

The Right of Privacy and the Right of Publicity:

It's not just about tabloids and fame

Choices & Challenges: Hot Topics Facing Curators and Archivists

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In our work as archivists and curators we focus on our patrons and the possible uses of the photographs and other materials in our collections. However, under the rights of privacy and publicity there may be risks involved in use by both our patrons and our repositories. This paper is an analysis of the rights of privacy and the rights of publicity as they affect the management of archives and museum collections, identifying areas where both the choices and the challenges for repositories lurk. Please note that law is a balance of risks, and the actions taken by an institution will be a reflection of the analysis of those risks.<sup>1</sup>

## **Right of Privacy**

As archivists and curators, especially those involved with public institutions, we have experience managing our collections in light of issues of privacy – contractual agreements in deeds of gift and FERPA rules covering student records in public higher education institutions are two examples. However, in this case we are looking at the general right of privacy as covered in tort law. The right of privacy is a part of tort law, since an injury can occur when there is an intrusion into someone’s privacy. Actions in privacy are controlled by state law, since there is no general federal right of privacy. Thus in analyzing a possible risk for an institution, the specific laws of the state must be reviewed. The right of privacy was articulated over 100 years ago.<sup>2</sup> Privacy law is generally comprised of four different actions “an intrusion into seclusion, public disclosure of private facts, false light, or appropriation.”<sup>3</sup>

In order to identify issues for archives and museums, we must understand how the actions in privacy operate. In an action for intrusion into seclusion three factors must be present: an intrusion, offensive to a reasonable person, and in an area where a person is

entitled to privacy.<sup>4</sup> In an action for public disclosure of private facts, the publication itself must be objectionable or offensive to a reasonable person.<sup>5</sup> An action for false light is similar to public disclosure, but is invoked if the facts disclosed are false and would portray the subject untruthfully in the eyes of the public.<sup>6</sup> In some states knowledge that the publicized materials would place the person in a false light is required.<sup>7</sup> An action for appropriation is similar to the action in the right of publicity, but is more generally used by non-celebrities. It is the unauthorized use of a person's name or likeness, without any requirement of commercial use involved.<sup>8</sup> In each of these occurrences the law operates to protect the personal and emotional interests involved in an invasion of privacy. There are many actions that could cause a breach of privacy, but the risks to repositories and users are variable and must be weighed.

In privacy three defenses are available – death, consent, or newsworthiness. Privacy is generally recognized as not surviving death.<sup>9</sup> If the subject of the invasion or publication consents, preferably in writing, this is also a defense to liability.<sup>10</sup> Finally, if the disclosure of private facts is newsworthy there may be a defense to a privacy action.<sup>11</sup>

### **Archives, museums and the right of privacy**

In looking at a general privacy law and its exceptions, what are the issues that archives and museums must be aware of in administering their collections? In an initial reading of privacy law the first thought is of tabloids and screaming two inch headlines, not of archives, museums and their researchers. There are many examples of materials in our collections that could cause us concern, the first example that comes to mind is that of the innocent correspondent who wrote to a person whose material was donated to a public institution, including the letters that they received. Another example is a taped

conversation of two people with their consent and knowledge where the content of the conversation includes private facts about a third person. Barring any explicit language in a donor agreement, of what issues in privacy must a repository be aware?

In archives and museums, a cause of action for invasion of privacy would be unusual, since most collections are donated by or purchased from another party. The repository did not cause the invasion, and therefore could not be held liable for it either as the intruder or in contributory negligence. This does not preclude an institution from being the legal owner of the materials that were the product of the invasion, which creates no liability.

However, institutions may want to explore the issues involved in public disclosure of private facts. A cause of action may lie against a repository, if material created by an intrusion into seclusion is displayed or published, or somehow publicized to the public in a highly offensive manner. An example could be activities by the institution that may be termed “in poor taste,” sensationalizing lurid details of particular materials. A possible defense to this cause of action could be the newsworthiness of the information to be disclosed – supporting “a legitimate public interest or concern.”<sup>12</sup> For example under Oregon law, a court declared that the image must be “obtained or broadcast in a manner or for a purpose wrongful beyond the unconsented publication itself . . .”<sup>13</sup> A publication without permission, on its own, is not sufficient for a claim to lie in the state of Oregon, especially when balanced against the First Amendment right implied in newsworthiness. Thus, newsworthiness could provide a defense to an action of infringement, but the decision to proceed would be a balance of the risks made by the institution.

An analysis of privacy is not complete at this point. There are two categories of materials that carry a presumption of privacy because of their nature or content: medical and psychiatric records, and materials containing information obtained during a client relationship, such as attorney or clergy.<sup>14</sup> Most curators and archivists are already sensitive to this type of information in the management of their collections.

As noted earlier, there are also two additional actions for breach of privacy open to a plaintiff: false light and attribution. False light, similar in operation to public disclosure, would be a very unusual action against a repository as it requires publication in an offensive manner, in addition to, in most states, knowledge that the information is false. The combination of factors in the actions of a responsible repository would be very unusual, and defenses may be available depending on the facts. The final action available is appropriation – the unauthorized use of a person’s identity. This too would be unusual in an archives or museums setting, since a person must be alive to have a claim in this action, and in most cases the defense of newsworthiness and First Amendment claims are available to a defendant and are often successful.<sup>15</sup>

An analysis of privacy rights is not complete without contemplating the defenses available to an institution. The first question to ask is if the subject of the materials alive. If not, there is no right of privacy. There may still be a right of publicity that will be addressed later in this paper. This has long been one of the advantages for archivists and curators, because in many cases the materials that we administer refer to persons who are already dead. Second, if the repository or the patron holds written consent to publish the material there is no violation of the right of privacy. Finally, could the publication of the facts or images be seen as newsworthy? If the release is newsworthy, rather than just

gossip or sensationalism, there may be a defense. Thereafter, the facts of each case, and the particular circumstances of the state law will provide differing results for any set of facts.

For example, would publishing private love letters create a cause of action from the author? It would depend on the publication and any newsworthiness claim. As with most law impacting collections, there are few clear cut safe harbors. Consent is always a defense, but it may not always be practical to obtain. Death is a defense, but often we are dealing with materials of a third party that is still living.

### **Right of Publicity**

The right of publicity is a cause of action that is not often mentioned in the archival literature. Most of the discussion of legal issues for archivists and curators focuses on issues in copyright, contract, and privacy, and with good reason as the bulk of concern and liability falls into those areas. However, as the following analysis will show, the right of publicity, although not as common, presents issues that need to be paid attention to by archivists and curators.

The right of publicity is a comparatively new cause of action to gain recognition in the courts. It was first articulated in 1953 by the United States Court of Appeals for the Second Circuit.<sup>16</sup> It was recognized by the Supreme Court in 1977 in the *Zacchini* case.<sup>17</sup> The Supreme Court took the case in this instance because in the Ohio State Supreme Court it was struck down on the basis of First and Fourteenth Amendment rights. In this instance the Court overturned finding that broadcast of the complete human cannonball act without his consent was a violation of the right of publicity.<sup>18</sup> The right of publicity is a property right with a cause of action in tort law. It protects a proprietary interest against

economic harm, while the right of privacy protects a personal interest and against emotional harm.<sup>19</sup> The right of publicity, like the right of privacy, is based in state law and thus can vary. Currently twenty-eight states have some form of a right of publicity, with some states using a combination of common law and statute.<sup>20</sup> Eighteen states recognize a common law (prior judicial decisions and longstanding legal doctrines) of publicity.<sup>21</sup> Ten states have an explicit publicity statute.<sup>22</sup> Eight states include the right of publicity inclusively within the right of privacy.<sup>23</sup>

As with privacy, the right of publicity and any other state law-based right involves issues of jurisdiction. These are generally characterized as choice of law questions. In general, U.S. courts will apply the law of the individual's domicile to determine if a right of publicity exists – answering the question “is there a property interest?” Then the court will use the law of the state where the property is located or the state having the most significant interest in the conflict to determine whether the right has been infringed – answering the question, is there an injury or a breach of contract.<sup>24</sup> This is the common law interpretation of choice of law. In statutory publicity law, some states specify the jurisdictional coverage. For example, in Indiana, the statute covers along with issues of domicile and activities, “a person who engages in conduct within Indiana that is prohibited under . . . this chapter.”<sup>25</sup> This statute thus has sweeping coverage of affected parties.

The right of publicity is an outgrowth of the right of privacy that guards against appropriation of persona. It is the unauthorized commercial use of a person's name, likeness, or other personal attribute.<sup>26</sup> In most states it is a right only extended to those who are “celebrities” and who have exercised a commercial interest in their persona.<sup>27</sup>

The rationale being that there is a grant of an economic interest in the fruits of publicity or celebrity status.<sup>28</sup> This is a view that recognizes celebrity as a commodity that has value.

As with the right of privacy, consent, preferably written, is a defense. Newsworthiness and a balance with First Amendment rights can be a defense, but it is a balance that would be adjudicated, and is not a precluding defense. Given the nature of the right of publicity, that it almost always occurs in commercial speech, a First Amendment defense is more difficult since commercial speech receives a lower level of protection than commentary or news.

Unlike the right of privacy, death of the subject is not always a defense to an action for violation of the right of publicity. In most states, the right of publicity is descendible and often transferable, and can remain in effect in some cases from 10 to up to 100 years after the death of the subject.<sup>25</sup> Only two states do not recognize a descendible right of publicity, New York and Wisconsin.<sup>26</sup> The two states that have the longest potential post-mortem right of publicity are Indiana and Tennessee. In Indiana, by statute, the right of publicity lasts up to 100 years after death.<sup>29</sup> It is worthwhile to note that one of the largest licensing companies is headquartered in Indiana.<sup>30</sup> In Tennessee, the statute provides for protection for as long as the right holder continually exploits the commercial value of the identity.<sup>31</sup> Thus, for a lucrative and timeless personality, such as Elvis, the protection could be unlimited. Although the materials of celebrities are more unusual in many repositories, problems may arise more frequently as there is not the safe harbor of death to preclude suit in most cases, and because of the appealing nature of using these materials in promotion and publication.

## **Archives, museums and the right of publicity**

What are the rights of publicity of famous personalities that might affect creative efforts on the part of repositories and their patrons to use materials contained in collections? For example, at Oregon there are many photographs of Steve Prefontaine, a noted college cross-country athlete and Olympian, who died in 1975. Setting aside any copyright issues, we would have no question of privacy, because the subject is dead, but to what extent can his image be used to promote the university, the collections, or running shoes, without express permission? It is these questions that repositories face in utilizing materials from their collections in the promotion of their repository and collections.

The focal point for most right of publicity litigation is in the use of the “persona” in advertising, promotion, or through other revenue generating activities for which the person depicted has not given permission. A repository cannot assume that because a celebrity donates their papers to a repository, that they also give their consent to use their likeness in revenue generation. This could raise issues for archives and museums, because of possible promotional or revenue generating activities by the repository. In competing for the attention and money of potential patrons, collections of famous people or those that include them with high name recognition are prime candidates for use in publications, exhibits, and promotion.

Liability depends on state law, especially if the subject is dead, or if the use of the material is newsworthy rather than simply advertising. For example the statute in Indiana specifically prohibits the use of an aspect of a personality’s right of publicity for the purpose of fundraising, along with other more typical commercial behavior.<sup>32</sup> The

remedies for a violation of the right of privacy are injunctive relief, monetary damages can only be assessed after establishing and quantifying the economic damage, and punitive damages can be assessed in cases where willful infringement is proven.<sup>33</sup> These factors should become a part of any risk analysis by an institution. A repository must be aware of their actions, especially when ownership of a collection is used to promote a repository. When utilizing materials in our collections, physical ownership and copyright are not the only rights to be taken into account.

In both privacy and publicity there is no firm course of action as the boundaries of permissible action vary from state to state. Thus we must proceed with our knowledge of the rights involved, and the benefit or purpose of our actions, in making decisions for publishing, displaying, or publicizing personal information or images in our collections. Given the preceding analysis, there is no basis for conservative or overly cautious use of materials. However, prudent review of issues of privacy and publicity should occur alongside a repository's other legal considerations of copyright when managing their collections. The lesson we must take away is that we need to educate ourselves, our users, and our donors about the rights of privacy and publicity.

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<sup>1</sup> This paper is presented for discussion and is not intended as legal advice.

<sup>2</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>3</sup> William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

<sup>4</sup> Thomas A. Lipinski LIBRARIES, MUSEUMS, AND ARCHIVES: LEGAL ISSUES AND ETHICAL CHALLENGES IN THE NEW INFORMATION ERA 48 (The Scarecrow Press, Inc. 2002).

<sup>5</sup> *Id.* at 49.

<sup>6</sup> *Id.* at 50.

<sup>7</sup> James N. Talbott NEW MEDIA: INTELLECTUAL PROPERTY, ENTERTAINMENT AND TECHNOLOGY LAW S. 8:8 at 8-10 (Clark Boardman Callaghan 1999).

<sup>8</sup> Lipinski at 51.

<sup>9</sup> *Id.* at 48.

<sup>10</sup> *Id.* at 48.

<sup>11</sup> *Id.* at 49.

<sup>12</sup> Raymond T. Nimmer INFORMATION LAW P. 8.05, at 8-22 (West Group 2000).

<sup>13</sup> *Anderson v. Fisher Broadcasting Companies, Inc.* 300 Ore. 452, 469; 712 P.2d 803, 813 (1986).

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<sup>14</sup> Gary M. Peterson & Trudy Huskamp Peterson ARCHIVES AND MANUSCRIPTS: LAW 40 (Society of American Archivists 1985).

<sup>15</sup> Claire E. Gorman, *Publicity and Privacy Rights: Evening Out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247, 1262 (2004).

<sup>16</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* 202 F. 2d 866, 868 (2d Cir. 1953).

<sup>17</sup> *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977).

<sup>18</sup> *Id.* at 576.

<sup>19</sup> Gorman at 1263-1264.

<sup>20</sup> Gorman at notes 94, 95, 96.

<sup>21</sup> Gorman at note 94 (Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Mississippi, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin).

<sup>22</sup> Gorman at note 95 (California, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Tennessee, Texas, and Washington).

<sup>23</sup> Gorman at note 96 (Florida, Massachusetts, Nebraska, New York, Rhode Island, Utah, Virginia, and Wisconsin).

<sup>24</sup> Stanley Rothenberg, *Candle in the Wind: Would Elton John's Publicity Rights Extinguish With His Death?* [http://library.lp.findlaw.com/tortspersonalinjury\\_2\\_6214\\_1.html](http://library.lp.findlaw.com/tortspersonalinjury_2_6214_1.html) (last viewed November 1, 2004).

<sup>25</sup> IND. CODE S. 32-36-1-9 (2002).

<sup>26</sup> Lipinski at 52.

<sup>27</sup> Talbott at S. 9:2.

<sup>28</sup> Lipinski at 52.

<sup>25</sup> Jeremy T. Marr, *Constitutional Restraints on State Right of Publicity Laws*, 44 B. C. L. Rev 863, 865 (2003).

<sup>26</sup> *Id.* at note 22.

<sup>29</sup> IND. CODE S. 32-36-1-8 (2002).

<sup>30</sup> Curtis Management Group, <http://www.cmgww.com/clients.html> (last viewed November 1, 2004).

<sup>31</sup> TENN. CODE ANN. S. 47-25-1103(b) (1984).

<sup>32</sup> IND. CODE S. 32-36-1-2 (2002).

<sup>33</sup> Marr at 873-874.