

The Right of Publicity

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The Right of Publicity

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The right of publicity protects an individual's interest in the commercial exploitation of his or her name or likeness. It gives an individual the exclusive right to license the use of his or her identity for commercial endorsement. Right of publicity laws, which vary by state, are designed to protect those who were not covered by the states' right of privacy laws. (See the PVLA pamphlet "Invasion of Privacy" — briefly, right of privacy laws protect someone's feelings or reputation from harm, i.e., men-tal interests.) States are interested in protecting the commercial interest of individuals in their names, likenesses, and acts. Without such protections, individuals' abilities to perform and entertain would suffer — a result states deem harmful because it decreases artists' incentive to produce creative works. Thus, unlike the right of privacy, the purpose of right of publicity laws is not to protect an individual's feelings or reputation, but rather to protect an individual's economic interests.

Who may have a right of publicity claim?

Celebrities (e.g., athletes, politicians, entertainers, etc.), who value their names and likenesses, are afforded right of publicity protections. The right of publicity is not limited to individual performers; a musical group, for instance, may have a protectable right of publicity. In some cases, the right of publicity also applies to newsworthy people who are not celebrities. Generally, if you have a commercial interest in your name or likeness, then you will be afforded protection.

Although right of privacy and defamation laws, like right of publicity laws, protect individuals during their lifetime, only the right of publicity (and only in some states) protects someone's commercial interest in his name or likeness after death.

This is because the right of publicity is a property interest — meaning someone may assign that right during his or her life to another, and the right does not "disappear" upon the celebrity's death. For example, Elvis Presley, despite being dead since 1977 (say some), is still one of the most valuable names and likenesses annually.

The Scope of the Right of Publicity

An individual's name, face, and signature have been protected since the inception of the right of publicity. More recently, the protections have expanded to include a celebrity's "likeness," and sometimes a celebrity's voice or vocal style.

Differences Between State and Federal Law

There is no specific federal right of publicity statute, but a similar action may be brought under the federal unfair competition law. The right of publicity is mostly a state law cause of action. Several states have laws that protect a celebrity's right of publicity, however most do not. The majority of states that do have right of publicity statutes are the states known for entertainment — e.g., New York, California, Tennessee, etc.

Locally, New Jersey's common law right of publicity survives the death of the person. Pennsylvania has also recognized a common law right of publicity.

Of the states that have large entertainment industries, New York is the most difficult state in which to win a right of publicity case. The New York right of publicity cause of action stems out of §§ 50-51 of New York's Civil Rights Statute, and the Court of Appeals of New York has stated that there is no separate common law right of publicity. (In other words, in New York, if you do not fit under the statute, then you cannot sue someone for a violation of your right of publicity.) In addition, under the New York Civil Rights statute, the right of publicity applies only to living persons and does not survive death.

The Right of Publicity

California is the best state in which to bring a right of publicity claim because the state has enacted broad statutes that protect its celebrities. California Civil Code § 3344 covers the unauthorized use of a person's name, voice, signature, photograph, or likeness for purposes of advertising, selling, or soliciting. The right of publicity is freely transferable before death, and descendible and heritable (in other words, you can transfer it before you die or it can pass to your estate after you die), but the rights must first be registered.

Recently a California court has ruled that someone's copyright and right of publicity are inseparable, and that therefore selling a copyright precludes a lawsuit alleging infringement of right of publicity. See *Laws v. Sony Music Entertainment, Inc.*, 48 F.3d 1134 (9th Cir. 2006). That is, the court in essence ruled that people do not retain a right of publicity in their work after selling it. In the *Laws* case, the plaintiff was a singer who sold a license to use a sample of her recording, which was then later used as background music on another song. The plaintiff objected to this use, but the court ruled that "the right of publicity is not a license to limit the copyright holder's rights merely because one disagrees with decisions to license the copyright." One can still, however, stipulate in the licensing contract whether there are any restrictions on a song's use.

Also in California, the Fred Astaire Celebrity Image Protection Act, § 3344.1, was passed to protect the rights of a deceased's personality and to extend protection to 70 years after death. The rights do not have to be exploited during the lifetime, but there are no rights if the person became famous only after death.

Defenses

The unauthorized use must be commercial in order to violate the right of publicity. Because they are usually protected by the First Amendment, uses by news media or commentators are not violations, despite their profit motives. (These uses often constitute "fair use," which is covered in-depth in PVLA's Fair Use Guide pamphlet.)

The First Amendment protects the news media, writers and artists from right of publicity claims. The media may use a person's name or photograph for a news report. Additionally, someone's life story (even in the form of an "unauthorized" biography) is potentially fair game, despite the right of publicity protections.

Parody and criticism are also granted a great deal of First Amendment protection, particularly parodies and criticisms of the activities of public figures and celebrities. With regard to the right of publicity, this right to parody is limited by the commercial nature of the use. If the parody is only incidental to the commercial use, then there is more likely to be success on behalf of the plaintiff in a right of publicity claim.

Remedies and Damages

First, if someone is appropriating an individual's identity, then the individual may simply ask that person to stop ("cease and desist"). If that does not work, then the most common remedy is an injunction granted by a court that prohibits the illegal use of a person's name, likeness or identity. Non-celebrities may be granted damages for emotional distress, and celebrities may be granted damages for commercial loss.

One thing to keep in mind is that although many states have right of publicity laws, the protections those laws provide can be waived. That is, if you sign a release authorizing an agent to sell or market your name or likeness, then you may be prohibited from recovering pecuniary loss from the agent's marketing efforts (unless they turn out to be negligent or malicious). It is always a good idea to consult with an attorney before signing any contract; for help reaching an attorney, please contact PVLA.

For more information on these or any other arts-related legal issues, contact:

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