

# Hole Two

## Federal:

*ETW Corp. v. Jireh Publishing, Inc.,  
332 F.3d 915 (6th Cir. 2003)*

185%



# Tiger wins at Augusta but scores a triple bogey in the federal courts:

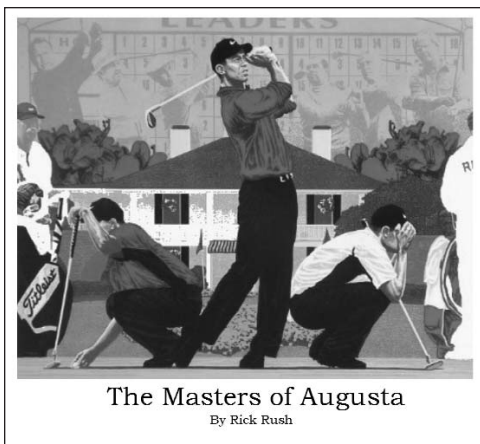
## “The Masters of Augusta”

Eldrick “Tiger” Woods has had an unprecedented professional career since becoming a pro golfer in the late summer of 1996. In 1997, at age twenty-one, Tiger became the youngest player to win the renowned Augusta Masters Tournament. He won the event by a convincing 12-stroke margin. By 2007, Tiger had collected four “green jackets” from his victories at the Masters, a number suitable to outfit a well-dressed foursome of leprechauns on St. Patrick’s Day.

In addition to being one of the world’s most recognized golfers and celebrities, Tiger is a major business enterprise. Before playing in his first tournament as a professional, Tiger signed endorsement contracts estimated at \$70 million. Eldrick “Tiger” Woods, Inc. (“Woods”), Tiger’s commercial merchandising arm, holds the exclusive right to manage his publicity rights, including his name, image, likeness and signature. The company also owns the U.S. trademark “Tiger Woods,” which includes the right to use his name in connection with “art prints” and other memorabilia.

To what extent does the law limit the commercial use of Tiger’s image and identity by others?

The legal fireworks in *ETW Corp. v. Jireh Publishing, Inc.*



started in 1998 following Tiger's first triumph at Augusta. Rick Rush, who bills himself as "America's sports artist," created a limited edition painting depicting the 1997 event. Striking various golfing poses, the painting captures Tiger on

the prowl. Also shown in the painting are two caddies (one being Tiger's caddy at the time, "Fluff" Cowan) as well as the Augusta National Clubhouse. Hovering in the sky-blue background, presumably providing an artistic connection to the past, are the images of well-known golfing legends—Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus. Rush's signature appears in the bottom right-hand corner above the title "The Masters of Augusta."

The publisher of the artwork, and target of the lawsuit, was Jireh Publishing. According to the court documents, it sold 250 serigraphs (prints made by a silkscreen process) for \$700 apiece, and 5000 lithographs (prints made by an ink-impression process) for \$100 a piece. The painting and prints were very similar to a poster of Woods sold by Nike under a license from Woods. Not surprisingly, there was no dispute that Wood's likeness in Rush's artwork was reproduced for commercial profit.

Woods fired a "stinger" at the defendant by suing in the Federal District Court for the Northern District of Ohio for trademark infringement, unfair competition, deceptive trade

practices, and violation of his right of publicity.<sup>15</sup> Tiger's awesome prowess on the golf course didn't translate into a legal victory. The court dismissed the complaint. It found that the use of Tiger's trademarked name was "fair use" under established principles of trademark law, that Tiger's image in the painting was not protected under the argued theories, and that the Master's painting by Rush was protected by the First Amendment.<sup>16</sup>

Tiger did not lose graciously; he appealed to the Sixth Circuit Court of Appeals. On June 20, 2003, the court of appeals affirmed the district court, and six weeks later denied the request for a rehearing. The appellate court applied three related legal rules. First, it applied an *ad hoc* balancing approach, which balanced Woods' proprietary right of publicity against Rush's right to free expression. Second, it construed the right of publicity as being limited by "fair-use" principles contained in federal copyright law. Finally, it found that Rush's work satisfied the "transformativeness test" because the artwork consisted of much more than a mere literal depiction of Tiger Woods. It was a panorama of Woods' victory, with all the trappings of the tournament presented. In short, it was a portrayal of a historic sporting event that Tiger happened to win.

The right of publicity, the first legal rule applied by the court, is a relatively new type of intellectual property right. The right is a creature of state law, in this case Ohio, and its violation gives rise to a cause of action for the commercial tort of unfair competition. Under this theory, a famous person, such as Tiger Woods, has the general right to exploit his name or like-

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15. A "stinger" is a specialty golf shot popularized by Tiger Woods. Instead of using a driver or 3-wood off the tee, Tiger sometimes uses a two-iron to hit a low-boring screamer that goes about 270 yards.

16. U.S. Const. amend. I. "Congress shall make no law ... abridging the freedom of speech ..."

ness for financial gain. The Restatement (Third) of Unfair Competition, Section 46, which is followed in Ohio, generally defines the right of publicity: “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.”

As recognized by the court, the right to benefit from one’s celebrity status has constitutional limits. In balancing the competing interests between the artist and the celebrity, the right to free expression, as guaranteed by the First Amendment, is accorded substantial weight. The court states:

After balancing the societal and personal interests embodied in the First Amendment against Woods’s property rights, we conclude that the effect of limiting Woods’s right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression. In this case, we find that Woods’s right of publicity must yield to the First Amendment.

Tiger is as aggressive in the courts in attempting to protect his “right to publicity” as he is in attempting to win every golf tournament. But as this case illustrates, he does not always win.

### **Inside the Rules, Rule 1: “The game”**

The Rules of Golf (“Rules”) govern the game made famous by the legendary golfers depicted in Rick Rush’s painting “The Masters of Augusta.” The Rules define the nature of the sport in the following way: “The game of golf consists of playing a ball from the teeing ground into the hole by a stroke or successive strokes *in accordance* with the Rules.” They also state that no

player “shall take any action to influence the position or movement of a ball except in accordance with the Rules.” Like any set of rules, however, not every circumstance can be anticipated. Any situation not directly covered by a rule is governed “in accordance with equity.” While the phrase “in accordance with equity” is necessarily elastic, and thus not defined by the Rules, the official U.S.G.A. Decisions on the Rules of Golf (“Decisions”) reflect the core idea as treating similar situations similarly. In its broadest and most general sense, the phrase embodies the principle of fairness.

Although various rules will be discussed in subsequent chapters, two principles bind the rules together. One is the requirement that a golfer accept the lie of the ball as it is found on the golf course, unless a specific exception is granted to do otherwise. This principle was captured in the novel *The Gods of Golf*.<sup>17</sup>

Pick a ball, any ball at all  
But never, ever let it fall ...  
For if it falls, and fall it may  
You must play it where it lays!

The second principle is that a golfer must play the same ball on each hole without handling it until the hole is finished unless the Rules permit a substitution. There are only a few exceptions. Some exceptions are if the ball is unfit for play (Rule 5-3), in a water hazard (Rule 26), lost or out of bounds (Rule 27), or unplayable (Rule 28), a player may substitute another ball. A player may change balls after finishing one hole and starting the next one.

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17. David L. Smith and John P Holms, *The Gods of Golf* 115 (1996).