

Slide 1 – Title Slide

Disclaimer: Presentation is for discussion purposes only, and is not legal advice.

Similar to presentation originally given at the Choices & Challenges Symposium at the Henry Ford.

Slide 2 – Image of Vanessa Redgrave Letter

Introduction statement

(Why it matters to archivists)

Archivists are focused on encouraging use

Our users and our own

An analysis of rights of privacy and publicity

In my experience, especially publicity not discussed as much. Wise to pay attention.

My experience with my colleagues at Oregon

Slide 3 – Right of Privacy

What is it – MacNeil:

Right of non-interference

Personal decisions without interference

Control of information about self

Privacy – secrecy, anonymity, & solitude

Tort law = injury

State law, therefore varies

Analyze the specific law for your state

Fairly recent

1960 Prosser Article, 1977 Second Restatement of Torts

US Privacy Act – 1974 – Government collection and disclosure of information

Four different actions

Intrusion into seclusion

Intrusion, offensive to a reasonable person, in an area reasonably entitled to privacy.

Public disclosure of private facts

Publication itself must be objectionable or offensive to a reasonable person

False Light

Similar to public disclosure, but false

Defending person from pain & humiliation involved

In some states, knowledge required

Appropriation

Similar to publicity – unauthorized use of person's name or likeness

Focuses on tort law concepts of personal injury to dignity and mental distress

“eg before & after photographs”

unsuccessful if celebrity

“Highly offensive to a reasonable person”

Mac Neil “numbing of public”

Health

Nude photographs & sex tapes

The public disclosure of a deceased spouses diary that reveled private thoughts about the marriage & surviving spouse. (Sheets v. Salt Lake County 45 F3d 1383, 1388 10 Cir. 1995) Police gave copies of diary to person writing a book

Slide 4 – Archives and Privacy

Defenses available

Death – privacy does not succeed death

Can be an advantage for archivist and curators

(Note: Canadian data protection laws imply post mortem rights.)

Consent – preferably in writing

Disclosure as implied consent problematic

Newsworthiness

First Amendment freedom of speech & press, legitimate public interest in facts

More than just gossip or sensationalism

Presumption of privacy

Content: medical, psychiatric

Client relationship: e.g. attorney, clergy

FERPA, HIPPA

Slide 5 – Image of letters and film

***Archives – not tabloids**

Access not controlled by statute

Eg. OUS records retention schedule

Examples from archives:

3rd/2nd party correspondent – often found in letters, but also in other media

Description of sex with other people, love letters from mistress to donor

Invasion

Unusual since most collections purchased from or donated by others

Publication of private facts

Maybe

Displayed or published in a highly offensive manner

Poor taste, sensationalizing, lurid details.

OR Case law – Anderson v. Fisher Broadcasting (1986) – obtained or broadcast purpose wrongful beyond unconsented publication – NOT ENOUGH

Defense: Newsworthiness

“Supporting a legitimate public interest or concern”

Few clear cut safe harbors = an adjudicated concern.

Slide 6 – Image of Prefontaine

No worries about privacy here

Dead

Public space

Possible issues of publicity

Slide 7 – Right of Publicity

Warhol Quote – In the future everyone will be world famous for fifteen minutes

Tort Law,

1st case to use phrase Haelan Labs v. Topps Chewing Gum

Infringing baseball cards, exclusive agreement, right to enforce & grant

1977 Zacchini Case – Supreme Court = human cannonball

State law, varies widely

Application of law questions

Law of domicile or law of event

1 for right and 1 for injury

Laws of residence – situs of economic harm

Outgrowth of appropriation

“Unauthorized commercial use of a person’s name, likeness, or other personal attribute.”

Identity + damage to commercial value

Economic interest in publicity or celebrity status

Not necessary to prove actual damage

“Celebrity” required in some states

Previous exercise in commercial interest

Increasingly uncommon

Celebrity is a commodity that has value

Viewed as a form of property. Infringement is a violation of the commercial tort of unfair competition.

Slide 8 – Archives and Publicity

Defenses available

Consent – preferably written

Newsworthiness

First amendment rights

More than just advertising

Adjudicated

Unidentifiable non-celebrities

Face in a crowd

Case law – state dependent

Federal preemption of state law = close to copyright actions

Not a defense

Death – state dependent

Descendible, often transferable

For example (IN & OK) 100 years

IN – implicit reach back 100 years from 1994 enactment, no requirement of lifetime exploitation

IN nations largest licensing companies

IN specific prohibitions to fundraising in law

OK reach back 50 years of 1985 enactment

Lack of intent to identify – state case law dependent

NY element of knowledge not a part of cause of action

Absence of consent

Lack of intent to identify

Remedies

Injunction and/or damages

Slide 9 – Ivory Poster

Our materials are appealing for use in promotion or publication

Advertising, revenue generating activities

Can't assume that because they give papers they also consent to use in revenue generation

Note: Posters are not generally newsworthy

Examples

Name of authors, artists, and performers can be used to identify the creator of a particular work.

Narrow permission for use

The Bostonians is a James Ivory film

Transformative artistic use allowed, but must be transformative

Allowed under 1st amendment

Transformative definition of California court vague

Use of a person's picture in an advertisement cannot be justified on the ground that the picture also serves an educational or informative purpose –

Beverly v. Choices Women's Medical Center Inc. 141 AD2d 89, 532 NYS2d 400 (1988) appeal dismissed

Female physician photograph used in medical center calendar

Slide 10 – Bill Bowerman & Phil Knight

What are the lessons?

Bringing two concepts together, privacy & publicity

We tend to focus on issues of copyright

With good reason, because they are numerous

These issues cannot be ignored

We needn't be scared, but we need to pay attention

The lesson is that we need to educate ourselves, our users, and our donors about these issues.

Slide 11 – Sources

Some sources used in presentation