



# BOBBLEHEAD JUSTICE

*Jonathan R. Siegel*

EVERYONE LOVES the *Green Bag*'s series of bobblehead Supreme Court Justice dolls. Lawyers scramble to get hold of one;<sup>1</sup> they have inspired poetry<sup>2</sup> and parodic federal regulations;<sup>3</sup> national media have covered them.<sup>4</sup> But are they lawful? Despite the danger to these cherished icons, the question must be asked. So I asked it on my intellectual property exam.<sup>5</sup> The question, and such answer as I have to it, appear below.

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<sup>1</sup> As is related at [www.greenbag.org](http://www.greenbag.org), there is no sure way to secure a bobblehead Justice, and even those lucky enough to receive a doll certificate face the somewhat arduous task of trekking to Arlington, Virginia to redeem the certificate for an actual doll. Some people are apparently willing to pay \$25 for the privilege of having George Mason students redeem the certificate for them, see [www.gmu.edu/org/padlaw/Bobblehead.doc](http://www.gmu.edu/org/padlaw/Bobblehead.doc), and collectors have reportedly paid as much as \$2,100 for one of the dolls on eBay. Heather Gehlert, *Bobblehead Justices Help Journal Promote the Lighter Side of Law*, L.A. Times, July 3, 2006, at A16.

<sup>2</sup> James M. Rosenbaum, *Case Closed*, 9 Green Bag 2d 110 (2006).

<sup>3</sup> Leandra Leaderman, *The Federal Income Tax Consequences of the Bobble Supreme Phenomenon*, 9 Green Bag 2d 423 (2006).

<sup>4</sup> Gehlert, *supra* note 1; Michelle Norris, *New Bobbleheads on the Block*, All Things Considered (Oct. 27, 2003); Lara Weber, *Bobbleheads of the Supreme Court*, Chicago Tribune, May 19, 2003, at 8.

<sup>5</sup> In typical law professor fashion, I didn't ask anyone's permission to reproduce an image of the *Green Bag*'s image of a Supreme Court Justice. For the record, I did

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## EXAMINATION

*Intellectual Property – Law 470*

*Section 10 – Siegel*

*Spring, 2004*

### *Instructions*

1. This is an open book examination. You may use any written materials that you have brought with you (including typewritten, printed, or published materials). ...

6. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam. ...

10. Good luck. ...

### *Question Five*

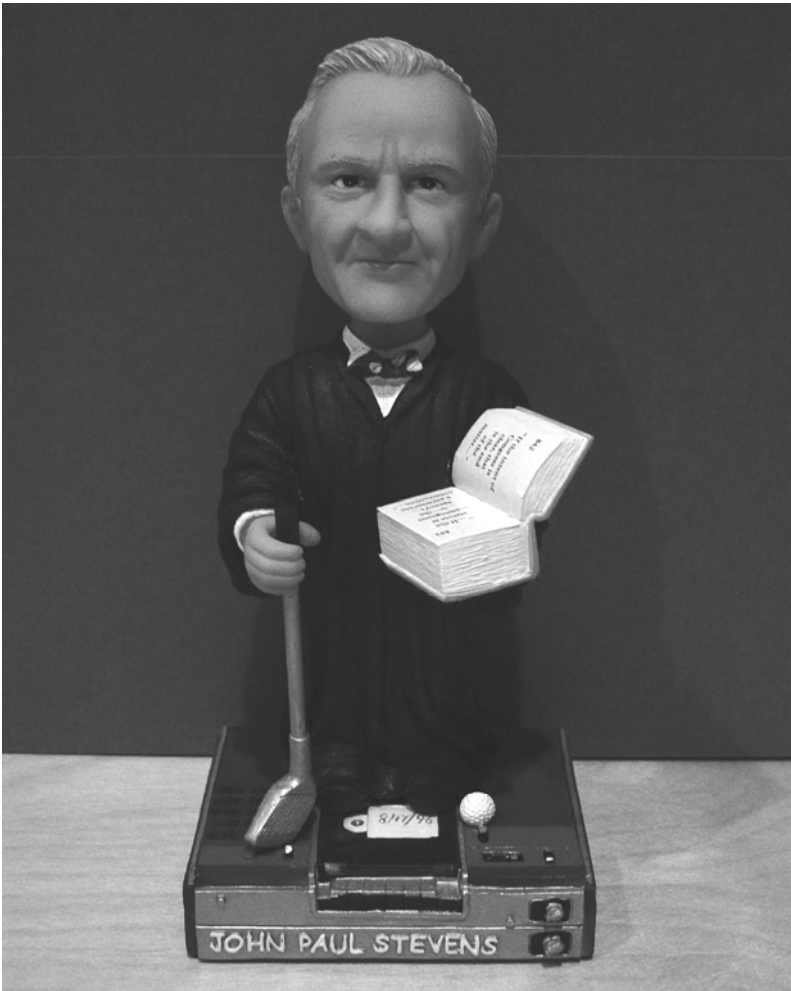
(20 minutes)

The *Green Bag* is a quarterly journal specializing in short articles on legal topics. In the spring of 2002, the *Green Bag* commissioned the creation of a limited-edition bobblehead doll of Chief Justice William Rehnquist of the U.S. Supreme Court and had 1000 of the dolls produced. (A “bobblehead” doll has a head that bobbles back and forth on a small spring.) The journal did not sell the dolls, but sent one to each of its subscribers as a gift. The *Green Bag*’s subscribers live throughout the United States. The dolls proved very popular and the editors noted an increase in subscriptions to the *Green Bag* following their distribution.

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think about the legal implications of using this image on my exam and concluded that it would be a fair use for copyright purposes and a noncommercial use that would not implicate the right of publicity.

## Bobblehead Justice



The *Green Bag's* editors decided to follow up with a Justice John Paul Stevens bobblehead doll, pictured here. The doll's face resembles that of Justice Stevens, and the words "John Paul Stevens" appear on the doll's base. The doll portrays Justice Stevens wearing a bow tie, as the Justice is noted for doing in real life. The doll portrays Justice Stevens standing on top of a Sony VCR, to commemorate Justice Stevens's opinion in the "fair use" case of *Sony Corp. v. Universal City Studios*. The doll holds a golf club to commemorate

Justice Stevens's opinion in the well-known *Casey Martin* case, in which a disabled golfer sued for the right to use a golf cart in professional golf tournaments. The doll also holds a copy of Volume 467 of the United States Reports, which contains Justice Stevens's opinion in *Chevron U.S.A. v. Natural Resources Defense Council*, an important case in administrative law.

The editors of the *Green Bag* did not seek Justice Stevens's permission to create the bobblehead doll, but one of them said he hoped the Justice would have a "sense of humor" about it. Once again, the dolls were not sold, but one was sent to each *Green Bag* subscriber as a gift.

You are Justice Stevens's law clerk. Upon learning about the doll, Justice Stevens is upset and asks you whether he can "do anything" about the doll.

Write Justice Stevens a memorandum in which you discuss whether Justice Stevens might have any claims against the *Green Bag*, defenses the *Green Bag* might raise, and the likely outcome of any litigation, and suggest what you think Justice Stevens should actually do.

## EXAM COMMENTARY

This commentary briefly discusses the issues from the exam and indicates what I thought the answers were. It does not discuss every nuance of the questions. . . .

### *Question Five*

Justice Stevens's claim against the *Green Bag* would be for violation of his right of publicity, which protects against the commercial exploitation of one's identity.

The bobblehead dolls exploit Justice Stevens's identity because they use his name and likeness. Protection against the commercial exploitation of one's name and likeness forms the very core of the protection provided by the right of publicity, so it is unnecessary to consider whether the various other items (bow tie, golf club, VCR, volume of U.S. Reports) further create an association between the doll and Justice Stevens's identity.

## *Bobblehead Justice*

Although the dolls were not sold but given away as a premium to subscribers, it appears that they helped boost subscriptions to the magazine. Therefore, they probably count as a sufficiently “commercial” exploitation of the Justice’s identity to implicate the right of publicity. Although the dolls are not especially embarrassing or harmful to the Justice’s reputation, the *Green Bag* is commercially profiting (albeit indirectly) from the use of the Justice’s name and likeness, and that’s what the right of publicity protects against.

Of course, the right of publicity is a creature of state law, so we would need to check the law in a particular state before bringing any claim. The foregoing analysis assumes state law similar to that shown in the cases we studied.

The *Green Bag*’s main defense would be that the dolls are protected by the First Amendment. In the *Saderup* case,<sup>\*</sup> the court held that a simple exploitation of a celebrity’s likeness is not protected by the First Amendment, but a “transformative” use of the likeness, in which the artist adds creative elements that transform the likeness into the artist’s own expression, is protected. As one guide, the court suggested inquiring into whether the value of the work derives primarily from the fame of the celebrity depicted or whether it comes from the creativity, skill, and reputation of the artist.

This case demonstrates why the *Saderup* test is difficult to apply. On the one hand, I would be inclined to say that the primary value in the dolls comes from their exploitation of Justice Stevens’s likeness. It’s just fun for a lawyer to own a Justice Stevens doll. The dolls don’t involve any great artistic skill or creativity and I don’t even know who the artist is so I can’t care about the artist’s reputation. On the other hand, there is a certain parodic element inherent in the concept of a bobblehead doll, with its oversize, bobbling head, and the choice of items to commemorate Justice Stevens’s cases involves at least some creativity.

If we took away the golf club and the VCR, I would think it pretty clear that the doll is not protected under the First Amend-

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<sup>\*</sup> *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 21 P.3d 797 (2001).

ment (at least, assuming the *Saderup* test is the correct test). The bow tie is simply a literal depiction of what the Justice usually wears, and the open reporter is a common element in serious portraits of judges. So the doll would just be a pure exploitation of Justice Stevens's identity. The addition of the golf club and the VCR add just enough humor to the doll that I could see a court's holding it to be a "comment" that is protected under the First Amendment, although personally I think it does still take the bulk of its value from the fame of the celebrity depicted. Putting everything together, I think the doll is primarily "just" a depiction of Justice Stevens and I would be inclined to rule in favor of a right of publicity claim under the *Saderup* test, but it seems like a close case.

In any event, if I were really Justice Stevens's clerk, I would advise him to relax and not worry about the dolls, which are certainly doing him no harm and which everyone regards as a tribute to him. A lawsuit, even if successful, would probably harm his reputation and end up in his being ridiculed as overly thin-skinned.

