

# The Delaney Report

## “Legal Perspectives”

“Legal Perspectives” is a supplement that appears periodically in *The Delaney Report* to update and inform our readers on the latest legal issues that are of relevance and importance to their industries.

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### Celebrity Advertising/Endorsements

The power of celebrity persona to promote and sell products and services is unchallenged. Advertisers increasingly turn to “mega-celebrities” (e.g. **Lebron James, Jerry Seinfeld, Derek Jeter** and now **Michael Phelps**), as well as lesser known public figures, to base advertising campaigns on. The legal issues with respect to celebrity advertising and endorsement deals, and the potential pitfalls encountered, are multi-faceted and merit close attention by advertisers contemplating a celebrity-based campaign.

#### When Is An Agreement With The Celebrity Required?

Always. Despite state and federal laws expressly protecting the rights of every person (celebrity or not) to exploit their own persona, frequently advertisers fail to recognize the need for an agreement with the celebrity whose name or likeness is being exploited. Most states have “right of publicity” laws which prohibit the use of any person’s name, likeness or image without advance written permission, if the use is for advertising or commercial purpose. “Commercial purpose,” in this context, is broadly interpreted and such use, whether or not a personal endorsement is stated or implied, is prohibited. To counter theft of publicity rights, celebrities closely guard their publicity rights and monitor the airwaves, print and internet for unpermitted uses. A recent example involves a lawsuit concerning a press release (not an advertisement) from **Cingular** comparing the company’s technical advances to **Chuck Yeager**’s breaking the sound barrier. Yeager sued, and the case is pending.

Whether the “right of publicity” survives a celebrity’s death, giving a celebrity’s heirs the right to control the use of the celebrity image, depends on the law of the state in which the celebrity was domiciled. An increasing number of states have concluded that the “right of publicity” survives death; such states typically provide, by statute, a period of years after which these post-mortem rights expire. Of the states that have considered this issue, only New York and Wisconsin currently refuse to recognize post-mortem publicity rights. An additional remedy is found in Section 43(a) of the **Lanham Act**, a federal law which prohibits false and deceptive advertising and has been held to prohibit an advertiser’s false/misleading representations concerning product endorsement, sponsorship or origin.

#### Federal Regulatory Guidelines Governing Endorsements

When the use of a celebrity’s name involves an endorsement, an additional set of rules apply. The **Federal Trade Commission (FTC)** has issued fairly extensive guidelines governing the use of endorsements and testimonials. An “endorsement” is defined as any advertising message that a consumer is likely to believe reflects the opinions, beliefs or experience of the person appearing in the ad. Federal law requires that the endorsement must reflect the “honest opinion” and “beliefs or experience” of the endorser, must be truthful, be capable of substantiation (if any product claims are made) and, where circumstances require it, explicitly disclose the connection between the endorser and the seller of the advertised product.

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## Legal Pitfalls Of Celebrity Endorsements

**Moral Clauses.** Most endorsement deals contain heavily negotiated clauses providing for early termination upon the occurrence of specified events involving the celebrity, such as legal entanglements (arrest, conviction, divorce, etc.), misconduct (drug use, immoral behavior) or conduct detrimental to the advertiser's image or reputation, or to the celebrity's image. The invocation of morals clauses often involves a delicate and nuanced analysis. A recent case study is actress **Sharon Stone**, whose statements suggesting that the post-hurricane loss of life in China might be attributable to "bad Karma" caused by China's treatment of Tibet apparently resulted in the pulling of her **Dior** ads in China – but apparently not the complete rupture of the endorsement relationship.

**False Advertising.** Celebrity endorsers and "spokespersons" need to be carefully scripted so that they do not exceed the boundaries of "substantiable claims," or the celebrities' beliefs and experiences. Advertisers, similarly, must portray the celebrities and their views and qualifications truthfully and realistically. A **Pfizer** ad campaign for Lipitor presenting the inventor of artificial hearts, Dr. **Robert Jarvik**, as an avid rower was recently pulled, after it was embarrassingly revealed that Jarvik was neither a rower, nor a practicing physician.

**Personal Liability.** Several years ago the FTC sued retired professional baseball player **Steve Garvey** for his role in appearing to endorse Enforma dietary supplements, causing a flurry of concern among celebrity endorsers and their attorneys. Garvey appeared in infomercials and elsewhere promoting the efficacy of the Enforma system, and also appeared on the company's website and on packaging materials. An appellate court ultimately dismissed the "participant liability" and "endorser liability" case against Garvey, after finding, among other things, that the FTC had not proven that Garvey's conduct violated the FTC Guidelines or that Garvey was recklessly indifferent to the truth of his statements or avoided ascertaining the truth.

## Conclusion

The allure of celebrity endorsement and promotion is well-founded. The inherent risks to the advertiser and to the celebrity from such a relationship may be lessened by a thoughtful review of the circumstances unique to each deal.

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