



CULTURAL ICONS POSE UNIQUE RIGHTS CLEARANCE ISSUES

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Incorporating pre-existing materials depicting celebrities, landmarks and other readily identifiable cultural objects in a new work can pose unique liability issues beyond the normal scope of copyright clearance. In certain contexts, the use of celebrity images or images of objects closely associated with a celebrity can give rise to liability for invasion of privacy and related claims. In other cases, theories akin to copyright and trademark infringement have been raised in connection with the use of cultural icons. With respect to newer architectural landmarks, copyright issues relating to the protection of architectural drawings may be at issue. Even if the material is properly licensed for commercial use and the license contains representations and warranties from the licensor that all necessary personal, location and materials releases have been secured, when dealing with cultural icons it is also important to consider whether there is a right of privacy, right of publicity, copyright, trademark, or other privilege affecting the use of the material in a particular context without further clearance.

The "right of privacy" prevents the unauthorized use of an individual's name or likeness. Traditionally, the "right of privacy" has served to protect individuals from the emotional anguish resulting from the publication of private facts that are embarrassing, intimate or portray the individual in a false light. The unauthorized appropriation of a person's name or likeness for a commercial advantage is a developing legal doctrine related to the concept of invasion of privacy and referred to as the "right of publicity." The "right of publicity" is generally defined as an individual's right to control and profit from the commercial use of his or her name, likeness and persona. It recognizes that a person's image has an economic value that is presumed to be the result of that person's own efforts and creativity, and that each individual has the right to exploit the value of their own image.

The right of publicity is counter-balanced by the right to free speech under the First Amendment. Zacchini v. Scripps, 433 U.S. 562 (1977). The First Amendment protection exists to ensure that the public is entitled to know about things, people and events that affect it. The First Amendment provides a hierarchy of protection depending on how an individual's identity is being used. Where information is "newsworthy" the protections afforded by the "right of publicity" are curtailed. "Newsworthiness" includes factual, educational and historical material.

The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity's likeness creates a false and misleading impression that the celebrity is endorsing a product. Since the First Amendment does not protect false or misleading commercial speech and even non-misleading commercial speech is generally subject to somewhat lesser First Amendment protection, the right of publicity may often trump the right of advertisers to make use of celebrity figures. Comedy III Productions, Inc. v. Saderup, 25 Cal 4th 387 (2001) (citations omitted).

There is no uniform federal law on the "right of publicity," so application of the doctrine varies from state to state. Either common law or statutory law in almost every state protects certain individuals from the unauthorized exploitation of their identity. For example, Minnesota now recognizes the tort of "appropriation" which prohibits the unauthorized use of a person's name or likeness for advertising or trade. In Elli Lake v. Walmart Stores, Inc., 582 NW2d 231 (Minn. 1998), the Court referred to a "tort of appropriation" but the case was decided on other grounds.

California has the most developed statutes and case law on the right of publicity. The California Civil Code Section 3344 imposes statutory liability for the unauthorized use of a person's "name, voice, signature, photograph or likeness in any manner on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent..." Section 990 of the California Civil Code extends this protection to the estate and heirs of deceased persons.

The right of publicity has been successfully applied in cases involving celebrity endorsements. See e.g. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); and Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (both involving voice impersonations). Such claims have been unsuccessful where the courts find an element of newsworthiness, or non-commercial use. See e.g. Montana v. San Jose Mercury News, Inc., 34 Cal.App.4th 790 (Ct.App. 1995); and Dora v. Frontline Video, Inc., 15 Cal.App.4th 536 (Ct.App.1993) (both involving news and public affairs). In a New York right



of publicity case, Koepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002), the court addressed the use of a celebrity's image as part of a collage. The court focused on whether the collage was primarily a work of art with a social or public interest aspect entitling it to First Amendment protection, or rather if its value was primarily in generating sales through the popularity of the depicted celebrity.

The right of publicity has been expanded over the years to include more than simply a person's name and likeness. Nicknames and former names (like "Ali" and "Lew Alcindor" (Kareem Abdul-Jabbar's former name), distinct phrases associated with a celebrity ("Here's Johnny!"), a distinct way of singing (Tom Waits), even distinct markings on a racing car (Motschenbacher's), have all been protected under "right of publicity" based claims.

While celebrity animals do not have a right of publicity – not being human they do not have publicity rights – claims have been raised using theories based on concepts of trademark law, arguing that the celebrity animal is a branded image entitled to trademark protection.

With respect to architectural landmarks, there is no right similar to the right of privacy but in some cases there may be issues of copyright or trademark rights. The general rule of thumb is that the use of footage of buildings or other structures taken from public streets and other non-restricted places does not need to be cleared. However, developments in copyright and trademark law may pose clearance problems in some contexts. While architectural plans may be protected by copyright, buildings built prior to December 1, 1990 are expressly exempt from copyright protection. Whether buildings constructed after 1990 from copyrighted architectural plans are also protected by copyright appears to be an open question. Similar to the right of publicity, copyright protection is balanced by the rights protected by the First Amendment through the doctrine of "fair use." It is also conceivable that in certain situations where a structure is so closely associated with a good or service as to be recognized as a brand, there may be restrictions imposed by trademark law on how the image is used.

The right of publicity is a product of state law. As such, the applicable state law depends on the jurisdiction in which a claim may be brought. In states like Minnesota, which have only recently begun to address the right of publicity, there often is no case law to provide guidance on how that doctrine should be applied. Decisions from other jurisdictions provide little specific guidance other than indicating that the court needs to balance the interests of an individual's right to publicity against the interests protected by the First Amendment. These decisions suggest that where commercial speech is involved, and the use of a celebrity's image is purely for commercial gain, individual protections afforded by right of publicity outweigh the protections afforded by the First Amendment. On the other hand, where there is a social or public interest ("newsworthiness") or the image is used other than purely for commercial gain, the balance shifts towards protection by the First Amendment.

While it is not possible to guess what a particular court in a particular jurisdiction might conclude, careful analysis of how a particular image will be used can be helpful. Consideration should be given to whether the image is used as a principal or a de minimis element of the work, whether the work as a whole promotes a public-interest or educational theme favored by the "fair use" doctrine or is used purely for commercial purposes, and whether the image is used in a way which could imply endorsement of a particular product or service.