

Jumbo and Not So Jumbo Risks of Displaying Fan Images at Sports and Event Venues

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Sports venues have displayed images of individuals attending their events on jumbotrons for decades. This practice continues to thrive largely due to the principle that people do not have an expectation of privacy at public events. Marketing teams have increasingly upped their jumbotron creativity in recent years through popular programs such as the “kiss cam,” “karaoke cam,” and the more recent trend of comparing attendees to celebrity lookalikes. Although these types of uses have not resulted in significant litigation to date, it is nevertheless important for sports teams and venues alike to exercise caution in how they administer such programs. Of potential concern may be claims concerning the right of publicity, copyright, and other privacy issues.

More than half of the states recognize the right of publicity in some form—either through statutory protections, common law precedents, or both. In the states that recognize these rights, obtaining consent to use an individual’s name, image, or likeness can help defend against a publicity rights claim. It is common practice for event tickets to include language that grants the venue (or its partners such as a sports team or event performer) the right to use attendees’ images for event-related purposes such as capturing fan enthusiasm. However, this consent may not reasonably extend beyond event-related purposes if the individual’s likeness is used for more commercial purposes. For instance, using the individual’s likeness for advertising or promotional purposes may be considered “commercial” and thus increase the risk of liability. This is because several of the states’ statutes or common law concerning the right of publicity impose liability on commercial use that was done without consent of the individual. Some states that recognize the right of publicity place more weight on commercial uses than others in assessing potential liability. Obtaining consent through event tickets, while prudent practice, becomes less reliable as the use becomes more commercial, particularly given the less than conspicuous consent method. In

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other words, capturing the moment and fun at the venue presents minimal risk, but using those images in larger publicity campaigns would be problematic.

Outside of the right of publicity, sports event marketers should be cautious of potential copyright infringement claims and false endorsement claims. When selecting an image of a celebrity to use in a celebrity lookalike program, marketers should procure the right to display the image on the jumbotron. Although there are arguments that the use of an image may qualify for the fair use affirmative defense given the “comparative” commentary aspects, the strength of the defense can be compromised if the comparison was used in a commercialized manner. This is analogous to “commercial use” discussed above for right of publicity concerns. Further, using the image in a manner that promotes the team or venue, could cause consumer confusion about the celebrity’s endorsement, in potential violation of the false endorsement restriction under the Lanham Act. Ultimately, sports teams and venues should exercise caution in using these images to promote the team or venue, or sell or advertise other products.

Furthermore, in recent years due to the ever-evolving technological landscape, there have been concerns regarding biometric privacy issues. Several national (and international) sports leagues utilize biometric facial scans at their events. When purchasing tickets to events, many venues include a notice, typically in a small typeface. In around 20 states, privacy laws prohibit the processing of sensitive data (including biometric data) without clear, conspicuous consent which allows individuals to opt-in or opt-out. Texas, Illinois and Washington each have their own specific laws that require explicit consent for the use of biometrics.

Recently, a class action lawsuit was filed in the U.S. District Court for the Northern District of Illinois, regarding a sports team’s alleged collection of biometric data of game attendees. Although this issue is developing and has yet to be fully litigated, sports teams and venues should nevertheless exercise caution in how they administer programs which use attendees’ images—either be it on the jumbotron or in biometric facial scanning. Attendees should be cognizant of the limitations on privacy at public events, especially with facial recognition technologies, smart phones, and other novel technologies.

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