

# In the public eye

How to protect publicity and privacy rights **Interviewed by Meredyth McKenzie**

**W**e are all afforded publicity rights to protect the commercialization of our name, image and likeness, whether famous or not. Businesses that use individuals in merchandising, packaging or marketing have to be aware of these publicity rights and must secure the proper rights and licenses before using an individual's image or persona, or they can face hefty penalties.

"Protecting your publicity rights and carefully negotiating for the use of one's likeness will maintain the value of the overall brand, and may even increase the brand's value over time," says Nick J. G. Sanchez, attorney with Theodora Oringher Miller & Richman PC.

*Smart Business* spoke with Sanchez about key things to understand when dealing with publicity and privacy rights and how the Internet has affected these rights.

## What problems do businesses deal with regarding privacy and publicity rights?

There are two competing business interests here: the obvious and traditional business interest, as well as the individual's business interest. For example, Toyota may use the name and likeness of a professional football player in a marketing or advertising campaign. The obvious business interest is Toyota, but the professional athlete has a business interest as well — the value of his brand.

More and more companies are turning to celebrities and athletes for ad campaigns, merchandising and packaging, but companies are not always careful to secure the appropriate publicity rights. It's critical to obtain those rights (usually through a licensing agreement) at the outset, so proper permission is granted to use the person's likeness in accordance with specifically negotiated parameters. Both the individual and business should negotiate for the use well in advance to avoid any trouble or expense, especially when working with tight production deadlines.

Individuals also face problems. For example, a celebrity may permit the use of her likeness but may want to reserve the right to approve images and how they are used. An individual must carefully examine the rights being granted and whether there should be restrictions or limitations on the scope of the use by time, project, location, etc.

## What are some key things businesses need to understand about publicity rights?

Use of a person's image, voice, signature, photograph or likeness in connection with



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goods or advertising is often mistaken as solely a trademark issue, but it's not. Publicity rights in most states are governed by state statutes, and in states where no statutes have been legislated, common law remedies endure to protect publicity and privacy rights. In California, publicity rights are governed by California Civil Code section 3344 (although the common law doctrine still exists).

Publicity rights remain after death — 70 years under California law.

It also should be noted that publicity rights protect more than a visual likeness and extend to a person's signature, gestures, mannerisms or other elements that create an unequivocal association to a specific personality.

Businesses also should keep in mind that a national advertising campaign must comply with the publicity rights laws in jurisdictions where that campaign reaches. For instance, a Los Angeles-based company must comply with Indiana's progressive publicity rights laws if the campaign reaches Indiana.

## How can businesses develop agreements to protect privacy and publicity rights?

Businesses should consult with an intellectual property attorney to identify issues or troubleshoot problems before they arise. This is also true for individuals, especially high-profile personalities who have developed a

brand around their image.

Publicity rights are almost always governed by a licensing agreement, and I suggest that individuals and businesses consult with counsel before executing the agreement. Counsel can assist in preparing a standard license for a particular enterprise that easily can be modified as circumstances demand.

Businesses (or licensees) also should consider whether a morals clause would be appropriate in the agreement. This may allow the licensee business to terminate a contract and recover fees when a celebrity or athlete is involved in unseemly conduct that may diminish value.

## How has the Internet affected privacy and publicity rights?

Advertising often drives revenue for Internet sites, and more and more companies are turning to online advertising and marketing campaigns or at least incorporating online campaigns with more traditional advertising.

Advertising images and content can be shared on the Web in a fraction of the time compared to more traditional avenues. That means a failure to secure publicity rights can have a greater and more immediate impact, exacerbating potential problems and requiring increased awareness. Given the speed and availability of the Internet, a mistake can be repeated and disseminated many times throughout the world in mere seconds.

## What legal ramifications are associated with publicity rights?

Infringing on a person's publicity rights can be an expensive mistake. There are a number of remedies available to a plaintiff whose publicity rights have been compromised. First, a plaintiff can recover the greater of \$750 or actual damages sustained as a result of the violation. Damages might be measured by the loss of value or dilution of the individual's brand.

A plaintiff also may recover profits gained from the unauthorized use. In fact, the plaintiff need only prove gross revenue, while the defendant carries the burden of establishing deductible costs and expenses. Punitive damages and attorney's fees are also recoverable.

It should be noted that a publicity rights claim may also constitute a false endorsement claim under the Lanham Act, which provides additional remedies for plaintiffs. <<

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