First Amendment Law Letter

2009

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California Supreme Court Issues Key Ruling in Misappropriation Case

By Kelli L. Sager and Rochelle Wilcox

In a unanimous decision, the California Supreme Court has held that the single publication rule applies to claims for misappropriation and right of publicity, just as it does for defamation and other content-based tort claims. The Court also rejected the argument that the "discovery rule" should apply to misappropriation claims arising from publications that are widely distributed, even when the claim involves the alleged use of the plaintiff's image in an advertisement or on a product label. *Christoff v. Nestlé,* S155242 (Aug. 17, 2009).

Background

Plaintiff Russell Christoff was a professional model who claimed that he was unaware that his image was being used by defendant Nestlé USA on millions of labels for Taster's Choice instant coffee, with the use continuing for more than five years before Christoff purportedly "recognized" his photograph on a jar of coffee on a store shelf. Christoff sued Nestlé for statutory and common law misappropriation, among other claims. The trial court rejected Nestlé's motion for summary judgment based on the statute of limitations, holding that California's Uniform Single Publication Act (Cal. Civil Code § 3425.3) did not apply to claims for the alleged unauthorized use of the plaintiff's likeness. Although a two-year statute of limitations applied to Christoff's claims, the trial court further held that the "rule of delayed discovery" applied, such that Christoff could seek damages extending back to Nestlé's first use of his image if he could prove that he had not previously known or suspected that his photograph was being used. After a jury trial, at which the proper means of evaluating damages was hotly contested, the jury ruled in favor of Christoff and awarded him more than $15 million in damages.

The Court of Appeal reversed, finding that the trial court should have applied the single publication rule, and remanded the case for further proceedings in the trial court on the issues of whether the plaintiff's failure to "discover" the use was caused in any way by Nestlé, and whether there had been any "republication" of Christoff's image within the two-year statute of limitations period for which he could recover damages. The Court of Appeal also held that the jury's award of more than $15 million in profits attributable to the use of Christoff's image was not supported by substantial evidence, and reversed the jury's quantum meruit award. The California Supreme Court granted review.

California Supreme Court ruling

Although the Supreme Court granted Christoff's petition for review, its unanimous decision largely rejected his legal arguments in favor of the positions presented by Nestlé and by its amici. First, the Court rejected Christoff's argument that the Uniform Single Publication Act only applies to "defamation-like" claims, not to misappropriation claims. The Court pointed to the broad language of the statute, which it held covers claims for "any tort" arising from a "single publication or exhibition

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About the First Amendment Law Letter

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A professional model claimed that he was unaware that his image was being used on millions of labels for Taster's Choice instant coffee.

or utterance, such as any one issue of a newspaper or book or magazine…or any one broadcast over radio or television…" Opinion at 8–9.

Second, the Supreme Court held that the discovery rule—which essentially tolls the statute of limitations for certain claims until the plaintiff "discovers" the facts that give rise to the claim—does not apply to misappropriation claims that arise from widespread publications, including advertisements in the mass media and labels on products that are widely distributed. This ruling also is important for publishers, because it prevents a plaintiff from avoiding the limitations period by claiming—years after a book was published or a movie was released—that he or she "didn't know" about the publication. Instead, the limitations period for the claim will begin to run on the date of first publication.

The Court remanded the case on the issue of whether the various uses by Nestlé of Christoff's image over a period of six years were a "single" publication, within the meaning of the USPA, or whether some of the uses were "republications" that would restart the statute of limitations. Because the trial court erroneously held that the USPA did not apply at all, the record was not developed on whether the uses were a "single" publication or involved multiple publications; consequently, the Supreme Court remanded for further proceedings on this issue.

In a concurring opinion, Justice Werdegar suggested that at minimum, the trial court should consider whether Nestlé's uses included labels with different content from the original label, that were "aimed at different audiences." Her concurrence suggested that while a "reissue, rebroadcast or reexhibition" might be a new publication, that did not mean that any separate printing should constitute a new publication, or that any download of material from the Internet would be a new publication. Instead, she suggested that one factor should be whether there was a "conscious and independent" or "conscious and deliberate" decision to reissue or republish, such that the statute of limitations might be restarted for the reissued or republished material. No other member of the Court joined in her concurrence.

To view the court's decision, visit dwt.com/NestleDecision. ▪

California Court of Appeal Says MySpace Not Private

By Kelli L. Sager and Jeff Glasser

In a decision that reinforces the application of traditional free speech protections to claims arising from Internet publications, the California 5th District Court of Appeal has held that a plaintiff may not maintain an action for invasion of privacy based on the republication of information she voluntarily posted to her MySpace.com page.

Writing for a unanimous three-judge panel, Justice Bert Levy found that no reasonable person would have an expectation of privacy regarding information that he or she has freely disseminated on a public social networking Web site. "A matter that is already public or that has previously become part of the public domain is not private," according to the court.

The plaintiff posted an article on her MySpace page titled "An Ode to Coalinga," which railed against the Central California town where she grew up.

In *Moreno v. Hanford Sentinel Inc.,* No. F054138 (Cal. Ct. App. Apr. 2, 2009), plaintiff Cynthia Moreno posted an article on her MySpace page titled "An Ode to Coalinga," which railed against the Central California town where she grew up. After the principal at Moreno's former high school convinced a friend to publish the ode in the local newspaper, the Coalinga Record, Moreno and her family claimed that they were so severely harassed by local residents that the family was forced to move out of town. Moreno and other family members sued the principal and the newspaper publishers[1] for invasion of privacy by publication of private facts, and for intentional infliction of emotional distress.

In the published portion of the decision, the Court of Appeal rejected Moreno's privacy claim on the ground that the allegedly "private facts" were not actually private. As the court explained, whether or not Moreno intended her article to reach only a limited audience, "[b]y posting the article on myspace.com, Cynthia opened the article to the public at large. Her potential audience was vast."

The court also rejected Moreno's claim that her name was private because the article only used her first name, noting that "her identity was readily ascertainable from her MySpace page.[2]

This decision is consistent with a 2005 ruling from a federal district court in San Diego, which held that the Associated Press did not violate the privacy rights of Navy SEALs by republishing

photographs found on the Internet that depicted the SEALs roughing up detainees in Iraq. *Four Navy Seals v. Associated Press et al.,* 413 F. Supp. 2d 1136 (S.D. Cal. 2005). The district court held that because the plaintiffs had willingly taken these photographs and allowed them to be placed on the Internet, their privacy was not invaded when the same photographs were widely distributed by the Associated Press. Id.

Both Moreno and *Four Navy Seals* applied protections against privacy claims that developed in response to claims against traditional media companies. For example, more than two decades ago, in *Sipple v. Chronicle Publishing Co.,* 154 Cal. App. 3d 1040 (1984), the California First District Court of Appeal found that plaintiff Oliver Sipple's disclosure of his sexual orientation to hundreds of people in San Francisco barred his invasion of privacy claim against the San Francisco Chronicle, which had reported that Sipple was gay in a story describing his heroic act in saving President Gerald Ford's life from an attempted assassin. See also *Brewer v. Hustler Magazine, Inc.,* 759 F.2d 527 (9th Cir. 1984) (no cause of action for violation of right to privacy from magazine publication of plaintiff's photograph when plaintiff already had distributed it to approximately 200 people in the advertising industry).

These recent decisions help to limit the threat of invasion of privacy claims arising from the republication of content that a prospective plaintiff has posted on the Internet for the world to see. Under these circumstances, a defendant who "merely [gives] further publicity" to information that already is "public," by virtue of its dissemination on the Internet, can and should be protected. ▪

FOOTNOTES

[1] The publishers prevailed on an anti-SLAPP motion, which was not challenged on appeal.

[2] The court also rejected the privacy claim brought by Moreno's family members for the same reason, as well as on the ground that privacy rights cannot be asserted by family members merely based on their relationship to the individual identified in the publication. In an unpublished portion of the decision, however, the court held that an emotional distress claim alleged against the individual who supplied the article to the local newspaper could not be decided on demurrer, since "reasonable people could differ" about whether this action was "extreme and outrageous."

New Maine Privacy Law Restricts Marketing to Minors

By Robert J. Driscoll

The state of Maine recently enacted legislation that will effectively prohibit direct marketing of products and services to Maine residents under the age of 18.

The new law, which took effect in September, prohibits the collection of personal information from a minor without first obtaining the verifiable consent of the minor's parent or legal guardian. ("Personal information" is defined to mean (1) a person's first name or first initial and last name, (2) a home or other physical address, (3) a Social Security number, (4) a driver's license or state identification card number, and (5) any information concerning a minor that is collected in combination with one of the identifiers described above.) The law also prohibits the use of a minor's personal information for the purpose of marketing a product or service to that minor—with no exceptions, even if the information was collected with parental consent. The law also imposes equivalent restrictions with respect to the collection and use of health-related information.

The Maine law is substantially more restrictive than the Children's Online Privacy Protection Act (COPPA), the federal law that governs the collection of information from children. While COPPA applies only with respect to the collection of information online, the Maine law applies to both online and offline activities. In addition, COPPA only applies to children under age 13, but the Maine law applies to all minors (a term not defined in the statute, but presumably meaning anyone under age 18, which is the age of majority in Maine). Unlike COPPA, the Maine law also gives private litigants the right to sue for damages and injunctive relief and to recover attorneys' fees in the event of a successful lawsuit.

It remains to be seen how Maine courts and regulatory authorities will interpret and enforce the new law. For example, the scope of its application to not-for-profit organizations, such as colleges and universities that might wish to provide promotional materials to teenagers, is unclear. It appears likely at this stage that most marketers will implement age and residency screening measures at every point where consumer data is collected and will no longer permit Maine residents who are minors to participate in activities that require the collection of personal information, such as entering sweepstakes or signing up for online newsletters. Compliance will present particular difficulties for marketers whose databases do not currently permit them to identify minors by state of residency.

In the wake of the law's enactment, industry groups are examining the possibility of seeking a legislative modification of the act or challenging it in court. However, with the state legislature not scheduled to reconvene until January 2010, marketers should be prepared to implement compliance mechanisms in the meantime. ▪

Update: 9th Circuit Panel Modifies Yahoo! Decision On Section 230

By Kelli L. Sager, Bruce E.H. Johnson, Thomas R. Burke, and Ambika K. Doran

An advisory circulated last month summarized the 9th Circuit's May 7, 2009, decision in *Barnes v. Yahoo!,* 2009 WL 1232367, which reaffirmed the broad scope of immunity under Section 230 of the Communications Decency Act, but also allowed the plaintiff to proceed with her promissory estoppel claim against Yahoo! for allegedly failing to remove a profile that the plaintiff claimed she did not create after it promised to do so. (DWT Alert 05.12.09.)

On June 22, 2009, the 9th Circuit amended its decision in response to a request by defendant Yahoo! and its amici, removing language that had suggested that a defendant must assert Section 230 of the Communications Decency Act as an affirmative defense, as well as changing language that could have been interpreted as suggesting that the defense applied only to state law claims.

Background

Plaintiff Cecilia Barnes claims that she asked Yahoo! to remove a profile that allegedly was created by an ex-boyfriend that included nude pictures of her. She claims that she relied on a promise by a Yahoo! representative to remove the profile, but sued when the profile was not taken down after several months. The 9th Circuit, construing her lawsuit to assert claims of gratuitous negligent undertaking and promissory estoppel, found that Section 230 barred the former but not the latter claim. In its original decision, the panel also chided Yahoo! for not asserting Section 230 as an affirmative defense, and the decision contained language that might have been misconstrued as implying that the federal statutory immunity applies only to state law claims.

Modification

The amended decision clarifies both issues. The 9th Circuit now has *entirely removed* the portion of its decision stating that Yahoo! should have asserted Section 230 as an affirmative defense which "does not by itself justify dismissal" by FRCP 12(b)(6) motion. It also *clarified* language describing the elements of the Section 230 defense that might have been interpreted as limiting it only to state law claims. In the amended opinion, the Court added a footnote stating that it had "limited" its discussion of the law to state law claims "because we deal in this case with state law claims only. We have held [Section 230's] protection also extends to federal law causes of action. Because no federal law cause of action is present in this case, we need not decide how or whether our discussion of section 230(c)(1) would change in the face of such a federal claim."

Both parties' requests for rehearing and for rehearing *en banc* were denied. ▪

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