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Copyright and the Use of Individual Likenesses

When an actor performs in a television, movie or commercial role, most people would assume that the resulting work is owned by the company or studio which produced the work. Since the actor is presumably paid for their services, it seems logical that the one paying the actor's salary would retain the rights to the work. Few would think that an actor would have a copyright on every movie or commercial in which they participate. The companies that produce movies, commercials and television programs, generally retain the copyrights to the productions.

But what about an actor's photographs? It may seem that someone who pays to have their picture taken would retain the rights. Generally, this is not the case. The copyright of a photograph is generally retained by the photographer (the "author" of the photograph) and not by the person being photographed absent a written agreement to the contrary. For example, if you pay someone for a headshot, and there is no written agreement assigning you the copyright in the photo, the photographer retains the copyright rights. These rights (retained by the photographer) include the right to make additional copies or reproductions, the right to make derivative works, the right to distribute (i.e., give away or sell) and the right to publicly display (i.e., post on the Internet). The photographer does not have the right to infringe your right to publicity or your right to privacy. For example, the photographer can not make commercial use of your image as explained in more detail below. If you sign a release (which contractually may give the photographer these rights) then you may have given up these rights as well. Accordingly, rights the photographer may have (by reason of having the copyright rights) may not be able to be exercised to the extent such use would infringe on the subject's right to publicity.

As an actor (or parent of an actor) it is very important for you to understand your rights, and the limits of those rights, in order to protect you and your likeness from unauthorized use. Accordingly, you should understand the laws relating to copyright, publicity, privacy and contracts.

Uses of your likeness that are not permitted by law

In most states it is unlawful for anyone to use another person's name, likeness or image for purposes of trade without the consent of the person whose image is being used. This is usually referred to as a "right of publicity" and it is a state law right. Each state differs in how they interpret and enforce this right of publicity. California has a very strong right of publicity law which makes it difficult to use photographic images of others without their consent. Of the various categories of illegal uses, there are three categories which are of particular interest to actors: advertising uses, commercial uses and uses by fans. Each of these categories are explained in more detail below. It is important to remember that uses of one's likeness are unlawful **only** when they are unauthorized. In other words, if you authorize someone either expressly (such as verbally or in writing) or impliedly (as in conduct) to use your photograph or image then you may not be able to claim there is a violation of your rights.

Advertising

Use of an individual's name, likeness or identity in advertising without that individual's consent is generally prohibited. For example, unauthorized use of an individual's photograph on a photographer's website for the purpose of advertising and soliciting either photography services or for the sale of photographs is generally a violation of that individual's right of publicity.

In these types of situations, you may need to send a cease and desist letter and/or a letter regarding the breach of the contract. Depending upon the situation, you may also need to involve third parties, such as eBay, as explained in more detail herein.

Commercial Use

Use of an individual's likeness for commercial use, such as selling photographs of that individual without the individual's consent of such sale, would generally be a violation of the rights of publicity. For example, if someone uses your image on purely commercial items, such as on mugs or T-shirts, without your consent they are also in violation of your publicity rights.

Photographs that you have allowed to enter the market without restriction on the further sale, may not be a violation of your rights. For example, photographs which you give away can be resold. Pictures get "into the market" in various ways. For instance, one may give photos to a casting director, an agent or a fan. If the use is not contractually restricted, it generally allows the receiver to further sell or give away that photo. You should consider notices such as "not for resale" or "may not be distributed or displayed without written consent." It does not permit them to make copies or make commercial use of the photograph. In this regard you may want to consider using a watermark on all photos and making web-based photos of a low resolution. Likewise, a photographer duplicating and selling the photograph would be a commercial use he is not entitled to without your consent. While one original on eBay may usually be considered a non-infringing use, selling multiple copies of the same photograph is usually an infringement of your publicity rights. In addition, a "copy" is a copy whether it is on paper or an electronic copy (.jpg).

The sale of your photos on eBay by random parties may or may not be an infringement depending upon how they obtained the photos. If they were not obtained "legally" (that is, with authorization) they are not authorized for sale. You may need to involve eBay's assistance in removing such auctions. Furthermore, the sale of headshots on eBay by photographers (or by a third party where the photographer supplied the photo), absent an agreement authorizing this specific activity, is illegal in that it's unauthorized.

Uses of your likeness which are allowed by law

While it is important to know the instances in which the unauthorized use of your image is illegal, it is of equal importance to recognize when your image can be used lawfully without your permission. The lawful uses of most interest to actors occur when images are used on a fan site or for a newsworthy purpose.

Fan Sites

Use of photos on both authorized and unauthorized "fan sites" is also of concern. Fan sites who write and get an autographed photo (even without disclosing their intent) are generally allowed to use that photo. Just because something is available on the Internet does not mean it is "public domain" or authorized. Fan sites which get a

photo from an unauthorized source, or take a photo to use without authorization from the source, are generally not protected uses.

Newsworthy Purpose

The use of a person's name, likeness, or picture for a "newsworthy" purpose does not require the authorization of the individual whose image is used. This also allows photographs of performances or photographs taken in public locations to be used in news reporting. For example, a photograph that is used to indicate an actor has just agreed to a certain part in a movie can be published without actual consent from the individual.

Breach of Contract or Release

Photos taken for a specifically described project that are then used in another manner may be a breach of the contract, and as an authorized use, is infringement of the right of publicity. Further, if there was fraud in the inducement for the release, the entire contract may be void. For example, if the photographer said the project was for a "limited edition" book – with no intention of preparing such a work – the photos cannot be used in another matter without consent to do so.

You need to recognize your rights when someone does something different than what was agreed upon by (release or contract). When you sign a contract or release, make certain it is representative of what you want to happen.

Conclusion

Your image belongs to you. Photographs of you may not. Generally, no one has the right to use your image or likeness unless you give them permission. Accordingly, carefully review all contracts and releases with this in mind. Accordingly, BEFORE you sign anything or send anyone a photo, make sure you understand the implications of the action.

Resources

U.S. Copyright Law: Title 17 U.S. Code

California Right of Publicity: Civil Code Section 3344

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