

Right of Publicity Minimum Standards

March 27, 2019

Sponsoring Committee: The Minimum Standards Subcommittee of the Right of Publicity Committee.

RESOLUTION:

WHEREAS, in 2015 the Board elevated the issue of right of publicity within the Association's strategic objectives by creating the Right of Publicity Committee to study the issues surrounding the "right of publicity," "personality rights" and "identity rights;" by analyzing right of publicity protections around the world;

WHEREAS, the INTA Board of Directors approved (March 1998) in principle the necessity of having U.S. federal right of publicity legislation as an amendment to the Lanham Act that would embody all of the following standards:

1. Preempts all state law, both statutory and common law.
2. Harmonizes, to the extent practicable, the divergent laws of various states in a manner that recognizes the principles underlying the right of publicity and fairly balances competing public interests.
3. Recognizes the principles underlying the right of publicity by providing for a descendible and transferable right of publicity for a fixed term after death without regard to whether their right was exploited during a person's lifetime;
4. Protects the public interest by providing, through a "grandfather clause," prior user rights for the owners of names and marks consisting of an aspect of persona lawfully acquired before enactment of federal right of publicity legislation;
5. Protects the public's interest by exempting from liability, uses of persona that meet fair use/First Amendment standards for uses such as, without limitation, news, biography, history, fiction, commentary and parody;

WHEREAS, the right of publicity is presently protected in some manner in a number of jurisdictions around the world, both through statutory enactment and judicial decisions; and

WHEREAS, there is a need to create a basic set of standards applicable worldwide, which will provide guidance to brand owners and enable individuals to have greater control over the commercial exploitation of their identity.

BE IT RESOLVED, that the International Trademark Association recommends that in providing

protection for a right of publicity, all governments and relevant international institutions adopt the following minimum standards:

1. The right of publicity is reserved to natural persons and not companies, animals or objects.
2. The right of publicity would prohibit others from making an unauthorized use of a person's name, likeness, voice or other personal characteristic that identifies that individual to an ordinary and reasonable viewer or listener.
3. To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist. The claimant must establish that the use of his or her persona results in injury or damage to the claimant and/or unjust enrichment to the defendant.
4. An individual claimant need not make commercial use of his or her persona to have a right of publicity. The commercial value of a persona may have an impact on any damage amount claimed in a dispute.
5. An individual should have post-mortem rights for a defined term. The rights should be freely transferable, licensable and descendible property rights.
6. Where practicable, a non-mandatory post-mortem registration system would assist an individual's heirs, descendants, survivors, agents or other rights holders in providing public notice that such rights are being claimed, and provide contact information for the use of such rights. There could be incentives to register the claim of rights, such as reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.
7. There should be general exceptions to publicity rights so as to permit fair use of an individual's persona in protected speech or expression. These exceptions may include uses in:
 - a. News, public affairs and sports reporting or commentary;
 - b. Dramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual;
 - c. Works that parody, criticize, satirize or comment upon the individual;
 - d. Advertising and promotion for (a)-(c); and
 - e. Any other noncommercial use, including, but not limited to, education and research.

BACKGROUND:

Brand protection involves much more than trademark law. For decades, INTA members have used the images of celebrities and others in advertising to promote their brands and for other commercial purposes.

The right of publicity is presently protected in some manner in a number of jurisdictions around the world, both through statutory enactment and judge-made law. The primary goal of the

Minimum Standards Subcommittee of the Right of Publicity Committee was to lay the foundation for a long-term effort to bring greater uniformity to the protection of “the right of publicity,” “personality rights” and “identity rights.”

The benefit to brand owners will be to improve the efficiency and effectiveness of efforts to clear, license and use publicity rights in support of brands around the world. The process will equally benefit rights holders, by enhancing opportunities to license for those who wish to do so and, for those who do not, by minimizing inadvertent infringement resulting from unavailability of information and lack of transparency.

Rationale for Each of the Recommended Minimum Standards

- 1. The right of publicity is reserved to natural persons and not companies, animals or objects.**

This is a fundamental characteristic of publicity rights that is common to every jurisdiction that recognizes them. The Subcommittee is unaware of any precedent that recognizes a right of publicity for any entities other than individual human beings.

- 2. The right of publicity would prohibit others from making an unauthorized use of a person's name, likeness, voice or other personal characteristic that identifies that individual to an ordinary and reasonable viewer or listener.**

Some jurisdictions limit the elements protected to one or a few named characteristics, the most common being name and image, while others provide for protection of any recognizable aspects of the persona. Since the harm to be redressed is the commercial exploitation of a person without their permission, the Subcommittee could see no justification for failing to protect whatever characteristics are in fact used to identify or invoke the person to a reasonable observer.

- 3. To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist. The claimant must establish that the use of his or her persona results in injury or damage to the claimant and/or unjust enrichment to the defendant.**

Use for a commercial purpose is the primary characteristic that distinguishes the right of publicity from privacy rights, protection from intrusion or moral rights. The requirement of a direct connection between the use and the commercial purpose is intended to distinguish between uses where commercial exploitation is the primary and intended purpose, and those where commercial aspects are secondary or attenuated. The requirement of injury to the claimant and/or unjust enrichment to the defendant is intended to avoid adjudication of purely hypothetical disputes, but is not necessarily meant to require quantifiable monetary damage or benefit.

- 4. An individual claimant need not make commercial use of his or her persona to have a right of publicity. The commercial value of a persona may have an impact on any damage amount claimed in a dispute.**

The fact that a claimant need not have made a commercial use of his or her persona distinguishes the right of publicity from trademark law. Some early judicial decisions in the United States suggested that a publicity right could be protected, especially after

death, only if the person had previously made commercial use of their persona through endorsements or licensing. The Subcommittee did not see a justification for such a limitation, since it would necessarily imply that a person who chooses not to commercially exploit their reputation would thereby lose the right to prevent others from doing so.

5. An individual should have post-mortem rights for a defined term. The rights should be freely transferable, licensable and descendible property rights.

The protection of rights after death has often been a motivating factor in the passage of legislation to recognize publicity rights, and post-mortem rights are recognized in many jurisdictions, though not all. The Subcommittee acknowledges the importance to survivors and heirs of being able to protect against unpermitted commercial exploitation of a decedent's reputation, but also believes that some limit on the duration of those rights is appropriate. This is because clearance becomes more and more difficult with the passage of time after death, and at the same time the interests of survivors may be expected to gradually become more attenuated over the same period. The Subcommittee believes it unnecessary to advocate a single period of time that would apply in all jurisdictions, the important aspect being not the length of time involved but the fact that there is some definite expiration. The most common periods of time adopted by current regimes are from fifty to one hundred years. Finally, as a commercial, intangible property right, the right of publicity should be subject to transfer or licensing to promote commercialization where authorized by the individual. This is consistent with other intellectual property rights.

6. Where practicable, a non-mandatory post-mortem registration system would assist an individual's heirs, descendants, survivors, agents or other rights holders in providing public notice that such rights are being claimed, and provide contact information for the use of such rights. There could be incentives to register the claim of rights, such as reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.

Whether to adopt a registration system requires balancing the interests of publicity rights owners in preserving the right with those of putative users in being able to clear or license rights. The Subcommittee believes that a comprehensive registration system for inter-vivos rights, such as that implemented in the Bailiwick of Guernsey, would impose more costs and effort in compliance than would be justified. In addition, because the publicity right is closely related to the right of privacy, many jurisdictions may be skeptical of any system that would require compliance with formalities upon pain of forfeiture of all rights.

But the balance may shift once an individual is deceased, because clearance becomes more difficult when there is no living individual to contact. To best accommodate these different interests, the Subcommittee believes that a permissive registration system for holders of post-mortem rights would facilitate public notice, as these rights and/or rights holders may be defined or mandated by local estate and trust laws, and importantly, provide easy contact information for those seeking permission from rights holders. The Subcommittee believes there should be an incentive, but no requirement, to register these rights. For example, the availability of monetary relief could be

conditioned on whether the publicity right was registered before the unauthorized use began. Rights holders would preserve the ability to obtain injunctive relief without registering, but, to ease the burden of clearance, users would be protected from damage exposure if rights had not been registered. Registration could be a simple notice filing without examination. Statutes implemented by the U.S. states of Arkansas, California, Nevada, Oklahoma and Texas provide examples of different ways that such a post-mortem registration system could be implemented. Ideally, the person filing for the registration would be the primary rights holder that controls the post-mortem rights at issue, to make it easier for potential users of the identity right to negotiate for a license.

7. **There should be general exceptions to publicity rights so as to permit fair use of an individual's persona in protected speech or expression. These exceptions may include uses in:**
 - a. **News, public affairs and sports reporting or commentary;**
 - b. **Dramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual;**
 - c. **Works that parody, criticize, satirize or comment upon the individual;**
 - d. **Advertising and promotion for (a)-(c); and**
 - e. **Any other noncommercial use, including, but not limited to, education and research.**

The concepts of fair use and freedom of expression are important exceptions to a right of publicity, and are recognized in varying degrees in virtually all jurisdictions that recognize the right. The specific balancing of fair use and freedom of expression with an individual's ability to control the commercial exploitation of his or her identity also varies by jurisdiction. The Subcommittee incorporated the examples of fair use set forth in the U.S. Trademark Dilution Revision Act of 2006, and the test applied in *Rogers v. Grimaldi*. These examples are illustrative of the kinds of uses many jurisdictions have chosen to protect. The term "public affairs" in Section 7(a) is intended to apply to political content, civics, programming or public service messaging that references current events, but which may not fall under traditional concepts of news and sports reporting or commentary. A fair use exception for "public affairs" or similar language has already been adopted and interpreted in a few jurisdictions. A careful balance must be struck. The fair use umbrella should not protect "disguised" advertisements, which may appear to be expressive works but are essentially non-expressive commercial uses of identities. On the other hand, an individual should not have the ability to de facto censor expressive or newsworthy works incorporating or commenting upon that individual, when those works are in the nature of those enumerated in this suggested minimum standard.

CONCLUSION:

The Minimum Standards Subcommittee of the Right of Publicity Committee has worked to establish a set of core principles that stand the best chance of achieving broad consensus

across a range of interests and jurisdictions. To provide clarification and uniformity, the Subcommittee requests that the Board of Directors approve the preceding resolution.