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Copyrights of the Rich and Famous

Levine, Melissa Smith; Guttenplan Grant, Lauryn

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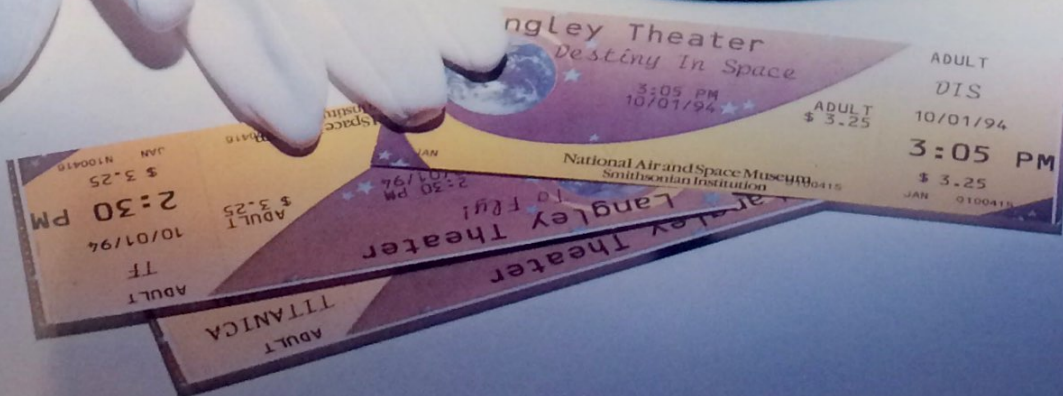
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Cover: Photograph by Mark Gulezian, QuickSilver, Takoma Park, Md. Styled by Polly Franchine. Right: "Time Square," an exhibit on time and time measurement at The Children's Museum of Memphis, one of the city's leading museums. Photo: Murray Riss.

That's Edutainment!

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Copyrights of the Rich and Famous

BY MELISSA SMITH LEVINE AND LAURYN GUTTENPLAN GRANT

You operate a science museum and decide to produce a T-shirt. On the front, you reproduce a photograph of Jonas Salk, the scientist who discovered the polio vaccine, along with a reproduction of his signature. On the back, you print scientific facts. The museum's goal is to inspire interest and curiosity in the subject, and you regard a T-shirt as an effective means for educating students between the ages of 10 and 14. You find a photograph of Jonas Salk that appears to be in the public domain (no copyright protection), reproduce the image on the T-shirt, and begin to sell the shirts in your museum shop.

One day, you receive a letter from an agent purporting to represent the estate of Jonas Salk. He claims that Salk bequeathed the exclusive right to use his public "persona" to a well-known research institution and that your unauthorized use violates the institution's right of publicity. The agent demands that you immediately cease and desist

Melissa Smith Levine is an attorney and a contract negotiator for the Smithsonian Institution in the Office of Contracting and Property Management. Lauryn Guttenplan Grant is an assistant general counsel in the Office of the General Counsel.

from selling any more T-shirts and claims that you owe a royalty for using Salk's likeness and an additional percentage for use of his signature.

What do you do? Do you pay the royalty? Should you have sought permission initially? Is a T-shirt protected under the First Amendment as a means of expression?

Museums increasingly face such dilemmas as interest grows in exhibitions that address and explore popular culture, particularly that of the 20th century. Anyone who develops such exhibits and related material should be aware of the legal right of publicity that public figures hold in their name, like-

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ness, voice, and other aspects of their persona. As in the area of copyright, a museum that owns an image of a famous person may not necessarily have the unlimited right to use that image in any manner. Exhibitions of photographs of famous persons, the sale or licensing of products such as exhibition catalogues, calendars, and T-shirts containing such images, names or signatures, and the licensing of such images for media products all require consideration of this legal right.

The right of publicity protects the economic interest that famous people and celebrities—often legally called “public figures”—have in their persona. The right of publicity has been held to protect the name, picture, likeness or image, signature, and even the voice of public figures. This right is based on the theory that there is economic value inherent in the persona of a public figure that is owned by the public figure, his or her licensees, and, in some instances, the person’s descendants. To use some aspect of that persona in a commercial manner without obtaining permission or providing compensation

is a form of unfair business competition or misappropriation because public figures often earn their living from the commercial exploitation of their persona through, for example, product endorsements and public appearances.

Because there is no federal or uniform law that establishes the “right of publicity,” the scope and duration of the right and the standards for enforcing it are generally governed by state law. In some states, the right is not recognized at all; in others, the nature of the right may differ considerably. For example, in some states the right exists only during the life of the public figure, while in other jurisdictions the right extends beyond death through the public figure’s estate. In states where the right continues after death through the public figure’s estate, the public figure must in some cases have commercially exploited his or her persona during his or her lifetime.

It wasn’t until 1953 that the right of publicity was recognized by courts. The relevant case involved the use of a baseball player’s image on a baseball card. The court stated in its opinion that the

player had the “right of publicity” to grant the exclusive privilege of publishing his picture. Prominent people like actors and ballplayers would feel “sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances,” the court concluded.

In a museum setting, there are two common situations in which the right of publicity is likely to arise: the exhibition of photographs of celebrity personae and the sale of merchandise depicting famous persons. The first situation is simple to address; the second is more complicated.

Generally, exhibiting the likeness of a public figure in an exhibition, even without consent, is not regarded as a violation of the right of publicity. This is because the First Amendment “free speech” clause protects such use, just as it protects the use of celebrities’ persona in the context of news events, documentaries, fictionalizations, and parody or satire. This First Amendment exception to the right of publicity aims to strike a fair balance between the public’s right to learn about newsworthy people and

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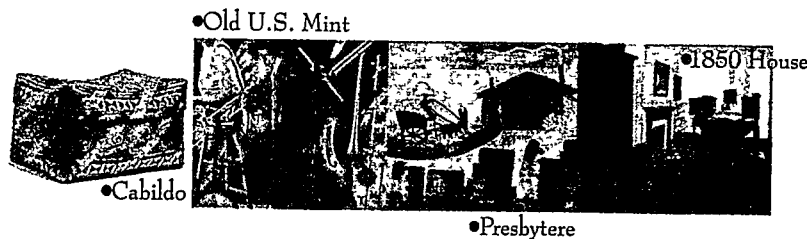
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the rights of public figures to protect the economic value of their persona against unauthorized exploitation. In determining where to strike the balance, the courts rely on several factors, the most important of which is whether the celebrities' persona has been used for an educational "free speech" purpose or whether the user has misappropriated the celebrities' persona for its own commercial gain. Under this analysis, an exhibition displaying the photographs or other likeness of public figures, such as an exhibition of Annie Leibovitz photographs of celebrities, would be protected by the First Amendment exception to the right of publicity.

With respect to the second category, the manufacture and sale of products by museums—even "educational" products such as books, catalogues, and calendars—the analysis is more complicated. In most cases, the need to get permission in advance will depend on whether the intended use is primarily commercial in nature—even if the underlying intention is to educate or to obtain funding to further the museum's educational mission. Act in good faith and seek permission if your proposed use has commercial overtones. You may have to pay a flat fee, a license fee, or a royalty for the use. As a business decision, you may decide the proposed use is prohibitively expensive and elect not to use the material at all in a commercial product or publication. If you forge ahead without permission—or without at least a documented, good-faith effort to obtain permission—you risk lawsuits, negative publicity, and accusations of unethical behavior.

How can you avoid such pitfalls? If you ran the museum that wanted to produce the Salk shirt, you would first ask whether the right of publicity is applicable. The answer would depend on the state in which your museum operates as well as the state in which Salk lived and died. Answering these questions, which in legal parlance are known as "choice of law" questions, can be extremely difficult. Yet the choice of law will determine, for example, whether Salk exploited the rights during his lifetime, whether the rights survive his death, and for how long.

Assume that the state in which Salk

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lived and died recognizes the right of publicity, that it can be passed by will to his heirs, and that it does not require commercial exploitation during his lifetime. Although you might try to persuade the agent that the contents of the T-shirt are protected by the First Amendment as expression, this argument is unlikely to prevail against the agent or in a court of law. The fact remains that the sale of T-shirts is first and foremost a commercial (not educational) activity requiring permission before using a famous person's likeness or signature.

Consider another scenario. Included in your museum's collection are baseballs signed by some of the greatest players of all time. You take a photograph of the baseballs, thinking it would make a great poster and notecard to sell in your museum shop. You have checked your accession records, and you are satisfied that your museum acquired all rights in the baseballs when they were purchased at auction. Must you obtain permission from the baseball players whose signatures appear on the baseballs before selling these products?

Here, the determination of applicable law is also important and could vary for each player according to the state in which he lived and died. Trying to track down each and every player or his heirs could be enormously time-consuming and costly. What should the museum do? Representing the interests of many famous baseball players are several agent/management groups that grant licenses to use players' names, images, and signatures, and negotiate fees for these uses. They may be willing to reduce the fees for a nonprofit organization. In this situation you should either obtain permission and pay the required fees or not use the image. As a general rule, famous sports figures are likely to aggressively protect their rights of publicity, so you should assume that their permission is required before using their signature (or any other aspect of persona) in a commercial manner.

These same rules apply if you wish to reproduce the persona of Hollywood celebrities who, like sports personalities, vigorously enforce their rights of publicity. It is often easier, however, to establish the nature and extent of their

rights because California was one of the first states to enact a right of publicity, and the law in that state is fairly well settled. Moreover, a celebrity's movie or production company can easily direct you to the agent or other contact person who handles requests like yours. Keep in mind that celebrities' rights of publicity can even extend so far as to protect a costume—such as Elvis Presley's hallmark white jumpsuit—from unauthorized reproduction.

Let's say your museum is borrowing a traveling exhibition of photographs by the famous photographer, Richard Avedon. The exhibition was organized by a larger museum, and your loan will extend for six months. There is no exhibition catalogue to accompany the show, so you decide to print and publish a pamphlet that contains highlights from the exhibition. Because you do not have the resources to pay for this project, your intention is to produce the pamphlet inexpensively and to sell it at a nominal cost. The photographer grants permission to reproduce his photos in your pamphlet and requires no payment because the use you propose is

very limited. However, he warns you that a few of the subjects—the "super models"—are extremely protective of their images and generally object to reproductions unless they are of the highest quality. You are concerned that the models will object to your inexpensive pamphlet if you ask for permission. You wonder whether it is necessary to ask permission because you do not expect very large visitation to the exhibition, and you are located in an area in which none of the models is likely to see the pamphlet. More important, the pamphlet is primarily intended to be an educational device to guide visitors through the exhibition, and you intend only to defray the cost of publication but not to profit from its sales.

If your plans called for an expensively produced exhibition catalogue with high quality reproductions of Avedon's photographs, the museum clearly should obtain permission not only from the copyright owner (Avedon) but also from the subjects (the super models). The models undoubtedly have a right of publicity in their images, and an exhibition catalogue, while educational, is still

a commercial product. But is the analysis different when the image is reproduced in an inexpensively produced pamphlet? Does this make the use of a famous person's image less "commercial" and more informational (thus more likely to be protected by the First Amendment) in nature?

The argument certainly could be made that, based on these facts, the balance tips in favor of the First Amendment and that the need to obtain permission is diminished or even eliminated. In this case, it might make sense for the museum to print its pamphlet and wait and see if any objection arises. The more cautious museum manager might decide to avoid any risk and try to contact the super models and/or their agents to obtain permission.

Although the right of publicity has been recognized in the courts for over 40 years, its emergence as an issue for museums is fairly recent. Museum directors, exhibition staff, curators, registrars, and others must be aware of its existence and take precautions before using any aspect of celebrity persona in museum activities. **M**

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