

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES WALLEN, ROYCE LADER, RITA FAHRNER, LEEANN BIDDIX, FRANK HIGHSMITH, JERRY HILL, HELEN KASSAMANIAN, and ERNEST BRANIGH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CONSUMER REPORTS, INC.

Defendant.

Case No. 7:21-cv-08624-VB

**FIRST AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

On behalf of themselves and all others similarly situated, Plaintiffs James Wallen, Royce Lader, Rita Fahrner, LeeAnn Biddix, Frank Highsmith, Jerry Hill, Helen Kassamanian, and Ernest Branigh (collectively, “Plaintiffs”) allege the following based upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters based upon the investigation conducted by and through their attorneys. Plaintiffs believe that substantial evidentiary support exists for the allegations set forth herein.

NATURE OF ACTION

1. Defendant Consumer Reports, Inc. (“Consumer Reports” or “Defendant”) publishes *Consumer Reports* magazines.
2. Defendant derives revenue in at least two ways: First, it sells subscriptions to its magazines to consumers; and second, it sells the identities of its magazine subscription consumers (“Data Brokerage Products”) to various third parties, including data miners, data aggregators, data appenders, data cooperatives, list rental recipients, list exchange recipients, and/or list brokers, among others (“Data Brokerage Clients”).
3. The Data Brokerage Products that Consumer Reports sells, licenses, rents,

exchanges, and otherwise discloses to its Data Brokerage Clients contain its customers' specific identities, including their full names, titles of magazine publications subscribed to, home addresses, and myriad other categories of individualized data such as each customer's gender, ethnicity, and religion.

4. By licensing, renting, exchanging, or otherwise disclosing—rather than only selling—its magazine subscribers' identities, Consumer Reports is able to misappropriate (and profit from) their identities time and time again to countless third parties.

5. Consumer Report's disclosure of names and identities and other individualized information is not only unlawful but is also dangerous, because it provides malevolent actors with the tools needed to target particular members of society.

6. By selling products to its Data Brokerage Clients comprised entirely of its magazine subscribers' identities—without their consent—Defendant has violated, and continues to violate, statutes governing the misappropriation of individuals' names, identities, and/or likenesses in the states of Alabama, California, Hawaii, Indiana, Nevada, Ohio, and Washington.

PERTINENT STATUTORY SCHEMES

I. Alabama

7. The Alabama Right of Publicity Act states that: “any person or entity who uses or causes the use of the indica of identity of a person, on or in products, goods, merchandise, or services entered into commerce in this state, or for purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise or services ... without consent shall be liable under this article to that person, or to a holder of that person's rights.” Ala. Code § 6-5-772(a) (the “Alabama Statute”).

8. Indica of identity “include[s] those attributes of a person that serve to identify that person to an ordinary, reasonable viewer or listener, including, but not limited to, name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes.” Ala. Code § 6-5-771(1).

II. California

9. California’s misappropriation of name or likeness statute, Cal. Civ. Code § 3344 (the “California Statute”), states that: “Any person who knowingly uses another’s name ... or likeness, in any manner, on or in products, merchandise, or goods ... without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable ... to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use[.]” Cal. Civ. Code § 3344 (the “California Statute”).

10. Notably, California Civil Code Section 3344 was amended in 1984 to include the phrase (appearing in the statutory text quoted above) “on or in products, merchandise, or goods” as an additional way in which an unauthorized use of a person’s name or likeness violates the statute. *See* Stats. of 1984, Ch. 1704, §2 at 6172. In making this amendment, the California legislature sought to prohibit the use of a person’s name on or in a product, good, or piece of merchandise, rather than simply in an advertisement for another product or service. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 801-02 (Cal. 2001).

III. Hawaii

11. Hawaii’s misappropriation of name or likeness statute, Haw. Rev. Stat. Ann. § 482P-1, *et seq.* (the “Hawaii Statute”), states that: “any person who uses or authorizes the use of a living ... individual’s or personality’s name, ... or likeness, on or in goods, merchandise, or services entered into commerce in this State ... without express or implied consent of the owner of the right, has infringed a publicity right under this chapter.” Haw. Rev. Stat. Ann. § 482P-5.

IV. Indiana

12. Indiana’s misappropriation statute, IC 32-36-1-1, *et seq.* (the “Indiana Statute”), states that: “A person may not use an aspect of a personality’s right of publicity for a commercial purpose ... without having obtained previous written consent.” IC 32-36-1-8(a).

13. Under the Indiana Statute, “commercial purpose” is defined as, *inter alia*, “the use of an aspect of a personality’s right of publicity ... [o]n or in connection with a product, merchandise, goods, services, or commercial activities.” IC 32-36-1-2.

V. Nevada

14. Nevada’s misappropriation statute, Nev. Rev. Stat. Ann. § 597.770, *et seq.* (the “Nevada Statute”), states that: “There is a right of publicity in the name, voice, signature, photograph or likeness of every person. The right endures for a term consisting of the life of the person and 50 years after his or her death, regardless of whether the person commercially exploits the right during his or her lifetime.” Nev. Rev. Stat. Ann. § 597.790.

15. Under the Nevada Statute: “Any commercial use by another of the name ... of a person requires the written consent of that person or his or her successor in interest[.]” Nev. Rev. Stat. Ann. § 597.790.

16. “Commercial use” includes “the use of the name, voice, signature, photograph or likeness of a person on or in any product, merchandise or goods or for the purposes of advertising, selling or soliciting the purchase of any product, merchandise, goods or service.” Nev. Rev. Stat. Ann. § 597.770.

VI. Ohio

17. Ohio’s misappropriation statute, Ohio Rev. Code § 2741.01, *et seq.* (the “Ohio Statute”), states that: “a person shall not use any aspect of an individual’s persona for a commercial purpose” unless “the person first obtains the written consent to use the individual’s persona[.]” Ohio Rev. Code §2741.02(A)-(B).

18. The term “persona” is defined as “an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value.” *Id.* §2741.01(A).

19. “‘Name’ means the actual, assumed, or clearly identifiable name of or reference to a living or deceased individual that identifies the individual.” *Id.*

20. “‘Commercial purpose’ means the use of or reference to an aspect of an individual's persona ... [o]n or in connection with a place, product, merchandise, goods, services, or other commercial activities not expressly exempted under this chapter.” *Id.*

VII. Washington

21. Washington’s misappropriation statute, RCW 63.60.010, *et seq.* (the “Washington Statute”), establishes that in the state of Washington: “Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness.” RCW 63.60.010.

22. Further, “Any person who uses or authorizes the use of a living or deceased individual’s ... name ... on or in goods, merchandise, or products entered into commerce in this state ... without written or oral, express or implied consent of the owner of the right, has infringed such right.” RCW 63.60.050.

23. Under the Washington Statute, “individual” means “a natural person, living or dead.” RCW 63.60.020.

24. “Person” is defined as “any natural person, firm, association, partnership, corporation, joint stock company, syndicate, receiver, common law trust, conservator, statutory trust, or any other concern by whatever name known or however organized, formed, or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, and community, civic, or other organizations.” *Id.*

25. “Name” means the actual or assumed name, or nickname, of a living or deceased individual that is intended to identify that individual. *Id.*

PARTIES

26. Plaintiff Royce Lader is a citizen of Alabama who resides in Fort Payne, Alabama. Plaintiff Lader has been a subscriber of *Consumer Reports* magazine for over ten years.

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