Right of Publicity Claims Based On

Brand Integration into Editorial Content

RIGHT OF PUBLICITY CLAIMS BASED ON BRAND INTEGRATION INTO EDITORIAL CONTENT

Creating and selling content in order to make a profit does not make the content commercial speech. Smith v. California, 361U.S. 147,150 (959). First Amendment protection for news media and editorial content is not diminished by the profit motive of publishers of editorial content. New Kids on the Block v. News America Publ. Inc., 745 F. Supp. 1540 (C.D. Calif 1990), Aff'd, 971 F. 2d 302 (9th Cir. 1992). Models and celebrities claims for the use of their images to illustrate editorial content have been denied where the material has been held to bear a reasonable relationship to the editorial content and there is no showing of influence over the content by any marketer or advertiser. Stephano v. News Group Publications, Inc., 485 N.Y.S. 2d 220 (1984); Hoffman v. Capital Cities/ ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

EDITORIAL USE

The Right of Publicity – a private right of action for the commercial use of a person's identity – has always been limited by First Amendment concerns either by courts interpreting statutes to be consistent with constitutional limitations, Freihofer v. Hearst Corp., 65 N.Y 2d 135, 140, 490 N.Y.S. 2d 735, 739 (1985), or by legislatures carving out newsworthy/public interest exceptions, Calif Civil Code 3344, subd. (d). As a result, editorial material is afforded wide latitude in using names and pictures of people from innocent bystanders as in Howell v. Post, 81 N.Y. 2d 115 (1993) to people who serve to illustrate the general subject matter as in Finger v. Omni Publications Int'l Ltd., 77 N.Y. 2d 138 (1990). The public interest has been broadly defined to include everything from "Nude Beaches of the World", Creel v. Crown Publishers, Inc., 496 N.Y.s. 2d 219 (1st Dept. 1985), and "Girls Gone Wild", Lane v. MRA Holdings, LLC, 242 F. Supp 1205 (M.D. Fla. 2002), to contemporary fashion, Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001). Even a professional model whose photograph is used to illustrate editorial material may have no claim for a use without a valid release when the photography bears a reasonable relationship to the editorial content. See Messenger v. Gruner & Jahr USA Pub., 706 N.Y.S. 23d 52 (N.Y. 2000). The First Amendment also protects Art and creative expression, a subject beyond the scope of this paper. E.g., ETW Corp. v. DC Comics, 30 Cal 4th 881 (2003).

PRODUCT INFORMATION

Editorial content includes a great deal of discussion and reviews of products and services marketed to the public. The New York Magazine "Best Bets" Column is a prime example. Almost thirty years ago it was the basis for a publicity rights claim by a model wearing a jacket that the editor of the column had decided to feature. The column included the store where it could be purchased and the price. The model sued complaining that he had given permission for "editorial use only," and indeed received a higher rate for photography used for advertising. His claim failed on the ground that neither the manufacturer nor the store had anything to do with the use of the photography by the magazine. Most significantly the Court noted that there was no evidence of any "Quid Pro Quo" – any consideration paid to the magazine by anyone connected with the product. There was no purchasing or promise to purchase advertising in the magazine in exchange for being featured. Stephano v. News Group Publications, Inc., 485 N.Y.S. 2d 220 (1984).

ADJACENCY

A recent California Court of Appeals case analyzed the practice of selling advertising space based on the editorial content immediately adjacent. Stewart v. Rolling Stone, LLC., 181 Cal. App. 4th 664 (2010). Stewart involved a "butterfly" gatefold where the advertising surrounds the editorial content which can be viewed only by opening up the advertising pages to reveal the content spread inside. The court held that the magazine was not subject to a right of publicity claim by anyone featured in its editorial content by virtue of adjacent advertising referencing the subject matter of the feature…so long as the editorial content was in no way influenced by someone "engaged in the sale or hire of products or services." The Court stressed certain facts that if they were to be viewed as necessary would set a high bar for the future of maintaining the "no Quid Pro Quo" standard:

1. Although informed of the subject of the feature, the advertiser was not told of the specific content;

2. There was no evidence that anyone at Rolling Stone (or the advertiser) had any concerns that the advertisement and the Feature would be perceived as an integrated whole;

3. The advertiser had no input into the content, design or look of the Feature;

4. The advertiser did not review or approve it Id. At 23-24; and

5. The editorial staff that created the Feature at the time of creating it was unaware of the advertiser who would appear on the surrounding pages.

In short, the Court embraced the "industry practice" of a "wall" between editorial and advertising staff to insure "that there is no advertiser influence or pressure on editorial independence." This is not to say that all of these standards must be met to avoid media being liable for a commercial appropriation claim by a person featured in editorial content that is offered to an advertiser as an adjacency, but plaintiffs will likely argue this very high standard.

> Today, all media, including print media, are looking to utilize their digital staff to create digital advertising to accompany their digital editorial content.

The media should have an additional defense to a claim in these circumstances. The Court went on to hold that New York Times v. Sullivan standards for imposing liability on a media defendant would have to be applied to a claim seeking to impose liability for editorial content. The Court held that for plaintiff to hold the media liable for an adjacency, the media would have to have acted with the requisite degree of recklessness presumably in ignoring the danger of confusion of the reader over any association of the plaintiff with the advertiser due to the context in which the content and the advertising are presented. The advertiser may not have this additional defense. Thus, the risk to an advertiser who pays for the adjacency with knowledge of the content of the editorial material may be greater than that of the media. This was not before the Court in Stewart.

CONTENT CREATED SPECIFICALLY FOR AN ADVERTISER

Increasingly, media are creating advertising content for advertisers. A practice that is old as early newspapers and that was essential to birth of radio, has exploded with Digital media capabilities. Today, all media, including print media, are looking to utilize their digital staff to create digital advertising to accompany their digital editorial content. It is a short hop from creating content that creates a hospitable environment for advertising of a particular product or category to creating actual advertising for that product. Advertising agencies have always known that advertising content creates exposure to publicity rights claims. Content companies, producers, authors and editors have been accustomed to the warm embrace of Fist Amendment protection against claims be people who see themselves in the editorial material created for its own sake. When they are pressed into service to create content that is

created in concert with promoting the sale of a product to consumers and the manufacturer or seller has input into the content, they need to be made aware that different rules may be applied. See Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008). Permitting the advertiser to approve the content may be sufficient to create a basis for a right of publicity claim. Robinson v. Snapple Beverage Corp., 55 USPQ 2d 1501, 200 WL 781079 (S.D.N.Y. 2000).

Innovative integrations of brands and their marketing positioning or spokespersons may also pose problems. The Federal Trade Commission's recent revision to its Guides Concerning the use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255, require advertisers to insure disclosure of their influence over any otherwise seemingly independent media or blogger who writes about their products. Media may also be held accountable for failure to disclose a material relationship, not otherwise apparent, between the brand and a review or endorsement contained in an article or other content. Such labeling or disclosure of the brand may be just enough for a right of publicity claim based on the assertion that the calling out of the brand or the disclosure of its relationship to the author is sufficient to turn the content into commercial speech and therefore ripe for a right of publicity claim.

EDITORIAL CONTENT ON THE WEB

There never was any real doubt that content on the internet contained editorial content that was protected from publicity rights claims. Stern v. Delphi Services Corp., 626 N.Y.S. 2d 694 (N.Y. Sup. Ct 1995). So it is understandable that there are not many cases addressing the fluidity of websites moving from editorial to advertising to integrated messaging. Once case that provides some help is the decision of Federal District Court Judge Denny Chin's decision in the Southern District of New York discussing the website of Atkins Nutritionals. Gorran v. Atkins Nutritionals, Inc., 464 F. Supp 2d 315 (S.D.N.Y. 2006) aff'd 279 Fed. App. 40 (2d Cir 2008); (2008 WL 216456). Although not a right of publicity case, Judge Chin held that a commercial website may contain "editorial" content fully protected by First Amendment principles along side content that sells products. It must be noted, however, that such a website may be analogous to the "magalog" published by Abercrombie & Fitch where failure to keep the editorial materially wholly separate from the products offered for sale created a publicity rights claim for a person in a photograph used to illustrate the editorial content. Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir 2001). The case may be limited to its facts in that the catalog not only offered for sale clothes like the clothes worn by the surfer in the picture, but also arguably lost its First Amendment protection because the statement about the surfer being part of the early California surfing scene which was what was relevant about the picture was false. Thus, the surfer could claim both that the picture of him was commercialized AND "false" yielding two strikes against First Amendment protection.

PUBLIC RELATIONS

Public Relations professionals are accustomed to their work being filtered through media into "editorial" content with First Amendment protection. Press releases traditionally were not published to the public at large. Material supplied to First Amendment protected media when incorporated into the media's independently created content is covered by the ultimate publisher's First Amendment protections. Section 50 of the New York Civil Rights was amended to reflect this following the decision in Arrington v. New York Times, 55 NY 2d 433 (1982). Today, however, the press release may be published on the corporate website resulting in a claim that it is advertising (directed at consumers) so that any names or pictures included in the release may give rise to publicity rights claims. Yeager v. Cingular Wireless, 88 USPQ 2d 1372 (E.D. Cal. 2008).

PRACTICAL ADVICE

A new generation of digital savvy content creators needs to be educated about possible liability arising from content that includes the name, picture, likeness, voice, signature, or context creating a possible invocation of the persona of a celebrity. While brand integration into such content selected by the writers, producers, and editors of such content has long been viewed as permissible, brands insisting on dictating any specific inclusion or product mention may result in a publicity rights claim. Indeed, permitting the advertiser to influence the content may be sufficient to support a publicity rights claim. The FTC Guides, supra. In addressing when a blogger might need to disclose "a material connection" with a brand she recommend, the FTC Guides suggest that promotion of a product because of future expectation of support or consideration, including the continuing supply of valuable samples or other free items or perks may be sufficient influence over the content to constitute such a "material connection." This suggests that media should consider whether perks, parties, invitations to events or any other connection between staff who influence content and advertisers might at some point be viewed as influencing the content that they create.

> Media should consider whether perks, parties, invitations to events or any other connection between staff who influence content and advertisers might at some point be viewed as influencing the content that they create.

Courts may look to Stewart and Stephano as setting a standard of no contact between editorial staff and advertising sales staff beyond a general description of the subject matter of a feature or a page to permit sale of adjacent space. (Combining the editorial and ad sales staff could be a problem). Emails between ad sales and editorial simply expressing caution to be careful to avoid the possibility that the editorial content may be perceived as part of an integrated communication containing the adjacent advertising can be made to look sinister in the hands of a plaintiff's counsel in light of Stewart. Advertisers' bolder efforts to make the advertising compatible with the look and feel of the editorial content make it function in tandem with the editorial content and tie it into web links and interactive content create additional cause for concern.

Consumers' understanding of new media technologies and how they operate and what they convey are constantly evolving. Allowing consumers to manipulate the content in ways that permit them to create new content that integrates advertising into the editorial content and to publish that new content may create unintended material that form the basis for publicity rights claims.

And, when all is reviewed and considered and the risks seems warranted…remember there is always the Lanham Act claim for likelihood of confusion over whether a celebrity who is not depicted or named still claims to be implicated by association with the content. Burck v. Mars, Inc., 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

In sum, careful thought should be given to the design of websites that integrate brand messaging and facilitate online purchasing. The design of the site and means to getting to the purchasing process may impact right of publicity liability. Training for content creators and website developers is essential if media expect to be able to make intelligent risk assessments of new and developing technology and interactivity. Media staffers have had little or no occasion to think about the publicity rights liability created by the changes in content- advertising mix, juxtaposition and integration of websites and interactive media.

By Rick Kurnit of Frankfurt Kurnit Klein & Selz