

Einstein's Visage, Hebrew University and the Right of Publicity

By

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What's Einstein Got to Do with the Right of Publicity?

In the May 17, 2022, issue of the *Guardian* appeared an article titled, "Who owns Einstein? The battle for the world's most famous face," by Simon Parkin. This long article delves into the thorny issue of postmortem publicity rights, particularly, when there is no mention of these rights in the decedent's will. <https://tinyurl.com/2etakyvu> *We suggest you read this article before reading our article.*

What Is the Right of Publicity?

The right of publicity is generally defined as an individual's right to control and profit from the commercial use of his/her name, likeness and persona, which shall be referred to in this article as the "individual's identity". Protecting the individual from the loss of commercial value resulting from the unauthorized appropriation of an individual's identity for commercial purposes is the principle purpose of this body of law. *Find Law*

In order to learn more about the right of publicity, I asked attorney Dave Koehser, my legal advisor, to comment on this article and, in particular, the right of publicity. Here are Dave's comments.

Right of Publicity Issues

This raises several interesting issues, some of which I have encountered before. As noted in the article, in the US the right of publicity is determined under state law. A few states have statutes that provide for a right of publicity after death, but even those vary. Some put a time limit on it, and others require that the right to have been exercised during the person's lifetime in order to survive after death. Of course, it only takes one state to create a problem, and the laws in California, Texas and Tennessee are generous in awarding post-death publicity rights. (Can you guess why there is a generous statute for this in Tennessee?)

Questions Raised by the Einstein Case

This particular case raises multiple questions, including:

- Can Hebrew University, which is not a natural heir, claim the right based on Einstein's will? Statutes that provide for a post-death right of publicity usually award the right to statutory heirs or to a person expressly named as receiving the right in a will.
- Does the right even exist, since it was not in existence and recognized by any state's law at the time of death?

- Most right of publicity statutes and the common law on the right of publicity expressly exempt books, documentaries and other similar works, even if unauthorized, that are about the individual. For example, I can publish a biography of JFK or Kurt Cobain, whether the estate wants me to or not. This comes up regularly, as I have had several agents/heirs try to claim that we cannot publish an unauthorized book about their deceased client/relative, but responded by citing the applicable statute and common law that cuts them off.

The question here is a bit further afield, since the book is not directly about Einstein, but is using his image to pair with a title (and presumably some subject matter) associated with him. It is generally thought to be permissible to use a famous person's image on the cover of a book or magazine about a larger subject in which that person participates; for example, a photo of Aaron Rodgers on the cover of a book about the NFL from 2010 - 2020 or Richard Petty on a book about NASCAR in the 1960s. Does this book fit into that category or is it another step removed, with Einstein's image merely used to draw attention to the book (for example, a book on quarterbacking techniques for junior high football players, with a photo of Aaron Rodgers on the cover)?

- The book in question appears to be in international distribution, so that raises another can of worms in that outside the US some nations may have very clear right of publicity statutes with a post-death provision, and thus it becomes a question of clearing the book in each jurisdiction.

Children's Books and the Right of Publicity

The right of publicity question comes up frequently with children's books, as it is common to publish a children's book about some famous living athlete or other celebrity. As noted above, I frequently get claims from agents of famous individuals arguing that we cannot publish a book about the individual. It's essentially a shake down for money, as they know that the law is not on their side, but they hope someone will just pay them and not bother to challenge their claim. Sometimes famous people will register their names as trademarks for books and try to use that to cut off publication of unauthorized books, but that usually does not work either, due to the trademark nominative fair use doctrine, which says that you can use a trademark as needed for identification purposes to identify the subject of a legitimate book.

Michael Jordan, Kareem Abdul Jabbar, and Vanna White as Litigants

The right of publicity is an interesting and not fully developed area, so it makes for frequent complaints. Some extreme examples:

- Michael Jordan sued a Chicago grocery store chain for an ad that congratulated him on being an MVP;

-Kareem Abdul Jabbar sued an Oldsmobile dealer. According to the February 9, 1996, *Chicago Tribune*, "At issue is an Oldsmobile ad run in 1993 during which the announcer asked who held the record for being voted the tournament's outstanding player, and the screen showed the name of Lew Alcindor of UCLA."The ad called the car "a definite first-round pick."

-Vanna White sued for an ad with a robot that looked like her and turned letters on a board.

They all won their cases, but their cases turned on true commercial use (i.e., advertising), so that gave them a leg up in asserting a claim.

Concluding Thoughts

As a publisher, be aware that you could encounter right of publicity issues if you design book covers, or magazine covers, or write advertising copy and are contemplating using the photo or other likeness of a celebrity. Most likely you won't encounter the right of publicity in your day-to-day publishing, but you should know that it exists.

Free Articles of Interest

- R-23, *McHugh's and Koehser's Rights and Permissions Glossary*, 2019, 10 pages, <https://tinyurl.com/4r2yw4w3>
- R-28, *Rights and Permissions: McHugh's Recommended Books and Web Sites*, 2014, 3 pages, <https://tinyurl.com/yzh6f9n6>

Right and Permissions Services

John B. McHugh is an experienced publishing executive and consultant with special expertise in managing rights and permissions. His advice and insights cover all areas of intellectual property management for both print and digital products.

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- Grow revenues by fully exploiting the income potential of your digital rights. McHugh will help you effectively organize your rights management to take advantage of the exploding innovation in digital distribution.
- Educate yourself and your staff about the confusing and ambiguous subject of copyright with McHugh's executive coaching and question and answer service.
- Get a detailed analysis of the strengths and weaknesses of every area of your rights management with McHugh's ***Rights and Permissions Audit***. He will make recommendations to optimize staffing, streamline management processes, and increase rights, revenues and profitability. *Most importantly, McHugh will alert you to serious legal exposure and when you should contact a copyright attorney.*

David Koehser, Attorney-at-Law

David Koehser is a Minneapolis-based lawyer who practices in the areas of copyright and trademark law. Dave's website contains articles on the topics of: Publishing Law, Merchandise Licensing, Copyrights and Trademarks, and Theater and Performing Arts. Request a copy of Dave's informative quarterly e newsletter, *Publishing and Merchandise Licensing Law Update*. Dave has a B.A. from the University of Iowa and a J.D. *cum laude* from the University of Minnesota Law School. You can find his website at www.dklex.com. Contact Information: dklaw@cognisinc.com; 612-910-6468

About John B. McHugh

John B. “Jack” McHugh is a 40-year veteran of the publishing business. Jack has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary’s Press. Jack is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality and, for a two-year period, he served as the Interim Publisher at the Project Management Institute. He is a member of the ASAE Advisory Board for Publishing, Communications, and Media Issues and Practices.

Jack’s specialties include association/nonprofit publishing, book publishing, executive recruiting, journal publishing, rights and permissions, new ventures, organizational design, and social media strategy and policy. Mc Hugh is also the manager of the LinkedIn™ group, **Association and Nonprofit Publishing**. <https://www.linkedin.com/groups/2949807/>

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