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"RIGHT OF PUBLICITY" IN PARK PROMO MEDIA

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Recently, NRPA headquarters forwarded a request from Illinois for a future law column on the topic of "taking photos of people in the parks for park promotional material." According to the request, this topic had been discussed with other park professionals seeking information regarding "the laws concerning consent."

When it comes to "taking photos of people in the parks for park promotional material," good communication and public relations can go a long way in eliminating the types of surprises and misunderstandings which could give rise to a legal controversy. If asked, I would suspect that many, if not most, park patrons would not object to a photo of their likeness appearing park promotional materials. On the contrary, many might be flattered by the request and be more than happy to sign some type of "photo consent form." In so doing, a properly executed photo consent form should obviate most legal concerns regarding privacy, publicity, and publication.

As you would with any legal document, particularly given jurisdictional variations, local counsel should be consulted to draft the photo consent form to be used in a particular situation. In addition to the people in the photos, don't forget the photographer, particularly if he/she is not taking photos as an employee or creating "works for hire" pursuant to an agreement. Otherwise, in the absence of a properly executed release, the photographer retains rights in his work, including any republication. (See April 2001 law column: "Author Generally Owns Copyright Unless Employee or 'Work for Hire'")

In the unlikely event that one of these promotional photos reappears at a later date in some other medium, like a hot selling T Shirt, the agency needs to be able produce the original consent form to establish the agency's exclusive and ongoing rights in the original photo and any republication. Otherwise, the people in the photo and/or the photographer could claim that the original consent for park promotional materials did not extend to such republication, particularly if it involves unrelated and/or commercial purposes

A search of the Internet would indicate that a number of public park and recreation agencies in various jurisdictions use some type of "photo consent form" when taking photographs of people in public park and recreation settings for later inclusion in promotional materials.

For example, California State Parks has apparently utilized a rather detailed consent form which grants the agency unrestricted right to the use and reuse of any photographs "in whole or in part, in any manner, for any purpose and in any medium now known or hereinafter invented," including publication, copying, distribution, alteration, and public display for "editorial, trade, or advertising purposes." Moreover, the agency is released from "any and all claims and demands arising out of or in connection with any use of the photographs described above, including any and all claims for libel, defamation and invasion of privacy and/or publicity." The consent form stipulates that no money will be paid for use of any photograph, but the agency, in its sole discretion may provide one copy of one photograph chosen by the agency.

RIGHT OF PUBLICITY

As described in the Restatement (Second) of Torts § 652 C, "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Similarly, Section 46 of the Restatement (Third) of Unfair Competition defines the claim of right of publicity as follows:

> One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability [for damages or injunctive relief].

A number of states recognize this "right to publicity" in some form. Generally, such claims require the plaintiff to show that the defendant used the plaintiff's likeness, without consent, to obtain some sort of advantage, commercial or otherwise. Such use, however, does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to commercial purposes.

For example, Illinois law (765 ILCS 1075) recognizes "each individual's right of publicity" which is defined as the "right to control and to choose whether and how to use an individual's identity for commercial purposes." Commercial purpose is defined as "the public use or holding out of an individual's identity" in connection with the "offering for sale or sale of a product, merchandise, goods, or services," including advertising, promotion, and fundraising. This Act, however, would not apply to the use of an individual's identity for non-commercial purposes i.e., "any news, public affairs, or sports broadcast or account, or any political campaign," including "promotional materials, advertisements, or commercial announcements" for such non-commercial purposes. Presumably, photos of people in a park brochure or similar communications would be considered public affairs promotional materials, and thus exempt under this particular state law.

PRODUCT HYPE

In the case of *Tellado v. Time-Life Books, INC*. 643 F.Supp. 904 (D.C. N.J. 1986), plaintiff brought an action for invasion of privacy and misappropriation of likeness after his picture appeared in defendant's promotional materials for a series of books on the Vietnam War. In 1966, during a search and destroy mission in Ta Nin, Vietnam, a photograph was taken of Tellado with a few other infantrymen. They were coming off of a forced march and had just moments ago been through a fierce thirty-minute battle. No release was ever obtained from Tellado by anyone at anytime for the use of this photograph and no payment was ever made to him for such use. Two decades later, while working as a janitor, Tellado was emptying out a trash can when he saw a picture of himself in the bottom of the garbage can on a brochure envelope promoting defendant's Vietnam War books.

Tellado said he panicked when he saw the photo of himself "with rosary beads around his neck that his mother gave him." In his deposition he testified that "I was kind of freaked out. Here I look in a trash can, almost 20 years later and I see myself there. Here's something that I've been trying to avoid for the past 19 years and all of a sudden I find myself back under the same

situation." Tellado testified that "he had a great fear of re-experiencing the emotional trauma of his experiences in Vietnam and had avoided anything that might remind him of those experiences." He testified further that the photograph brought on a fear of returning to a state of mind marked by periods of depression and flashbacks.

In response, defendant contended that "the use of this photograph of a newsworthy event cannot form the basis for a misappropriation claim because the photograph was not used for the purposes of taking advantage of plaintiff's reputation, prestige or other value associated with him, for purposes of publicity." Defendant further argued that there was "no basis for plaintiff's invasion of privacy claim because the photograph was taken in a clearly public setting and publication cannot be construed as offensive to a reasonable person."

The specific issue before the court was whether defendant's promotional brochure constituted an invasion of privacy because it effected an appropriation of Tellado's likeness. As cited by the court, Section 652C of the Restatement, Torts, 2d provides that "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other." In making this "appropriation" determination, the court noted the distinction between commercial use of private information and commercial use of information which is of a public or historic nature.

> While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information.

In this particular situation, the court found that public attention had been focused on Tellado's likeness "as a representative participant in an historical event of great social significance." Under such circumstances, the court determined that "a misappropriation claim for a public event will stand only if the plaintiff's likeness is used for predominantly commercial purposes." According to the court, "mere publicity is not actionable; it must be shown that defendant acted with a commercial purpose or otherwise sought some benefit from revealing information about plaintiffs."

> [D]efendant would be liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose, i.e., if defendant was seeking to capitalize on defendant's likeness for purposes other than the dissemination of news or information... The use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value.

Defendant had argued that "its use of the photograph is privileged under the First Amendment of the United States Constitution because the photograph was taken in a public place during a war and, although it was not used in the book, it could have been so used." According to the court, the First Amendment did not protect defendant's appropriation of Tellado's likeness without his consent when the predominant purpose for such use was to advertise and promote the sale of defendant's books.

> The purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talents which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted.

Applying these principles to the facts of the case, the court characterized defendant's use of Tallado's photo as a commercial advertisement, totally devoid of any "attempt to convey historical facts or political opinion" on the Vietnam War.

> [D]efendant did not use plaintiff's photograph in any part of the books themselves. Had plaintiff's picture been used to depict the history of the Vietnam war, defendant's use clearly would have been protected by the First Amendment, regardless of what type of profit defendant expected to make with its book series. However traumatic the memories of the War are for plaintiff, defendant's right to contribute to the public debate on Vietnam would have prevailed.

The court also considered "whether defendant may be held liable for a commercial misappropriation of plaintiff's photograph, which was taken in a public place." In making this determination, the court took particular note of the fact that "defendant used plaintiff's photograph solely to hype its product." Under such circumstances, the court concluded that "Plaintiff should be permitted to seek compensation for this use."

> The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

INCIDENTAL USE

In the case of *Vinci v. American Can Company*, 69 Ohio App. 3d 727; 591 N.E.2d 793 (1990) Charles Vinci, the 1956 and 1960 weight-lifting Olympic gold medalist, alleged that the American Can Company used his name and likeness on a series of promotional disposable drinking cups sold as Dixie Cups. The lower court granted summary judgment to defendants; Vinci appealed to the state supreme court.

The state supreme court cited the following legal standard for "invasion of privacy by appropriation of the name or likeness of another":

> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial… The fundamental wrong is the

> appropriation of a person's name, likeness, or identity for one's own benefit whether or not that benefit is pecuniary.

In establishing this standard for the "appropriation of the name or likeness of another," the state supreme court acknowledged that "the mere incidental use of a person's name or likeness is not actionable under the 'right of publicity'."

> The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity.
>
> No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.

Applying these principles to the facts of the case, the state supreme court concluded that the "[r]eference to the athletes' names, likenesses, and identities was merely incidental, historical information."

> Our review indicates that the mention of the athletes' names within the context of accurate, historical information was incidental to the promotion of the Dixie Cups by the partnership between the Minute Maid Corporation and the United States Olympic Committee. The reference to the athletes and their accomplishments was purely informational; there was no implication that the athletes used, supported, or promoted the product.

The state supreme court, therefore, affirmed the summary judgment of the trial court in favor of defendants.

BEYOND CONSENT

In the case of *Ainsworth v. Century Supply Company*, 295 Ill. App. 3d 644; 693 N.E.2d 510 (1998), plaintiff was hired to install tile in the house of defendant's sales manager. Plaintiff gave permission to defendant to videotape him installing tile. Defendant told plaintiff the instructional videotape would be distributed to defendant's customers. Later, short bits of plaintiff's image from the instructional video, lasting a few seconds, were included in defendant's television commercial. Plaintiff complained about his appearance in the commercial, although there was "nothing objectionable about his appearance or the way he is installing tile." In his lawsuit, plaintiff claimed defendant had violated his right of publicity by appropriating his likeness in the commercial.

As noted by the court, “[t]he tort of invasion of privacy consists of four branches: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) a public disclosure of private facts; and (4) publicity which reasonably places another in a false light before the public."

As defined by the court, “an appropriation of another’s name or likeness” in this context includes "an appropriation, without consent, of one's name or likeness for another's use or benefit.” Further, the court noted that “[t]his branch of the privacy doctrine is designed to protect a person from having his name or image used for commercial purposes without consent."

Century alleged that plaintiff's consent to appear in the instructional video extended to the commercial. The court rejected this argument.

> Century's reasoning is clearly flawed, as it amounts to the assertion that, by consenting to eat apples with dinner, one has also consented to eat oranges. The fact that both are fruit does not make them indistinguishable. Likewise, the fact that plaintiff consented to appear in the instructional video that was to be available to Century's customers does not mean that his consent extended to his appearance in a television commercial, broadcast to the television-watching public.

The court also rejected Century’s argument that it “received no commercial benefit” from the use of plaintiff’s image in the commercial.

> [Despite the availability of other images] Century nevertheless chose plaintiff's image and no other. Plaintiff's image was integral to the concept of the advertisement. Century benefited by airing the television commercial. Plaintiff's image, not one of the others, had some value to Century, even if it were merely ease of procurement. Because Century received a commercial benefit from its advertising, we cannot say that Century received no benefit from the use of plaintiff's image.

As a result, the court found plaintiff had made a case against defendant for the “appropriation, without consent” of his likeness for use in the commercial.