

Some Privacy Here!

Know your rights—and the rights of others—when planning your next shoot

Q: If I filmed a wide shot in a city, and caught a number of unsuspecting bystanders in the shot, what could happen if my film makes a ton of money? Can a bystander sue me? —*T. Miller, TENNESSEE*

A: Yes, if you capture “unsuspecting bystanders” in a film you can be sued by those bystanders, if they are clearly recognizable. But in reality, lawsuits more commonly arise when the bystander is clearly recognizable *and* the depiction has caused damages (i.e. humiliation, embarrassment). Generally, the types of lawsuits brought in such cases revolve around violation of privacy rights and on occasion defamation, depending on how the bystander is depicted.

WATCH THOSE LANDMINES: ASSORTED TYPES OF LAWSUITS

“Intrusion into seclusion” is a type of privacy violation typically characterized by the situation where someone on private property is unknowingly captured on film through the use of a telescopic lens. Another type of privacy lawsuit is called “false light depiction.” This suit is typically brought by someone angry about the manner in which, through the magic of editing, the individual is depicted as saying, doing or subscribing to a thing or belief to which he or she does not. “False light” is a close cousin of “defamation,” but there are some technical legal differences. Fans of Comedy Central’s “The Daily Show” know that much of the show’s humor comes from funny edits that depict the interviewee in a humorous fashion. You can be certain, Comedy Central has releases from each of those interviewees (who signed them without reading the contents, which likely stated “we can humiliate and ridicule you!”). Without those releases, a “false light” privacy claim could possibly exist.

Yet another subset of the “right of privacy” is the “right of publicity.” In its simplest definition, the right of publicity is essentially a claim of “misappropriation of likeness.” The bystander claims, “You took away my



right to say I do not want to be affiliated with this product.” Right of publicity claims are akin to forcing someone to be a “product pitchman” without compensation. For example, about five years ago, I represented a number of women who were all gainfully employed as fashion models. Those models appeared in various lingerie catalogs and ads. Certain strip clubs took those photographs and incorporated them into their own advertising. These clubs misappropriated these women’s likenesses and lawsuits ensued.

Celebrities are more apt to sue than non-celebrities when their image is captured without their permission because they can argue that the use of their image without compensation was tantamount to a producer forcing them to be in their film for free. Though celebrities generally have an easier time showing damages, non-celebrities can sue, as well. Producers are extremely susceptible when an unlicensed image appears in commercials or a box cover for the movie.

Of course, hovering around these assorted lawsuits is the First Amendment. All of these claims are inevitably measured against the full extent of the First Amendment and its strong bias against restriction on free expression. Most cases are highly fact-specific and different outcomes can result depending on the facts of each case.

Therefore, determining when a release is needed and when it may be safe to take a calculated risk and use footage without a release is an inexact science which legal experts, insurance carriers and distributors wrestle with on a daily basis—and legal advice can change as new cases develop. Newsworthy documentaries are generally viewed as news items that do not require releases. But recently a patriotic soldier who felt he was depicted as unpatriotic in Michael Moore’s *Fahrenheit 9/11* filed a “false light” suit against Moore and the film’s distributors. Will this affect distributors’ willingness to acquire documentaries without comprehensive releases?

THE BOTTOM LINE

The general rule should always be: If you *can* get a signed release, get it! If you are shooting in an uncontrolled street with unsuspecting bystanders, convert them to *suspecting* bystanders.

If it is nearly impossible to obtain individually signed releases, the next best thing is to have very large "warning signs" at every ingress and egress (that's lawyer talk for entrances and exits) that passes through the field of the camera. The warning signs should alert everyone in plain English that filming is occurring for commercial exploitation purposes and by crossing past this sign, the bystander gives his or her consent to be filmed. Also, make sure a cameraman films all of the signs at the time they go up and come down, so you can document where the signs were located during the shoot for evidentiary purposes.

BUT WHEN WOULD AN AVERAGE GUY EVER ACTUALLY SUE?

There are numerous cases involving real-life lawsuits. But rather than dissect actual cases which might lead to actual lawyers writing to complain about how I presented their cases, listed below are two fun fictional scenarios where an "average guy" might bring a lawsuit over his image being readily recognizable on film:

Example 1: Yabba Dabba Doo, No Clearance Releases For You!

It is hard to find a more average guy than Fred Flintstone. In one episode of the most classic of all classic television series, "The Flintstones" (What? Don't all legal articles cite Hanna-Barbera for legal authority?), Fred and Barney lied to their wives so they could go to a bachelor party at the Water Buffalo Lodge on a night that Fred was supposed to be celebrating his wedding anniversary. While Fred and Barney were out cavorting, they unsuspectingly fall prey to their antics being captured by "Peek-a-Boo Camera," a hidden-camera television show quite popular in pre-historic times. When the boys return home, they realize their wives have seen them and their lie has been revealed. In the actual episode I believe the boys, without thinking of the ramifications, chiseled their signatures on a release made of stone.

Now, assume Fred and Barney never signed an appearance release with "Peek-A-Boo Camera" and their appearance on the show led to Wilma and Betty divorcing Fred and Barney. It would be easy to see how these two "unsuspecting bystanders" would be angry enough to file a brontosaurus-sized lawsuit.

Example 2: When I Was Down On My Luck, This Town Walked All Over Me

A successful attorney feeling over-worked and under-loved simply abandons his job, his family and all his earthly possessions and begins a new life as an alcoholic homeless man living on the streets. A film crew sets up a few shots for a major motion picture on the very street corner he calls home. His disheveled face, along with his ragged clothes and shopping cart are captured on film by the director, who finds the depiction to be "artsy." Despite being thoroughly unkempt, his friends, family and former co-workers all readily recognize the man when they see this blockbuster film.

Now, assume some time passes. The attorney climbs out of his alcohol bottle and his depression and is ready to return to his former life. He is confident he can re-piece together his life and no one will ever know where he was or how low he sank. When he returns home, he is dumbfounded to learn that everyone knew. He rents the videotape depicting him in his past days with the homeless. His attorney venom begins to flow, his wrath builds and the re-vitalized lawyer places the producers directly in his litigious sight.

CLOSING THOUGHTS

Remember, clearance decisions are often quite difficult and that is why lawsuits regularly arise. Releases should always be obtained from everyone all the time. When shooting crowd scenes in public places where individual releases cannot be obtained, utilize large, clearly-written placards informing the public that filming is occurring and if they cross a certain line they may be captured on film and by crossing into that area they give their consent to be filmed. You should also coordinate with production counsel to ensure the proper wording and adequacy of the signage for the given genre and type of scene being filmed. If a release was not obtained, then contact qualified legal counsel to help guide you in determining your next step. No producer enjoys dealing with the legal stuff, but when those issues arise, your production attorney can guide you on the proper path leading to the right answer. In addition, if you adopt steps to consider the legal issues that might affect your production before and during filming, you will have a greater ease in resolving the issues when it comes to secure distribution (and the insurance required by distributors) for your film. **MM**

Have a question for David Albert Pierce, Esq.? Email it to counselor@moviemaker.com.

Article written by David Albert Pierce
Reprint courtesy of MovieMaker
Magazine

PIERCE
LAW GROUP LLP