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RE: Use of photographs of Sea Grant activities on websites (MASGC 07-007-09)

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Dear Melissa,

Thank you for your question about the use of photographs of Sea Grant activities on websites. Meaghin Burke of the Mississippi Law Research Institute (the Legal Program's parent department) has researched the issues and prepared an excellent response memo, which I have reproduced below (with minor editing) under the "Discussion" heading. The information in this letter should not be taken as formal legal advice, but rather as our objective analysis of the relevant legal issues.

Question Presented

What are the potential legal problems with using photographs (especially of children) on websites to highlight Sea Grant activities?

Short Answer

The law in this area is not well developed in Mississippi. However, a general overview of the state of the law nationwide illuminates some potential issues.

Publication of a photograph may impact the subject's right to privacy. In some circumstances the publisher could be liable for the torts of misappropriation or false light. These issues may be resolved by acquiring the subject's consent to publish the photograph. Parental consent may be necessary for photographs of children.

In the absence of express consent, factors affecting potential liability include the purpose for which the photograph is being used, the age of the subject, and whether the location was public or private. Generally speaking, people in public places have a decreased expectation of privacy.

Discussion

The use of a person's likeness without permission creates tension between two major areas: First Amendment free speech concerns and the privacy interests of the photographed individual. This tension can reflect itself differently depending on the circumstances surrounding the image and the use of the image.

Please note that the law relating to rights of privacy is poorly developed in Mississippi, as the state judiciary has only given perfunctory attention to the rights of privacy. Much of this discussion, therefore, relates to broad trends in the law that have not yet been adopted or fully developed under Mississippi law.

Rights of privacy in Mississippi

The Mississippi Supreme Court has acknowledged (though not unequivocally recognized) the four traditional rights of privacy: "(1) the intentional intrusion upon the solitude or seclusion of another; (2) the appropriation of another's identity for an unpermitted use; (3) the public disclosure of private facts; and (4) holding another to the public eye in a false light."¹ These four rights of privacy, as defined in Mississippi, are "distinct and separate sub-torts."² These torts have different elements and allow for different damages.³

Two of these torts seem particularly relevant with respect to the use of photographs: misappropriation and false light. Misappropriation is available in Mississippi for plaintiffs whose identities are used for the commercial advantage of a defendant without knowledge or express consent of the plaintiffs.⁴ In Mississippi, the tort of misappropriation encompasses the Restatement's approach to damages; namely, "one who has established a cause of action for invasion of his privacy is entitled to recover damages for his mental distress proved to have been suffered if it is a kind that normally results from such an invasion."⁵ It is important to note, therefore, that pecuniary damages need not be proven in the tort of misappropriation. "[A]n intrusion which is of very little commercial consequence can nonetheless cause serious emotional distress."⁶

The second tort with potential application is "tortious invasion of privacy through publicity placing a person in a false light."⁷ To prove false light, a plaintiff must demonstrate that the false light in which the plaintiff was placed would be highly offensive to a reasonable person and that the

¹ *Deaton v. Delta Democrat Publishing Co.*, 326 So. 2d 471, 473 (Miss. 1976).

² *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999).

³ *Candebat v. Flanagan*, 487 So. 2d 207, 209 (Miss. 1986).

⁴ *Id.* at 210.

⁵ *Id.* at 212.

⁶ *Id.*

⁷ *Cook v. Mardi Gras Casino Corp.*, 697 So. 2d 378, 382 (Miss. 1997).

defendant had knowledge of or recklessly disregarded the “falsity of the publicized matter and the false light in which the other would be placed.”⁸ To prove false light, the plaintiff does not need to demonstrate that the plaintiff was defamed; merely proving that false characteristics or conduct have been attributed to him is sufficient.⁹ Mississippi’s adoption of false light was not explicit; post-*Prescott* decisions have held the tort to be implicitly recognized.¹⁰

Use of images when releases have been secured

When releases have been secured, the primary legal issue relates to the scope of consent given in the authorization. No Mississippi cases were found directly relating to the ramification of exceeding the scope of consent. Other states have, however, been willing to award damages to those whose images were used in a manner that exceeded the scope of their consent.

New York courts have demonstrated willingness to enforce the language of photograph releases. “[I]f there is a limitation in the consent as to time, form or forum, the use of a name, portrait or picture is without consent if it exceeds the limitation.”¹¹ On the opposite end of the spectrum, New York courts have also been willing to uphold very broad and general releases.¹² While New York law is not binding on Mississippi courts, it serves to highlight the important role that well-written consents and releases can fill.

In conclusion, though there is not direct guidance from the Mississippi courts, other courts seem willing to enforce the language of the authorization contract to protect a plaintiff’s privacy interest.¹³ In fact, “many of the cases in which the right of privacy has been protected are instances where plaintiff had consented to his or her photograph being taken in the first instance, but because defendant then used the photograph for a further and different purpose... it is held that there is no waiver or consent for such later use.”¹⁴

Of course, minors are unable to effectively contract a release, as they lack capacity to form a contract.¹⁵ A child may not, therefore, grant consent to use his or her image. Parental or guardian permission would have to be secured in order to have a valid release for use of a child’s image.

Use of images when releases have not been secured

When releases have not been secured, several concerns arise. The analysis will change depending on the purpose for which the photograph is being used, the age of the photographed party, and the location where the photographs were taken.

⁸ *Id.*

⁹ *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 80 (Miss. 1986).

¹⁰ *See Cook* at 382.

¹¹ *Spiegel v. Schulmann*, 2006 U.S. Dist LEXIS 86531, *52 (D.N.Y. 2006).

¹² *Id.* at *55 (determining that there was no material issue of fact as to the scope of consent when language in release had no limitations).

¹³ *See Leto v. RCA Corp.*, 341 F. Supp. 2d 1001, 1006 (N.D. Ill. 2004) (recognizing that plaintiffs’ claims turned on the scope of the release given by the plaintiffs); *Faber v. Condecor, Inc.*, 477 A.2d 1289 (N.J. Super. 1984) (analyzing the scope of consent with respect to plaintiff’s photograph).

¹⁴ *Faber* at 1294.

¹⁵ *In re D.N.T.*, 843 So. 2d 690, 717 (Miss. 2007); *Johnson Motors, Inc. v. Coleman*, 232 So.2d 716 (Miss. 1970).

Purpose for which photograph is being used

“One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials.”¹⁶ As a general rule, portrayals that can be categorized as newsworthy or of public concern, informational, or artistic are shielded from liability.¹⁷ This rule stems from the idea that the need to disseminate information to the public outweighs individual privacy rights.¹⁸ There is a critical distinction, therefore, between commercial uses of a photograph and informational uses of a photograph.¹⁹ Courts have long looked to the distinctions between commercial speech and more protected types of speech; these distinctions are frequently not perfectly clear. For instance, the Supreme Court has acknowledged that entertainment can enjoy First Amendment protection both on its own terms and under the notion that entertainment itself can constitute news.²⁰

While many commentators have decried the somewhat artificial distinction between commercial use and informational use, most courts will likely attempt to categorize speech according to its nature in order to assess the potential liability of a defendant because the common law refuses to recognize tort actions for invasion of privacy where the publication relates to matters of public interest.²¹ Note that courts do not impose high standards on the “newsworthiness” of an item; it appears to be a fairly low standard.²²

Age of the photographed party

The age of the photographed party becomes an important consideration when attempting to argue “implied consent.” If a subject is aware that they are being photographed and his or her reactions reasonably indicate consent, the photographer may be able to assume implied consent on behalf of the subject.²³ A subject was found to have impliedly consented to the taking and publication of his picture when he encouraged the photographer to take his picture at a sporting event.²⁴ In *Neff*, the court clearly rejected the plaintiff’s argument that publication in a magazine published for profit created a misappropriation on behalf of the magazine.²⁵ The First Amendment was found to be a complete defense to the magazine based on the newsworthy nature of the sporting event and the implied consent of the plaintiff.²⁶ This “implied consent,” however, requires capacity on behalf of the subject.²⁷ Children, as discussed above, are incapable of forming capacity with respect to contracts and arguably are incapable of granting valid implied consent.

¹⁶ *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

¹⁷ Peter Felcher & Edward L. Rubin, *Privacy, Publicity, & the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1585 (1979).

¹⁸ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

¹⁹ See <http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter12/12-b.html>.

²⁰ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977).

²¹ *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 793 (1995).

²² See *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (holding that an update on a former child prodigy constitutes news).

²³ Bert P. Krages, *Legal Handbook for Photographers: The Rights and Liabilities of Making Images* 36 (2d ed. 2006).

²⁴ *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Location where photographs were taken

As a general rule, “there is no liability for photographing a person in a public place.”²⁸ This approach is reflected in the Restatement Second of Torts, which indicates that those in public have removed themselves from seclusion and consequently decreased their personal expectations of privacy.²⁹ Courts have made clear distinctions between photographs taken in public locations and photographs taken in private locations.³⁰ In short, though on-point Mississippi law is lacking on this particular subject, courts seem willing to acknowledge that in public places plaintiffs have a decreased expectation of privacy and decreased ability to argue invasion of privacy interests.³¹

Conclusion

As the information above shows, there are indeed potential legal concerns that arise when photographs are published. These concerns may or may not apply to the photographs you want to publish. The analysis is very fact-specific, so each situation should be examined carefully before you proceed. I would be happy to help if you have questions about a specific situation.

I hope this information is useful to you. If you have any further questions about this subject, or about any other subject, please feel free to email or call. Thanks again for bringing your question to the MS-AL Sea Grant Legal Program.

Sincerely,



Josh Clemons
Research Counsel

²⁸ *Key v. Compass Bank, Inc.*, 826 So. 2d 159, 165 (Ala Civ. App. 2001).

²⁹ RESTATEMENT (SECOND) OF TORTS § 652B cmt. c.

³⁰ *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935 (Mass. 1979) (noting that pictures taken in private places would be subject to a claim of invasion of privacy).

³¹ *See Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1427 (8th Cir. 1991).