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Celebrity Licensing and the Right of Publicity: Navigating New Frontiers of Opportunity and Liability

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Ask several licensing executives to define *celebrity licensing* and you almost certainly will get a range of responses. Sure, it involves featuring a famous person on a product or in advertising, but that raises as many questions as it answers. Celebrity licensing takes many forms and incorporates a range of intellectual property rights and restrictions. What are those rights? What developments are shaping this segment of the licensing industry?

Consider the vast differences between pop icon Jennifer Lopez and civil rights icon Rosa Parks, Olympics swimming sensation Michael Phelps and Olympic track star Jesse Owens, or former Colts and current Broncos quarterback Peyton Manning compared to former Colts quarterback Johnny Unitas. There are as many differences as there are similarities between these iconic figures, not the least of which is that some are alive and others are not. Nevertheless, directly or through appointed representatives, each participates in the celebrity licensing realm.

The common denominator threading them all together is the legal doctrine known as the "right of publicity." Celebrity licensing, with the right of publicity at its core, presents tremendous opportunities for licensors and licensees alike. Similarly,

commercial use of a famous person without permission can trigger substantial liability.

Recent times have ushered in staggering acquisitions of the rights of iconic living and deceased personalities, stunning technology that creates unprecedented licensing opportunities as well as potential lawsuits, and critical legislation defining these rights. These areas, too, all revolve around a right of publicity nucleus. This segment of the licensing industry, and the legal doctrine inseparably associated with it, present intricacies and distinctions that need to be understood in order to navigate between opportunity and liability.

The Right of Publicity: 101 (for Non-Lawyers)

My preferred definition of the right of publicity is simply "the right to control the commercial use of one's identity."¹ Like any good legal definition (or the definition of *celebrity licensing* for that matter), this also raises as many questions as it answers, but it encapsulates the most salient concepts: control (as opposed to merely compensation); commercial use (as opposed to an editorial or statutorily exempted use); and identity (as opposed to a rigid definition of identity that quickly becomes inadequate as wily infringers get as close to any pre-defined line as the law would allow).

The right of publicity is recognized by statute in 19 states, but that does not mean the right is only enforceable in states with a statute.² The right also is recognized by common law—meaning through judicial interpretation and application of an acknowledged right even without the benefit of the legislature enacting a statute that specifically defines the contours of the right. The majority position is that most, if not all, states would recognize these rights unless the courts of that jurisdiction already have determined that it does not through a judicial ruling. Only a few states or courts have taken this approach.

Despite widespread recognition, these rights are often violated, and movie stars, athletes, and

musicians are not the only ones. For example, shortly after President Obama's election in 2008, Ty Inc. introduced two Beanie Baby dolls named "Sasha" and "Malia," asserting that the products and the names were just "beautiful names."³ Of course, in right of publicity analysis, one should consider the entire context of a potential infringement. The timing of the Beanie Babies, coupled with two otherwise uncommon names, dictates that there is no reasonable debate that the products were based on the President's children.

Early in 2012, a company called In Icons was preparing to issue a Steve Jobs action figure. Apple reportedly sent a cease and desist letter to In Icons, prompting Tandy Cheung of In Icons to state "Apple can do anything they like...I will not stop, we already started production."⁴

If an activity is prohibited by law, being "already in production" provides no defense or entitlement to proceed. In Icons reportedly stated "Steve Jobs is not an actor, he's just a celebrity," and that "[t]here is no copyright protection for a normal person."⁵ Aside from referencing the wrong area of the law, this comment demonstrates the kind of thinking that often gets companies sued for right of publicity violations.

The right of publicity is assignable during life through contractual transfers or assignments, or at death through testamentary documents or interstate succession. The right of publicity also is divisible in whole or in part, meaning that several owners could own varying percentages of a right of publicity. This flexibility allows personalities, especially those with enough business to justify such maneuvering, to transfer these interests into a corporate entity for taxation, liability, and management reasons. It also allows the person in question the ability to pass the right of publicity to designated heirs, and to ensure that the right of publicity will be managed in a manner consistent with the person's legacy, values or instructions.

States Get Serious About Protecting the Right of Publicity

As legal doctrines go, the right of publicity is still in its nascent stage. It has been around in various manifestations for over a hundred years in the United States and has been known by this term for over half a century, yet it still is evolving at a rapid clip. In recent years, no less than California, Connecticut, Illinois, Indiana, Louisiana, Massachusetts,

Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, and Washington have considered right of publicity legislation.

Early in 2012, I wrote, testified in support of, and defended from lobbying forces a statute concerning Indiana's position on right of publicity.⁶ This statute confirmed that the right of publicity in Indiana would be recognized for those who died before the enactment date of the statute itself. The premise is simple enough: These rights already existed in common law, and passage of the statute simply codified the existing status of the law. Indiana's passage of this legislation in 2012 was a significant event in right of publicity development, and struck an important chord for protection of iconic personalities.

California passed legislation in 2008 that accomplished essentially the same thing as Indiana's statute. This amendment, signed into law by then Governor Schwarzenegger, was in response to a California ruling which concluded that Marilyn Monroe was not entitled to statutory right of publicity protection under California law because of the perceived location of her domicile at the time she died in 1962. The assumption that her domicile was New York at the time of her death may be debatable based on indications that she intended California to be her domicile. Interestingly enough though seemingly overlooked in the ruling, New York did in fact recognize post-mortem publicity rights in 1962, through a long line of other cases affirming this position.

New Hampshire, as distinguished from Indiana and California, recently failed to pass a statute advanced by Matt Salinger, son of author J.D. Salinger. Salinger lived in New Hampshire in part because of the value New Hampshire places on individual rights and liberties. Matt Salinger tells of how a photographer ambushed his father in the latter years of his life, manipulated the image, and used it on t-shirts:

A photographer literally jumped out of the bushes on top of him ... then took this picture as my father was recoiling. My father looked terrified, looked angry, looked startled and looked a bit haunted. It's a terrible photograph, but that wasn't enough for this person who made these t-shirts. He then went in ... and made his eyes bright red, and made his face yellow—just made him look more freakish and wild.⁷

The New Hampshire bill made its way through New Hampshire's entire legislative process, only to be vetoed by New Hampshire's Governor, who stated: "I believe

that this legislation is overly broad, would potentially have a chilling effect on legitimate journalistic and expressive works that are protected by the New Hampshire and United States constitutions, and would invite rather than diminish litigation over legitimate journalistic and expressive use of a person's identity, I have decided to veto this bill."

Arguments in opposition to New Hampshire's bill were put forward to the effect of "libraries will not be able to post information about new books they carry because this new law will make them liable." Sadly, as erroneous as these arguments are, proliferation of such nonsense is shockingly effective at derailing legitimate and important efforts to recognize these rights.

To those concerned that right of publicity recognition threatens the First Amendment, I am happy to report that the First Amendment is alive and well in the numerous states that have already passed right of publicity legislation. From my vantage point, there has not been "a wave of litigation" or "a suppression of First Amendment liberties" to the extent so often predicted by right of publicity opponents.

Virtually every area of the law is subject to potential abuse, but the law and those who work in the profession navigate these perils and serve to keep things on track. The judiciary is very good about safeguarding the First Amendment and in making case-specific determinations when First Amendment concerns might legitimately trump the right of publicity. If a bad lawsuit is filed, there are procedural and substantive protections in place for dealing with it. The entire doctrine should not be halted because of potential misuse, or simply because certain scenarios may require careful review by the judiciary. That's their job, and they usually are good at doing it.

Unfortunately for New Hampshire, Governor Lynch missed an opportunity to make New Hampshire one of the growing number of states that provide statutory right of publicity recognition for its citizenry. The passage of right of publicity legislation brings clarity to the public and businesses alike in knowing the extent of recognition and how the doctrine will be delineated in a given jurisdiction.

There is an argument that perhaps the right of publicity should move to the Federal level, whereby one uniform law would apply throughout the United States, instead of varying from one state to the next. The variations from one state to the next are not as troubling as opponents would like everyone to believe, but both trademark and copyright began as state based doctrines and eventually moved to the Federal level. Perhaps that is the next tectonic development awaiting the right of publicity.

Celebrities Are Brands

I often have said "celebrities are brands." When I first started speaking in these terms years ago, the concept struck some as foreign. Harley-Davidson is a brand; Coca-Cola is a brand. People are not brands, are they?

Many celebrities are developing a critical mass around their identities and the business based on their personas which reflect certain lifestyles, ideals, and values. These are trademark indicators that go a long way towards substantiating the idea of a celebrity as a brand.

Gene Simmons of KISS has declared that "KISS is a brand, not a band," and encourages audiences at his business lectures to consider that "you are your own brand." Aside from good motivational speech fodder, there is something to this idea, and various celebrities have sought trademark registrations on aspects of their persona and identity. When successful, trademark registrations serve as an additional asset in the intellectual property portfolio of those personalities, and reinforce the protection afforded by the right of publicity.

The idea that celebrities are brands may not be surprising with respect to people such as Donald Trump, Oprah Winfrey, or Gene Simmons, who for many years have sought trademark protection on various aspects of their identity. But in 2012, trademark applications were made by less obvious candidates such as the NBA's surprise early season-star, New York Knicks' Jeremy Lin, for the phrase *Linsanity*,⁸ and Anthony Davis of 2012 NCAA Champions University of Kentucky, for the phrases *Raise the Brow*⁹ and *Fear the Brow*¹⁰ based on his distinctive unibrow.

Even more surprising, music stars Beyoncé and Jay Z applied for trademarks for the given name of their newborn baby, Blue Ivy, just weeks after the baby's birth.¹¹ It is not clear if they intend to develop products branded with the baby's given namesake, but other parties seem to be pursuing the idea: one fashion designer applied for *Blue Ivy Carter NYC*¹² and another designer applied for *Blue Ivy Carter Glory IV*¹³ for a fragrance line. These applications were refused by the US Patent and Trademark Office (PTO), which noted in its decisions that the name belonged to a "very famous infant" and consumers would wrongly assume that any products with the requested mark were approved by Beyoncé and Jay-Z.

Considering the extent of their own efforts in branding their personas, Beyoncé and Jay-Z may indeed intend to develop the Blue Ivy mark through products to an extent that would support their trademark application. This is important, because applying for a mark

purely for defensive reasons—to prevent others from using the same mark—is not really the idea behind the grant of a trademark by the PTO. Instead, a trademark registration is supported by actual use of the mark in commerce, so at some point there will have to be products using the *Blue Ivy* mark in association with the goods designated in the trademark application.

Celebrities are becoming savvy about how to promote their brand. When LL Cool J decided to release a clothing line with Sears, the launch was synchronized to coincide with the release of his latest album. Former Van Halen front man, and current Chickenfoot singer, Sammy Hagar applied the same concept to cross-promoting his Cabo Wabo tequila line. “Lots of people are coming up with tequilas, but you’re going to have to come up with 5-10 million dollars a year to...break a new brand. If you’re me, you don’t have to spend a penny on it. I promoted it on tour, saving five million dollars and made money on my shows. It was a great crossover—rolling my brand into my business.”¹⁴

Indeed, celebrities are brands.

Dead Celebrities Are Brands Too

But when it comes to celebrities as brands, an even more impressive feat is when the person who is dead still out earns his or her peers. Testament to this counterintuitive phenomenon is *Forbes’* annual irreverent *Dead Celebrities* earnings list. Last year’s list reported Michael Jackson in the number one slot, at \$170 million. Elvis Presley came in second with \$55 million.¹⁵

Moving down the *Forbes* list, the entries become more varied, in some cases providing a time capsule of recent events and trends. Elizabeth Taylor, who died in 2011, tied with John Lennon, as did author Stieg Larsson with the benefit of the US movie adaptation of his posthumous bestselling works. Andy Warhol brought up the bottom of the list at \$6 million, tied with various others.

In an age in which almost everyone carries a camera at all times and can post content online within seconds, coupled with scandals *du jour*, it is not surprising that deceased celebrities present a more attractive option for licensing and brand-building than living personalities. Once deceased, the person’s legacy is established and complete, and there will be no surprise arrests, embarrassing half-time slips or ill-advised career decisions diminishing their reputation or standing in pop culture.

Following his death in 2009, Michael Jackson earned a reported \$275 million in 2010 exceeding the

two most profitable active musical acts of 2010—U2 and AC/DC. Jackson’s estate earned revenues from music licensing, merchandising deals, and the film *This Is It*, which grossed over a quarter of a billion dollars. The comeback he was preparing for was successful beyond all expectations, though his passing obviously changed the equation in almost every conceivable way.

Something beyond typical licensing and branding transactions has been contributing to the astronomical numbers in *Forbes’* annual dead celebrities list. In April 2006, it was reported that CKx, the same entity that bought the rights to Elvis Presley for just over \$100 million a few years earlier, had purchased an 80 percent interest in the rights to Muhammad Ali for a reported \$50 Million.¹⁶ This amount would put Ali near the top of *Forbes’* 2012 list, though revenue from a one-time acquisition is not exactly the same as generating revenue from new products and advertising campaigns.

Following Ali and Elvis in the acquisition turnstile was Bob Marley. A cover story in the February 12, 2011 edition of *Billboard* reported that his various intellectual property rights were acquired for approximately \$20 million.¹⁷ In the interview, I commented that while the family had surely been doing their best to manage and protect the intellectual property rights of Bob Marley on their own:

...[T]hey probably were not maximizing their opportunities, but they’ve now entered into a transaction where they can do that...The Marleys face the same challenges as any of these deceased iconic clients. The first part is responding to unauthorized uses. The second is keeping the celebrity relevant in the minds of consumers. Given Marley’s enduring popularity, that part shouldn’t be a problem, but the third challenge is a bit trickier: It’s a matter of choosing your partners carefully and exercising quality control over the brand, and not oversaturating the market...It’s a balancing act. They have to understand what it is that Bob Marley means to the consumer, and to the extent that they can, try not to alienate his fans.¹⁸

Most recently, Marilyn Monroe LLC sold the controlling shares of the intellectual property rights of Marilyn Monroe. The amount of the acquisition was unspecified, though perhaps it can be ascertained by her re-entry on *Forbes’* list after a long absence from making the list at all, at a reported \$25 million.

Monroe has been the center of a long line of litigation and has seemingly emerged on top. After a flurry of lawsuits pitting the right of publicity, trademark, and contractual rights of the Estate (more precisely, Marilyn Monroe LLC) against potential copyright interests of various photographers, the Monroe owners are saving the Shaw Family Archives (a Defendant in one of the prior lawsuits and the administrator of photographer Sam Shaw's works) from bankruptcy and lifting them out of its relationship with its long-time licensing agent, Bradford Licensing (a party also involved in the Monroe/Shaw litigation).¹⁹ In exchange for a reported payout of \$75,000, those in control of Marilyn Monroe's rights are guaranteeing \$3 million in earnings over the span of a five year deal. As a result, Marilyn Monroe LLC and its new owners will have licensing control over the images. Considering that this transaction goes to the heart of the issues in that litigation years ago, perhaps losing isn't losing at all in the world of celebrity licensing and intellectual property rights pertaining to famous persons.

Aside from these one-time transactions involving acquisition of the underlying intellectual property rights (the right of publicity, trademarks, and if applicable, music publishing rights, and real estate), one also has to give recognition to the longevity reflected in the successful licensing of properties such as Elvis, Babe Ruth, and Vince Lombardi, as a few examples of personalities who year after year sustain viable licensing and branding programs. Hall of Fame NFL coach Vince Lombardi was recently memorialized in the licensed Broadway play *Lombardi*, and a major motion picture adaptation is in the works.

In 1930, Babe Ruth famously made more playing a season of Major League Baseball (\$80,000) than the President of the United States, Herbert Hoover earned in a year. Ruth's response was: "Why not? I had a better year than he did." If only Babe Ruth had known that he was not even close to his peak annual earning potential.

Marilyn Monroe once said: "[Hollywood is] a place where they'll pay you a thousand dollars for a kiss and fifty cents for your soul." What Marilyn could not have realize is that her posthumous right of publicity would be worth millions.

Celebrity Licensing, Technology, and Litigation

The preceding scenarios are premised on willing buyers and willing sellers. But many landmines and pitfalls exist in relation to commercial use of famous personalities. Sometimes mistakes made in this regard

lead to high-stakes litigation, as lawsuits ranging from Lindsay Lohan suing E*Trade over its talking babies, and their "milkaholic Lindsay"²⁰ reference to Michael Jordan filing lawsuits against Chicago-area businesses running advertisements with his number 23, or his high-top basketball shoes, following his induction to the basketball Hall of Fame.²¹

Interestingly, the advertisements seemed to avoid use of Jordan's name or image. Of course, *if* the use was permissible as fair use, one likely could have gone ahead and used his image as well. Perhaps such apparent subtlety indicates an awareness that the line between fair use and infringement was being skirted, since none of those businesses had a license to run advertisements associating with Michael Jordan, and in some cases, the businesses competed with actual businesses Jordan was pursuing. Ultimately, that association with the personality is where the bulk of value lies, so the argument that the advertisements were to congratulate Jordan seems transparent to me. Alas, I was not the Judge on the case.

No situation exemplifies the need for right of publicity or the potential for both unprecedented licensing and unheralded abuse as the virtual reincarnation of rapper Tupac Shakur at the 2012 *Coachella* Festival.²² Through the use of digital reanimation and hologram technology, Tupac appeared at the end of the concert for an encore performance with Dr. Dre and Snoop Dog (or Snoop Lion, now, though that name change could warrant its own discussion in branding strategy). The crowd had no forewarning that Tupac was about to appear, and reportedly was initially stunned by what their eyes and ears were witnessing: a three-dimensional, solid, realistic, and believable apparition of Tupac, performing a song live and seemingly in person.

Suffice it to say that the technology now exists to fool the eyes and essentially reanimate the dead. The applications for this technology are seemingly limitless. A headlining tour of Tupac? What about other bands that have lost a key member over the years? Imagine the potential for a Led Zeppelin reunion tour with a virtual John Bonham on drums? What about new movies starring James Dean? Or unsavory depictions of Princess Diana or Marilyn Monroe? A substantial market exists for every one of these applications.

As a representative for some of the personalities who could be candidates for this technology, if the proposed application or use meets the quality control standards and is determined to be tasteful, I would be inclined to embrace the opportunity. My business experience dictates that it might be best to embrace the technology and proceed with a project that meets

quality control requirements, rather than leave the field open to be filled by unauthorized projects. The compensation for licensing a project using this technology could be significant, and could be based on a percentage of profits, in which case, a highly-successful tour could yield major revenue to an estate.

Also important is the question of merchandise, advertising, sponsorships, tie-ins, and other activities that are part of the modern concert tour landscape, if a hologram performer is sent out to perform. What happens if someone argues “we don’t have to pay the estate for use of this celebrity on this t-shirt because we didn’t use his actual image, just the hologram of his image.” No right of publicity statute specifically designates “holograms” as part of the elements of persona, which demonstrates the importance of a catch-all approach to defining what constitutes a right of publicity, as noted in the second section of this article. If a given use unequivocally identifies a particular personality, the right of publicity is implicated.

I made a prediction in the May 9, 2012, edition of the *Indiana Lawyer* that this technology will likely lead to both licensing and litigation.²³ Just weeks later, the June 2012 edition of *The Hollywood Reporter* revealed exchanges between the lawyers for Marilyn Monroe LLC and Authentic Brands on one hand, and Digicon Media on the other.²⁴ Digicon Media claims to have “copyrighted” the virtual Marilyn. I put “copyrighted” in quotes because this argument as a basis to claim any broad-level rights to Marilyn Monroe is dubious, at best. Digicon Media claims to have grand plans for the virtual Marilyn.

These digital scenarios underscore the critical importance of the right of publicity, and the potential danger in rendering airtight “exemptions” into state statutes that delineate the law from state to state. Digital recreation is perhaps the best example imaginable for why these rights need to exist. The argument that an activity, product, or medium is categorically protected under statute by virtue of an exemption in the law exposes the flaws inherent in interpreting any given medium as absolutely protected. Perhaps the common law right of publicity, which exists simultaneously, would allow for a different result from a strict statutory interpretation, or perhaps a forward-thinking judge would have no trouble determining that a seemingly airtight exemption should not be allowed to swallow the law itself.

In any event, I submit that there should not be any difficulty in determining that a digitally recreated musician being made to perform, or a digitally recreated actor being made to act, should absolutely require permission on the basis of that person’s right of publicity. If that notion is not defensible, one would have to wonder about the long-term efficacy of the right of publicity as a distinct doctrine.

Perhaps a landmark lawsuit will be required to give clarity to the issue.

All’s Well That Ends Well

These developments portend more legislative developments, new licensing applications, and litigation over unprecedented infringement scenarios. Violating a person’s right of publicity can be expensive. Using it properly can be effective and lucrative. Famous persons, and the lawyers representing them, are more in tune than ever in terms of monitoring the marketplace and filing lawsuits when necessary.

My experience is that when an unauthorized use takes place, the key questions become these: (1) What is the value of this claim? and (2) What is the fair market value of what was appropriated? To answer these questions, an expert witness on valuation is needed. But consider these words by Shakespeare from *Othello*, which, while obviously not directed at the right of publicity or celebrity licensing, are instructive on these topics just the same:

Who steals my purse steals trash; ’tis something, nothing;

’Twas mine, ’tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed.²⁵

The difference in a right of publicity context is that filching another’s good name (or image or likeness) indeed *can* significantly enrich the wrongdoer. Hence, infringements will continue. But at the same time, the strength and vibrancy of celebrity licensing and the growth and recognition of right of publicity legislation presents tremendous opportunities, as well. Like many things in business and in life, it is up to the user to navigate the opportunities and liabilities that exist at the intersection of business and the law.

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