confusion.

The results of the two cases would likely have been the same regardless of the respective reputations of the plaintiffs.

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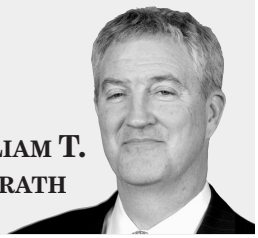

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