

**ID:**

**Exam Name:** EntLaw\_LSN\_(Greenberg)\_Final\_F08

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**Grade:** \_\_\_\_\_

1)

**Question Number 1**

An avatar that resembles Madonna has been used without her permission for Harris Ranch's commercial gain. I will advise her as to her legal rights in this situation, including what defenses, if any, are available to any of the parties. Further, I'll discuss where any lawsuit would be filed, and what I project to be the final outcome.

**1. Kraftwerk**

Kraftwerk is an entirely German company with no minimum contacts in the United States. As a matter of jurisdiction, it would be very difficult to bring a suit against the German company. Ideally, Madonna should seek out German legal counsel and look to sue there. Considering that her second home and her ex-husband live in London, this would not be too difficult for her. However, it might be possible to bring suit against Kraftwerk much like what happened in the *LICRA v. Yahoo* case. In that case, the court ruled that where the harm is felt is where jurisdiction lies. But, Yahoo! chose to stop fighting about the issue after they were approached by a group of American rabbis. Because of this, the law is not that clear. However, this is very tricky: it would be a lot to convince a judge that there are minimum contacts with the US. I would attempt to bring the case in the US District Court of NY, where Madonna is a resident, because that is where the harm is felt, or in the alternative, in the NY state court, depending on the state law.

Because the law in this arena is still very sketchy, I am not confident in a successful outcome, but there is a possibility of being able to get jurisdiction. Should that happen, then you could sue for the same violations that you could sue Harris Ranch for (see below for more complete analysis). Madonna could sue for a violation of her right of privacy and a violation of her right of publicity. The right of privacy is available in all jurisdictions. But since the right limits the protection to use of one's name, image or likeness, it is not clear if this will rise to the level of a violation. The avatar is not actually Madonna, and doesn't say that it's her. It's not actually her voice, nor her dancing. But she would likely succeed in a right of publicity claim. Because of the elements of identifiability, it is an unlawful appropriation of someone's name, likeness or image, or any of the elements of identifiability - the things that make Madonna, Madonna. The creation of the avatar is very clearly meant to replicate Madonna. As well, Kraftwerk used her likeness for their commercial gain when they sold it to HR for \$1 Million.

However, it is not clear if the US court will recognize the jurisdiction, so I would strongly recommend that Madonna seek German counsel, since I am not qualified to discuss

German law.

## 2. Harris Ranch (HR)

Because this is a well established California company, it would be much easier to bring suit for violations of rights of publicity and of rights of privacy. Further, California has a very strong right of publicity statute (unlike a few other states), so there is a codified way to enforce the right beyond Prosser's common law rights of privacy. There is another layer in the jurisdiction issue: the fact that the violation took place on Second Life. However, I would argue that because all of the financial gains garnered from the illegal use of Madonna's image took place in California, it would be ideal to sue there. If Madonna is seeking to get financial remedies, it's important to follow the money. But regardless, a violation that occurred in Second Life should also be a violation in the real world. There is real money involved, so there is no reason that it should fit under any exception.

The issue is that HR is using an image that greatly resembles Madonna in order to advertise their product and for commercial gain without the permission of Madonna. There are a variety of remedies available to Madonna. First is the **4th of Prosser's common law right of privacy**: Remedies for appropriation, usually for commercial advantage, of one's name or likeness. Here, the avatar dances like Madonna, sings like Madonna, and greatly resembles Madonna. Despite the fact that Madonna's name isn't used, and the person singing is not actually Madonna (just an actor imitating her style), a reasonable person looking at the avatar would presume that the avatar was meant to be a likeness of Madonna. As well, the avatar was used for commercial gain: it was used to advertise its products, which can be purchased online or through the company's brick & mortar stores. Because of these facts, it's highly likely that a court will find that there was a violation of Madonna's right to privacy in the use of this avatar.

HR would likely defend that since it wasn't Madonna's actual voice, name or likeness that there was no violation. This could be successful for the right to privacy claim, but not as much with the right to publicity claim below.

Further, I advise Madonna to sue for a violation of her **right to publicity**. Because the violation took place in California (although it was on Second Life, see discussion above), there is a clear codification of laws surrounding the right, as well as case law that fills in the holes. The violation takes place when there is an unlawful appropriation of someone's name, likeness or image, used for commercial advantage. Case law has further held that beyond name, likeness or image, the "elements of identifiability" are also protected, such as in the *Bette Midler* case and the *Vanna White* case, where close approximations of the two women were used in advertising, such that there was no mistaking who the ads were trying to utilize for their ad campaigns. Here, the avatar uses many of the things that make Madonna famous: her style of dancing, her singing voice, and her very muscular body (seriously, she's built like a young male rock climber). These things are all the things that the public identifies with Madonna, and HR used that to their commercial advantage.

There are few defenses available to HR: they can't argue that this fits within any of the exceptions to the right of publicity, (i.e., biography, single painting of celebrity, or a feature film about a well known person). As well, there probably wouldn't be a 1st amendment defense, since there are more limitations on commercial speech than there are on other forms of speech. Therefore, I would predict a successful suit for this claim

against HR.

Under the theory of respondeat superior, Madonna may seek to bring a **defamation claim of libel** against HR. Since it was their executive that posted the false information about Madonna in the Wikipedia article about her, she might be able to get money from HR. Defamation is a statement made against plaintiff that is false and relied upon by a 3rd party that proximately caused damage to plaintiff. Here, there is definitely a false statement made about Madonna. What's not clear is whether there is any reliance upon the information by any third party and if there was any damages. Furthermore, Madonna's big problem would be proving that the VP actually did it. There are millions of people who spend countless hours editing articles on wikipedia. Proving that one of those people who edited the Madonna article was the VP is hard to do. Further, that relates to the problem of 3rd party reliance - since so many people post on wikipedia, can anything on it be presumed to be fact? While sometimes a valuable resource for settling dinner conversation disputes, it is not something that can be relied upon for any kind of academic article or anything that should be taken as fact. Madonna would have a hard time showing that this was the case. Nor do the facts show that there was any damage to Madonna. If she were working with her friend Stella McCartney on her vegan clothing line and after this, McCartney fired her from the line, that could show damages. But the facts do not show this. On the other side, the information was presented as fact, not as an opinion, so wouldn't be protected speech - since it was in an online dictionary, it could be presumed that the information presented this is fact. Just note that in Wiki, they have notations for editors to use when claims are [opinion]. Further, Madonna might attempt to show that saying that a vegan wants to start selling meat is per se libel. While to other vegans, this might hold true, to the average reasonable person, there isn't really anything that terrible about eating meat or selling it. In order to be per se libel, the accusation must imply that the person has a terrible disease or has done something morally reprehensible to the general public - not just to vegans. Therefore, it would be very difficult to show that there was libel, and the claim would probably fail.

### **3. Wikipedia**

She may consider suing Wikipedia for libel; but considering the analysis above, that would not be a very successful claim. However, she might be able to request that they edit her article and consider locking it until the chaos from the suit settles down.

### **4. Vice President of Harris Ranch**

If the respondeat superior argument doesn't work against HR, Madonna might consider bringing suit against the VP who posted the false information in the Wikipedia article. However, as shown in the analysis above, it is not likely that the a libel claim would succeed without a showing of 3rd party reliance or damages.

2)

### **Question Number 2**

Optimus Prime (OP) has a pretty good argument that Megatron (Mega) breached their exclusive recording contract (K). There are various factors at issue, and it looks like some of them may constitute breach. Because most record contracts include dispute resolution clauses, there is a requirement to give notice and opportunity to cure any

material breach by either party. Therefore, should any of the issues be a material breach, OP must give Mega the opportunity to cure the breach before taking them to binding arbitration. If OP was smart, they may have a clause that they can go to court for extraordinary relief - i.e., an injunction, before the two go to binding arbitration.

**a.**

A record label does not have to commit to release a record, because it's a huge economic risk for them. While they attempt to recoup their expenditures on the costs of the band recording their music, they can't recoup for promoting the record, and so they have a right to say if a record is commercially and technically satisfactory. Mega likely has a lot more knowledge about the current market and trends in music, and may well believe that OP's third record will not sell.

However, OP might have an argument that Mega is not acting with good faith and fair dealing. This concept underlies all of Contract law, and applies even in an arms-length agreement such as this one. While there is no fiduciary duty owed by Mega to OP, they do have a duty to work within the K and attempt to make the record work. However, pending any evidence that this was in fact the case, it is hard to show that Mega didn't actually believe that the record wouldn't sell. OP might in the alternative argue that the requirement to make another recording to be charged against future royalties would be unconscionable. It is a great expense for OP, one that they already have to recoup to Mega, for them to record again. This additional requirement could be unconscionable.

OP might try to negotiate for a Production and Development deal for this last record, so that they may record the record on their own and then bring the finished product to Mega. However, considering the level of antagonism between the two parties, I'm not convinced that they are at negotiating terms.

**b.**

Cross-collateralization is generally a bad deal for artists, and should be avoided at the time of making the K. However, there are no laws or industry rules against cross-collateralization. But it's generally a bad thing, because what happens is that the expense of producing each record is applied to revenues from a different record in the same deal. What often happens is that artists never get out of the hole unless they make a huge amount of money.

Since Mega is making OP record a new record at great expense, OP might be able to argue that it's an unconscionable term of the K, since they are unable to earn any of the royalties. Should the term be found to be unconscionable, the breach is might be found to be material.

**c.**

I'm assuming that by cumulative advance, it means that the \$6K is for the entire group. That being assumed, this term of the K is a violation of the California personal services statute. While there is a limit of 7 years for most personal service statutes, the music industry has a special work around that permits it to be more flexible. While the industry standard is 10 years, it is also common to have a term of 2-3 years to record & see how record sells with an opt-out option to renew. This means that unless the label gives the artist notice, their K will continue to be in effect. However, a requirement to keeping an artist in an exclusive service K is to pay them a certain amount: this is where the 9/12/15 scheme comes in. The label has to pay \$9K the first year of the K, \$12K the second year

of the K, and \$15K per year for the 3rd - 5th year of the K. Here, Mega has only been paying OP \$6K for the past three years. This is way too little, and removes any ability of Mega to enjoin Mikaela from leaving the group and getting another label. In fact, this failure on their part means that they are not in an exclusive services K - so OP may well have the ability to sign with another recording label and get a better deal. This was a huge failure on Mega's part and is a material breach.

Another side question is whether OP has a partnership agreement between them and how the plan to split their royalties in the future with Mikaela - it is likely that they are going to pay her off for her share in the partnership, since there are no objections to her leaving the deal.

**d.**

It is an industry standard to provide royalty payments to artists 2 times per year, in March & in September. March is traditionally the bigger payment, since it includes the Christmas sales. It is also an industry standard to provide an accounting of the royalties and the recoupment level at this point as well. Here, Mega has failed to make payment and has failed to provide an accounting as to why there are no royalties for September 2008. Since it is a term of the K to provide an accounting, it is a breach of that K to fail to provide it. Mega's claim that they don't have to provide any accounting for less than \$50K is not an industry standard, and isn't a term of the K - if it were, then they could get away with it, but there is no showing that it is a term. Furthermore, the K provides that OP has a right to audit. This is not always granted, and apparently the lawyer who fell asleep on the cross-collateralization deal woke up for the auditing section. Mega has the right to name the auditor (usually a CPA), and the audit will be at OP's expense. Further, the audit is limited to the books for OP's records, nothing else in the business. By failing to permit OP to conduct an audit, Mega is committing a material breach. OP has no way of knowing what's going on with their royalties, nor if Mega is behaving reasonably towards them. It is likely that OP would be successful in showing that these failures constituted material breach.

**END OF EXAM**