

Appropriation of personality: How to protect your image from unapproved use

By Sport Solution Program Managers Shane Henry and Steven Teal



was unsure of how to best go about it.

Recently a case came into the Sport Solution office that was a first for us, but is something that many athletes have likely experienced. At issue was a web site that was using an athlete's picture to promote a product without permission. The athlete wanted the picture removed from the site, but

The first thing to know if you encounter this situation is that you have the right to protect the use of your name or likeness. In Canada, this is known as **appropriation of personality**. Should you come across a situation such as this, the first question to ask is whether or not your NSO gave permission to use your image. If the answer is yes, then this issue should be addressed with your NSO. If the answer is no, there are two options that you can pursue—one easy, the other more complex.

The easy option is simply to request that the web site remove the picture immediately. Without permission from an authorized source, the company posting your image may be breaking the law. If they refuse to remove the picture, it may be that they have grounds to maintain their web site as is.

If a legal remedy becomes necessary it is important to know the elements that constitute **appropriation of personality**. When an issue such as this arises, Canadian courts will look to balance your privacy interests with the public interest in freedom of expression. An example of a public interest would be a magazine using your picture in a newsworthy fashion.

One legal precedent that was not considered newsworthy was discussed in the case of *Aubry v. Editions Vice Versa Inc.* Here, a photographer took a picture of a woman and published it in a magazine. The photographer was held liable based on the fact that the woman was identifiable and could have been asked for her consent. So what is it that separates the two examples? To answer this question, there are three elements that the court will look at in making a ruling:

The picture displays your defining characteristics

This means using an image where it is obvious that it is you, even if it is not necessarily your face. An example would be a lingerie company using Jennifer Lopez's body to promote their product, or a makeup producer using Angelina Jolie's lips.

You can be identified in the picture

This is similar to the issue of defining characteristics, but is differentiated based on the image being identified as you by others. It is not good enough if you are the only person that can identify the image.

The image is used for commercial interests.

If the company in question is not seeking to profit from the use of your image then they will have a complete defense. In order to challenge a company using your image you must be able to establish all three of the above elements—two out of three is not sufficient. As mentioned, if consent has been acquired, the company will be justified in the continuing use of your image.

In summary; check with your NSO to see if permission has been granted. If permission has not been granted, ask to have the picture removed. If the request is denied, the legal option may be available provided that the above three elements can be established.

For more information, athletes may phone 1-888-434-8883 to receive free confidential advice.

You can also reach the Sport Solution by fax at 1-519-661-3886 or by email at law.sportsolution@uwo.ca

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