

# Litigating Virginia's Right of Publicity Laws

## WRITTEN BY

Timothy J. St. George | Peter Stephen Cox | David N. Anthony | Noah J. DiPasquale

---

*This article was originally published in Virginia Lawyer and is republished here with permission as it originally appeared in June 2026.*

By statute, Virginia recognizes a right of publicity, but the proper application of that right is still developing in the Commonwealth. Privacy litigators need to understand the often-overlooked nuances and exceptions to the law, the boundaries of which have recently been tested by plaintiffs' attorneys.

## VIRGINIA LAW

Virginia has two virtually identical right of publicity statutes, both of which prohibit the unauthorized use of a person's name, portrait, or picture for "advertising purposes" or "purposes of trade."<sup>1</sup> Written consent must be received to use a person's name or likeness for either purpose. Va. Code § 8.01-40 establishes a civil remedy allowing the plaintiff to recover damages for any injuries sustained, whereas Va. Code § 18.2-216.1 establishes a criminal penalty of a misdemeanor and fine between \$50 and \$1,000.

Virginia courts have held that there are separate and distinct statutory concepts for "advertising purposes" and "for the purposes of trade."<sup>2</sup> Claims based on a use for advertising purposes have received more liberal treatment than those based on a use for purposes of trade.<sup>3</sup> Advertising purposes is defined as a name or likeness that "appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service."<sup>4</sup> It is intended to give redress when a person's name or likeness has been commercially exploited by public use for promotional purposes.<sup>5</sup> For example, an equine consulting business used the name of a nationally renowned equestrian in its internet address.<sup>6</sup> The use of the equestrian's name was a violation of § 8.01-40 because it was used in commerce to promote the equine consulting business without the equestrian's consent.<sup>7</sup>

"For the purpose of trade" is a narrower category than "advertising purposes" and must be construed more strictly.<sup>8</sup> To determine whether a name or likeness was used "for the purposes of trade," the court must consider whether the name was used to draw trade to an entity.<sup>9</sup> For example, the use of a name and address in an accurate news report is not use "for purposes of trade" because there is no advantage gained in this situation by using the name.<sup>10</sup> In other words, no trade is drawn to the news reporting agency due to the use of the name in the report.

It is unnecessary to prove "willful, wanton, or malicious" conduct to support punitive damages under § 8.01-40.<sup>11</sup> All that is needed for proof is that the defendant "knowingly used" the plaintiff's name or likeness for advertising purposes or the purpose of trade.<sup>12</sup> Additionally, the proof must be related to the wrong suffered.<sup>13</sup>

## MARKETING ACTIVITIES

Based on these statutory definitions, there has been substantial litigation in which plaintiffs have sought to apply Virginia's right-of-publicity statutes to marketing activities. But, to date, those attempts have largely been rejected.

For example, a Virginia circuit court held "the exchange, sale, or rental of mailing lists, which are comprised of individual names and addresses, does not violate Virginia Code section 8.01-40."<sup>14</sup> Including individual names on a mailing list is neither for advertising nor trade purposes because the names are not used to promote the actual product or service.<sup>15</sup> Further, there is no relationship between the individual name and the exchange of the list.<sup>16</sup> Any relationship is "too fleeting and incidental" to be actionable under § 8.01-40.<sup>17</sup> Importantly, the Virginia circuit court's decision clarifies that the exchange, sale, or rental of mailing lists containing individual names and addresses does not infringe upon § 8.01-40.

Other courts nationwide have similarly rejected attempts to assert statutory or common-law right-of-publicity or misappropriation-of-likeness claims based on the sale of names.<sup>18</sup> That is also true in cases where the names are sold as part of "data brokerage products" that link personal identifiers with consumer preferences.<sup>19</sup> In one case, for instance, the Southern District of New York stated that the sale of a marketing list that included plaintiff's identifiers and marketing preferences did "not implicate the right of publicity, because it is the plaintiffs' identities themselves that are being sold . . . . It is therefore not plausible that any single name 'promoted' the 'Data Brokerage Products,' or otherwise influenced the transactions between Hearst and the third-party recipients before they occurred."<sup>20</sup>

## INCIDENTAL USE EXCEPTION

Despite the statutory prohibitions, it is established that a defendant will only be liable for using a plaintiff's name, portrait, or picture if there is a "direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work."<sup>21</sup> Therefore, an incidental use exception that is recognized under Virginia law excludes from liability the use of a plaintiff's name when the name is not the "primary subject" of the work.<sup>22</sup>

For example, a newspaper published a photo of an attorney's family, which included the plaintiff (the attorney's mother) after the attorney's bar license was suspended for having sexual relations with clients.<sup>23</sup> Because the plaintiff's son was the primary target of the article, the use of the plaintiff's name or likeness in the article was incidental to the purpose of the publication, and therefore, protected by the incidental use exception.<sup>24</sup>

Mailing lists can also fall under the incidental use exception. The inclusion of a single name on a mailing list is "incidental" to the sale of the list and therefore not actionable.<sup>25</sup> When it comes to mailing lists or aggregate datasets, the names included are not the primary subject of the sale and are therefore exempt from potential liability.<sup>26</sup>

In contrast, the incidental use exception did not apply to a club publishing images of models, without their consent, on the club's website and social media accounts to advertise for events.<sup>27</sup> The exception did not apply because the models' allegations directly connect the images to the main purpose of the advertisements, which was to "entice the public to go to the club to see plaintiffs or attractive women like plaintiffs."<sup>28</sup> The use of the images was

the main purpose of the publication, and therefore, the incidental use exception did not apply.

## **“NEWSWORTHINESS” EXCEPTION**

Another exception to § 8.01-40 exists for items that are “newsworthy” or “matters of public interest,” which are not considered to be for advertising or purposes in trade.<sup>29</sup> The “newsworthiness” exception is applicable when there is a genuine connection between the speech and the use of an individual’s name or image.<sup>30</sup> However, the exception does not apply if the speech is simply a disguised advertisement.<sup>31</sup> For example, a doctor brought suit against a broadcasting station that aired a broadcast where patients accused him of sexual assault.<sup>32</sup> The § 8.01-40 claim was struck because the broadcast promoted a report of a “newsworthy event and a matter of public interest,” and, therefore, did not constitute an unauthorized use.<sup>33</sup> The newsworthiness exception to § 8.01-40 clarifies the legal boundaries concerning the use of an individual’s name or image in media. The exception distinguishes legitimate news reporting from advertising and serves to ensure that individuals’ rights are protected from commercial exploitation.

## **CONSTITUTIONAL CONCERNS**

The First Amendment protects commercial speech from overreaching governmental regulation when the commercial speech is based on “the informational functioning of advertising.”<sup>34</sup> In addressing constitutional issues, Virginia courts will thus first analyze whether the speech is “informational.”<sup>35</sup> If the speech is found informational, then courts will undertake a First Amendment analysis, in which the informational content of the speech must be weighed against any unauthorized “promotional” uses. A court may find speech to be promotional instead of informational—and, therefore, constitutionally barred by Va. Code §§ 8.01-40 and 18.2-216.1— if the speech is used to generate interest in a commercial transaction with minimal description of the product or service being promoted.<sup>36</sup> Virginia right of publicity cases thus require an inquiry into whether the defendant “received a commercial benefit from use of plaintiff’s name or likeness that, without plaintiff’s image, he would not otherwise have received.”<sup>37</sup>

## **CONCLUSION**

The courts are still developing the contours of Virginia’s right of publicity. Still, it is important to understand the exceptions courts currently recognize to the right, including marketing lists, incidental uses, and newsworthy speech. Practitioners would also be well advised to consider the complex constitutional concerns implicated by the right of publicity, most notably the nascent balance between informational and promotional speech.

## **ENDNOTES**

1 Va. Code § 8.01-40; Va. Code § 18.2-216.1.

2 *Town & Country Properties v. Riggins*, 457 S.E.2d 356, 362 (Va. 1995) (citing *Beverly v. Choices Women’s Medical Ctr., Inc.*, 78 N.Y.2d 745 (N.Y. 1991)).

3 *Id.* (citing *Gautier v. Pro-Football, Inc.*, 278 A.D. 431 (N.Y. 1952)).

4 *Id.* (citing *Beverly*, 587 N.E.2d at 278; *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276 (N.Y. 1959)).

5 *United States News & World Report, Inc. v. Avrahami*, 1996 Va. Cir. LEXIS 518 at \*16 (Va. Cir. June 13, 1996).

6 *Crump v. Forbes*, 52 Va. Cir. 52, 55 (Va. Cir. 2000).

7 *Id.*

8 *Town & Country Properties*, 457 S.E.2d at 362.

9 *Goodweather v. Parekh*, No. 1:20-cv-00006, 2020 U.S. Dist. LEXIS 253268 at \*28 (E.D. Va. 2020) (citing *Town & Country Props., Inc. v. Riggins*, 249 Va. 387 (Va. 1995)).

10 *Barker v. Richmond Newspapers, Inc.*, 14 Va. Cir. 421, 424 (Va. Cir. 1973).

11 See *Pts Corp. v. Buckman*, 561 S.E.2d 718, 722 (Va. 2002); *Town & Country Properties*, 457 S.E.2d at 365 (finding that to prove a willful violation, the plaintiff must only prove name and likeness was used “knowingly,” not willfully, wantonly, or maliciously).

12 *Pts Corp.*, 561 S.E.2d at 722; *Town & Country Properties*, 457 S.E.2d at 365.

13 *Pts Corp.*, 561 S.E.2d at 722.

14 *Avrahami*, 1996 Va. Cir. LEXIS 518 at \*16.

15 See *id.* at \*17 (“The inclusion of a name as part of a larger mailing list for purposes of a direct mail solicitation does not constitute use of that name in the promotion of an actual product or service itself.”).

16 *Id.* at \*17–18.

17 *Id.*

18 See, e.g., *Curtis v. City of New York*, 195 N.Y.S.3d 592, 597-98 (N.Y. Ct. App. 2023) (claims under New York’s misappropriation statute “are to be strictly limited to . . . dissemination of an individual’s name and/or likeness to the public to promote a particular good or service”); *Brooks*, 2021 WL 3621837, at \*4-5; *Farris v.*, 2022 WL 10477051, at \*8-10; *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 402 F. Supp. 3d 767, 803-804 (N.D. Cal. Sept. 9, 2019) (holding sharing consumer’s data was “categorically different” than “using a plaintiff’s face or name to promote a product or service”).

19 *In re Hearst Comm’cns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 623 (S.D.N.Y. 2022).

20 *Id.*

21 *Geiger v. Abarca Family Inc.*, No. 3:21-cv771, 2022 U.S. Dist. LEXIS 167087, at \*8–9 (E.D. Va. July 29, 2022).

22 *Compton v. Foster*, 82 Va. Cir. 279, 283 (Cir. Ct. 2011).

23 *Id.*

24 *Id.*

25 *Id.* at \*17–18.

26 *Compton*, 82 Va. Cir. at 283.

27 *Geiger*, 2022 U.S. Dist. LEXIS 167087, at \*3–4.

28 *Id.* at \*12.

29 *Williams v. Newsweek, Inc.*, 63 F. Supp. 2d 734, 736 (E.D. Va. 1999); *see also WJLATV v. Levin*, 264 Va. 140, 161 (Va. 2002) (finding broadcasts reporting a newsworthy event or matter in the public interest are not unauthorized use under § 8.01-40); *Compton*, 82 Va. Cir. at 282 (recognizing an exception to § 8.01-40 where the name or likeness is used in connection with reports of newsworthy events or matters of public interest).

30 *Compton*, 82 Va. Cir. at 282.

31 *Id.*

32 *Levin*, 564 S.E.2d at 386–87.

33 *Id.* at 395.

34 *Town & Country Properties*, 457 S.E.2d at 363.

35 *Id.* at 395–96.

36 *Id.*

37 *See Covington Specialty Insurance Company v. Omega Restaurant & Bar, LLC*, No. 2:21cv-247, 666 F. Supp. 3d 528, 538 (E.D. Va. 2023) (inquiring into whether the defendant “received a commercial benefit from use of Plaintiff’s name or likeness that, without Plaintiff’s image, he would not otherwise have received”).

## AUTHORS

**Timothy J. St. George** is a partner at Troutman Pepper Locke in Richmond. St. George represents clients in federal and state courts, at both the trial and appellate levels. He focuses his practice in the areas of complex litigation and business disputes, financial services litigation, and consumer litigation.

**Peter S. Cox** is an associate at Troutman Pepper Locke’s [Privacy and Cyber Practice Group](#) in Richmond. He

draws upon legal insight and journalistic experience to represent clients facing litigation related to the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA), consumer privacy, and data security.

**David N. Anthony** is a partner at Troutman Pepper Locke in Richmond. He handles high-stakes litigation against consumer financial services businesses and other highly regulated companies across the U.S.

**Noah J. DiPasquale** is an associate at Troutman Pepper Locke's [Privacy and Cyber Practice Group](#) in Richmond. He represents clients in consumer law, business disputes, and commercial litigation.

## **RELATED INDUSTRIES + PRACTICES**

- [Privacy + Cyber](#)