



### **The Quick and the Dead: Publicity Rights in the US and England**

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**E**ver wondered about the paparazzi who shove cameras in celebrities' faces and then publish the pictures? How do television networks get to air mini-series on the life of Princess Di? Did you ever play with Lincoln Logs? Should Napoleon brandy makers have to pay a royalty, or has the old boy been too long in the ground? All these situations illustrate the "right of publicity", which protects our names and likeness from commercial exploitation. Let's take a look first at US and then very briefly at England and Wales.

#### **Back in the USA**

The right of publicity was first recognized by the federal courts in 1953 as the right of an individual to control the commercial exploitation of his or her name or likeness. There are two rationales for protecting an individual's right of publicity. The first is to prevent "unjust enrichment" through the unauthorized goodwill; the second is to provide an economic incentive to individuals to provide performances of interest to the public. This right is commonly recognized

these days and at least eighteen states protect the right by statute with thirty-six other states providing common law protection. Such law varies widely from state to state and can apply to both the living and the dead.

Publicity rights can cover, among other things, a person's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures or mannerisms. These attributes are generally considered property and their value can be both controlled by the living and, for the dead, passed on to future generations. It often does not matter if the person exploited his or her persona when living. The focus, instead, is usually whether or not the persona itself has commercial value.

What's not covered by right of publicity? First Amendment issues, of course, do come into play. In the name of persona-protection, the living cannot, generally speaking, cut off fair comment about their lives or careers. Material with political, historical or newsworthy value usually is not affected by right of publicity statutes. The relevant

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law tends to focus instead on “commercial purposes”, which usually entails use on or in connection with products, commercial activities, or advertising for such products and services.

### The Dead

As to the dead, one may generally represent a deceased person in a play or a movie, and picklock biographers generally operate without restriction except that they must be more careful when they refer to the living in their works. As to commercial activities, the right of publicity does not last forever. After a number of years after death (as long as 100 years), the “persona” becomes part of the public domain. During a famous person’s lifetime, however, and for at least a lifetime or two thereafter, certain heirs can protect the right of publicity. Qualified heirs can lease it, license it, sell it or even prohibit certain uses.

Naturally, portraying the dead causes no small amount of heartburn for writers and producers. There is one school of thought, for instance, that holds that the rights in one’s “persona” should be viewed differently from copyright in a deceased person’s books and that once a person dies the persona belongs to the public. Another school holds that if an individual spends his life creating the value of his image, that is no different than creating a book or building up any other business and should be preserved for the heirs for a time.

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*“Using an individual’s persona in connection with a “news” or “public interest” story requires a reasonable relationship between the person’s persona and the story itself”*

### The First Amendment

Due to First Amendment considerations, a living person’s persona is a bit more dicey than the dearly departed. Generally, the law tries to strike a balance between an individual’s right of publicity and free speech rights. The greatest protection is provided for news, lesser protection is provided for entertainment and fiction and the least protection is available for advertising uses where a portrayal of a real person’s identity is used to sell a product or service.

When it comes to “newsworthiness”, the concept includes real-world information including current news items, news that has occurred in the past and information that is not strictly news, but is still informative, media presentation on “public issues”, factual and historical material for education; and entertainment and amusement concerning interesting aspects of a particular person’s identity. When analyzing newsworthiness, pay attention to a couple of factors: first, is the unauthorized use of an individual’s persona really news? Second, is there a reasonable connection between the use of the individual’s persona and the news being conveyed?

### A Reasonable Connection

Using an individual’s persona in connection with a “news” or “public interest” story requires a reasonable relationship between the person’s persona and the story itself. If

Attorney at Law  
**David P. Crocker**  
 Solicitor of England and Wales



Business Address  
 Russell House  
 158 Pleasant Avenue  
 Portland, Maine 04103-3204 USA  
 Phone: 207.879.0708  
 Fax: 207.221.6417  
 Email: dpc@davidcrocker.com

**Local and International**  
**www.davidcrocker.com**

*First admitted to practice in 1989, David P. Crocker manages an international law practice in licensing, intellectual property, information technology and business law. He has experience in domestic and international licensing, technology development and general intellectual property law, including copyright, trademark and trade secret protection.*



*Crocker provides direct and timely assistance not only to technologists, but also to writers, artists, photographers and all creative people who wish to protect and license their work.*

*Crocker is currently qualified to practice in the United States and England and Wales. He advises United States, United Kingdom and other international clients in intellectual property, technology and business matters.*

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there's a connection, then the right of publicity must yield to the First Amendment. To succeed on a right of publicity claim, a claimant would have to demonstrate that his persona was used *merely* as the flag to attract attention to the news or entertainment message. Likewise, an individual cannot suppress photographs that were taken in a public place to illustrate a newsworthy story.

### Oh, to be in England

The law in England and Wales is less developed than the United States and English courts seem to have trouble deciding whether to refer to “celebrity”, “personality”, “character”, “publicity” or “image” rights. “Publicity” and “image” do perhaps make the point more clearly and avoid the difficult label of “personality”, which in some cases may seem less in evidence than the image itself. But as a very general matter, publicity rights relate to the concept of “passing off”. Under English law, actionable passing-off requires that (1) the claimant has goodwill associated with his name and image; (2) the defendant has made a misrepresentation likely to confuse the public into associating the defendant's products or services with those of the claimant, and (3) there is loss or the material prospect of loss to the claimant. But to get anywhere in England, however, you often need to resort to a patchwork of other law, including copyright, trademark, breach of confidence, and violations of the Data Protection Act.