

# THE *Licensing* Journal

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## **Toy and Game Licensing**

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### **The Right of Publicity**

A license frequently becomes more valuable because of its association with a certain character. Currently, there is tremendous demand for virtually anything associated with the Harry Potter character, and the owner of the rights in that character obviously has control over the way in which it is used in books, movies, and other products. Licenses also frequently involve an association or endorsement by a specific person, however, such as the George Foreman Grill or Michael Jordan Cologne. Advertising also will use endorsements from lesser-known persons, such as an audience member in an infomercial. This article discusses the fact that each person has the right to control the way his or her identity is used for commercial purposes and the impact of that right on licensing.

Although this right takes a variety of forms, the basic notion is that an advertiser cannot use a natural person's name or likeness in commercial advertising without permission. In some states, this right applies regardless of the per-

son's fame or notoriety or whether the persona has intrinsic commercial value. Indeed, one of the core rights is the ability to choose whether to commercialize one's identity.

There is no federal law harmonizing the right of publicity, and the protection can be quite different depending on which jurisdiction's law applies. In some states, such as New York, the right ends at death. In other states, the right of publicity survives death and can be enjoyed by the person's heirs. Indiana has made itself an attractive venue for plaintiffs by extending the right for one hundred years after a person's death.

These differing approaches have also created interesting but unresolved questions about whether the right is a property right or a personal right, and whether, for example, the right can be assigned or made the subject of a security interest under Article 9 of the Uniform Commercial Code. Characterizing the right of publicity as a property right could result in anomalous results, including the possibility that a living person could lose the right to control his

or her identity based on the results of a foreclosure sale.

The right of publicity extends to virtually any indicia that make a person readily identifiable, including the person's name, nickname, former name (e.g. "Lew Alcinder" as opposed to "Kareem Abdul Jabbar"), or likeness. A California court extended the right of publicity to a person's voice, granting relief to Bette Midler after a sound-alike performer copied her voice in a television commercial. In another case, Johnny Carson challenged the use of the name "Here's Johnny" to promote a line of portable toilets. The court held that the phrase "Here's Johnny" was associated with Johnny Carson and ruled that the use of that phrase in advertising violated Johnny Carson's right of publicity. Another court ruled that the depiction of a racecar in advertising could violate a driver's right of publicity if that car were sufficiently associated with the driver.

Importantly, confusion is not an element of the right of publicity. In other words, the public need not believe that the person is endorsing the product; it may even be clear that the person expressly disapproves of the product. The core issue is whether the person is identifiable. Accordingly, each person in a crowd could potentially seek compensation for the use of his or her likeness if they are readily identifiable in a picture.

On the flip side, the user of a person's likeness or identity can at-

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tempt to defend that use by asserting rights under the First Amendment. In these instances, a court would balance the constitutional right to expression and commentary with the individual's state law right to control use of his or her image. Primary issues in that balancing will be whether the use is expressive (e.g., writing a song whose lyrics attribute comments on society to a specific person ) or primarily commercial (e.g., using a person's likeness to advertise a toy).

Although the First Amendment may provide an argument to counter lawsuits, it is not an absolute defense in any case and will be of little effect when the defendant uses a person's identity on a commercial product or when advertising a product or service. This uncertainty, combined with the lack of federal law and wide dissonance in the various state laws, makes the need for licensing ahead of time highly attractive. Although licensing for the use of a person's name or likeness may add

costs or multiply the logistics associated with launching a product or promotion, it is often a much wiser strategy than risking the alternative.

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