

# Rights of Publicity and Entertainment Licensing

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## What is a Right of Privacy?

- A. No Federal Law Prior to 20<sup>th</sup> Century
- B. Warren & Brandeis Article – 1890
  - Called “Invasion of Privacy”
  - Distinguished from laws relating to protection against unauthorized use of collected information and government access to private records
- C. Beginning of State Legislation
  - 18 states have it, the rest don’t
  - But common law, Lanham Act – type protection is some

## Prosser Privacy Divisions

1. Intrusion upon seclusion or solitude, or into private affairs
2. Public disclosure of embarrassing private facts
3. Publicity placing one in a false light
4. Appropriation of name or likeness for commercial purposes

## Examples

1. Police invade the wrong house
2. Private citizen's bedtime habits
3. True innuendo that lawyer has accepted tainted money as fee
4. Stating or implying endorsement of a product or service

## Breakout of Right of Publicity

A. State Law, not Federal

B. Factors v. Pro Arts – Elvis Presley poster

- Commercial right
- So even with ©, couldn't exploit

## Right of Publicity Elements

- A. Commercial appropriation
- B. Of name, likeness, other indication of identity
- C. For purposes of trade
- D. Without consent or with limited consent

## Immediate Questions

- Does death terminate?
- Is celebrity status required?
- What qualifies as a “likeness?”

## Interpretations of “Likeness”

1. Intro to famous person – “Here’s Johnny”
  - Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831 (6<sup>th</sup> Cir. 1983)

# Interpretations of “Likeness”

## 2. Voice – Bette Midler Case

Midler v. Ford Motor Co., 849 F.2d 460

# Likeness Including Look-Alike

## 3. Woody Allen case

Allen v. National Video, 601 F. Supp. 612

## What about Character Portrayed by Actor

### 1. Vanna White –

White v. Samsung Electronics, 971 F.2d 1395

# What about Character Portrayed by Actor Wendt – Ratzemberger

Wendt v. Host Int'l, 197 F.3d 1284

## What about Character Portrayed by Actor

### 3. Bela Lugosi/Dracula

- Lugosi v. Universal Pictures, 25 Cal.3d813, 160 Cal.Rptr.323, 603 P.2d 4W (1979)

## What about Character Portrayed by Actor

4. *McFarland v. Miller*, 147.3d912 (3d Cir. 1994) (“Our Gang”)
  - Merely an actor? No.

## Character Portrayed by Actor

5. Dustin Hoffman (false endorsement)
  - Hoffman v. Capital Cities/ABC, Inc. 255 F.3d 1180 (9<sup>th</sup> Cir. 2001) – Protected by First Amendment

## Right of Publicity v. First Amendment

- Freedom of Speech presents conflict with Right of Publicity
- First Amendment freedom requires that Right of Publicity be narrowly interpreted
- Does a discernable line exist between the two?

## First Amendment – Tiger Woods

332F.3d 915 (6<sup>th</sup> Cir. 2003)

- Original Painting - “Masters of Augusta”
- Reproduction sold as prints
- Protected by First Amendment

# “Masters of Augusta” Painting

## Right of Publicity – Three Stooges

Comedy III Productions v. Gary Saderno  
25 Cal.4<sup>th</sup> 387, 21 P.3d 7978. 106  
Cal.Rptr 2d 126

- Original drawing of Three Stooges
- Reproductions sold on T-Shirts
- Violation of Right of Publicity

## Licensing

A. Usually has strict terms

B. License Points to consider

1. Purpose of use

- Personal endorsement
- Voice over
- Announcing only

2. Nature of product or service

3. Extent of involvement

4. Duration of use

## Licensing (Continued)

### 5. Nature of Use

- TV
- Radio
- Print
- Billboard

# Common Restrictions in Licensing

## A. Distortions

- Edgar Winter v. D.C. Comics 30 Cal.4<sup>th</sup> 881, 69P.3d473, 134 Cal.Rptr.2d 634 (2003)

# Common Restrictions in Licensing

## B. Cartoons/Caricatures

Carlton Fisk

Nolan Ryan

## Common Restrictions in Licensing

C. Nature (orientation) of Products

D. Tie-ins with other products

1. Promotions of movies, etc.

## Need for Other Releases

- Location
- Portrayal of real people
- Identifiable props (properties)
- Product placement considerations

## Reasons to Cancel

- A. Willful partial or non-performance
- B. Illness, death
- C. Violation of morals clause
- D. Shift in Licensee's promotional plans
  - 1. Usually with penalty clause

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