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Even the Deceased Have Publicity and Privacy Rights

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Welcome to media•insights, formerly IP 101. OneBeacon Professional Partners' initial series addressing Intellectual Property exposures has been so enthusiastically received, we felt it appropriate to extend this special publication. Beginning with this issue, we are upgrading the name of our newsletter and expanding our coverage of topics to accurately reflect the broader scope of exposures faced by our agents' and brokers' clients as media-related companies are scrambling to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media•insights turns our attention to risks facing publishers and broadcasters, beginning with issues associated with rights of publicity and of privacy.

A California case has established that even as to a deceased person – especially a celebrity – rights of publicity will protect his or her likeness, name and other distinctive characteristics, such as voice. The most recent case involving The Three Stooges showed that such rights are protected years after a person's death.

California is one of approximately twenty states that gives heirs some right to control the publicity of deceased persons. A statute protecting such rights was originally enacted in 1971. In 1984, a new provision was created which provided for a statutory right of publicity that was descendible to heirs and assignees of deceased persons. The statute provides that:

Any person who uses a deceased personality's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or goods or for purposes of advertising or

selling or soliciting purchases of, products, merchandise, goods or services, without prior consent from the person or persons specified in subdivision c, shall be liable for any damages sustained by the person or persons injured as a result thereof.

Amounts recoverable include profits from the unauthorized use as well as punitive damages, attorneys' fees and costs.

A person who used images of The Three Stooges on lithographs and t-shirts argued that his conduct did not violate the terms of the California statute and that the sale of the likeness of The Three Stooges was protected by the constitutional guarantee of freedom of speech. The appellant argued that the California statute only applied to advertising, selling, or soliciting purchases of products or services. He argued that his use did not constitute an advertisement but was artistic and, thereby, protected by the First Amendment. The California Supreme Court disagreed and argued that the plain reading of the statute contemplated use of the likeness on or in a product or in advertising or selling. To the court, it was clear that appellant's use constituted a likeness on a product within the meaning of the statute. The appellant also argued that his use was an expression of free speech. In addressing the balance of protections afforded by the First Amendment and freedom of publicity, the California Supreme Court utilized analysis familiar in copyright cases as to whether or not a new work is "transformative" or used in a different manner. By requiring that an artist's

work be transformative to be protected, the court sought to balance the interests of the state in preserving the publicity rights of one's heirs against the interest of the artist who seeks to use the image as a basis for artwork.

The ruling found that if an artist simply utilizes a literal depiction or imitation of a celebrity, state law interests outweigh the express interests of the artist. However, if the work contains transformative elements, it is afforded First Amendment protections because the transformative work does not generally threaten the celebrity's marketability, which the right of publicity is designed to protect. In determining whether a work is transformative, the principal inquiry focuses on determining whether the product has become a reflection primarily of the artist's own expression or merely contains the celebrity's likeness. The court ruled that the use of The Three Stooges' images on lithographs or t-shirts were not transformative in any way, but simply amounted to recreations of the comedians' likeness on a blank t-shirt or canvas. Thus, the California Supreme Court concluded that:

- the state retained its interests in protecting the heirs; and
- controlling the distribution of The Three Stooges' images outweighed the appellant's commercial use of the likenesses since his merchandise did not convey any artistic expression or message.

Journalists, artists and advertisers should

be especially careful in any portrayal of celebrities – living or deceased – if such uses may constitute a commercial appropriation of likeness. Celebrities and heirs are litigious adversaries and often have the financial wherewithal to mount an aggressive and successful case.

Recently, a lawsuit was filed by the parents of a soldier from Oklahoma who died in Iraq. The plaintiffs objected to the line-entry listing of their son's name among some two thousand names of war dead on a t-shirt being sold by anti-war groups. Several laws prohibiting similar uses of names of soldiers for commercial gain are now pending before the U.S. Congress. Similar issues have arisen with respect to crime scenes, natural disasters, the Oklahoma City bombing, the World Trade Center attacks of September 11, 2001, the human remains of the astronauts from the Columbia Shuttle disaster in 2003 and casualties of the war in Iraq.

With respect to the receipt of caskets of military dead arriving at Dover, Delaware, a ban on photographs has existed since the time of the Persian Gulf War in 1991. After the 1989 invasion of Panama, the first President Bush complained about an incident in which three television networks broadcast split-screen images of the President making jocular remarks and of coffins arriving at the Dover mortuary. In 2000, President Clinton expanded the ban to all military personnel dead.

The military has indicated that the ban is intended to avoid unwarranted or undignified attention. Critics say the issue is not about privacy but about trying to prevent the country from facing the unpleasant reality of

war. Caskets arrive to an honor guard ceremony at Dover that is dignified and reverent, but also carried out in secret, off-limits to the media. Many families of the deceased are said to favor the policy.

Historically, photos and film footage of caskets have been allowed. During the Vietnam conflict, images of caskets, arriving at Dover became a staple on the nightly news and the "Dover Test" became an expression to signify relative public tolerance or intolerance of mounting casualties. The conflict in Somalia also involved broadcast images of dead Americans, and domestic opinion of U. S. presence in Vietnam and Somalia was said to change from such broadcasts.

In April 2004, the ban on images of the receipt of flag-draped caskets at the Dover mortuary was breached as more than three hundred images taken by Defense Department photographers were mistakenly released in response to a Freedom of Information Act request. At that same time, an employee of a private contractor, working in Iraq for the Pentagon, was fired after taking photos of coffins of war dead being loaded onto a transport plane for shipment to the U.S. All of the aforementioned photos were soon found on the internet.

While not illegal, per se, publications or broadcasts of the images of war involve issues of privacy, taste, news value, local sensibility, potential harm and emotional sensitivity. Journalists should probably avoid black and white rules which would automatically allow or prohibit portrayal of such images and should consult with experienced media counsel.

Incidents that take place in public are not always fodder for public consumption. Two persons injured in an automobile accident sued the broadcast news media for intrusion, a form of invasion of privacy. In that case, television journalists broadcast film of a rescue of individuals who were in a car that left the road and fell into a ditch. The accident occurred on a public highway; was newsworthy, and seemingly, the accident victims would not have a reasonable expectation of privacy. However, broadcast of film taken on board a rescue helicopter and film involving the use of a microphone to record discussions at the accident scene and on the helicopter between a nurse and one of the victims was tantamount to intrusion into zones of expected privacy. The California Supreme Court ruled that the press does not have "general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast."

Rights of publicity and privacy are increasingly at risk due to the proliferation of camera phones and similar equipment and because of the easy transmission of images and sounds to thousand in seconds over the internet. Courts struggle to balance the public's insatiable appetite for information with the privacy and publicity concerns of subjects, the deceased and their families. Now, more so than ever before, publishers and broadcasters need to work closely with media counsel in respect to such issues. A media liability policy with broad coverage for such risks is an important aspect of the media company's risk management.

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