

ACQUIRING AND MANAGING THE IDENTITY INTERESTS FOR SOFTWARE AND MEDIA PRODUCTS

*Jon M. Garon*¹

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¹ Jon M. Garon, Dean and Professor of Law, Hamline University School of Law. Garon received his J.D. from Columbia University School of Law in 1988, B.A. from University of Minnesota, Twin Cities.

INTRODUCTION

The state laws of publicity, unfair competition, defamation, and privacy are among the most unsettling to navigate in licensing arrangements. This paper outlines the preventive measures that an attorney can take to assure that these identity rights are adequately identified and licensed to the greatest extent provided by law for use in software, media, advertising, and packaging.

The goals of any licensing scheme are to regulate the relationship between the parties, provide clear guidance on the obligations and conduct of each party, minimize conflict, and provide a mechanism to resolve the conflicts that inevitably arise. The simplest licensing model provides that in exchange for a payment, the licensee may engage in an approved activity. Under a software license, a software consumer may play a videogame or operate the software on an approved device. Under a gallery agreement, an art gallery may display a work of art and sell it for a commission. Under an American Society of Composers, Authors, and Publishers (ASCAP) license, a musician may perform a musical composition in a nightclub.² In each case, the licensor controls the conduct, allowing the licensee to engage in narrowly specified acts.

The licensing framework becomes more complex when each party has obligations and limitations on its conduct such that both the licensor and licensee have affirmative duties under the licensing agreement. When the licensor and licensee are interdependent on decision making the power dynamics of the relationship shift between the parties depending on the investment, obligations, timing of decision making, and interests of the parties. For example, in publishing, a publisher has dominant power over the publisher-author relationship when acquiring a book.

² See 17 U.S.C. § 101 (2002) (“A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.”).

Obligations to market and promote the book are totally under the power of the publisher while timeliness of publication rests in the hands of the author.

This complex relationship is rarely captured in the relatively simple publishing agreements typically used. In more sophisticated agreements, however, where book tours or subsidiary rights are involved, the contracts can become highly complex so that the ongoing obligations of each party are clearly delineated. The publishing industry can also reduce the length of the agreements because well-established custom and trade fosters the common expectations of the parties, reducing miscommunication and creating a normative baseline for most commercial conduct.

Modern media licenses involving Internet sites, video games, multimedia projects, and independent motion pictures follow the publishing industry's shifts of power and control. Those acquiring rights have significant leverage at the outset but lose that power as completion deadlines near. Marketing leverage depends significantly on the importance of the participants to the marketing strategy, so that if live appearances are critical to marketing, then those individuals have much more influence than for those projects where the persons involved are excluded from marketing.

In addition, these so-called "new media" industries do not have the meaningful custom or trade practice helpful to interpret common licensing provisions. As a result, the licenses should be more specific, detailing the obligations and authority of each party. New media projects are far less standardized than book publishing, resulting in the need for considerable detail and for incorporation of an easy-to-use dispute resolution mechanism.

In the context of identity-interest licenses for new media, a well-crafted license requires that (i) the identity interests are correctly identified; (ii) the obligations of each party are carefully specified; and (iii) the range of remedial measures is tightly controlled. This paper first identifies what types of interests are typically licensed in such transactions. It then identifies common uses of these interests so that full use can be made of each interest

acquired. Finally, the paper outlines the essential elements needed for an effective license of the identity interests relevant to each transaction.

I. TYPES OF INTEREST SUBJECT TO INCHOATE LICENSING

A. *The Right of Publicity*

The right of publicity is the most property-like of the identity rights subject to state law protection. The right of publicity may be defined as the right to control the exploitation of a person's name or likeness.³ The Restatement (Third) of Unfair Competition summarizes the interest by stating that “[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability.”⁴ The “other indicia of identity” may extend to protect a person's performance.⁵ Although the Restatement captures the essence of the interest, the specific formulation of the right of publicity varies widely from state to state. Perhaps the most commonly cited formulation for the modern right of publicity flows from the California formulation:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for

³ Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

⁵ See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-76 (1977). In this case, Zacchini – the human cannonball – was taped doing his entire 15 second act at the local fair. He successfully sued the television company that broadcast his act without paying him.

any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.⁶

In New York, the formulation captures the privacy roots of the right of publicity: “A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”⁷ Other states have recognized publicity rights under common law doctrine.⁸

The principle underlying the publicity right is not complex. General Mills cannot use the likeness of any sports figure on a box of Wheaties without that person’s permission. Whether or not such a use is flattering, it is nonetheless commercial and therefore requires the express permission of the person identified. Some states require that the permission be provided in writing.⁹ In other states, the consent is not required to be in writing, but a reasonable practice would demand it, particularly for highly commercial activities such as the Wheaties box. In addition to the package for

⁶ CAL. CIV. CODE § 3344 (a) (West 2002).

⁷ N.Y. CIV. RIGHTS LAW § 50 (McKinney 2002).

⁸ *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905) (recognizing the common law right of publicity before any other state).

⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. f. (identifying Kentucky, Massachusetts, Nevada, New York, Rhode Island, Texas, Virginia, and Wisconsin as requiring written consent).

a product, the advertisement for a good or service is legally covered by the doctrine.

Because publicity interests could have a chilling effect on news, comment and criticism, states and courts commonly exclude any publicity rights for those activities commonly protected by the First Amendment. California is again illustrative of the legislative framework used to separate the newsworthy from the commercial:

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such

owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.¹⁰

Despite the statutory delineations and court attempts to avoid entanglement between publicity interests and protected speech, the growth of both bodies of law have resulted in numerous contentious decisions.¹¹ While this debate has taken center stage in the academic debates over publicity interests, the debate is only marginally relevant to the issue of licensing. Sound advice suggests that even marginally commercial activity should be licensed to avoid the risk and potential exposure a party would undertake if it were to rely on a First Amendment defense to the exploitation of another person's publicity interests. Perhaps only the category of docudrama represents the area where the choice to license is truly a case-by-case and person-by-person issue.

By acquiring publicity rights, the risk of tort liability is transformed into a readily calculated cost of production or advertising. For example, the use of Angelina Jolie as Lara Croft on the Tomb Raider videogame packages requires a license agreement for such use. Arguably, Ms. Jolie has no such right with regards to the motion picture, but the Screen Actors Guild collective bargaining agreement nonetheless specifies the right to use the likeness and the obligation to include screen credit.¹² The contractual provisions provide a much better basis upon which to structure a transaction than any concept of copyright preemption.

Content creators may occasionally choose not to license publicity rights materials when the product in question is a strong

¹⁰ CAL. CIV. CODE § 3344 (d)-(f) (West 2002).

¹¹ *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Ct. App. 1995).

¹² *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 652-53 (Ct. App. 1996).

parody of the subject. In *Cardtoons*, for example, the use of baseball players names, statistics, likenesses, and team affiliations were held to be a protected form of speech and therefore not subject to publicity rights claims because they were used as parody trading cards that ridiculed professional baseball.¹³ This may be an appropriate choice for some commercial endeavors but the risks and uncertainties remain high.

B. Federal Lanham Act Protection under Section 43(a)

Federal law provides a form of unfair competition protection that closely approximates the right of publicity and provides for more general unfair competition relief. Under §43(a) of the Lanham Act:

Any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.¹⁴

The ability to claim that a person's name has been used without authority to falsely imply the affiliation, association, or approval of goods or services comes very close to duplicating the

¹³ *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996).

¹⁴ 15 U.S.C. § 1125(a) (2004).

state rights of publicity. While there have been cases where a publicity right has been violated without violation §43(a), those situations are quite rare.¹⁵ Instead, §43(a) has the effect of expanding liability for publicity-type unfair competition claims to those parts of the country that have rejected state publicity claims or have not ruled on the issue. It also provides federal court jurisdiction over the various identity claims that may be brought.

A recent Supreme Court decision has suggested a reduction in the scope of §43(a) in some contexts. In *Dastar Corp. v Twentieth Century Fox Film Corp.*, the Supreme Court limited the use of §43(a) when applied to a public domain television production that was being repackaged by Dastar without any acknowledgement of Twentieth Century Fox or others involved in the creation of the original film.¹⁶ The Court properly recognized that a work protected by copyright should be free to use by any party and in almost any manner once that work has fallen into the public domain. The Court explains that non-identification cannot therefore be actionable in this context.¹⁷ The Court implies that accurate identification of the names involved would also be beyond any §43(a) claim because such designations would not be false.¹⁸

The Court did not seem to believe that Twentieth Century Fox would not make a claim for false association or false sponsorship in the event that the original credits had been retained.¹⁹ In fact, the Court's hyperbolic language still leaves open the possibility that such a claim may be brought. If the public domain producer creates a very poor reproduction, such as a DVD

¹⁵ *E.g.*, *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992).

¹⁶ *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

¹⁷ *Id.* at 35-36.

¹⁸ *Id.*

¹⁹ *Id.* at 36 (“In this case, for example, if Dastar had simply ‘copied [the television series] as Crusade in Europe and sold it as Crusade in Europe,’ without changing the title or packaging (including the original credits to Fox), it is hard to have confidence in respondents’ assurance that they ‘would not be here on a Lanham Act cause of action.’” (quoting trial transcript)). *Id.*

with physical scratches or poor quality encoding, then the slavish copying of the original credits may create an actionable claim that the original producer is now being associated with low-quality reproductions. Such a claim had been available under §43(a) and may survive *Dastar*.

Despite the confusion and limitation fostered by *Dastar*, the general applicability of §43(a) to a federal form of publicity interest remains resilient. Unauthorized associations with famous persons, unfounded endorsements of facts, and false implications of a product's approval will remain actionable under both state publicity claims and federal Lanham Act causes of actions. As a result, a creator of products using publicity or identity interests must acquire those rights when selling a commercial product or advertising that product.

C. Defamation

In contrast to the property interests embodied in publicity rights, defamation law represents the least tangible of interests involved in identity licensing. Because of the risk involved for a publisher or producer, the risk from claims of defamation should, to the extent possible, be minimized.

A statement or product is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."²⁰ Under California law, "libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."²¹ Under the common law, a statement was

²⁰ RESTATEMENT (SECOND) TORTS § 559 (1977). See also *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

²¹ CAL. CIV. CODE § 45 (West 1999).

considered defamatory if it held one out for hatred, ridicule, or contempt.²²

Potentially, a manufacturer or publisher can defame a person in a number of different ways. Imputing that a person is a criminal or is involved in a crime involving moral turpitude,²³ has a loathsome and communicable disease,²⁴ conducts one's business, trade or profession in a dishonorable manner,²⁵ or participates in serious sexual misconduct²⁶ represent "per se" slanders that are readily actionable without any proof of special harm.²⁷ Other statements or images may be actionable even if they fall outside these categories, if the communication falsely lowers the reputation of the person and results in specific, calculable damages.

While defamation is typically considered a media problem, it can arise in a product development or marketing context. Unauthorized use of identity for a character in a hyper-violent videogame or on the packaging for a deviant sexual aid will be defamatory. Merely acquiring publicity rights will not immunize such use as consent to the particular use is also needed.

One of the few unique aspects of the Internet is a federal restructuring of common law state defamation liability principles. As a result of broad safe-harbor provisions of the 1996 Communications Decency Act, Internet Services Providers and most websites that merely reproduce other parties' content are immune from liability for republishing defamation.²⁸ At common law, a different result would occur if a publisher republished the defamation than if the republication was committed in a passive

²² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting) (a "[d]efamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule.").

²³ RESTATEMENT (SECOND) TORTS § 571 (1977).

²⁴ *Id.* at § 572.

²⁵ *Id.* at § 573.

²⁶ *Id.* at § 574.

²⁷ *Id.* at §§ 569-70.

²⁸ 47 U.S.C.S. § 230(c)(1) (Lexis Nexis 2004).

manner, such as by the bookseller who distributed the defamatory work. In early Internet libel cases, the analogy seemed to depend on the amount of editorial control retained by the ISP or bulletin board.²⁹ Congress recognized that punishing those ISPs which attempted to provide some measure of editorial control created the wrong incentives and instead elected to provide robust protection from third party liability.³⁰

When distributing the content of third parties, producers and publishers will generally not be liable. In the context of allegedly misleading information on eBay, the court in *Gentry v. eBay, Inc.* explained:

It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the

²⁹ *Compare* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (finding no liability because the bulletin board system provided no means to control postings) *with* *Stratton Oakmont, Inc. v. Prodigy*, 23 Media L. Rep. (BNA) 1126, (finding liability where Prodigy provided a “family oriented” mediated service).

³⁰ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).

Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. Congress' purpose in providing the §230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id.

information that appellants claim is false or misleading.³¹

Similarly an online dating service was held immune from liability for fraudulent postings of an anonymous user.³² These cases represent a strong sentiment that courts will not find secondary liability for other party's posted content. As a result, the law has changed significantly in the new media industries so that although primary liability for defamation has remained unchanged, the risk for secondary liability in online publishing has diminished.

D. Privacy

In addition to traditional defamation, the common law doctrine of false light creates liability for invasion of privacy by giving a person "unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position."³³ Even if the statement is laudatory, it may be actionable if it is highly objectionable and false. False light has evolved into a close approximation of defamation, allowing recovery for those statements that are injurious but not so contemptuous as to be defamatory.³⁴ As such, false light claims are intentional torts requiring intent or reckless disregard of the truth for all parties rather than the negligence standard available for libelous statements made regarding private persons.³⁵

In addition to false light, other privacy invasions may be actionable. Unwanted, highly offensive, broadly disseminated publication of one's personal private information remains a

³¹ *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833 n.11, 121 Cal. Rptr. 2d 703, 717 n.11 (Cal. Ct. App. 2002).

³² *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

³³ RESTATEMENT (SECOND) TORTS § 652E (1977).

³⁴ *Time, Inc. v. Hill*, 385 U.S. 374, 384 (1967).

³⁵ *Id.* at 387.

common law tort.³⁶ Broad publication of a person's physical or mental health issues may result in liability, as would any number of other statements that are true but highly embarrassing when broadcast to the public and are of little public concern.³⁷

Privacy has extended beyond the traditional common law concept in recent years. Today, various federal regulations provide protection for personally identifiable information in a variety of different fields. Academic or educational records,³⁸ health care records,³⁹ financial records,⁴⁰ and the personal information of children under the age of thirteen⁴¹ are protected by federal law. Arguably the fraudulent creation, trafficking, or use of personal identification is a separate federal offense.⁴² As a result of this overlay of private information protection, producers and publishers of content rich projects must be sure that they have either received permission to redistribute such information or they have de-identified the aggregate data in such a manner that no personally identifiable information is available to the public. The aggregated data can then be used for a host of research and entertainment products.

Finally, a recent New Hampshire decision may indicate an additional realm of potential privacy liability. After a young man

³⁶ RESTATEMENT (SECOND) TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

³⁷ *E.g.*, *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762, 767 (1st Dist. 1983).

³⁸ Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. 1232(g) (1994 & Supp. IV 1998).

³⁹ 45 C.F.R. § 164.501 (2001). See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,461 (Dec. 28, 2000) (codified 45 C.F.R. pts. 160 and 164).

⁴⁰ Gramm-Leach-Bliley Financial Services Modernization Act of 1999, 15 U.S.C. § 6801 (2000).

⁴¹ The Children's On-line Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501-6505 (2004).

⁴² The Identity Theft and Assumption Deterrence Act, 18 U.S.C. § 1001(a) (2002).

used an online research firm to identify the social security number and work address of a New Hampshire woman, the man fatally shot her outside of her office, later killing himself.⁴³ The New Hampshire Supreme Court found that the state recognized the common law rights of privacy and publicity.⁴⁴ More than merely recognizing the law of privacy, the Court found the distribution of the victim's personal information actionable. "The threats posed by stalking and identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so that an investigator has a duty to exercise reasonable care in disclosing a third person's personal information to a client."⁴⁵ As a result, this type of case has the potential to expand the duty of care for websites, researchers, and investigators involved in the public disclosure of private facts. Whether this duty of care expands to other states remains to be seen.

II. THE USES OF IDENTITY INTERESTS

The identity interests that derive from publicity rights, consents to use private information, and waivers from claims of unfair competition or defamation can take on a variety of forms. There are many different points in the creative process where identity interests may be helpful to producers or publishers of creative materials. Each use and its market should be carefully identified prior to the execution of a license agreement to assure the producer or publisher that the scope of the rights acquired are sufficient.

⁴³ *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 816 A.2d 1001 (2003).

⁴⁴ *Id.* at 157 (adopting the RESTATEMENT (SECOND) OF TORTS § 652C formulation).

⁴⁵ *Id.* at 155.

A. *Creation of Product Content*

First, there are products⁴⁶ focusing on the identity itself. Autobiographies, biographies, personal websites, fan websites, and infomercials typically fall into this category. Docudramas and true-life stories can fall into this category for the persons highlighted by the work. Each of these types has content primarily about the celebrity or person featured. In this category, the person who is the subject of the project is likely to demand significant authority or control over the use of the identity.

Second, there are products where the celebrity or identity is used to endorse or promote some other product or service. This group may include infomercials, videogames and websites featuring celebrities, sports-based games featuring celebrity players, and the docudramas from the perspective of the minor characters to the story. In this group, the identity is part of the product but not central to it. For these products, the producer or publisher is unlikely to agree to allow the party licensing the identity to retain substantial control over the use of the identity.

Third, there are products where the particular identity is reproduced in a manner incidental to the product. For example, background photographs that viewers can recognize, names used in song lyrics, personally identifiable data that can be culled from databases, and actors' images when those actors are portraying characters other than themselves (as actors rather than in their role as celebrities). These reflect the most common uses of identity interests for which simple releases are fine for most commercial uses, and implied consent often suffices in practice for casual use.

⁴⁶ Whereas the term "product" is used to include both editorial and commercial activities. Whether the product is a newspaper, motion picture, videogame, website, or action figure, the identity issues are similar. Those products that are characterized as noncommercial speech receive additional First Amendment protection, but other than this distinction, the products are treated in roughly the same manner. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (finding allegedly defamatory publication in question was a paid advertisement).

B. Media and Distribution of Products Created

Each of the three categories listed above reflect the relationship of licensed identity to the creation of the product. Such usage can be categorized separately in terms of how the identity interest will be developed by the producer or publisher. It should be treated distinctly from the question regarding what media will be used to reproduce, distribute, or display the final identity interests.

Producer and publishers must acquire the rights to reproduce, distribute, and display whatever product they create. In situations where the celebrity retains approval rights, those rights should be focused on the development of the product. Other than issues regarding quality control, celebrities should be far less involved in controlling the distribution of the content once it is created. For example, a professional golfer may be very involved in approving the graphic images of a video game and may even demand approval over the design of the golf courses used in the game. Nonetheless, it is unlikely that the golfer will be involved in the choice of computer platform for which the game is optimized or the video-clips featured in the advertising. By separating out the creation of content from its distribution, the parties can more appropriately structure approval rights for the project.

In terms of the distribution media, another aspect of this use flows from the packaging of the product created. Dust jackets, j-cards, jewel cases, blister-packs, and other content packages typically include some of the identity information incorporated into the product. An intriguing cover to a book or trailer for a movie may result in a more defamatory statement than anything contained in the book or film itself.⁴⁷ Similarly, the trailers, television advertisements, billboards, and marketing materials can create an entirely separate use for the licensed identity. While this use is

⁴⁷ See, e.g., *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318 (Cal. Ct. App. 1997) (claiming the trailers from the motion picture were defamatory and an invasion of privacy, perhaps more damaging than the actual film).

included in most identity releases, it should be specified and recognized for its potential to change the nature of the license.

C. Product Endorsements

Finally, certain aspects of the use of the identity transform the usage from one product category to another. For example, the creation of action dolls using an actor's likeness is a use outside of the actor's performance requiring express, additional permission. Similarly, the use of actors or celebrities to sell a third party's product requires express, additional permission. Whether the other product is a Happy Meal or a BMW, the association between the person and the product will be different in an ad for that product than it will be in a movie or television episode. The right to use a person's identity in the editorial content of the product does not extend to the right to advertise or sell a different product. The agreement should specify the two uses separately.

The parties must pay close attention to the product's development process when using the celebrity to endorse a product. When doing so, a celebrity will first want to know precisely what the product is. If the endorsement includes any claims, the celebrity should have confidence those claims are legitimate. The Federal Trade Commission has promulgated guidelines for advertisers to avoid committing unfair and deceptive trade practices (FTC Guides).⁴⁸

An endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.⁴⁹

⁴⁸ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 *et. seq.* (2001).

⁴⁹ *Id.* at § 255.0 (b).

The identity release is not a waiver of the obligations under the FTC Guides. Under the FTC Guides a person endorsing a product must conduct some minimal due diligence. Notwithstanding the rights acquired under the identity licensing agreement, the parties should make every effort to assure that the endorsing party has taken reasonable efforts to substantiate any claims made.⁵⁰ “Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser.”⁵¹ The FTC Guides require that the statements of the endorsing party “reflect his [or her] good faith belief and opinions.”⁵²

The ongoing obligations for the endorsement to reflect honest opinions and experience may be incorporated into the license agreement, but regardless of the drafting, the producer is obligated to meet this test. Repudiation by the endorser will undermine the ability to continue to use that person to market or promote the product. This provision of the license agreement should therefore be phrased as an affirmative duty of the endorsing party, separate from the identity interests acquired elsewhere in the agreement.

III. THE EXCULPATORY CLAUSE AND OTHER PROVISIONS

Initially, it may seem inconsistent that a licensing scheme can provide a remedy from the risk of defamation and false light invasion of privacy. The primary method of reducing the risk of claims to defamation is thorough due diligence, so that statements are not published if they are false. To the extent that false

⁵⁰ *FTC v. Garvey*, 2002 U.S. Dist. LEXIS 25725, 20, 2003-1 Trade Cas. (CCH) P73932 (C.D. Cal. Nov. 25, 2002).

⁵¹ 16 C.F.R. § 255.1 (c).

⁵² *FTC v. Garvey*, 2002 U.S. Dist. LEXIS 25725, at 20. *See* 16 U.S.C. § 255.1 (c). “[W]here the advertisement represents that the endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as he has good reason to believe that the endorser remains a bona fide user of the product.” *Id.*

statements continue to be published, reasonable efforts should be made to eradicate falsehoods. Since a party must be at least negligent to be found liable of defamation,⁵³ identifying, conducting, and documenting reasonable steps to avoid falsehood is an important part of the efforts to head off claims of negligence.

For example, televised advertising claims must be approved for broadcast by the commercial clearance department for each network. Of the “approximately 50,000 submissions of proposed commercials (40,000 new, 10,000 revised versions) ... approximately 25,000 are cleared.”⁵⁴ While the clearance process primarily involves review for the credibility of claims made in the advertisements, it also includes documentation of the necessary publicity rights, questions of taste, and substantiation of comparative or other claims.⁵⁵ From the commercials submitted,

⁵³ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (declaring unconstitutional liability without fault.) Specifically, the Court explained “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347. This standard has generally been that of negligence. See RESTATEMENT (SECOND) TORTS at § 580B cmt. C.

⁵⁴ Richard Kurnit, Product Distribution and Marketing, ALI-ABA Course of Study Materials SJ075 (March 2004).

⁵⁵ *Id.* The networks’ response to challenges to comparative advertisements are also informative:

Any commercial that appears on a network may be challenged. Challenges to network clearance are the least expensive, and often the most expeditious way to obtain modification of a competitor's commercial, if it is running on network television. Each network receives approximately 200 competitor challenges to commercials previously accepted. Approximately 40% of these challenges result in some modification of the advertising. A challenge is instituted by a simple letter that states the basis. The networks will evaluate the challenge. If the commercial was cleared only conditionally, a network might withdraw clearance immediately. Usually the advertiser will be given ten days to respond to the challenge (or to pull the spot). Meeting with the network clearance departments is advisable in any challenge.

“approximately one-third have been modified to satisfy network objections. Many are withdrawn. About 2% are rejected.”⁵⁶

The preventative nature of licensing agreements allows publishers and producers to take additional steps to minimize risks of claims for defamation or falsification of endorsement claims. By entering into written agreements with the objects of the published projects, publishers and producers can reduce the range of potential claims.

At the most extreme, this would include a process whereby the subject of a project would be provided a copy at each step in the editorial or creative process and all objections dealt with through the revision or elimination of content. While this may be done in some situations, it transfers a great deal of editorial control to the subject of a project. Such a license might be appropriate for autobiographical works, “vanity” projects, or projects where the star is the key to the merchandising. One can imagine that former boxer and grill-meister George Foreman has substantial control over the manner in which his name and likeness are used. A sports video game license may give similar approval rights to each athlete so as to preclude the characters from cheating in the game.

At the other end of the defamation licensing spectrum, publishers and producers routinely include a clause which purports to waive any claims for defamation or invasion of privacy in addition to licensing the rights to use one’s name and likeness. This waiver of claims reduces the ability of a person to later claim that he or she has been injured as a result of the use of identity. A highly experienced media attorney⁵⁷ suggests the following licensing provision:

Of course, the advertising can continue to run in spot and cable, but the advertiser is at additional risk that a subsequent lawsuit will include a claim that the advertiser was on notice that unbiased experts found the substantiation inadequate.

Id.

⁵⁶ *Id.*

⁵⁷ Richard Kurnit, Frankfurt Kurnit Klein & Selz.

I shall have no right of approval, no claim to compensation, and no claim (including, without limitation, claims based upon invasion of privacy, defamation, or right of publicity) arising out of any use, blurring, alteration, distortion, illusionary effect, faulty reproduction, fictionalization, or use in any composite form of my name, signature, picture, likeness, voice, and biographical information.⁵⁸

This provision illustrates the type of waiver that captures the rights of publicity and the waiver of defamation, privacy, and unfair competition actions. It specifically eliminates the need for prior notice or approval, and broadly defines the range of use and misuse of the publicity rights.

A. Scope of Use Provision

At the outset, it may be contractually necessary to provide some explanation regarding the intended use of the acquired identity rights. The context of the “use of” clause should specify the intended use or, at a minimum, specifically state that any use may be made of the rights acquired. Unless the contract is a complete agreement with an integration clause, oral statements made about the intended use of the identity rights may be admissible. In one famous example, the singer Cher successfully brought an unfair competition claim for an interview published in an adult-men’s magazine when it had been purchased for a general audience publication.⁵⁹ The clause quoted above would not protect the licensee from such a claim.

⁵⁸ Richard Kurnit, Product Distribution and Marketing, ALI-ABA Course of Study Materials (March 2004).

⁵⁹ *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 637 n.1 (9th Cir.1982), *cert. denied*, 462 U.S. 1120 (1983).

B. Waiver for Intentional Torts

The greater problem with the quoted clause is not what it fails to include but rather what it purports to include. The signatory to the clause is agreeing to waive claims for various torts that have not yet been committed. In California, for example, the civil code specifically prohibits the intended form of waiver described in the proposed release. "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."⁶⁰ Minnesota has a common law tradition that is consistent with the statutory formulation of California.

A clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced. . . . Though we have not heretofore addressed the issue, courts of other jurisdictions have held such clauses invalid if they purport to exonerate a party from willful or wanton recklessness or intentional torts.⁶¹

Thus Minnesota and California both articulate the common public policy proposition that it is improper to contract out of intentionally tortious conduct. Courts are willing to uphold exculpatory clauses for assumption of risks and willing to extend those risks to the simple negligence of the contracting parties in some fields of endeavor but states are unwilling to allow for broader exculpation.

In the context of defamation waivers, this policy poses something of a dilemma. The exculpatory provision quoted above will discourage litigation but most likely be void as including the

⁶⁰ CAL. CIV. CODE § 1668 (West 2004).

⁶¹ *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). *See also* *Ball v. Waldoch Sports, Inc.*, 2003 Minn. App. LEXIS 1105 (Minn. Ct. App. Sept. 2, 2003) (unpublished opinion).

attempted waiver of intentional torts. Revisions of the clause to limit it to negligent defamation may have limited impact and diminishing benefit.

C. Consent to Particular Use as an Alternative to Waiver for Defamation

To the extent that a person providing his or her identity interest agrees that the intended use is not defamatory or an invasion of privacy, the problem can be eliminated. This is particularly true for those uses of the identity that would otherwise be *per se* libelous. As an example, an advertiser for a communicable disease treatment or deviant sexual item can eliminate the risk of an actor's lawsuit simply by informing the actor of the purpose of the ad and receiving an agreement in advance that the intended use is not defamatory. Actors who knowingly agree to participate in the product development, packaging, or advertising of the items cannot later claim that the results are defamatory. As a matter of risk management, the knowing consent should always be carefully captured in writing.

If the intended use is more typical, then the description can be broader. Actors serving as models for video games can sign a fairly general release which includes the language "I hereby consent to the use of my name, likeness and identity for any and all purposes, including without limitation computer and video games." If the products are more violent or adult oriented, then specifying that the games "may be rated 'M' for mature" only adds to the quality of the consent being obtained. The "any and all purposes" clause has the added benefit of limiting challenges to the license on the grounds that permission had not been granted for some future technology or format.⁶²

⁶² If this is a significant issue, then a formal future technologies clause should be included in the final, integrated document. Such a clause should specify that the "rights granted herein may be used in perpetuity in any medium now known or hereafter devised throughout the universe."

If the party acquiring the identity interests wishes to obtain the broadest possible release, then one possibility is to attempt to distinguish between any “negligent act or omission” which is subject to the waiver and not to any “intentional or willful conduct intending to cause harm or injure the reputation of the party.” This distinction tracks the public policy concerns and may provide a slightly broader scope for protection of the waiver.

D. Severability and Reformation Provision

In addition to the waiver clause itself, the agreement will benefit from a severability clause that states the intent of the agreement and instructs the parties and adjudicators as to its interpretation. A recent example cited by an approving Minnesota court illustrates the approach:

THE UNDERSIGNED further expressly agrees that the foregoing [assignment,] release, waiver, and indemnity agreement is intended to be as broad and inclusive as permitted by the law of the Province or State in which the event is conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.⁶³

A formulation such as this is essential to avoid the nightmare scenario of a party denying the enforceability of the identity licensing clause above by claiming that since the defamation and privacy sections were void as against public policy, the clause and even the agreement must fail. Using a severability and reformation clause may become essential to avoid sharp dealings and avoid all-or-nothing litigation involving the agreement.

⁶³ Ball v. Waldoch Sports, Inc., 2003 Minn. App. LEXIS 1105 (Minn. Ct. App. Sept. 2, 2003) (unpublished opinion).

E. Arbitration Provision

Perhaps more important than any of the careful drafting suggested above, may be the terms of the arbitration provision. Whatever the public policy implications of mandatory arbitration in other settings, the choice to include mandatory arbitration is essential for an identity licensing agreement.

First, the value of the licensing agreement may be substantially compromised by any public conflict regarding the dispute. If the celebrity endorser of a product sues the manufacturer of that product, the value of the endorsement may erode regardless of outcome.⁶⁴ A public trial may permanently damage the product. Arbitration assists both parties in keeping the dispute, trade secrets, and other details out of the public record.⁶⁵

Second, and perhaps more controversially, an arbitrator may have a greater ability to look behind the general public policy, which disallows waiving intentional torts in the context of fictionalization and defamation. Although the legal arguments may become highly complex, the practical question is whether the actual use was so far beyond the reasonable expectation of the parties that the consent and waiver clause should not be enforced. At its heart, a litigant's objections can be restated as "*I knew the producers planned to fictionalize me, but I did not expect them to show me like that.*" Whatever the "that" is represents the alleged offense. Indeed, no matter what the contract states, a producer will be liable if it fraudulently misleads the licensing party into believing that the rights are intended to be used in a neutral or flattering way when in fact the producer's intent was to disparage or ridicule the subject.

⁶⁴ This also suggests that the arbitration proceeding and any determinations should be treated as confidential by both parties. While this is a common outcome of settlements, it can be incorporated into the arbitration clause itself.

⁶⁵ Parties may also seek confidentiality provisions in the agreement. These provisions go significantly beyond merely keeping the dispute out of the public record.

If I am correct that this is the heart of most disputes, then an arbitrator with experience in the advertising or entertainment fields is vastly superior to a state court judge or jury which must contort this claim into the fractured legal framework of defamation and contract fraud. I expect that the conceptual disconnect between the legal framework of these claims and the underlying disputes helps explain why so few of these valuable and contentious cases result in trials and verdicts.

For these reasons, an arbitration process is central to the core of a broad licensing system. The arbitration provision should be drafted broadly to incorporate any and all disputes between the parties, “including whether such dispute or claim is arbitrable.”⁶⁶ Do not limit the provision to disputes arising under particular provisions of the contract. By drafting the arbitration clause to include all disputes among the parties, it may provide the written arbitration clause required under the Uniform Arbitration Act even if post-agreement oral modifications are alleged to have changed the terms of the agreement.⁶⁷ By setting the scope of the agreement as between the parties, even subsequent oral agreements are covered by the arbitration clause.

Based on the arbitration provision at issue in *EEOC v. Waffle House, Inc.*⁶⁸ and the suggestions of the American Arbitration Association (AAA),⁶⁹ the following represents an example of the type of arbitration clause appropriate for many identity-licensing disputes.

Any controversy or claim relating to this contract or arising between the parties to this agreement, including whether

⁶⁶ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282 n.1 (2002).

⁶⁷ *See, e.g.*, MINN. STAT. § 572.08 (2003) (“A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

⁶⁸ *EEOC v. Waffle House, Inc.*, 534 U.S. at 282 n.1.

⁶⁹ American Arbitration Association, Current Clausebook, available at <http://www.adr.org/sp.asp?id=22020> (last visited May 10, 2006). [hereinafter *Clausebook*].

such dispute or claim is arbitrable, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties. The arbitrator will be selected from a panel of attorneys having experience with and knowledge of the [advertising] or [film and television industries].⁷⁰

The brackets indicating film and television or advertising should be informed by the use to which the identity will be put. For publicity rights, advertising is the predominant industry while for a life story film and television industry experience is more relevant. Depending on the parties and the scope of the claim, a panel of three arbitrators may be preferable to a single arbitrator. AAA provides a simple approach to determining such a panel.

⁷⁰ Cf. *EEOC v. Waffle House, Inc.*, 534 U.S. at 282 n.1. The original text provided the following:

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

Id.

In the event that any party's claim exceeds \$1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators. The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.⁷¹ It may also be helpful to separately specify the governing law and the location of the arbitration.⁷²

F. Injunctive Relief

In addition to incorporating arbitration, it may be important to assess the role of injunctive relief in the proceedings. A producer or publisher may wish to draft the arbitration clause to preclude the potential for preliminary injunctive relief. While this limitation has the potential to affect both parties, the manufacturer of a product or producer of content runs significant financial risk of a preliminary injunction that disrupts a marketing campaign. The cost from disruption in production and advertising can outweigh the net profit expected from the agreement.⁷³

⁷¹ *Clausebook*, *supra* note 69, at Qual 6, Arbsel 1.

⁷² For example, “[t]his agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.” *Clausebook*, *supra* note 69, at Gov 1.

⁷³ For example, in a complaint by Caterpillar that Disney had unfairly competed and diluted the Caterpillar trademarks by using real Caterpillar equipment in *George of the Jungle 2*, the court refused to grant the injunction. *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913 (C.D. Ill. 2003).

[S]hould the Court impose a TRO on the release of *George 2*, the Defendants would lose the benefits of its ongoing nationwide marketing campaign promoting the imminent release date of October 21, 2003. This would entail the

In rare situations there may be the need to prohibit the celebrity or person licensing the identity from engaging in unacceptable conduct. In those situations, limited and pre-identified misconduct can be carved out of the arbitration provision, so that the parties explicitly agree to allow injunctive relief.⁷⁴ For instance, if the objective of a license agreement is to secure the exclusive rights to a person's life story, then the ability to enjoin the person from giving interviews or entering into agreements with third parties may be more valuable to the producer or publisher than the protection afforded by barring injunctive relief.

Similarly, a celebrity licensing his or her identity may object to this approach. The celebrity's interest may include the ability to terminate the contract if the products created do not meet the contract's specified production standards, products continue to be sold after the termination of the agreement, unauthorized products are sold along with those authorized, or other misconduct is committed by the producer or publisher. If the risk of such an injury is too great, the celebrity may insist on the right to injunctive relief. The ability to elect or reject injunctive relief does not supplant the arbitration agreement. The clause may empower

disruption of simultaneous marketing campaigns mounted by retailers and other associated parties made in reliance of the October 21, 2003, release date. Re-release of *George 2* would require mounting another, potentially more costly marketing campaign and would result in the loss of more time during the holiday season. Furthermore, the costs and time lost in making the alterations desired by Caterpillar will be substantial. As a result, the Court holds that granting the TRO will do more than merely preserve the status quo.

Id. at 923.

⁷⁴ If the subject of a project is known for certain notorious behavior, then such a contractual provision might be appropriate. On occasion it may become necessary to use endorsement agreements to compel celebrities to stay sober or free of drug use; to avoid high-risk sports; or to participate in certain events mandatory to the license.

or prohibit the arbitrator's ability to fashion equity-like remedies, depending on the demands of the parties.

If injunctive relief is sought to be allowed under the arbitration, then the following provision may be used:

Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).⁷⁵

If the decision is made to eliminate injunctive relief, then the following provision is preferable: "Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount."⁷⁶

Finally, in almost every instance involving identity issues, the primary risk of liability stems not from actual damages but from punitive damages. A clause eliminating this risk strongly benefits the producer or publisher, but may also protect a celebrity from claims of willfully breaching contractual obligations.⁷⁷

⁷⁵ *Clausebook*, *supra* note 69, at Prelim 1.

⁷⁶ *Id.* at Rem 5.

⁷⁷ *E.g.*, *id.* at Rem 1. ("The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.")

*G. Exclusivity; Delegation and Assignment Provision;
Integration*

In addition to the other important contractual provisions listed above, a few boilerplate provisions may be useful in protecting the parties. Identity interests are often licensed because of the exclusivity they provide. No advertiser wants to see the same actor marketing a competing product. More importantly, many life stories are purchased not to truly stop the defamation and privacy claims so much as to enforce the exclusive access to that source or perspective on the story. The agreement, therefore, must specify the nature and scope of the exclusivity.

Similarly, much of each party's conduct is unique and personal to that party. As a result, the person licensing the identity interests should be prohibited from assigning or delegating any duties or obligations under the agreement. Celebrity endorsers may similarly desire to prohibit any assignment or delegation of the agreement to protect themselves from being traded to other companies with whom they might not choose to work.

Finally, although there is a tendency to attempt to write simple and easy to use releases, these contracts may not provide the adequate protection needed to protect a producer or publisher from the seller's remorse that sometimes occurs when licensing identity interests. As a result, a longer but complete contract should be used, including an integration clause that specifies that "this agreement contains the entire understanding of the parties as to the subject matter hereof, and all prior agreement as to such subject matter have been merged herein. This Agreement may not be altered or amended in any way except by an instrument in writing signed by the parties hereto." The integration clause helps reinforce both the arbitrability of all aspects of any dispute and should help to eliminate any claims that the characterization of the identity usage was represented outside the terms of the agreement.

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⁷⁸ *Id.*

CONCLUSION

The need to license the identity of a person is not limited to motion pictures or Happy Meal characters. Individuals identified on websites, packing in videogames, and in other creative content have a variety of claims that they can bring to participate in the financial opportunity afforded by successful commercial products. Through advance planning, the exposure to potential liability can be greatly reduced and the costs of production accurately managed.

The legal basis for these identity rights derive from the mixture of publicity rights, unfair competition law, privacy laws, and consents to or waivers from defamation claims. These various rights intersect with an array of different uses for identity production and marketing. Whether the use is to create a life story, an information database, a videogame, or an infomercial, there is an identity interest at stake.

By careful drafting of the grant of rights, the scope of consents and waivers, and the arbitration clauses, the producer or publisher licensing these rights can craft an agreement that acquires sufficient interests to regulate the relationship between the parties and avoid costly litigation. Put another way—in business today, everyone’s in show business. The drafting principles outlined herein merely allow us to raise the curtain.