

BZ/Brief

PRIVACY/PUBLICITY

Some rules must be observed when planning to use any person's name and/or likeness in advertising. Generally, the right of privacy is the right to be left alone. The right of publicity is the right to be paid for the use of your name, likeness, voice, etc. For purposes of this note, the two terms may be used interchangeably.

The names, photographs, likenesses, or voices of living persons should never be used in advertising without their consent, as such use violates the individual's right of privacy. The only exception may relate to advertising on behalf of media on First Amendment grounds.

The use of names, photographs, likenesses or voices of deceased persons, however, is an area of legal uncertainty and is becoming increasingly risky.

In many states the right of privacy terminates upon the death of the individual. However, there is an increasing trend towards having the rights of privacy/publicity protected after a person's death. The state rule of law in these cases is usually determined by the state of the individual's domicile at the time he or she died.

Several states have passed legislation prohibiting the use of deceased persons' names and likenesses for a specified period of years following the death of the deceased without permission from his or her estate. The particular class of individuals covered under these statutes vary by state. For instance, Indiana protects privacy rights for one hundred years after a person's death and applies its law to any advertising that runs in Indiana. It also protects celebrity expressions and mannerisms.

For these reasons, as well as the general uncertainty surrounding the area of law, it is urged that any contemplated use of a deceased individual's name or likeness be reviewed with counsel.

It should be noted that in order to have a cause of action for invasion of the rights of privacy or publicity, an individual must be recognizable in the advertising. Whether or not an individual is recognizable, however, has been interpreted quite liberally. One need not use an actual photograph or show the individual's face. It is sufficient if the individual is in some manner reasonably identifiable. "Reasonably identifiable" has been interpreted in some instances to include mannerisms, identifying characteristics, and identifying associations.

Privacy/Publicity is taken from the ADVERTISING LAW HANDBOOK published by the law firm of Hall, Dickler, Lawler, Kent & Friedman, specialist in advertising law.

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