Right of Publicity and The Celebrity Brand Dead or Alive

The right of publicity happens everywhere you look. Yet when you mention the term, most people will give you a quizzical look. What is Right of publicity you ask? And how does it fit into the licensing industry? Basically it’s a person’s inherent right to make money out of his or her name, image, likeness and other elements of their persona. Why should licensing professionals care about right of publicity in their daily practice?
Well, look around. Licensing of a person’s (primarily celebrity types) name, image or likeness is evident in products sold everywhere – brick and mortar stores, pop-up shops, online shops, mobile phone apps, and social media. Celebrity licensing is big business, and at one time, if not all the time, you will have to deal with celebrity licensing, and hence, right of publicity issues.

Licensing trends reflect society’s cultural preferences, and are phenomena that continue to grow. Especially in today’s digital world with the exponential rate in the growth of information sharing, the expansion in consumer’s awareness of brand personalities and their licensed products is sure to continue to skyrocket. Brand personalities include those of celebrities, characters, and athletes.

As this segment of the licensing industry grows, we need to remember that for a celebrity, their brand is their personal asset and intellectual property. We call this type of intellectual property the owner’s right of publicity. Right of publicity is generally defined as the right of a person to control the commercial exploitation of his or her identity, and to prevent unauthorized commercial use. Each celebrity, athlete, and character is unique, and that uniqueness is valuable.

The History of Celebrity Licensing
First, let’s look at the roots of celebrity licensing. The concept of licensing has been around for hundreds of years. Earliest examples would include those during the Middle Ages when there was the common practice of using papal or royal warrants. A royal family member would grant to a local entrepreneur a warrant or license to collect taxes, with a certain percentage paid back to the royal family. This is where the term “royalties” originated from. Moving on to the 1700s, the British nobility began to license their name under covenant to various manufacturers and retailers in return for a fee. So as we see today, companies such as Harrod’s, and Turnbull & Asser carry royal warrants on their letterheads.

In the early 1900s, we begin to see the licensing of individuals who we would define as celebrities. Shirley Temple started her career at the age of three in 1932 and after an Academy Award in 1935, soon began licensing out her name and image. By 1936 she was reported to have made more than $200,000 in licensing royalties. Later, Ideal Toy was granted a license to create dolls based on her likeness, which by 1941 had sales of over $45 million.

Soon thereafter, we see the growth of character licensing. Superman was created in 1932 by Jerry Siegel and Joe Shuster, and eventually sold to DC Comics. By the 1940s, licensed Superman products included the popular comic books, puzzles, trading cards, and toy figures. As we see today, super hero types of products continue to be a heavily licensed category. The increasingly popular Comic-Con International convention, held in San Diego each summer, is a testament to the big business of character licensing.

Fast forward to today, and examples of celebrity, character, and athlete licensing are everywhere. You walk into a large department store and you see Justin Beiber fragrances, Katy Perry clothing, and Trisha Yearwood cookware. Outside of the department store you may find celebrity-licensed cannabis products. Due to the growth of licensing in general, a whole industry was created, including licensing organizations such as the Licensing Industry Merchandiser’s Association (LIMA), and its annual Licensing Show in Las Vegas where over 20,000 people from around the world in the industry gather each year.

What are Rights of Publicity Again?
Since the popularity of buying products licensed out by celebrities, characters, and athletes continues to grow in popularity, those working in the licensing industry will most likely eventually work on some sort of celebrity related deal. That is why it is important to understand the concept of right of publicity.

In the United States rights of publicity are protected primarily by state statutes or case law, and not protected by a specific Federal law. Outside the United States, it is a patchwork of laws that govern rights of publicity rights.

As mentioned in the introduction, a general definition of rights of publicity is that it is a right of a person to control the commercial exploitation of his or her identity, and to prevent unauthorized commercial use. And as we see in the number of celebrity based licensed products, there is value in the commercial exploitation of those celebrities. Our discussion of celebrities includes popular characters and athletes, because they too have developed their own persona. In the case of characters, the holder of that character’s rights should treat those characters as individual celebrities.

Celebrity Licensing Industry
In the last few years, celebrity licensing has accounted for roughly 5.75% of all the licensing
activity as measured by the Licensing Letter. In terms of retail dollars the Licensing Letter sees the U.S. licensing industry measuring something in the neighborhood of $125 billion. Or, put another way, celebrity licensing accounts for approximately $7-$10 billion annually in royalty revenues.

Celebrity licensing can take many forms, such as:
- Online licensing
- Personal appearances
- Juvenile licensing
- Services licensing
- Life experiences from deceased personalities (holographic shows ala Michael Jackson)
- Long-term promotional licensing
- Advertising campaign licensing
- Social media (e.g. Twitter, Facebook, Instagram)
- Long-term endorsement deals
- Retail exclusive licensing

Celebrity licensing is not limited to this list. As is the business of licensing in general, the categories are constantly evolving. Take for instance, holographic images of deceased celebrities. Who predicted that category ten years ago? The “Celebrity Rights Game” is a fluid one, and licensing professionals need to try to stay current with the topic.

The future of ROP and technology in licensing

The continuing expansion of rights of publicity usage is unquestioned. One need only turn on their television to see Samuel S. Jackson or Alec Baldwin (or the latest middle-aged celebrity) constantly selling credit card services. Or Phil Mickelson ubiquitously selling golf clubs and arthritis drugs. But where are these ads being viewed? How are they being delivered to consumers today? Increasingly, on handheld devices – the iPad, a Samsung Quantum, the Microsoft Corona, the iPhone, etc. This is more than a paradigm shift. It is a revolution in how people see advertising and promotion – and therefore, right of publicity usages – technology is bringing changes in how rights of publicity are being used.

As background, we have to understand that the rise of the handheld device is probably the most important technological revolution of the 21st century. Second, we need to see that there really are three major effects on the uses of rights of publicity in our mobile society as a result of this technological revolution. First, communication is now constant and literally instant. Second, communications and marketing are becoming intertwined on social media and Internet services; sometimes making it difficult to tell the difference between a paid advertisement from honest chatter. And third, therefore, this raises new opportunities for technology to develop new right of publicity applications.

But those same devices are also bringing new legal issues and misuses. Growth in popularity and technical capability of mobile communication, has led to unique legal cases. Technology drives increasing sophistication in telecom, interfaces, apps, avatars, holography, etc. While right of publicity keeps driving into new marketing and licensing applications.

What Drives Successful Right of Publicity Licensing?

A “compatible brand fit.” When a celebrity spokesperson is working well for the endorsee brand, the message cuts through all of the advertising clutter, and creates a new narrative message for the endorsee brand that can use all channels of advertising and marketing, from traditional television and print to social media and phone apps. The act of ROP endorsement is one that can allow the endorsee brand to do the following:

- Create new markets
- Create or attract a new base of customers
- Expand sales by expanding distribution
- Change brand imagery
- Build on the spokesperson’s own brand to enhance the endorsee’s brand
- Use the celebrity to bring innovation to the traditional brand
- Challenge old ideas
All of these are factors that can influence the success of a right of publicity deal, and they all affect deal pricing. But what are the core factors that influence long term success?

**Core factors that predict successful celebrity endorsement**

Not all celebrities are cut out to be a successful licensed brand. There are generally four factors that can help licensing professionals determine if a particular celebrity will be successful in using their rights of publicity. Those four factors are:

- **Level of Celebrity**
- **Level of Endorsement**
- **Level of Use**
- **Level of Connection**

**Level of Celebrity** is the most important factor driving celebrity endorsements. This is a measure of how famous is the celebrity doing the sponsoring. A higher number would correlate with actors or athletes who are widely known. A top number of 10 would require the celebrity to be internationally recognized, with a great reputation, and have a fan friendly image. Furthermore, a score of 10 would generally mean the celebrity is under constant watch of the press and paparazzi. For companies looking to enter specific local markets, a low celebrity level might be acceptable, given the fact amongst the specific market this person might be well known. An example of this would be for a company to hire a local hero to carry their product during the local New Year's parade.

**Level of Endorsement** is the measure of how involved the celebrity is with the brand. Celebrities are busy; hence their time is worth a great sum of money. Companies with big marketing budgets can afford to purchase a larger chunk of the celebrity’s time and right of publicity for their product. Efficient marketing involves precise planning in order to maximize returns while minimizing the chance of intellectual property law suits. For this reason, the level of endorsement, how involved the celebrity will be, should be accurately described in the contract. Level of endorsement can range from a simple Photoshop of the celebrity with the product, to the creation of a new side brand such as Nike’s Jordans.

**Level of Use** is how the company chooses to use and involve the celebrity. Once a photo or commercial has been captured of the product and celebrity then it needs to be publicized. Marketers that decide to pay for a low level of endorsement can get the most out of the endorsement deal by purchasing a great deal of air time or ad space. Level of use can also range from small local ads to massive global campaigns that range across the world.

**Level of Connection** measures how much the celebrity knows about the product, and their usage. Companies who want to attach a certain image to their product can seek out celebrities who have already established appropriate identities. Professional athletes would be considered experts on endorsement deals for products that relate to their sport. Celebrities’ expertise can be measured based on the identity the general public perceives of them. Tiger Woods’ actual use of Nike golf balls and clubs is an ideal connection. Michael Jordan’s endorsement with Nike would have a high level of connection but Charlie Sheen’s endorsement with Hanes would receive a much lower score.

**Publicity** Besides the four factors we listed, there is one other key factor – that the celebrity maintains a lack of negative publicity. A celebrity can be notorious. They can be the subject of enormous amounts of buzz and Twitter activity. But there is that line across which a company as a user of their rights of publicity doesn’t want them to cross. It is an invisible line between notorious and negative publicity – and it’s hard to define – but we all know when it has been crossed.

**What’s a celebrity? – a deceased celebrity**

Licensing professionals should also be concerned with those rights of publicity even after
a celebrity’s passing. We’ve coined the term “delebrity” to define a deceased celebrity. Post mortem rights of a celebrity can be very valuable, possibly even more so, after death. We can quickly look to examples of post mortem licensing deals for the estates of Elizabeth Taylor, Elvis Presley, and Michael Jackson. Fans can still experience the likes of Michael Jackson through the Cirque du Soleil “Michael Jackson ONE” show, Elvis Presley with the recent release of his 53rd album Elvis Presley Forever, and Elizabeth Taylor’s luxury lifestyle through wearing of her many fragrances. Other dead celebrities with established licensing deals include Frank Sinatra, Fred Astaire, John Lennon, Mickey Mantle, and Marilyn Monroe. Plus, once the Prince estate gets sorted out, licensing opportunities will surely arise.

Much like Michael Jackson and his Mijac Music catalog, Prince’s “vault” reportedly contains thousands of unreleased songs. Apparently 70% of the music he created was never released, and that’s for a musician who sold 100 million albums throughout his career. Frank Zappa’s and Tupac’s estates also released posthumous albums. And by keeping those celebrities alive, their licensing potential not only remains intact, but may actually grow. According to the Forbes Top-Earning Dead Celebrities list, Michael Jackson pulled in over $115 million in 2015. For comparison sake, let’s refer back to Katy Perry, #3 on the “living” top earning celebrities list, who made $135 million, which includes earning for live performances. So $115 million isn’t too shabby for a delebrity.

The licensing industry should be very cautious of, and at the same time take advantage of, the use of delebrity rights. Currently, rights of publicity are governed by state statutes or state case law; they are not covered by traditional intellectual property Federal laws. Depending on where the celebrity dies can determine how much future value the estate can earn. For instance in California, estates hold postmortem rights for 70 years after death, while in New York postmortem rights are not recognized. Lesson here: if you’re an heir to a prominent celebrity’s estate, make sure they die in California (or Indiana for 100 years of postmortem protection).

How can you take advantage of these delebrity rights? Use technology. Take advantage of technology to pursue licensing opportunities. Use technology to expand the delebrity brand by creating new markets, attract a new generation of fans, using direct-to-consumer distribution channels. Also, take the delebrity into product categories that may not necessarily have been invented or available when they were living. For instance, with more and more states legalizing marijuana, Bob Marley’s estate is currently marketing cannabis flowers and oils, body care products that use hemp seed oil, and an assortment of marijuana smoking, storage and preparation accessories.

Future Trends
While we are focused on the celebrities of today and the past, brands and licensees should keep an eye out for future “celebrities” to license. We increasingly see that celebrities are not only those who headline big budget movies or on primetime television sitcoms, but those who are discovered on YouTube, NetFlix, or the large number of reality shows on both the networks and cable channels.

Technology continues to be a factor in how celebrities, characters, and athletes can advance their licensing potential. The use of 3-D technol-
ogy, the abundance of communication platforms, and the personalities themselves, make this area of licensing a truly exciting and important industry in the global economy. The possibilities for celebrity brand extensions are headline news. Bottom line is there is lots of potential in the licensing of celebrities, characters and athletes. When there is value, there comes along with it the responsibility in maintaining that value. Make it a win-win proposition for all involved. Remember, once again: CONTEXT + TIME = VALUE

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