Museums meet the entertainment industry:
That’s Edutainment
That's Edutainment!
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Copyrights of the Rich and Famous

BY MELISSA SMITH LEVINE AND LAURYN GUTENPLAN 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 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 licensee, 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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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 com-
mercial gain. Under this analysis, an
exhibition displaying the photographs
or other likeness of public figures, such
as an exhibition of Annie Leibovitz pho-
tographs of celebrities, would be pro-
tected 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" prod-
ucts such as books, catalogues, and cal-
endars—the analysis is more
complicated. In most cases, the need
to get permission in advance will depend
on whether the intended use is primari-
ly 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 deci-
sion, you may decide the proposed use
is prohibitively expensive and elect not
to use the material at all in a commer-
cial product or publication. If you forge
ahead without permission—or without
at least a documented, good-faith effort
to obtain permission—you risk law-
suits, negative publicity, and accusa-
tions 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 life-
time. Although you might try to per-
suade the agent that the contents of the
T-shirt are protected by the First Amendment as expression, this argu-
ment 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 educa-
tional) activity requiring permission
before using a famous person’s likeness
or signature.

Consider another scenario. Included
in your museum’s collection are base-
balls signed by some of the greatest
players of all time. You take a photo-
graph 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 applica-
ble 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 organiza-
tion. 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 pub-
licity, 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 pub-
licity. 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 expensive-ly 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.