Implications of Right of Publicity on Library Activities

Ohio law recognizes a right of publicity. Under an Ohio statute, one can not use an individual’s “persona” for a “commercial purpose” unless appropriate prior written consent has been given. Though public libraries do not typically consider themselves engaged in “commerce,” libraries should assume that, for right of publicity purposes, their uses of “persona” are commercial in nature. The right of publicity protects an individual’s persona from unauthorized commercial use during an individual’s lifetime, if the individual is alive when his/her persona is at issue, or for a period of sixty years after an individual’s death, if the individual is already deceased.

To avoid right of publicity problems, a library, in communicating with the public and others via its website, newsletters, announcements, etc., should not use or make reference to “an individual’s [celebrity or not] name, voice, signature, photograph, image, likeness, or distinctive appearance,” without that individual’s prior written consent, in any of the following manners: (1) on or in connection with identifying a library or its products, merchandise, goods, services, or activities, (2) for the purpose of advertising or soliciting the use of a library’s services or (3) for the purpose of library fundraising. For example, (a) a library can not include the name of an individual in its name (i.e. “John Doe Public Library”) unless that individual has given prior written consent, (b) a library can not use a photograph of a famous athlete on its website to advertise or solicit the borrowing of books unless that individual has given prior written consent, and (c) a library can not use a photograph of a local celebrity in connection with a library fundraiser, so as to suggest that individual’s endorsement of the fundraiser, unless he or she has given prior written consent.

However, there are statutory safe harbor situations in which a library can use one’s persona for a commercial purpose without first obtaining written consent from the individual. These situations, with a special emphasis on the use of photographs, are outlined as follows:

First, a library can use or make reference to an individual’s persona (1) in connection with any material that has political or newsworthy value, (2) in the reporting of an event or topic of general or public interest, (3) in connection with any news, public affairs, sports broadcast or account, or (4) in connection with any political campaign so long as Ohio election laws are followed. So, for example, in communicating the previous appearance of a famous athlete at a library function, a library certainly could post a photograph of the athlete on its website, without prior written consent. This is of newsworthy value.

Second, a library can make use of a persona to the extent that it wishes to advertise or make a commercial announcement in connection with its activities that

1 Ohio Revised Code §§ 2741.01 to 2741.09.
2 Though the Ohio statute mentions that the right of publicity only extends to those individuals whose domicile or residence is in the state as of a certain date, numerous other states recognize a right of publicity. Therefore, it would be prudent for libraries to heed the requirements of the right of publicity regardless of the domicile or residence of the individual.
3 If any of these aspects have commercial value--However, Ohio law has not defined what constitutes “commercial value” so it would be prudent to assume that all aspects of an individual’s persona have commercial value.
are political or newsworthy in nature. For example, a library can use a celebrity’s photograph, without prior written consent, in connection with advertising a celebrity’s future scheduled appearance at a library event.

Third, a library can use “an individual’s name to truthfully identify the individual as the author of or contributor to a written work or the performer of a recorded performance” so long as the written work/recorded performance “is otherwise lawfully reproduced, exhibited, or broadcast.” For example, a library can use a photograph of the author/contributor in its newsletter to announce the arrival of a new book, movie, etc., without obtaining prior written consent.

Fourth, a library can make “use of the persona of an individual solely in the individual’s role as a member of the public if the individual is not named or otherwise singled out as an individual.” For example, a library can post photographs to its website of an event in which many individuals are featured, without obtaining prior written consent of each individual, so long as it does not mention the names of each individual.

In addition to the above exemptions, the Ohio statute incorporates by reference the protections of the First Amendment, so long as the use of one’s persona does not “convey or unreasonable suggest endorsement by the individual.” To the extent that any library participates in freedom of expression activities, a court will balance a library’s First Amendment interest against an individual’s right of publicity interest.4

So, beyond the “statutory safe harbors”, the protections of the First Amendment and common sense apply to determine whether a use could pose a “right of publicity” problem. Consider this example: The library photographs several patrons working contentedly at a library table, focused on their work, each with a tall stack of books (with the titles not obvious, to comply with the library records statute, of course). Could the library use that photo in a newsletter to illustrate a newly opened reading room, even if it identified the patrons by name? For practical purposes, the answer is probably yes.

Let’s change the example: Instead of several patrons, there is only one. And, the patron is smiling directly into the camera. Could the library use that photo on the cover of a brochure urging participation in a summer reading program? Here, right of publicity considerations would urge caution. The single patron is the focus of the cover of the brochure. There would likely be more of a sense that this patron endorsed the summer reading program. So, this use would likely need a written consent.

Consequences potentially follow from a violation of a person’s right of publicity. A library would be liable in a civil action to the individual injured. Potential remedies include actual damages (including any profits derived from the unauthorized use), punitive, and/or exemplary damages. In addition, in lieu of

4 ETW Corp. v. Jireh Pub. Inc indicates that the key inquiry is whether the use is transformative—i.e. “whether the celebrity’s likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.” Though this is a fact-specific inquiry, the more transformative the use, the more likely the first amendment will protect the use. Typically celebrities sue for the violation of the right of publicity, but there is nothing to indicate that an average citizen could not also benefit from this analysis.
actual damages, an injured individual can elect statutory damages of at least $2,500 but not more than $10,000. A four-year statute of limitations exists. In addition to the legal exposures, of course, the library would be exposed to potentially adverse press in connection with any legal actions.

It is unlikely that the typical library use of names or photos on web sites or in newsletters will give rise to right of publicity problems. However, a knowledge of the ground rules and asking the basic question, “does the planned use of a person’s persona make it appear that the person is endorsing the library,” can go a long way towards avoiding trouble.

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