

Intellectual Property**William Shatner and the tort of appropriation of personality**By **Dan Pollack**

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(December 13, 2017, 8:54 AM EST) -- William Shatner has objected to the unauthorized use of his name and image to promote a condominium project in Hamilton in a case that if litigated, could shed light on a rarely addressed cause of action.

Television City is a \$360 million condo project by Lamb Development in downtown Hamilton. The project site is the office for CHCH-TV, hence the "Television City" moniker. This also apparently inspired the developer to name the units after famous TV personalities, including Lucille Ball, Bob Barker, Jay Leno, Mr. T., Betty White and William Shatner. One problem: Shatner (and presumably the other celebrities) did not authorize the use of their names or likenesses to promote the project.

Instead of having his lawyers draft a nasty letter, Shatner tweeted his objection to Brad Lamb for using his name and likeness to "sell real estate." Lamb, presumably after beaming up his legal team, stated that he used the celebrity names as a "tribute" and "to add an element of playfulness," but that all references to the celebrities had been removed from the project. The Television City units are currently identified with different channel numbers.

In his response via Twitter, Shatner said that removing his name does not exonerate Lamb. He proposed settling the matter like "gentlemen" through Lamb making a "nice big donation" to Shatner's charity. Lamb then tweeted his amenability to such a resolution and suggested discussing it offline.

The Shatner-Lamb dispute will probably get resolved quietly without litigation, which in a sense is unfortunate, because appropriation of personality, the basis of Shatner's claim, is a tort that is long overdue for the courts to address.

The tort of appropriation of personality has been recognized primarily through two Ontario court decisions: *Krouse v. Chrysler Canada Ltd. et al.* (1974) 1 O.R. (2d) 225 and *Gould Estate v. Stoddart Publishing Co.*, (1996), 30 O.R. (3d) 520. In *Krouse*, the plaintiff, a football player for the Hamilton Tiger-Cats, objected to a car dealership promotional item that used his jersey. The Ontario Court of Appeal recognized the tort, but held that the defendant was not liable because the jersey use was not the primary object of the promotional item.

In *Gould Estate*, the plaintiff sued a publishing company for using the pianist Glenn Gould's name and likeness without permission in a book about Gould. The trial court adopted the "sales v. subject" distinction used by U.S. courts and concluded that the defendant was not liable because it is in the public interest to know more about Gould, but the court held that personality rights survived the death of Gould.

These cases (and a few others) suggest that this tort requires two elements (in addition to use without permission): (1) the exploitation of the plaintiff's identity was for a commercial purpose; and (2) the exploitation clearly and primarily captured the plaintiff.

Shatner can probably satisfy both elements. Regarding commercial purpose, Shatner's image and

likeness was used to promote the sale of condos. Even if it was done for “playfulness,” a condominium project is undeniably a commercial venture and associating a famous person like Shatner with the project would arguably promote sales. For damages, Shatner could point to his other endorsement deals and his fees for using his name and likeness. The second element appears to be satisfied as the promotional material prominently used Shatner’s name and an easily identifiable caricature of him.

There is significantly more U.S. jurisprudence addressing “rights of publicity” (appropriation of personality) and a recent case involving Michael Jordan illustrates the substantial exposure to damages for misappropriating a celebrity’s personality. In *Jordan v. Dominick’s Finer Foods*, Case No. 1:10-cv-00407 (N.D. Ill. 2015), Jordan sued a Chicago-area grocer for a *Sports Illustrated* ad featuring Jordan’s name and jersey number on what appeared to be a Chicago Bulls jersey with a \$2 discount coupon for steaks. Jordan claimed that Dominick’s misappropriated his name and persona.

Largely based on the substantial fees that Jordan charges to endorse brands such as Nike and Gatorade, a jury awarded him \$8.9 million US in damages. The jury was not swayed by the fact that only two coupons were used.

While it is doubtful that a Canadian court would award such a large amount in similar circumstances, Shatner’s objections to the use of his name and likeness with the Television City project should serve as a warning to anyone seeking to use a celebrity’s name, likeness, or other aspect of a celebrity’s persona without permission. Perhaps the next high-profile incident will be decided in the courts.

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