Intellectual Property Law

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Albert Einstein, Marilyn Monroe, and the Right of Publicity

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Rumored to have known each other intimately in life, Albert Einstein and Marilyn Monroe have now symbolically met in death in the courtroom. A court has ruled that Einstein and his estate possess rights that other courts have held Marilyn Monroe and her estate do not. And Einstein can thank New Jersey for the difference.

The Central District of California recently ruled that right of publicity claims brought by The Hebrew University of Jerusalem against General Motors for the unauthorized use of Albert Einstein's image in a magazine advertisement would survive a motion for summary judgment brought by GM. The district court concluded that Einstein had a postmortem right of publicity under New Jersey law, rejecting the very same arguments that had been made by the Estate of Marilyn Monroe in the process. *Hebrew University of Jerusalem v. General Motors LLC*, __ F. Supp. 2d__, 2012 WL 907497 (C.D. Cal. 2012).

The action arose out of GM's use of an image of Einstein in an ad for the 2010 GMC Terrain, which appeared in *People* magazine's "Sexiest Man Alive" issue. The ad depicted an image of Einstein's head on the body of a shirtless male model, who had "$e = mc^2$" tattooed on his bicep, along with the sentence "Ideas are Sexy Too." Hebrew University, which claimed to have been granted Einstein's publicity rights by his will, filed suit alleging right of publicity and other violations.

GM moved for summary judgment, arguing that the right of publicity was not included among the rights that passed to the University pursuant to Einstein's will because, among other things, the right of publicity did not exist when he died in New Jersey. That argument had been successfully made against Marilyn Monroe's estate in recent actions brought in New York and California. *See Shaw Family Archives Ltd. v. CMG Worldwide, Inc.,* 486 F. Supp 2d 309, 319 (S.D.N.Y. 2007); *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, No. CV 05-2200 MMM (C.D. Cal. May 14, 2007).

However, Judge A. Howard Matz ruled that Einstein's right of publicity did exist, and the issue of whether Einstein intended to include that right among those transferred to the University through his will should be decided by a jury. The key difference was the state laws applicable in the various cases, with the parties in the Einstein case agreeing that New Jersey law applied. The district court distinguished the Marilyn Monroe decisions, noting that in one previous decision the postmortem right of publicity did not exist in California until it was created by statute in 1985, and the statute was not amended to clarify that it

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applied retroactively until after those cases were initially decided. *Milton H. Greene Archives, Inc., supra.* Further, New York is the only U.S. state to clearly hold that it does not recognize a common law posthumous right of publicity, and thus the New York court's ruling that New York law applied was fatal to the other Marilyn Monroe action. *Shaw Family Archives, supra*.

As a New Jersey federal court had *recognized* a common law postmortem right of publicity in New Jersey years after Einstein's death, the right already existed in nascent form. Thus, while the *Hebrew University* decision did not *create* such a right, because the parties agreed New Jersey law applied to the right of publicity claim in the case before it, Einstein was held to possess a right that Marilyn Monroe was held not to possess under New York or California law. Finding a factual dispute on whether Einstein intended to grant his publicity rights to The Hebrew University by his will, the court denied GM's motion for summary judgment.

This decision illustrates the apparently inconsistent results that can flow from the state law nature of the right of publicity, where differences in choice of law rules and substantive rights can have case dispositive consequences for celebrities and public figures and their estates.