

- **Injunctions.**³⁰ A court may issue injunctions halting the manufacture or distribution of infringing articles. (See [Appendix C: No Injunction](#), p. 302.)
- **Impounding and Disposition of Infringing Articles.**³¹ A court may order the destruction of all infringing copies of a copyrighted work. In addition to ordering the destruction of the copies, it can also order that the instruments that made the copies also be destroyed. This includes: “all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.”
- **Criminal Penalties.** Courts may also sentence willful copyright infringers to jail for periods ranging from 1 to 10 years, depending upon the severity and amount of their willful infringement.³²

2. RIGHT OF PUBLICITY

WHAT IS THE RIGHT OF PUBLICITY?

An offshoot of privacy law, the *right of publicity* is a person's right to benefit from the commercial exploitation of his or her own identity. Infringement of the right of publicity occurs from the unauthorized use of a person's identity (or likeness, voice, name, etc.) for commercial purposes (i.e., labeling goods and services with the unauthorized likeness or using the unauthorized identity in commercials and advertisements).

A celebrity's likeness is not the only part of his or her identity protected by their publicity rights. For instance, Johnny Carson won a suit against a company that was using the phrase “Here's Johnny” to advertise a toilet.³³

Filmmakers tend to run into problems with right of publicity laws in two main areas:

- When they attempt to create merchandise, such as action figures, T-shirts, lunch boxes, and so forth, that feature an actor whose publicity rights have not been obtained.
- When they create television commercials for products or services that use a celebrity's unlicensed likeness to help sell that product or service.

DURATION

The duration and extent of right of publicity protection differs from state to state. Some states require a **signed writing** to convey the publicity right.

- In New York State, your right of publicity dies with you.
- In California, it lasts for 70 years after your death; lawsuits for misappropriation of your right of publicity therefore can be brought by your estate.
- Some states do not recognize rights of publicity.

FIRST AMENDMENT AND THE RIGHT OF PUBLICITY

The First Amendment greatly limits the extent to which the right of publicity can control areas outside of commercial exploitation of an image. Movies, television, some art, news, literature, and educational uses are usually not considered commercial use of a person's right of publicity. Even TV commercials and other advertisements promoting movies and television shows do not infringe the rights of publicity of the actors who perform in those movies and television shows being advertised.

That being said, outside of obvious commercial use, such as featuring an unauthorized likeness in a television commercial, courts and state laws are literally all over the map with regards to what triggers infringement.

For instance:

- A television news station broadcast of an entire human cannonball act without the performer's permission. The court held this may misappropriate the right of publicity.³⁴
- A movie recreated and fictionalized the events of the "Perfect Storm" and based its characters on real people. The court held this did not infringe the rights of publicity in the people depicted.³⁵
- A film portrayed Bobby Seales' participation in the Black Panthers without Mr. Seales' consent. In rejecting Mr. Seales claim for infringement of the right of publicity, the court pointed out that a public figure had no exclusive right to his or her own life story. The court went on to state: "[I]n addressing right of publicity claims, courts have been mindful that the First Amendment provides greater protection to works of artistic expression such as movies, plays, books, and songs, than it provides to pure 'commercial' speech."³⁶
- A commercial which depicted a robot turning letters in game show violated Vanna White's right of publicity.³⁷

One rule of thumb may be:

- "The use of a person's identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas may be protected [by the First Amendment], but
- The use of a person's identity for purely commercial purposes, like advertising goods or services or the use of a person's name or likeness on merchandise, is rarely protected."³⁸

TESTS TO DETERMINE INFRINGEMENT OF THE RIGHT OF PUBLICITY

The difficult part is determining where to draw the line between commercial and noncommercial use. Courts across the country have developed a variety of tests to determine whether a use is primarily commercial or primarily expressive.

- **Transformative Test.** Does the work which allegedly infringes a person's right of publicity contain significant transformative elements, so that the value of the work does not derive primarily from the celebrity's fame?
- **Relatedness Test.** Is the work which allegedly infringes a person's right of publicity directly related to that person, like a life story? If so, then it may be protected under the First Amendment. However, if the name or likeness is used just to attract attention to that work and does not relate to the person himself, this may be a form of advertising and, therefore, require that person's permission.
- **Predominant Use Test.** Is the predominant purpose to exploit the person's right of publicity or does it contain sufficient expressiveness so that it should be protected by the First Amendment?

When a filmmaker is dealing with the gray area of rights of publicity, the best practice, as always, may be to seek permission.

3. VIOLATION OF PRIVACY RIGHTS

Producers need to be careful to avoid stepping on the privacy rights of people whom they film. The extent to which privacy rights are recognized drastically differ from state to state. What a producer may do freely in one state may be actionable in another. As with most torts, consent is a valid defense to these causes of action.

There are four basic kinds of invasions of privacy:

- Infringement of the right of publicity (previously discussed)
- Intrusion upon seclusion
- Public disclosure of private facts
- False light

INTRUSION UPON SECLUSION

*Intrusion upon Seclusion*³⁹ is, perhaps, what is typically thought of when we think of invasion of privacy.

For a filmmaker to be liable for intrusion upon seclusion, all of the following elements must be present:

- The filmmaker intrudes, physically or otherwise, upon the privacy, solitude, or personal affairs of his subject.
- The intrusion must be of a kind that is objectionable to a reasonable person.
- The intrusion must occur where the subject has a reasonable expectation of privacy.

Example: Polly Producer is shooting a documentary about money-laundering in the dry-cleaning industry. She tails Gus Grimes, CEO of Clean As A Whistle, Inc., a dry-cleaning chain. Hoping to get some dirt on his money-laundering activities,