

DO I NEED A RELEASE?

By Mark Litwak

Filmmakers often ask if they need a release when they are shooting in public and capturing the images of people without their consent. Usually, persons photographed in a public place do not have a legal right to stop you from taking pictures of them to use in your film. But that is not always the case depending on the circumstances and how you use the images. If a photo is used, for instance, to promote the sale of spaghetti sauce, you likely will need to secure a release because while you are not violating the subjects' rights of privacy by taking their photo, you may be violating their rights of publicity by using their photo to sell merchandise. That same photo if used on the front page of New York Times in a newsworthy context would not provide grounds for invasion of privacy or right of publicity. However, if the subject was mistakenly identified to readers as a criminal, you might be liable for defamation.

Whether one needs a release or not is often a complex issue. When evaluating whether or not you need a release, you should consider:

Right of Publicity

The right of publicity recognizes the right of every person to control the use of his or her name and likeness. Because publicity rights are governed by state law, they vary across the nation.ⁱ Up until 2020, New York only recognized this right for those living, and not for the deceased. In other words, this right was considered personal, and when a person died, the right expired and did not pass to one's heirs. However, on November 30, 2020, the governor signed into law a provision, which for the first time, adds a postmortem right in New York which lasts for 40 years after death. The new lawⁱⁱ also prohibits the use of a "deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work . . . if the use is likely to deceive the public into thinking it was authorized by the person" or their heirs. This provision allows an exception when there is a "conspicuous disclaimer in the credits" and in advertisements stating that the use is not authorized. The law, like many other state laws, is limited to those persons domiciled in the state at the time of their death. A domicile is a person's permanent residence.

In California, Civil Code Section 3344.1 provides that the right of publicity descends and lasts for 70 years after the death of the person. A similar statute, Civil Code Section 3344, prohibits the unauthorized use of the name, voice, signature, photograph, or likeness on or in products, merchandise, or goods for those who are living. But these rights, like the laws in other states, do not apply to use of a photo for newsworthy purposes. Otherwise, subjects could prevent any critical coverage of their activities. When one person's right of publicity conflicts with another person's rights under the First Amendment, the rights under the First Amendment are often, but not always, the paramount right.

Defamation

Defamation is a communication that harms the reputation of another, so as to lower him in the opinion of the community or to deter third persons from associating or dealing with him. For example, those communications that expose another to hatred, ridicule, or contempt, or reflect unfavorably upon one's personal morality or integrity are defamatory. One who is defamed may suffer embarrassment and humiliation, as well as economic damages, such as the loss of a job or the ability to earn a living.

The law of defamation can be complex because the common law rules (judge made law or law of precedent) that have developed over the centuries are subject to constitutional limitations if they conflict with rights under the First Amendment.

If the person defamed is a public figure or public official, the individual has to meet a higher standard and must show that the defamer acted with actual malice, that is, the defamer knew the statement was false or acted in reckless disregard to its truth.ⁱⁱⁱ A private individual, on the other hand, may need to only show negligence to recover.

There are a number of defenses and privileges to defamation. Consequently, sometimes a person can publish a defamatory remark with impunity. Why? Because protecting a person's reputation is not the only value we cherish in a democratic society. When the right to protect a reputation conflicts with a more important policy like letting people express the truth, the defamed person may be denied recovery for the harm suffered. Therefore, if your remarks hurt someone's reputation, but your remarks are true, you are absolutely privileged. An absolute privilege cannot be lost through bad faith or abuse. So, even if you defame another person intending to harm them, you will be privileged if the statement is true. Truth is an absolute privilege because our society values truth more than a person's reputation. But sometimes the burden of proving the truth is on the defamer.

Rights of Privacy

The United States Constitution does not explicitly mention a right of privacy. According to the United States Supreme Court, however, such a right is implicit in the Constitution and the Bill of Rights. The right of privacy has been defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In other words, it is the right to be left alone.

Like defamation, the right of privacy is subject to constitutional restrictions. The news media, for example, is not liable for defamatory statements that are newsworthy unless they are made with knowing or reckless disregard of the truth (i.e., actual malice). Unlike defamation, a cause of action for invasion of privacy does not require an injury to one's reputation.

Many defenses to defamation apply to invasion of privacy, but truth is not a defense. Revealing matters of public record cannot be the basis for an invasion of privacy action because the information is already public. Express and implied consent are also valid defenses. If you voluntarily reveal private facts to others, you cannot recover for invasion of your privacy.

If a subject has a reasonable expectation of privacy, such as when they are in a bedroom or bathroom, taking a picture of them may well be a violation of their rights. On the other hand, if you go out in public view and wear a revealing dress, you may not be able to claim your right to privacy was invaded because you voluntarily displayed yourself in that manner to the public.

Usually, a production company cannot enter or film the interior of a private residence without the permission of the occupant. Doing so would be considered trespass. The exterior of a building and the land surrounding it, however, can usually be filmed or photographed if it is visible from a place open to the public. However, this is more complicated in California because it has enacted an anti-paparazzi law^{iv} that prohibits the filming, photographing, or recording of private property, even from a public place, such as a street or sidewalk, if made possible only with technologically advanced equipment and the subject has a reasonable expectation of privacy. A filmmaker can be liable if he attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of a person engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass.

Trademarks

What if you film a scene with a character drinking a bottle of Coca-Cola and the company's logo is clearly visible? Do you need a release? Usually, this type of use would not give rise to liability because you are not using the Coca-Cola logo as a trademark to market soda or your movie. However, if you used the logo to indicate to the audience that somehow Coca-Cola was a sponsor or was affiliated with the production, then that would require a release.

To prevail on a trademark infringement claim, a plaintiff must show that it not only has a valid, protectable trademark," but that the infringer's use of the mark is likely to confuse consumers as to the origin of the product or service.

Usually, showing trademarks in passing does not infringe the trademark owners' rights. However, if you show a character drinking their brand of soda, and then going into convulsions, that might be considered disparagement of the product, which is akin to defamation of a person. That might create liability separate and distinct from violating any trademark rights.

Copyright

Suppose you capture an image with your camera and that image is of artwork that is protected under copyright law? While reproducing artwork might be considered copyright infringement, if the image was shown only briefly in the background, it might be considered a fair use. In determining whether the use of a copyrighted work is a fair use, courts weigh four factors: 1) the purpose and character of the work; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion borrowed in relation to copyrighted work as a whole; and 4) the potential adverse effect on the market for, and value of, the copyrighted work.

In applying these factors to a specific factual situation, it can often be difficult to predict whether a use will fall within the doctrine. In one case,^v a court found that the use of numerous clips

from movies produced by American International Pictures (AIP) in a documentary about AIP's founders was likely a fair use because while the original films aimed to entertain their audience, the documentary was meant to educate the viewing public of the impact the founders had on the movie industry.

Because the question of whether one needs a release often requires a complicated assessment, it is often the best policy to obtain a release if you can. In order to minimize liability, filmmakers should consider the following guidelines:

1. Be especially careful if you disclose information about private living individuals who are not public figures or public officials.
2. Obtain written releases from people on-camera that might be identifiable to an audience whenever possible.
3. Purchase Errors & Omissions Insurance (E & O Insurance) for your company and add yourself as a named insured.
4. Avoid the use of hidden cameras and microphones.
5. To the extent possible, base the information in your film on matters of public record, such as court transcripts. Revealing matters of public record cannot be the basis for an invasion of privacy action because they are already public.
6. Have an experienced attorney review your completed film before it is released.

ⁱ A summary of different state laws regarding right of publicity can be found at: <https://rightofpublicity.com/statutes>

ⁱⁱ https://www.nyasembly.gov/leg/?default_fld=&leg_video=&bn=S05959&term=2019&Actions=Y&Memo=Y&Text=Y#jump_to_Text

ⁱⁱⁱ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

^{iv} Cal.Civ.Code § 1708.8

^v *Hofheinz v. AMC*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001)