

## Library Use of Photographs and Videos

Under Ohio's right of publicity statutes, one may not use an individual's "persona" (including such person's name, voice, signature, photograph, image, likeness or distinctive appearance) for a commercial purpose without appropriate prior written consent. Though libraries do not typically consider themselves to be engaged in "commerce," libraries should assume that their relevant uses of photographs and videos of patrons and other individuals are commercial in nature and subject to the statutory restrictions. Accordingly, in using photographs and videos on its websites and social media pages, and in newsletters, announcements and other media, the general rule is that a library should not use or make reference to an individual's persona without that individual's prior written consent, where the use involves any of the following (collectively deemed to be "commercial purposes"):

- (1) Identifying the library or its products, merchandise, goods, services or activities;
- (2) Advertising or soliciting the use of the library's services; or
- (3) Fundraising.

However, there are certain statutory safe harbors that allow for use of an individual's persona for a commercial purpose without first obtaining an appropriate written consent. These exceptions to the general rule are set out below in the Section entitled *A Signed Consent is Not Required When*.

The following are some guidelines for when prior written consent should be obtained in regard to a library's use of photographs/videos depicting patrons or other individuals.

### A Signed Consent Should Be Obtained When:

- The individual is recognizable or identified by name and the intended use of the photograph/video will express or imply that the individual appearing in the photograph/video endorses the library or a particular library program or that the person holds a particular belief or opinion regarding the library or some other matter.
- The photograph/video depicts the specific library materials that a recognizable individual is using or borrowing from the library.

### A Signed Consent is Not Required When:

- The photograph/video will not be used for a commercial purpose.
- The individual is not recognizable in the photograph or video (e.g., face does not appear or the distance is too great).
- The individual is one of many depicted in the photograph or video and is not identified by name. **Example:** The library may post to its Facebook page a candid photo of a library event in which many individuals are depicted participating in such event, so long as the individuals are not named in the post.

- The photograph/video is used in connection with material that has political or newsworthy value, or in connection with the reporting of an event or topic of general or public interest. **Example:** In reporting the appearance of a former OSU football player at a recent library function, the library could include a photograph of the player in the library's newsletter, without the player's prior consent.
- The photograph/video is used to advertise or make a commercial announcement in regard to the library's activities that are political or newsworthy in nature. **Example:** The library may use a local TV newscaster's photograph to advertise her upcoming appearance at a library function, without the newscaster's prior consent.

### Additional Examples

Consider the following example: The library photographs several patrons working contentedly at a table in the library's new reading room, focused on their work, each with a tall stack of books (with the titles not obvious, to comply with the library records statute, of course). Could the library use that photo in a newsletter to illustrate a newly opened reading room, even if it identified the patrons by name? For practical purposes, the answer is probably yes. The fact that multiple patrons are depicted in the photo, and that the patrons are depicted just using the library in an ordinary way, means that there is a lesser implication that any of the individuals is endorsing the library or the new reading room.

Now consider this variation: Instead of several patrons, there is only one. And, the patron is smiling directly into the camera. Could the library use that photo on the cover of a brochure urging participation in a summer reading program? Here, right of publicity considerations would urge caution. The single patron is the focus of the cover of the brochure. There would likely be more of a sense that this patron endorsed the summer reading program. So, this use would likely need a written consent.

### Avoiding Undue Surprise

Regardless of whether a signed consent is statutorily required in a particular situation, a library should take steps to avoid a circumstance where a patron is unduly surprised by the use of a particular photograph or video in which they appear, as people are more likely to sue or take other adverse action when they are caught off-guard or offended. In an effort to avoid undue surprise, a library might, when hosting events that will be photographed or filmed, consider posting signs in a conspicuous location informing patrons of the photography/filming and the fact that the library may use the resulting images for promotional purposes. Such a notice does not serve as a substitute for a signed consent, and should not be relied upon for that purpose. However, it does (i) put some patrons (i.e., those who read the sign) on notice that they may be photographed or filmed during the event, and (ii) give patrons the opportunity to raise any objections to such photography, filming or resulting uses at the time of the event.

### Photographs/Videos of Minors

In general, photographs/videos depicting minors are subject to the same right of publicity considerations as apply to those depicting adults. However, a library should keep the following things in mind when considering the use of such materials:

- Any consent required for the use of a photograph/video depicting a minor would have to be obtained from the minor's parent or guardian.
- From a practical standpoint, some parents may be more sensitive in regard to use of photographs/videos of their children as compared to photographs/videos of themselves. This may be especially true where there is an ongoing custody dispute, threat of domestic violence, or some other family situation that may cause one parent or the other not to want the whereabouts or activities of the child publicized. Accordingly, libraries should be especially cautious when using images of minors and should err on the side of obtaining the parent's/guardian's consent.

### Conclusion

It is unlikely that the typical library uses of photographs/videos of patrons on websites, social media platforms and newsletters will give rise to right of publicity problems. However, knowledge of the ground rules and asking the basic question "Does the planned use of the person's image make it appear that the person is endorsing the library?" can go a long way toward avoiding trouble.