

Covering Your Ads

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Between Cher And Joe Montana - When Is It Okay To Use A Person's Image To Advertise A Protected Use Of That Image?

In deciding whether the unauthorized use of a third party's name, voice, likeness or persona (collectively, "Image") violates such third party's publicity rights, the first level of inquiry is whether the use is properly categorized as a "commercial" or a "non-commercial" use. If an Image is used without permission in a non-commercial or "newsworthy" context, such use is generally protected so long as the Image used is reasonably related to the aspect of the use that makes it newsworthy, and so long as less than the Image owner's "entire act" is used.

Distinguishing between commercial and non-commercial uses is a context-specific inquiry, and describing the precedent on that issue is beyond the scope of this article. But where the underlying use is concededly non-commercial, such that permission does not need to be obtained from the person whose Image is depicted, this *Adbriefs* blog post briefly addresses whether the Image can also be used to advertise or promote the underlying use without giving rise to a valid right of publicity claim by the person whose Image is depicted.

In the context of print publishing, it is well established that an Image originally published in one issue of a periodical as part of a newsworthy item (and therefore concededly protected) may be republished subsequently in another medium as an advertisement for the periodical itself (but not on or as an advertisement for a collateral commercial product), without the consent of the person whose Image is depicted so long as the advertising does not falsely claim that such person is affiliated with or endorses the periodical. Analogously, if a video documentary contains a protected use of a person's Image, there is little question that an advertisement for the documentary, containing a clip of that use would be permissible.

One of the leading cases in this area is Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639 (1995), which held that the reproduction in poster form of actual newspaper pages containing plaintiff Joe Montana's photograph and artist rendition of Montana's likeness, and the subsequent sale of such posters, were protected by the First Amendment against Montana's common law and statutory commercial misappropriation claims. Each of the newspaper pages had been reproduced in poster form within two weeks of its original printing in the newspaper and had been made available for sale to the general public. The defendant San Jose Mercury News had submitted undisputed evidence that it had sold the posters to advertise the quality and content of its newspaper. The posters were exact reproductions of pages from the paper. They contained no additional information not included on the newspaper pages themselves, and they

did not state or imply that Montana endorsed the newspaper. In holding such use to be protected, the court explained:

“It is well established ‘a person’s photograph originally published in one issue of a periodical as a newsworthy subject (and therefore concededly exempt from the statutory prohibitions) may be republished subsequently in another medium as an advertisement for the periodical itself, illustrating the quality and content of the periodical, without the person’s written consent.’”

40 Cal.Rptr.2d at 642 (quoting Booth v. Curtis Publishing Company, 223 N.Y.S. 2d 737 (1962)). Citing precedent, the court then explained:

“Constitutional protection extends to the truthful use of a public figure’s name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication. Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium.”

Id.

The protection given to using another’s Image to advertise or promote the concededly protected speech in which such Image appeared has been held not to extend to advertising that suggests or implies endorsement of the underlying use by the person whose Image is depicted. A case brought by Cher against a magazine publisher illustrates this principle. Cher v. Forum Intern. Ltd., 692 F.2d 634 (9th Cir. 1982). In that case, Cher was interviewed for an article that was originally intended for *US Magazine*. The article was published instead in *Forum* magazine, which used the interview (and Cher's Image), along with copy that read "So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to Forum", to advertise subscriptions to *Forum* magazine. Holding that the magazine had exceeded permissible boundaries, the Ninth Circuit explained that "*Forum* would have been entitled to use Cher's picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication", but "*Forum* falsely proclaimed to the readers of its advertising copy that Cher 'tells Forum' things that she 'would never tell *US*'", and such conduct was deemed not protected. Id. at 639.

As virtual worlds and photo-realistic animation continue to evolve, the law on these issues will continue to search for controlling principles. The bedrock of that evolution, however, has already been laid.

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