

ENGLISH 101



By Jeff English, CFEE

OH SNAP!

Let's be clear - I'm not talking about some stupid squabble between botoxed beauties on the *Real Housewives of Orange County*. Nope, today we're talking about "snapping" pictures of your attendees at events and whether you can use those pictures in advertising and marketing materials.

I've been writing this column for nearly two years and doing a legal presentation at the annual IFEA conference for four years. The topic of taking photos of patrons and their children and then using those photos on websites, social media, billboards, print materials, and T.V. advertising always comes up. That's because there's A LOT of gray area over what constitutes a public space and the required permission to use someone's image or likeness.

Let's start with the basics: If you or your official photographers are taking pictures of patrons at your events and those pictures are used for advertising and marketing materials, then the subject of those photographs must give you permission to use their image or likeness. That's a pretty broad rule and the meaning of "permission" is certainly subject to interpretation. Consider this example: A beer company will be marketing a new beer and needs pictures of young, good looking people, having fun drinking the beer. Let's assume you are at an event (and are obviously young and good looking) and decide to try the beer. While you are chatting with your friends a photographer takes your picture. The next week you visit www.espn.com and there you are smiling, laughing and drinking the beer. Your first thought is, "What? I don't want my image and reputation to be associated with that nasty beer." Then, your materialistic instincts kick in and you think, "Well, at least someone needs to pay me some money." You don't remember giving the beer company permission to use your image, not because you drank too much, but because they didn't have you sign a consent form or even tell you that the picture would be used for advertising purposes. The law tells us that non-celebrities have a basic right for people not to intrude into what we are doing. Especially when it comes to unknowingly becoming the face of a beer advertisement. In this case, while you were hanging out at a public event and there was a possibility of your

picture being taken, the beer company did not advise you they were shooting images for advertising and in no way informed you that your image might be used to market the beer on the internet.

So what can your festival do to garner the permission of your patrons to use their images in advertising and marketing materials?

The idea of hosting an event and getting 20,000 people or more to sign a waiver and release is impossible and impractical. The Kentucky Derby Festival does three things to obtain permission and inform our patrons that their images might be used in advertising materials.

1. With events that require liability waivers, such as the miniMarathon race, we add language that gives us blanket permission to use their image or likeness. An example of acceptable language would be: "I understand that Kentucky Derby Festival, Inc. reserves the right to use all participant's names and/or likenesses in any and all promotional and/or advertising materials in any medium, including the internet."
2. For ticketed events, we add language on the back of the ticket that says: "Holder expressly grants the promoter and its licensee permission to use holder's image or likeness in connection with any live or recorded transmission or reproduction of such event, or in any future promotion and/or advertising materials, in any medium, including the internet."
3. For those venues that are fenced, but not ticketed, such as Thunder Over Louisville or the Fest-a-Ville concert venue, we hang signs at the entrance to the venues that read: "By entering this event venue, you expressly grant Kentucky Derby Festival, Inc. the right to use your image or likeness, or your child's image or likeness, in promotional or advertising materials, or in any live or recorded transmission of the event, in any medium, including the internet."

Let's walk through a hypothetical example. Your festival is producing a big concert with an expected attendance of over 10,000 people. It is not a ticketed event, but there is fencing around the venue to control the crowd. One of your photographers just happens to catch the perfect shot of a couple singing along to their favorite song. That picture becomes the billboard for next year's concert promotion. Neither person signed a written waiver, but they entered a venue where a sign was hanging with the language referenced in example #3. They call your office complaining that they don't want their picture on a billboard. They demand you take it down and pay them a fee for the time their image was used on the billboard. What arguments do you have to refute their demands?

In this case, you have a couple of good arguments to keep the billboard up and not pay them any money. You'd begin by telling them the concert was in a public venue that was fenced in and their expectation of privacy greatly diminishes in that type of setting. The festival was taking pictures of the crowd and such an act is common and should be expected at this kind of event. Finally, you would reference the sign at the entrance to the venue as ample and proper notice that if they entered the venue, the festival could take their picture and then use it in future promotions and advertising. Now, more often than not, the situation can be defused by offering tickets to an event or VIP access to a future show. But if they insist on pressing their case, just know that you have good legal footing to stand on.

What about having great legal footing to stand on? My suggestion would be that if you have an event where you KNOW that you need a great shot for future advertising, then you need to get written permission from those whose picture you take. Have an intern or volunteer follow your photographer around as they specifically seek out shots for that advertising and have those people sign a

Continued on page 107



Continued from page 18

waiver. A signed waiver is the only way to truly ensure you have 100% permission to use someone's image or likeness. In the case of children under the age of 18, a parent or guardian is required to sign the waiver

So just remember: In order to avoid someone wagging a finger in your face and telling you off, be sure to take the appropriate and necessary steps to ensure your Festival has the legal standing to say, "Oh no you didn't!"

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