

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RICHARD RAYMEN, <u>et al.</u>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 05-486 (RBW)
)	
UNITED SENIOR ASSOCIATION, INC.,)	
<u>et al.</u> ,)	
)	
Defendants.)	
)	

MEMORANDUM OPINION

On March 9, 2005, the plaintiffs filed a motion for a temporary restraining order seeking to prevent the defendants from further using their images in an advertising campaign against the American Association of Retired Persons (“AARP”), which is opposing President Bush’s efforts to alter the existing Social Security System. The Court heard arguments on the plaintiffs’ motion on March 9 and March 10, 2005.¹ At the conclusion of the March 10, 2005 hearing, this Court orally granted the plaintiffs’ motion from the bench. This Memorandum Opinion is issued consistent with that ruling.

I. Factual Background

On March 3, 2004, the plaintiffs were among 300 citizens of Multnomah County, Oregon who were married pursuant to a newly established right to same-sex marriage in that county. Complaint (“Compl.”) ¶ 9. While at City Hall awaiting their opportunity to wed, the plaintiffs, Steve Hansen and Richard Raymen, kissed. A photographer from a Portland, Oregon newspaper,

¹ Defendant Mark Montini was not present during the arguments.

the Tribune, captured the kiss in a photograph he took. Id. The photograph was subsequently published in both the Tribune newspaper on March 4, 2004, and later on the Tribune's website. Id. At some later point in time, this photograph was allegedly taken from the Tribune's website without permission² and used as part of an advertisement created by Mark Montini. Id. ¶ 10. The advertising campaign was created for a nonprofit organization, United Senior Association, Inc., which does business under the name USA Next. Id. ¶¶ 7, 10, 12. The advertisement, which featured the photograph of the plaintiffs kissing, was part of a campaign by USA Next against the AARP. Id. ¶ 14. Specifically, the advertisement contained two pictures. The first was a picture of an American soldier, who was presumably in Iraq, with a red "X" superimposed over it, and the second was the photograph of the plaintiffs with a green checkmark superimposed over it. The caption under the advertisement read: "The Real AARP Agenda," id. ¶ 13, suggesting that the AARP opposed the war in Iraq and supported the gay lifestyle. This advertisement ran on the website of The American Spectator magazine from February 15, 2005, to February 21, 2005. Id. ¶ 10. During oral argument before the Court, defendant USA Next indicated that the advertisement had been removed from the website and that the organization did not intend to further use the photograph of the plaintiffs.

According to the plaintiffs, the purpose of the advertising campaign was "to incite viewer passions against the AARP because of its alleged support of equal marriage rights for same-sex couples and its alleged lack of support of American troops." Id. ¶ 14. The plaintiffs contend that the advertisement attracted media attention, which then caused an even wider distribution of the

² The plaintiffs allege that defendant Montini later attempted to purchase the picture from the Tribune, but that his attempt to do so was unsuccessful. Id. ¶ 23.

advertisement throughout the media. Id. ¶ 16. The plaintiffs assert that because of the advertisement, they “have suffered embarrassment, extreme emotional distress, and the invasion of their privacy.” Id. ¶ 20. In addition, the plaintiffs represent that as a result of the false and misleading inference “communicated by the [a]dvertisement about [the] plaintiffs, their reputations as patriotic American citizens has been severely damaged.” Id. Therefore, the plaintiffs filed this action which seeks to prevent further use of their images depicted in the photograph. The complaint alleges four common-law causes of action—libel; invasion of privacy by portraying their images in a false light; invasion of privacy by appropriating their likeness; and intentional infliction of emotional distress—id. ¶¶ 27-62, and seeks permanent injunctive relief and monetary damages. Id. at 13-14. Currently before the Court is the plaintiffs’ motion for a temporary restraining order.

II. Legal Analysis

In determining whether the plaintiffs are entitled to injunctive relief, the Court must employ the familiar four-prong test, which requires the Court to evaluate (1) whether the plaintiffs have demonstrated that there is a substantial likelihood that they will prevail on the merits on one of their claims; (2) whether the plaintiffs have shown that they will sustain irreparable harm if injunctive relief is not awarded; (3) whether the issuance of injunctive relief will not “substantially harm” the other parties; and (4) whether awarding the relief is in the public interest. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998).

The plaintiffs need not prevail on each factor in order to receive injunctive relief. “Rather, . . . the factors must be viewed as a continuum, with more of one factor compensating for less of another. ‘If the arguments for one factor are particularly strong, an injunction may

issue even if the arguments in other areas are rather weak.” Blackman v. District of Columbia, 277 F. Supp. 2d 71, 77-78 (D.D.C. 2003) (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)). In fact, issuing an injunction may be justified “where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.” Id. at 78. The necessary level of degree of each factor “will vary according to the Court’s assessment of the other factors.” Id. (citing Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843-45 (D.C. Cir. 1977)). As the District of Columbia Circuit has recognized, an injunction may be issued “with either a high probability of success and some injury, or vice versa.” Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985). However, the failure to establish “that they would suffer or would be likely to suffer irreparable harm absent a preliminary injunction . . . in itself, is sufficient to defeat [the] plaintiffs’ motion for [injunctive relief].” Search v. Pena, 1995 WL 669235, at *2 (D.D.C. 1995).

(A) Likelihood of Success

The plaintiffs allege four common-law torts in their complaint—libel, invasion of privacy through the appropriation of their likeness, invasion of privacy for portraying them in a false light, and intentional infliction of emotional distress. Compl. ¶¶ 27-62. Before determining whether the plaintiffs are likely to succeed on the merits of their claims, this Court must first determine whether the law of Oregon or the law of the District of Columbia will control in this litigation. The plaintiffs posit that the law of Oregon controls. Plaintiffs’ Memorandum in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction (“Pls.’ Mem.”) at 7 n.2.

Jurisdiction in this case is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. Compl. ¶ 4. “To determine the applicable law in a diversity case, a federal court must follow the choice of law rules of the forum state.” Bledsoe v. Crowley, 849 F.2d 639, 641 (D.C. Cir. 1988) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). Courts in the District of Columbia apply a “governmental interest analysis” to determine which jurisdiction’s law applies. Id. Under this analytical framework, the Court must “evaluate the governmental policies underlying the applicable conflicting laws and . . . determine which jurisdiction’s policy would be most advanced by having its law applied to the facts of the case under review.” Williams v. Williams, 390 A.2d 4, 5-6 (D.C. 1978); see also Gaither v. Myers, 404 F.2d 216, 222-24 (D.C. Cir. 1968); Rong Yao Zhou v. Jennifer Mall Rest., Inc., 534 A.2d 1268, 1270-71 (D.C. 1987). Under this approach, potential conflicts of law are assessed as follows:

When the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law, a false conflict appears and the law of the interested state prevails. Where each state would have an interest in application of its own law to the facts, a true conflict exists and the law of the jurisdiction with the stronger interest will apply.

Bledsoe, 849 F.2d at 641. Here, there is no conflict of laws because the District of Columbia does not have a policy that would be advanced in this case. Rather, it is Oregon’s interests that are at stake since both of the plaintiffs reside in Oregon, the picture was taken in Oregon by an Oregon newspaper photographer, and the picture was allegedly appropriated from that Oregon newspaper’s website without its permission. Accordingly, the Court will apply the law of Oregon to determine the plaintiffs’ likelihood of success on the merits.

Turning now to the plaintiffs’ claims, they allege in one count of the complaint that the defendants have violated their right to privacy based upon the appropriation of their likeness.

Compl. ¶¶ 39-46. “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” Martinez v. Democrat-Herald Publ’g Co., 669 P.2d 818, 829 (Or. Ct. App. 1983) (quoting Restatement (Second) of Torts § 652C (1976)). Under § 652C of the Restatement, the plaintiffs can recover “damages when their names, pictures or other likenesses have been used without their consent to advertise a defendant’s product, to accompany an article sold, to add luster to the name of a corporation or for some other business purpose.” Id. However, there is no actionable appropriation of a person’s likeness claim “when a person’s picture is used to illustrate a noncommercial, newsworthy article.” Id. The Court concludes that the plaintiffs have a substantial likelihood of success on this claim.

Here, it is was conceded by counsel for defendant USA Next during oral argument that it did not have any legal right to use the images of the plaintiffs. Thus, there was clearly an appropriation of the plaintiffs’ images. Moreover, it is apparent that the defendants used the plaintiffs’ images for their benefit. The photograph was used as part of USA Next’s advertising campaign, which sought, at least in part, to engender opposition to the AARP. While the advertisement did not directly seek financial contributions, it is not unreasonable to infer such an incendiary advertisement would assist USA Next in their efforts to raise monetary contributions from people who support the war or oppose gay rights or the agenda of the AARP. Compl. ¶ 18. In fact, if someone who viewed the advertisement online clicked on it, the viewer would be taken to webpages produced by USA Next which described the organization, its position on Social Security reform, and also solicited donations. Compl. ¶ 17. In addition, while the newsworthy exception would clearly apply to the Tribune’s use of the photograph, it can hardly be said that

the use of the photograph in the advertisement is reporting on a newsworthy event. Based on the foregoing, it appears that the defendants used the photograph of the plaintiffs for their own financial gain. Accordingly, the Court must conclude that on the record before it, it appears that the plaintiffs have a substantial likelihood of success on this claim.³

(B) Irreparable Harm

The Court must next determine whether the plaintiffs have suffered or will suffer irreparable harm if injunctive relief is not granted. See Mova Pharm. Corp., 140 F.3d at 1066. It is well-established that injunctive relief is appropriate to prevent the misappropriation for a commercial benefit of an individual's name or likeness. See Factors Etc., Inc. v. Pro Arts., Inc., 579 F.2d 215, 220 (2d Cir. 1978); Ryan v. Volpone Stamp Co., 107 F. Supp. 2d 369, 404 (S.D.N.Y. 2000); Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978). While these cases involve public figures, non-public figures have this same right to protect their image from misappropriation. See Fanelle v. LoJack Corp., 2000 U.S. Dist. LEXIS 17767, at *34-35 (E.D. Pa. Dec. 7, 2000). Cases in which injunctive relief has been sought to protect privacy interests of public figures have concluded that “[t]o the extent that defendants are unlawfully appropriating this valuable commodity for themselves, proof of damages or unjust enrichment may be extremely difficult.” Ali, 447 F. Supp. at 729. And since a public figure has a valuable interest in the sale of his or her image, the “loss of sales in infringement actions constitutes irreparable injury” and thus injunctive relief is warranted. Id. (citation omitted). Similarly, individuals who

³ Because the Court concludes that the plaintiffs have a substantial likelihood of success on this claim, it need not review the other claims asserted in the plaintiffs' complaint. See Butler v. Alabama Judicial Inquiry Comm'n, 111 F. Supp. 2d 1124, 1230 (M.D. Ala. 2000) (“it is sufficient if the law or facts support a substantial likelihood of success on at least one claim that would sustain the issuance of a temporary restraining order.”).

are non-public figures can suffer irreparable injury through the misappropriation of their image. See, e.g., Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599-600 (Ind. 2001) (holding that University officials were irreparably harmed when their name and reputations were misappropriated). The Alabama Court of Appeals has noted that “[f]or a private person, psychological interests would likely be the main concern resulting from the appropriation of his or her likeness, even if only their family members or close friends were to recognize their likeness.” Minnifield v. Ashcraft, 2004 Ala. Civ. App. LEXIS 908, at *15 (Ala. Civ. App. Dec. 10, 2004).

As indicated, an individual’s personal image is a unique commodity, and this is true not only for public figures but also private individuals. Its value for non-public figures who have not marketed their images for financial reward is difficult, if not impossible to assess. Nonetheless, it has value, although to a large degree for non-public figures its value may be purely intangible. And the importance of an individual’s privacy interest is not diminished because the value attached to it is intangible as compared to economic. In fact, the difficulty in placing a monetary value on the infringement of a privacy interest that causes intangible harm makes the infringement more suitable for injunctive relief. See Ali, 447 F. Supp. at 729. While public figures will likely be able to acquire adequate monetary compensation for privacy interest violations resulting from the misappropriation and use of their images that were used for financial reasons, so too is not the case for non-public figures. So because it may be difficult to place monetary value on the infringement of a privacy interest when it has purely intangible consequences, a non-public figure cannot be adequately compensated monetarily, and thus the only possible means of addressing a violation is through injunctive relief. And not to provide

such relief would permit the continued misappropriation and use of the unique commodity of one's image that has been used against an individual's will without the real possibility of remuneration from the judicial process.

That is the situation here, despite the position taken by the defendants. While the defendants note that the photograph of the plaintiffs appeared in the newspaper and was available for purchase on the newspaper's computer website without their objections, this does not defeat their right to injunctive relief. This is particularly true in this case where the plaintiffs' images were used not only without their permission, but also for a purpose inconsistent with their perspectives on the subject (gay relationships) reflected in the photograph misappropriated by the defendants. In other words, the use of the plaintiffs' images to condemn a view they actually support as portrayed in the misappropriated photograph amounts to irreparable harm.

(C) Harm to the Defendants

The Court must also determine the harm, if any, to the defendants if injunctive relief is granted. Mova Pharm. Corp., 140 F.3d at 1066. There is little harm to the defendants if an injunction is issued. Defendant USA Next, during arguments, informed the Court that it did not intend to use the photograph or image of the plaintiffs in any future advertising campaign. Thus, granting injunctive relief in this case would only prevent the defendants from engaging in actions that USA Next has already informed the Court it will not engage in.

(D) Public Interest

To the extent that the public has an interest which warrants balancing in this case, this factor would weigh in favor of issuing the requested injunctive relief. The public, just as the plaintiffs, has a strong interest in preventing the image and likeness of an individual from being

used in a manner inconsistent with the person's beliefs and values without their permission. See, e.g., *McVeigh v. Cohen*, 983 F. Supp. 215, 221-22 (D.D.C. 1998) ("Certainly, the public has an inherent interest in the preservation of privacy rights").

III. Conclusion

Balancing the factors this Court must consider in deciding whether to grant emergency injunctive relief, it is clear that the plaintiffs' motion for a temporary restraining order should be granted. The plaintiffs have demonstrated a substantial likelihood of success on the merits for at least one of their claims. In addition, the plaintiffs have suffered irreparable harm and may continue to do so unless the injunction is issued, while the defendants do not face the risk of any harm. Moreover, the public interest weighs in favor of issuing the injunctive relief that is sought. Accordingly, the plaintiffs motion for a temporary restraining order is granted.⁴

SO ORDERED this 16th day of March, 2005.⁵

REGGIE B. WALTON
United States District Judge

⁴ The plaintiffs also seek an order compelling the defendants to provide to the plaintiffs every electronic and hard copy of the plaintiffs' images or likeness that the defendants have in their possession and a list of all persons to whom their likeness was given. This Court will rule upon these requests when it rules on the plaintiffs' motion for a preliminary injunction.

⁵ An order consistent with this Memorandum Opinion was issued on March 14, 2005.