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Licensing Rights of Publicity

Practicing Law Institute

Advanced Licensing

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"The Right of Publicity Is the Right of a Person to Control the Commercial Use of His or Her Identity"

J. Thomas McCarthy


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Rights of Publicity Have Become Important in Commercial Law Because:

- **Increased Public Focus on Entertainment Celebrity Roles in Society**
  - The entertainment business has continued to grow through and beyond the recession;
  - Film box office receipts are now included in the business news;
  - We now have more than a dozen weekly television programs that report on entertainment and celebrity issues each week;
  - Video games have become a multi-billion dollar industry now featuring movie-like images and scripts;
  - Entertainment is ubiquitous; it surrounds us in our homes, workplace, commute time, the gym, taxi cabs, airplanes, and cars;
  - Advertising has expanded to touch every space the entertainment industry has grown into.

Rights of Publicity Licensing Overview

We are going to cover the following topics:

- The history of the development and expansion of the Rights of Publicity;
- Comparison to the Rights of Privacy and other intellectual property rights;
- The primary cases that expanded the Rights of Publicity;
- The restrictions and the outlier cases that do not fit the trend;
- Resulting statutory enactments and statutorily created rights
- Contract considerations including morals clauses and reverse morals clauses

Historic Context

- Rights of Publicity are unique in that they are rights that are essentially first created by academics and judges;
- 1890 Harvard Law Review Article by Samuel D. Warren and Louis D. Brandeis entitled "The Right of Privacy"
- Warren and Brandeis argued that the expanding technology of cameras with fast shutter speeds and processing which allowed taking photographs of unwitting subjects and;
- The ability to transmit images across country via wire cable and telegraph meant that the photograph taken on the East Coast could be published in a West Coast newspaper the same day;
- Warren and Brandeis argued that people's privacy should be a recognized right and people had the right not to be bothered by unwanted intrusion into their private affairs and activities
- Warren and Brandeis could cite to no American cases to support the proposition and instead, looked to cases in England to argue by analogy that each individual should have the right to control their privacy;

Historic Context Continued

- Roberson v. Rochester Folding Box Company
  - In [1902], New York rejected an invasion of privacy claim by a young 18-year-old beauty whose photograph was used without her consent on posters, box covers, flour bags and displayed in markets, saloons and warehouses. The New York Court said that it did not wish to acknowledge a right that had not yet existed in Anglo-American common law.
  - The public outcry was so great, that the New York legislature passed a statutory right of privacy preventing commercial use of another's image without consent in 1905;

Civil Code §§ 50 and 51

Historic Context Continued

Other States Took a Contrary View

- By contrast, in 1905, the State of Georgia acknowledged the Right of Privacy as being a natural right inherent to all individuals. In Pavesich v. New England Life Insurance Company, the Supreme Court of Georgia articulated that each person held a right to prevent the unauthorized use of their identity and that such a right was inherent.

- Justice Cobb recognized the conflicts which could implicate the Constitutional Right of Free Speech and Press but wrote:

  - "There is, in the publication of one's picture for advertising purposes, not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject."

In 1953, Judge Jerome Frank Coined the Term, "Right of Publicity"

- He used it to denote a property right in a person's identity and distinguished it from the Right of Privacy because the interest was a financial interest rather than a privacy interest which was an injury to the psyche

- "We think that in addition to and independent of the (right to privacy), which in New York derives from statute), a man has the right in the publicity value of his photograph…the right to grant the exclusive privilege of publishing his picture and that such a grant may validly be engross…this right might be called a "Right of Publicly" for it is common knowledge for many prominent persons, especially actors and ballplayers, far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their continence displayed in newspapers, magazines, buses, trains and subways."

The Right of Publicity Grew Out of The Right of Privacy

- In 1960, Professor William Prosser surveyed the cases that had been decided over the 70 years, 1890-1960, and identified four (4) categories of cases

- Thus, after the Warren and Brandeis article and the early cases in 1910s, the Right of Privacy developed through the common law cases which shaped the contours of the right into four distinctly different, but related rights:

  - **The right to one's solitude (the right to be left alone);**
  - **The right not to have personal information publically exposed;**
  - **The right not to be placed in a false light;**
  - **The right to prevent the commercial exploitation by another of one's identity or persona.**

- Prosser, as the influential writer, had his four (4) torts included in the Second Restatement of Torts in 1977. (Prosser was the reporter for the Second Restatement)

The Right of Publicity Is Similar To Prosser's Fourth Right of Privacy Which Seeks to Prohibit the Commercial Exploitation of a Person's Identity Without their Consent

- However, the differences between the two rights are numerous;
- Right of Privacy compensates one for psychic injury;
- Right of Publicity compensates one for commercial injury;
- Right of Privacy is personal;
- Right of Publicity is commercial;
- Right of Privacy does not exist after death;
- Right of Publicity has post mortem existence;
- Right of Privacy may not be assigned;
- Right of Publicity may be assigned;
- Right of Privacy is recognized in the Second Restatement of Torts;
- Right of Publicity is recognized in the Restatement of Unfair Competition

Intellectual Property Characteristics of the Right of Publicity

- Like other intellectual property rights, it can be gifted, sold or transferred;
- It can be fragmented into narrow categories of permitted use for licensing purposes;
- It can be exclusive or non-exclusive;
- It can be taken back by the licensor if a breach or misuse occurs;
- It can be licensed for a term or in perpetuity;
- It can be waived;
- It can be owned but not exploited;
- It can be wasted if exploited improperly.

Distinguishing the Right of Publicity from Copyright

- Copyright is based upon a constitutional mandate contained in Article 1, Section 8 of the Constitution; to "promote the advancement of science and the useful arts."
- The Right of Publicity has been recognized in some common law courts as a natural right, inherent to everyone, without the need for legislative or judicial creation. But other courts see it only when legislatively created by statute like copyright;
- Copyrights are exclusively federal;
- Rights of Publicity are only state based and thus, vary in the extremes as to both scope of protection and length of duration;
- Copyright requires a modicum of creativity to exist; Rights of Publicity do not.
- The term of copyright is life of author plus 70 years;
- The term of Rights of Publicity depend on the state where the holder resides at the time of death.

Distinguished Rights of Publicity vs. Trademarks or Trade Dress

- Both are actionable when unfairly used commercially without consent
- Both can be based upon common law rights which do not require registrations to be enforceable
- Rights of Publicity are deemed inherently distinctive for each individual while some trademarks must acquire distinctiveness through use or by developing a secondary meaning
- The objective of trademark law is to protect the public
- The objective of rights of publicity law is to protect the individual owner
- Before Rights of Publicity fully developed, some celebrities would obtain trademark registrations of their names for enforcement purposes; now enforcement can occur without a trademark registration
- Conveyance of a trademark requires assignment of the associated good will. Rights of Publicity may be conveyed without good will.

Courts in the 1950s and 1960s Had Difficulty Distinguishing Between the Rights of Publicity and Privacy and Frequently Failed to Understand the Differences Including:

- Privacy is a personal right and therefore can never be sold, conveyed or transferred;
- Privacy did not, therefore, exist post-mortem and dies with the holder;
- Privacy focuses upon the holder's feelings whereas publicity sees a commercial or financial interest;
- Some courts believed the rights holder must have exploited during their late time to have conveyable rights;
- Some courts could not separate the economic injury from the emotional injury

Zacchini v. Scripps-Howard Broadcasting Company,

433 US 564 (1977)

- This case is often referred to as the human cannonball case which involved a news crew's filming of the 15 second act of a variety performer, Hugo Zacchini who was shot from a cannon into a net some 200 feet away.
- The United States Supreme Court consistently used the term "Right of Publicity" as referring to a recognized and established legal principal.
- "The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainers' incentive in order to encourage the production of this type of work."
- "Plaintiff does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it."
- Expansion of the scope of the Rights of Publicity has occurred through case analysis
- These cases have expanded the scope of the Right of Publicity

Motschenbacher v. RJ Reynolds Tobacco Company, 498 F.2d 821 (1974)

- Well known race car driver Lothar Motshenbacher was held to have his rights of publicity infringed when RJ Reynolds used a race car in an adverse advertisement that had very similar identifying characteristics to the car which Motshenbacher was well known for driving;
- Thus, an object which was deemed to be so closely associated with a person that use of the object implicated their right of publicity;
- When people saw the car, they thought of the driver;
- Think of a sequined glove (Michael Jackson)

Bette Midler v. Ford Motor Company, 849 F.2d 460 (1988)

- Bette Midler had her rights of publicity infringed when Ford Motor Company's advertising firm hired her back-up singer to imitate her voice in a series of 30 and 60 second television commercials which used a song which Bette Midler has made famous

- Thus, Rights of Publicity were expanded to sound a-likes. Voice impersonators are required to be identified by FCC regulations.

Woody Allen v. National Video Inc., 610 F.Supp. 612 (1985)

- A series of print ads featuring an actor who resembled Woody Allen was at a video rental counter checking out movies which Woody Allen had made, such as Annie Hall, Bananas, Sleeper, and Broadway Danny Rose. The Court held that ad infringed Allen's Right of Publicity even though it was not he who appeared in the ad;

- Rights of Publicity were expanded to cover look-a-likes or celebrity impersonators;

- Nevada's statute has an express exemption for live stage impersonations.

Vanna White v. Samsung Electronics America, 971 F.2d 1395 (1991)

- The Ninth Circuit held that a Samsung advertisement that featured a mechanical robot standing in front of a tote board wearing a white dress, pearls and a blonde wig evoked the persona of Vanna White and was thus an infringement on her California common law Rights of Publicity;

- The Right of Publicity is expanded to include any elements which makes a person identifiable.

Wendt v. Host International, 197 F.3d 1284 (1990)

- Actors John George Wendt and John Ratzenberger who played Norm and Cliff in the popular television show, Cheers, successfully enforced their common law Rights of Publicity in preventing the producers of the television show from allowing animatronics robots of their characters from being placed in bars licensed to use the Cheers set and name.

- When an actor's persona becomes inextricably intertwined with a character, infringement may occur even when the character is licensed by the character owner.

Limitations on the Right of Publicity

- Rights of Publicity do not apply to corporate or business entities. Felsher v. University of Evansville, 755 N.E.2d 589 (Ind. Sup. Ct. 2001); University of Notre Dame v. Twentieth Century Fox Film Corp. 15 N.Y.2d 940 (1965)
- Image of a person in artwork is immune from a Right of Publicity claim under the New York statute. Hoepker v. Kruger, 200 F. Supp. 2d 340, 63 USPQ 2d, 1168 (S.D.N.Y. 2002)
- Life story rights are not jeopardized by the partial fictionalization of characters. Tyne ex rel. Tyne v. Time Warner Entertainment Company, LP, 204 F. Supp. 2d 1338 (N.D. Fl. 2002)
- The truthful use of the names of individuals for purposes of identification does not give rise to a claim of either a Right of Publicity or unfair competition under the Lanham Act. New Kids on the Block v. News America Publishing Inc., 745 F. Supp. 1540 (D.C. Cal. 1990)
- Rights of Publicity are limited by the first amendment and the news reporting function; Montana v. San Jose Mercury News, 34 Cal. App. 4th, 40 Cal. Rptr. 369 (1995)
- Federal copyright sometimes pre-empts the Rights of Publicity where individuals have agreed to appear in a copyrighted work. They can not later assert their Rights of Publicity claims to defeat or limit the work. Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986).

Limitations of Rights of Publicity by Time of the Creation of a Will

- Shaw Family Archives Ltd. v. CMG Worldwide Inc., 486 F. Supp. 2d, 309 (S.D.N.Y. 2007)
- The Estate of the famous photographer sued the Marilyn Monroe Estate for declaratory judgment that the Marilyn Monroe Estate had no Rights of Publicity claims in the photographs the photographer had taken of Marilyn Monroe. The court concluded that because Marilyn Monroe's will was executed before California had passed a statute creating post-mortem Rights of Publicity and as there were no post-mortem Rights of Publicity in New York, that Marilyn Monroe could not have passed her Rights of Publicity in the residue of her estate through her will.
- Marilyn Monroe Estate v. CMG Worldwide
- In reaction, the Marilyn Monroe Estate and CMG Worldwide convinced the California legislature to expand the post-mortem Rights of Publicity in California by retroactively creating rights of any person who died after January 1,1938 by adding 75 years to the then existing statute.

More Recently Filed Case

- *The Hebrew University of Jerusalem v. General Motors, LLC*, 2012 WL 907497, No. CV10-03790 (U.S. Dist. Ct., C.D. Cal.) - General Motors used an image of Albert Einstein in a magazine advertisement in People Magazine, which it had licensed from Getty Images US. Jerusalem University asserted that it was the owner of Einstein's rights of publicity under a gift from his family. The District Court awarded costs and fees to General Motors, costs totaled $9,766.91, fees of $40,003.50 for the first cause of action and an additional $32,924.45 for the remaining claims. GM had requested fees totaling over $736,000, so the total fee award was about 10%

Continued . . .

- The United States Federal District Court denied summary judgment in favor of General Motors concluding that;
  - 1) lifetime exploitation under the prior New Jersey case law would not be applied by the New Jersey Supreme Court;
  - 2) that the New Jersey Supreme Court would likely conclude that lifetime exploitation is not necessary where clear fame has been achieved through lifetime work;
  - 3) there were issues of fact regarding the intention of the parties in conveying the rights of publicity as part of the residual estate;
  - 4) while the will did not specifically designate Einstein's publicity or trademark rights for inclusion in the trust, the will's specific language was sufficiently broad enough as to be read to include the intent to allow the future exploitation by others.

More Recently Filed Cases

- *Orthopedic Systems, Inc. v. Schlein*, 202 Cal.App.4th 529 (Cal.App. 2011) - court held that damages under section 3344(a) are appropriately "either the amount of damages specified in the statute or actual damages, whichever is greater, as well as profits from the unauthorized use."

- *Aldrin v. Topps Company, Inc.*, 2011 WL 4500013 (C.D. Cal. 2011) - Buzz Aldrin, the famous astronaut, sued Topps, a trading card company, alleging violation of his common law and statutory Rights of Publicity, as Topps had released a trading card set of "American Heroes" with historical information about those individuals. Topps filed a special motion to strike under SLAPP, which was granted.

More Recently Filed Cases

- *Michael E. Davis v. Electronic Arts, Inc.*, 2012 WL 3860818, No. 10-03328 RS (March 2012) – Three retired NFL players, Michael E. Davis, Vince Ferragamo and Billy Joe Dupree instituted a class action against Electronic Arts for including their images and persona in Madden NFL.

- The United States District Court denied Electronic Arts' Motion to Dismiss which was based upon the First Amendment defense and concluded that "Electronic Arts' claim for the transformative use did not make it exempt, where the artist's skill and talent is manifestly subordinate to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame".

Recently Filed Cases

- *Fraley et al. v. Facebook Inc.*, 2011 WL 6303898 (N.D. Cal. 2011) – Angel Fraley filed a State Court proceeding against the owners of the Facebook cite alleging that the advertising practice of placing members names, pictures and assertion that they "like" certain advertisements on the members page constituted unfair misappropriation in violation of California's Right of Publicity Statute, Unfair Competition and Business and Professional Code violation of California Code 3344.

- The complaint survived an initial Motion to Dismiss filed by Facebook as the Court concluded the complaint sufficiently alleged an injury and the plaintiff had standing to bring the suit under California's Unfair Competition law

Fraley et al v. Facebook Inc. - Settlement

- **<u>Settlement</u> – On September 4, 2012, the Trial Court preliminarily approved a settlement for the class. The terms included:**
  - $10,000,000 settlement payment;
  - Stipulated injunction to within 6 months:
    - Revise its statements about commercial content.
    - Create a way for users to have control over sponsored stories and interactions.
    - Revise its Statement of Rights and Responsibilities to allow parents or guardians of users under 18 to approve.
    - Provide additional FaceBook education and instructions.
    - Agree to an audit if Court ordered.
    - FaceBook will pay all administrative costs.
    - FaceBook will pay administrative expenses.
    - FaceBook will pay Plaintiffs' legal fees of $10,000,000 and costs of $300,000.

Black Rhino Enterprises v. Stars In Concert, C/09/45-0858/KGZA 13-1064 The Hague District Court

- Actor and comedian Dan Aykroyd and the widow of John Belushi attempted to enforce their copyrights and rights of publicity claims in the Blues Brothers against a European show that did an impersonation of the Blues Brothers.

- Dutch Copyright Act has a right called a Portrait Right, but has no equivalent right of publicity. The Dutch law recognizes that the subject of a photograph has an inherent right to exploit the photograph by making reproductions.

Black Rhino Enterprises v. Stars In Concert, C/09/45-0858/KGZA 13-1064 The Hague District Court

- On October 9, 2013, The Hague District Court upheld the trademark of Dan Aykroyd and Judith Belushi in the Blues Brothers, but denied the copyright claims including the claims in the film script and refused to protect the visual image of John Belushi and Dan Aykroyd as the Blues Brothers characters under the Netherlands Portrait Law.

- The court in the Netherlands concluded that John Belushi and Dan Aykroyd had created their characters by emulating the dress and performance of prior Blues legends, such as Rev. Gary Davis and John Lee Hooker and therefore had no protectable rights in the dress of black suit, white shirt, black tie, fedoras.

- Applying what would be equivalent to an American defense in copyright of scenes a faire, the Dutch Court concluded the plaintiffs could protect their name, but not their distinctive appearance or performance.

Franklin v. National Film Preserve, Ltd., 116 U.S.P.Q. 2d 1628, 43 Media L. Rep 2970 (Sept. 2015), Aretha Franklin v. Telluride Film Festival –

- Alan Elliot obtained rights to footage of Ms. Franklin's concert in a church in Los Angeles in 1972. Produced a film called Amazing Grace. The quick claim deed makes specific reference to Elliot's need to obtain Franklin's permission. His negotiations were unsuccessful. Court issued an injunction preventing the public showing during the Telluride Film Festival.

Jordan v. Jewel Food Stores Inc. et al., and Jordan v. Dominick's Finer Food, Case No. 1:10-cv-00407 and 1:10-cv-0034, US Dist. Ct. (N.D. Ill) –

- Settled after jury awarded a $8.9 million dollar verdict against the grocery store owned by Safeway Inc.

- Ads featured a coupon for a steak below the words "Michael Jordan . . . You're a cut above", together with the grocer's TM logo and slogan colored in Chicago Bulls red, black and white.

VIRAG, S.R.L. v. Sony Computer Entertainment America LLC, 2015 WL 5000 102 –

- Race car driver Mirco Virag, owner of Virag Racing Team, overcame a motion to dismiss filed by Sony which had included an image of the VIRAG name and logo displayed on the race track at the Rally of Monza in Monza, Italy. Sony reproduced the banner (for authenticity) but without permission or consent. The case is proceeding through discovery.

Rosa and Raymond Parks Institute for Self Development v. Target Corporation, 2016 WL 25495 –

- The 501©(3) non-profit corporation owns the name and likeness of Rosa Parks.
- Target offers seven books about Parks, a television movie "The Rosa Parks Story", and a collage-styled plaque that included pictures of Parks and Dr. Martin Luther King.
- Court applied Michigan's qualified privilege for matter of public concern and said Target could still sell the items without paying the Institute a fee.

Marshall v. ESPN Inc., CBS, NBC, ABC, Fox, 111 F.Supp. 3d 815 (2015) –

- Current and former football and basketball players brought a putative class action against conferences, networks and licensors involved in broadcasting college sports games alleging violation of rights of publicity under Tennessee law.

- Complaint alleged also violation of Sherman Act and a false endorsement claim under the Lanham Act.

- Court dismissed all of the Plaintiffs' claims indicating:
  - 1) Sports broadcast exception applied under Tennessee law;
  - 2) The ability to profit from a right of publicity does not rise to the level of a fundamental right;
  - 3) The Plaintiffs were subject to the NCAA eligibility rules and the Sherman Act does not apply to these rules;
  - 4) Broadcasting sporting events does not propose a commercial transaction and is thus not commercial speech.

In Dryer v. National Football League, 814 F.3d 938 2016

The Eighth Circuit Court of Appeals held:

- That professional football players' performance in a game recorded by NFL films does not constitute part of their "identities" (persona) rather than a fixed work eligible for copyright protection.

- That the players failed to provide evidence that their appearance in the film created "false or misleading statements" of a current relationship or endorsement with the NFL. The mere fact that some viewers may have misunderstood the extent to which the players may no longer have been associated with the NFL is not sufficient to overcome summary judgment.

Sarver v. Chartier, 813 F.3d 891 (9th Cir.) (2016)

- A former Iraq veteran and army sergeant sued the writer and film company that produced the award-winning film *The Hurt Locker* for misappropriation of his rights of publicity, defamation and intentional infliction of emotional distress.

- Mark Boal, a journalist, was embedded with the army and wrote an article about the bomb disposal units and I.E.D.s. The article appeared in *Playboy* and again in *Reader's Digest*. The article was used as the basis for a screenplay that became the film *The Hurt Locker*.

- Justice O'Scannlain, writing for the Court of Appeals for the 9th Circuit held:
  - 1) Case should be dismissed for violation of California anti-SLAPP statute;
  - 2) *The Hurt Locker* was expressive speech, not commercial speech or a commercial transaction;
  - 3) The plaintiff had failed to allege sufficient facts to sustain a defamation claim;
  - 4) The false light claim failed because the film's portrayal would not be highly offensive to a reasonable person.

Roe v. Amazon.com, 170 F.Supp. 3d 1028 (2016)

- S. District Court of Ohio declined to grant summary judgment for a writer of a book "*A Gronking to Remember*" published by Amazon, Barnes & Noble, Inc. and others which contained the engagement photograph of the Plaintiffs as its cover photograph.

- The District Court concluded the use of the Plaintiffs' photograph violated their (persona) rights under the Ohio statute, and the common law invasion of privacy rights were not preempted by the statute in Ohio. The Court also concluded the false light claims were a question for a jury and survived the MSJ.

- The corporate defendants faired much better, however, because the Court held that the booksellers of a self-published work were not publishers in the normal meaning and were not liable.

- Faulkner v. Hasbro, Inc., 2016 WL 3965200

  U.S. State District Court in New Jersey concluded that professional journalist Harris Faulkner had sufficiently stated a claim for right of publicity infringement for a toy it called the "Harris Faulkner Hamster" doll as part of its "Littlest Pet Shop" line of toys.

- 2Die4Kourt v. Hillair Capital Management, LLC, 2016 WL 4487895

  U.S. Central District Court of California granted a motion for preliminary injunction against the former licensee of trademarks and rights of publicity rights from the Kardashians after the license was terminated and the former licensee continued to use the trademarks and persona rights of family.

- Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776 (2016)

  Supreme Court of New York dismissed invasion of privacy claims by Karen Gravano and Lindsay Lohan under the New York right of privacy statute based upon their alleged inclusion in one of the game variations in "Grand Theft Auto V". Court concluded that the inclusion in the video game was not for advertising or trade as is prohibited by the New York statute.

Post Mortem Rights Vary Broadly from State to State and Range from the Shortest Period of 10 years to a period of 100 Years Post Mortem

Examples include Tennessee; T.C.A.§447-25-1102;

- Tennessee creates a minimum 10 year right after the death of an individual but then continues that right until there is a non-use for commercial purposes for a two (2) year period subsequent to the initial ten (10) years;
- Thus, creating a potential of perpetual rights (For the Favorite Son, Elvis Presley)
- California's Right of Publicity Statute creates post mortem rights of the life of the holder plus 70 years, thus matching the length of term of copyright;
- States like Nevada and Texas use a post mortem term of the life of the holder plus 50 years (the old copyright length);
- Oklahoma has expressly acknowledged post mortem rights for 100 years, however, the State preserves post mortem rights for any person who dies within 50 years prior to the effective date of the statute; compare that to states like Ohio who do not recognize post mortem rights in a deceased person unless they died on or after January 1, 1998.
- Thus, the terms of the post mortem rights very greatly from State to State.

Post-Mortem Rights Continued

- Similarly State statues vary markedly in what rights are deemed to be covered in a right of publicity with most states protecting the name;
- Photograph
- Likeness
- Voice
- States like Indiana have established the broadest protections including name;
- Voice
- Signature
- Photograph
- Image
- Likeness
- Distinctive appearance
- Gestures, or
- Mannerisms in connection with the persona

Four States Have Created Post Mortem Registries Allowing Heirs, Executors and Persons Claiming an Interest to Register the Individual's Name and Provide Contact Information

- Those states that provide for registrations are:
  - California
  - Nevada
  - Texas
  - Oklahoma
- In Nevada, a person asserting a right of publicity claim for a deceased celebrity may not maintain an action if they have not registered with the Nevada Secretary of State, thus, incentivizing a registration scheme to allow commercial exploitation through contacting individuals with knowledge of the deceased celebrities' representatives;
- Six states provide that a consent or license of a statutory right must be in writing; Massachusetts, New York, Rhode Island, Utah, Virginia and Wisconsin;
- The statutes of three (3) states simply say that consent is necessary, thus implying oral or in writing; California, Oklahoma and Tennessee;
- Florida expressly permits written or oral consent and;
- Nebraska's statute permits an express or implied consent suggesting oral is enough
- NOTE the 50 State Chart on pages 555-602 in Volume 2 of your course book, sets out the law of each State.

Contract Considerations in Endorsement Deals and Rights of Publicity Licensing

Terms commonly found in celebrity endorsement agreements:

- An explicit statement of the product or service which is being endorsed;
  - 1) An express warranty or representation that the celebrity has not previously endorsed a similar product or service; and 2) during the term and for a prescribed period following the terms, will not endorse a competitive product;
- A representation and express warranty that the celebrity will not criticize or disparage the company or the product and will uniformly acknowledged that that used the product and are happy using the product;
- Some contracts require actual public use of the good or product in public by endorser;
- A specific commitment for a number of photo shoots, filming opportunities and audio recording events or other opportunities to record the celebrity for purposes of the commercial advertising and endorsement.
- Express statement that celebrity is appearing in a photo shoot or as a "work made for hire" under the Copyright Act.

Continuation of Frequently Used Terms

- Enumerated personal appearances typically in a schedule with an express designation as to the amount of time that is the minimum requirement the celebrity spend at each event or occurrence;

- Express enumeration of the activities which the celebrity must engage in for the personal appearances such as meet and greet, minimum quantity of autographs or posing for photographs;

- Explicit conduct requirements including morality clauses and express termination rights for termination of the celebrity for cause.

- The recent trend is to use broader language that covers the companies' right to terminate based only on public controversy or scandal.

  "Any matter which would cause controversy or ridicule or which is inconsistent with the high ethical standards of the company or the communities it serves."

- The company business policy, ethics code, or good citizen standard is attached to the Endorsement Agreement and expressly acknowledged by the celebrity.

Celebrities Frequently Negotiate Their Own Requirements in Their Endorsement Deals With Considerations Including

- Minimum quantities of samples or service to which they are entitled during the term of the agreement;
- Approval right over the visual images which the company wants to use in its advertising and marketing campaign;
- Joint approval over all ad copy or commercials for products or services that might potentially impact the celebrity's overall larger rights of publicity;
- Express cessation of use terms upon the contract during the normal contract life or earlier upon an early termination;
- Minimum travel and accommodation riders for advertising shoots and personal appearances;
- Limitation on the number of meet and greets or personal interviews mandated in days or hours;
- Express restrictions on marketing on the internet as ad campaigns there take on a larger life through mirrored sites and are frequently impossible to end in the traditional sense of print or broadcast media;
- Limitation of the right to terminate based solely upon acts of moral turpitude or criminal conviction;
- A reverse moral clause.
- Liquidated damages triggered upon termination for any reason but criminal conviction

Alteration of Appearance

- One of the more controversial restrictions in some celebrity agreements is an alteration of an appearance by the celebrity during the term of the endorsement deal;
- Typically, language for morality clauses are closely negotiated and in the broadest use, celebrities can be terminated for any conduct that brings them into public disrepute, contempt, scandal or ridicule;
- Some aggressive morality clauses provide that any public dispute that interferes with the celebrities' ability to effectively fulfill their obligations as a spokesperson triggers termination;
- Some aggressive contracts have gone to far as to assert that if the media reports the scandal or indiscretion on a national basis for more than a 24 hour news cycle, the company has the right of termination, thus creating a very short opportunity for damage control by the celebrity and an almost immediate right to terminate by the company.

Termination Clauses by Company

Artist agrees that the Company shall have the right to terminate this Agreement upon thirty (30) days prior written notice to Artist in the event:

- Artist is prosecuted for, convicted of, or pleads guilty to, a crime involving moral turpitude, or is publically accused of acts of moral turpitude or other conduct that brings Artist into public disrepute, contempt, scandal or ridicule, and such public accusations are confirmed as true (either by admission, or by irrefutable evidence);

Most Morals Clauses Attempt to Control Celebrity Involvement in Forms of Moral Turpitude and Conduct that Would Be Embarrassing to the Sponsors

- Morality clauses seek to provide sponsors with the ability to terminate immediately the contractual obligations to celebrities or spokespersons who might become a source of embarrassment because of their activities or if they engage in conduct which would hold them up to criticism, ridicule, public outrage or contempt;

- Which would constitute a crime under State or Federal law;

- If the Celebrity is permanently disabled or physically unable to perform their obligations because they are undergoing rehabilitation or treatment for substance abuse or psychological conditions which are outside mainstream behavior (sexual addiction);

Morality Clause

Agency or Client may terminate this agreement immediately, upon written notice if:

- Celebrity is indicted (or the equivalent) in connection with Celebrity's use of illegal drugs, driving while under the influence (DWI), physical violence (other than physical violence occurring during Celebrity's participation in boxing events), or other forms of moral turpitude which if proven would constitute a crime under U.S. Federal or State law;

- Celebrity publicly disparages any of Client's alcohol beverage products including the Product, Client, or alcoholic beverage consumption in general, and if Celebrity has not been able to retract or clarify such statement or act so that in a reasonable person's judgment the impact of such statement or act is negated within ten (10) days of written notice to Celebrity setting forth such statement or act;

- Celebrity is permanently disabled or is physically unable to perform his obligations in this Agreement (it being agreed that Client may not terminate this Agreement under this sub-clause if Celebrity has rendered his services and performed his obligations prior to such time, and Client is able to exploit the materials created hereunder in accordance with the terms and conditions of this Agreement);

- Client or Agency may terminate this Agreement upon ten (10) days' prior written notice, if Celebrity is in material breach of the Agreement and such beach is not cured within ten (10) days of Artist's or Celebrity's receipt of such notice.

SAMPLE MORALITY CLAUSES

The University Coach may terminate the Coach in the following circumstances:

- Situations in which the University determines that the best interests of the University and its intercollegiate football program require that the Coach no longer retain the position of Coach of the University's football team and the Coach does not accept reassignment of responsibilities;

- Any conduct of the Coach in violation of any criminal statute of moral turpitude;

- A serious or intentional violation of any law, rule regulation, constitutional provisions, bylaw or interpretation of the University, the Big Kahuna Conference of the NCAA, which violation may, in the sole judgment of the University, include any serious violation which may result in the University being placed on probation by the Big Kahuna Conference or the NCAA and including any violation which may have occurred during prior employment of the employee at another NCAA member institution;

- A serious or intentional violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Kahuna Conference or the NCAA by a member of the football coaching staff or any other person under the Coach's supervision and direction, including student-athletes in the football program, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the Big Kahuna Conference or the NCAA;

- Conduct of the Coach seriously prejudicial to the best interests of the University or its athletic program or which violates the University's mission.

Athletes, Actors and Authors

- Major League Baseball Player: The Club may terminate this contract if the Player shall at any time fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class condition or to obey the Club's training rules;
- Television Actor: The Actor shall not commit any act or do anything which might tend to bring Actor into public disrepute, contempt, or ridicule, or which might tend to reflect unfavorably on the Network, any sponsor of a program, any such sponsor's advertising agency, any stations, broadcasting or scheduled to broadcast a program, or any licensee of the Network, or to injure the success of any use of the Series or any program;
- Movie Actor: The Actor shall conduct himself with due regard to the public conventions and morals. The Actor shall not, either while rendering such services to the producer or in his private life, commit an offense involving moral turpitude under Federal, state or local laws or ordinances. The Actor shall not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, public disrepute, contempt, scorn, or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the producer of the motion picture, theatrical or radio industry in general.
- Author: The Author shall not commit any acts that indicates dishonesty or moral turpitude or that otherwise could materially injure the Publisher's reputation.

Reverse Morality Clauses

- Celebrities with sufficient clout sometimes can obtain a reverse morality clause which allows a celebrity to terminate the relationship with a company should the company have to recall defective products, produce produces which have been ordered withdrawn by governmental agencies, should the company be accused of stock manipulation or accounting fraud or other activities of moral turpitude, where, if convicted, would constitute a crime under State or Federal law.

Reverse Morality Clause

Special Right of Termination by Artist

The company agrees that Artist shall have the right to terminate this Agreement as follows:

- Immediately upon written notice to the Company in the event the Company files or has filed against it any petition for bankruptcy, reorganization, arrangement or other protection under any state, federal or other applicable jurisdiction's bankruptcy, insolvency or similar laws; or
- Immediately upon written notice to the Company in the event that the Company materially breaches this Agreement and fails to cure such material breach within fifteen (15) business days (or five (5) business days in the case of a payment default) of the Company's receipt of written notice specifying said material breach.

Thank you

Any Questions?

For a copy of this presentation, please email your request to my assistant, Jeanne Meitz

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