



THE RIGHT OF PUBLICITY:

Is it Right for Your Business?

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Manifestations of the right of publicity permeate almost every facet of modern society, yet this rapidly evolving legal doctrine flies under the radar of most business people. Even a casual observer will note that the frequency of celebrity branded products, or recognizable personalities in advertisements, is on the rise. In observing these ads and products, you are witnessing the right of publicity in action.

Perhaps your marketing or advertising team is considering a famous individual for use in an upcoming product line or advertising campaign. Perhaps a competitor has beaten you to it, forcing you to react. On the other end of the spectrum, perhaps your company already has unwittingly infringed an individual's right of publicity in an advertising or merchandise context, exposing your company to liability.

The benefits and perils emanating from the right of publicity universe are increasingly relevant, at least in some capacity, to most businesses. But what is the right of publicity all about? Who has a right of publicity? What constitutes a commercial use? And why should business people be concerned with it?

Right of Publicity Basics, with Indiana at the Vanguard

The right of publicity is a state (as opposed to federal) doctrine that addresses every individual's right to control the commercial use of his or her name, image, and likeness (as well as related

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indicia such as signature, gestures, mannerisms, or other elements that create an unequivocal association to a specific personality). Every individual, not just famous people, possesses a right of publicity.

While some interesting lawsuits have been brought by non-famous individuals who wound up on a company's Web site, in promotional materials, or advertising campaigns, most right of publicity litigation and transactions involve famous people. Even so, a commercial use does not have to involve a celebrity, or be directly tied to the sale of a product, to constitute an actionable offense. This is one reason why every business is well-advised to have qualified intellectual property counsel troubleshoot their advertising, merchandise, packaging, Web site, or other promotional materials.

To date, nineteen states have adopted right of publicity legislation. Those that have not typically still recognize some version of the right through common law.

Indiana possesses one of the most progressive right of publicity statutes in the nation. In Indiana, this property right, as opposed to a personal right, exists for 100 years after the death of an individual, and a full array of remedies and damages is provided through the statute.

Indiana's publicity statute presents compelling reasons for out-of-state celebrities (or their estates) to affiliate with Indiana-based businesses and representatives, thereby establishing a nexus with Indiana's law. Similarly, advertising and merchandise campaigns that are distributed nationally must comply with the most stringent laws that the advertising or merchandise reaches, forcing a heightened awareness of Indiana's law and policies by manufacturers and advertising agencies throughout the country. Rest assured that the executives on Madison Avenue think about Indiana quite regularly.

The Indiana Right of Publicity law serves as a beacon and foundation for various Indiana-based businesses relying on the substance of the law. It is also complementary to initiatives such as the Center for Innovation and Intellectual Property at Indiana University School of

Law—Indianapolis by virtue of Indiana's place at the vanguard of a developing area of the law.

Other states have taken note of Indiana's statute. Indiana's right of publicity law has served as a model for other legislatures seeking to adopt their own right of publicity statutes, including most recently California, Washington, Pennsylvania, Michigan, and Illinois.

Licensing the Right of Publicity

The most likely scenario where the right of publicity becomes relevant to a business is through licensing (assuming the point of entry is not from an unauthorized use). In general, a license involves contractually granted permission from the owner of the right of publicity to a third party to utilize an individual's right of publicity according to specifically articulated parameters.

Licensed uses can range from silly to sublime, and the motivations to undertake a licensing relationship are manifold. Licensing applications that are appropriate for the rock band Kiss will not necessarily work for the late Princess Diana, though they both actively operate within the licensing universe. And a rock star might be just what your company's edgy, against-the-grain image requires, or utterly inconsistent with its refined, elegant reputation, in which case, perhaps a Princess presents the perfect complement.

Licensing of publicity rights is no longer reserved only for elite brands like Jaguar, Nike, and Pepsi, and high-profile superstars like Peyton Manning and Jessica Simpson. As two convenient examples, Mr. Roof has recently licensed Evil Knievel, and Geico has run a series of spots featuring a cadre of personalities like Charo, Little Richard, and Verne Troyer. The use of celebrities in this fashion brings an otherwise bland product to life and gets target customers thinking about a business, brand, or service in a desired way.

Be forewarned, securing a license for use of a celebrity can be expensive. No astute celebrity (or agent) will let an advertising or merchandise use take place without a license fee based on fair market value. The key question then becomes, what is fair market value, and the answer (as lawyers are often known for saying) is

it depends. Licensing transactions are highly secretive and closely guarded.

Furthermore, perception drives reality. For example, Tiger Woods reportedly rejects the vast majority of inquiries that come his way and will entertain only those offers that have very substantial premiums attached (starting in the seven figures). Whether that is entirely accurate becomes almost irrelevant because, at a minimum, it influences the offers being presented to Tiger. Considering that Tiger is credited for resurrecting the lagging Buick brand, it is hard to question that he was worth the expenditure for GM. Thus perception becomes reality.

Licensing celebrities can also be risky in part because celebrities are quite capable of getting into trouble of one kind or another. Just ask Sprite about its expensive affiliation with Kobe Bryant after his infamous infidelity debacle a few years ago. In such instances, well-drafted morals clauses can provide a crucial safety net for the licensee.

Even with these caveats, incorporating famous individuals into your company's advertising and promotional campaigns can be one of the most powerful, effective marketing devices available. The use of celebrities in advertising and promotional campaigns is on the rise, primarily because celebrities function as an effective form of shorthand in the very noisy field of advertising for competing products and services. In fact, a recent publication from the highly-regarded *The Licensing Letter*, entitled "Profit and Opportunity Outlook: 10 Top Trends" lists the increasing use of celebrity tie-ins and branding as the number one trend forecasted.

A Deeper Look: Noise, Traction and Transference

It is estimated that the average adult (perhaps your company's target demographic) views over one million advertisements in a given year. The competition for consumer attention is increasing even as attention spans are decreasing. A June 26, 2006 survey by Advertising Age of the top 100 advertisers ranked by advertising expenditures reveals over \$100 billion spent in 2005 by those 100 companies alone. So how does one cut through the noise and maximize advertising allocations? Using a famous indi-

vidual is perhaps the best tool—the machete through the brush—for separating a business from its competition.

If a viewer of an advertisement pays more attention to a trusted, attractive, or otherwise interesting celebrity, the advertisement is achieving traction. Consider Budweiser's recent spots featuring Jay-Z alongside NASCAR hotshots Dale Earnhardt Jr. and Danica Patrick. Obviously, a multi-layered cross-demographic approach is being taken. Judging from the popularity of the ads and the corresponding media response, it is safe to say these spots are achieving substantial traction.

The relationship between Jay-Z and Budweiser runs deeper than a mere one-off advertisement, however. Jay-Z is reportedly now a co-brand director for Budweiser Select, and the company sought out his fame and business acumen to influence younger adults to choose Budweiser Select over other choices in the market. In a statement to the Associated Press, Marlene Coulis, vice president of brand management for Anheuser-Busch, said "He's got great appeal" and added that Jay-Z can help them "reach people in groundbreaking ways."

The advertisements also feature the first single from Jay-Z's upcoming new album, his first since coming out of retirement. Imagine if Jay-Z or his label had to pay on the open market for the same amount of television air-time that Anheuser-Busch is investing in the spots. Thus, the symbiotic relationship and power of leveraging becomes evident.

Perhaps even more interesting than traction is the concept of transference. Transference addresses the often-subconscious associations a consumer has for a company as a result of a celebrity associating with a particular brand. Through the concept of transference, the viewing public assigns the goodwill and impressions it has for a given celebrity to the company being advertised. This is in part achieved through proximity. It can also be achieved through an implied or explicit suggestion that the personality approves of, or actually uses, the product.

Consider how much George Foreman has been worth to Salton Maxim in relation to its Lean Mean Fat Grillin' Machine. The answer can most accu-

rately be measured by empirical data: after the first few years of the offering proved successful, Salton paid Foreman \$130 million to buy out his rights of publicity in the product category of kitchen appliances.

Not every use constitutes a full-fledged endorsement campaign with the depth and complexity of Jay-Z and Anheuser-Busch or George Foreman and Salton Maxim. In some cases, the idea of endorsement is virtually irrelevant. Consider the aforementioned Geico advertisements. The celebrities in the spots demonstrate a healthy dose of self-deprecation and good humor as they "translate" into hyperbole and gibberish the words of an ordinary person describing in plain English an insurance-related situation. The consumer does not need to believe that Little Richard is actually a Geico customer. The key is that the spots are memorable.

When the Right Goes Wrong

Perhaps inevitably, situations arise in which a company has infringed on someone's right of publicity. Litigation over unauthorized uses of the right of publicity is also on the rise, and the exposure to damages can be significant. Sommer Barnard's Intellectual Property division has been involved in most of the recent cases implicating Indiana's right of publicity, involving personalities ranging from Marilyn Monroe, John Dillinger, Duke Ellington, and O.J. Simpson. Because of its distinction as one of the country's most progressive statutes, Indiana's right of publicity statute always receives considerable attention from the legal, licensing, and academic communities. As a result, litigation involving Indiana's statute tends to elicit particular attention, as these recent cases demonstrate.

Of course, right of publicity litigation occurs in almost every jurisdiction in the United States. In June 2006, the Missouri Court of Appeals upheld a jury verdict of \$15 million for former NHL player Tony Twist against the creator of the famous Spawn comic book series, Todd McFarlane.

The Twist case involved a mafia boss character known as "Tony Twistello." McFarlane admitted that the character was named after the hockey player, who

was well known as an "enforcer" for his rough style and frequent penalties. The court of appeals used the "predominant use" test in ruling that there was no evidence of a parody value to the use of Twist's name, and that there was no evidence to prove McFarlane's intent was anything other than commercial. Ultimately, no expressive component of the First Amendment justified using Twist's name without authorization; therefore, the predominant use of Tony Twist by McFarlane was simply for McFarlane's commercial advantage.

Another recent case in San Francisco involved a 58 year-old kindergarten teacher who posed for a photo session approximately fifteen years ago and was paid \$250 for his time. His modeling agreement provided that he would be paid a more substantial fee if his image was used in marketing. One of those pictures became the image on the packaging of Taster's Choice coffee throughout much of the world, but Christoff was never paid the "more substantial fee" provided for in his agreement.

Christoff sued for violation of his right of publicity, and the jury awarded Christoff a percentage of the profits from Taster's Choice during the time that his image appeared on the labels. A five percent royalty on profits was applied, amounting in an award of over \$15.3 million to Christoff.

Business As Usual: A Non Sequitur

Few businesses these days are exempt from the changes taking place in the world marketplace. It is not a coincidence, then, that right of publicity licensing is on the rise and is appearing in areas that might not have seemed intuitive just a few years ago.

As such, there is no business that should overlook the potential opportunities, as well as pitfalls, that the right of publicity presents. In a static sense, an educated awareness of the right of publicity can help any business avoid exposure to liability, which is critical in an arena where litigation is on the rise and damage awards are substantial. In a dynamic sense, a proactive right of publicity strategy can help a business reach new customers, reinvent or reinforce its image, and even create entirely new revenue streams. ■