

manatt

June 26, 2008

ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

- Pending New York Right of Publicity Bill To Provide Protection for Deceased Celebrities
- French Court Fines eBay Over Fakes
- ISPs Will Block Child Pornography Sites
- FTC To Focus on Green Building and Textile Claims
- Topps Aims for Upper Deck
- Pet Owners Sue Over Misleading Food Labels

Pending New York Right of Publicity Bill To Provide Protection for Deceased Celebrities

[Lindsay Schoen](#)

Celebrities may soon be able to protect the commercial use of their persona after death in the state of New York. The Right of Publicity bill pending in Albany would expand the current protections available under state law.

The right of a person to protect his or her name or likeness has greatly evolved over the past century. Over the years, a property right developed from the original personal right of privacy. No longer was the concern simply about ordinary people protecting their privacy, but famous individuals also wanted to prevent others from using their names, likenesses, and identifying characteristics for commercial purposes without consent. The right of publicity enables individuals to control the commercial exploitation of their identity.

Since the early 1900s, a living person's name, portrait, or picture could not be used for advertising or trade purposes in New York without that person's written consent. Once that person passed away, however, so did his or her rights to protect these assets.

The Right of Publicity bill prohibits the use of a deceased person's persona for advertising or trade purposes

UPCOMING EVENTS

October 21, 2008

ACI: Sports Sponsorship Advertising and IP

Topic:

"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

[Ronald S. Katz](#)

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

[Linda Goldstein](#)

The Carlton Hotel
New York, NY

[For more information](#)

...

October 22, 2008

D.C. Bar CLE Seminar

Topic:

"Copyright Law and Litigation"

[Kenneth M. Kaufman](#)

D.C. Bar Conference Center
Washington, D.C.

[For more information](#)

...

November 20-21, 2008

**PMA's 30th Annual
Promotion Marketing Law
Conference**

Topic:

"Navigating the Potholes: The Evolving Landscape for

without written consent for 70 years after his or her death. Not only does this bill provide postmortem rights to celebrities whose persona had commercial value prior to his or her death, it also expands the scope of covered rights. In addition to giving a deceased personality or his or her designee control over the personality's name, portrait, or picture, the protected persona also includes his or her likeness and voice.

This statute would not apply to the right of a photographer or the creator of an audiovisual work to own or use materials that contain images of a deceased personality, including licensing, selling, and transferring them to others along with any permission for use granted by the personality before the statute's effect. This statute would also not apply to any artistic creation or news report in which a deceased personality appears, as well as related advertising.

Depending on how quickly this bill moves through the legislature, it could be effective as soon as January 1, 2009. The protection will apply retroactively to deceased personalities who died within 70 years of the effective date. This means that advertisers could no longer use deceased personalities in advertising in New York without permission. In fact, advertisers who have legally been using images or the voice of a deceased celebrity in advertising in New York would have to seek permission to continue such use or create similar campaigns.

[back to top](#)

French Court Fines eBay Over Fakes

A French court has found eBay guilty of selling counterfeit goods and has ordered the online auctioneer to pay 20,000 euros (\$32,497) in damages to French luxury group Hermes.

The ruling, the first of its kind in France, found eBay liable for the auction of three Hermes bags, two of which were fakes, for a total of 3,000 euros.

Hermes had sought 30,000 euros in damages from eBay for complicity in the sale of counterfeit goods.

At the trial in April, Hermes' lawyer argued that eBay was more than a passive host for the fakes. "eBay is an active player in the transaction because not only does it offer a number of services to improve the sale, but when it does not work well enough or fast enough, they intervene with the

Sweepstakes, Games & Contests"

[Linda Goldstein](#)

Topic:
"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

[Kerrie L. Campbell](#)

Marriott Downtown Magnificent Mile
Chicago, IL

[For more information](#)

...

December 4-5, 2008 Film & Television Law

Topic:
"Product and Music Placement, Branded Entertainment: Issues and Litigation"

[Linda Goldstein](#)

Topic:
"The Value of Fame: Understanding the Right of Publicity"

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)
Partner
jedelstein@manatt.com
212.790.4533

[Linda A. Goldstein](#)
Partner
lgoldstein@manatt.com
212.790.4544

OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

[Practice Group Overview](#)

client,” he argued. “They are perfectly informed of the transactions since they take a percentage cut.”

The decision is a blow for eBay, which is defending a number of similar lawsuits in France. Louis Vuitton and Dior Couture have filed separate lawsuits for 20 million euros and 17 million euros in damages, respectively. Like Hermes, both brands accuse eBay of complicity in the sale of counterfeit goods by permitting transactions without any controls. Last December, the French auction industry sued eBay for allegedly encouraging sales of pirated and stolen goods. Finally, last September, L’Oreal sued eBay in France and four other European countries over the sale of bottles of fake perfume.

[back to top](#)

ISPs Will Block Child Pornography Sites

Internet service providers Verizon, Sprint, and Time Warner Cable will install controls preventing access to online bulletin boards and Web sites that distribute child pornography.

The agreements, which will affect customers throughout the country, are part of a deal struck with New York Attorney General Andrew M. Cuomo. Many industry players had earlier balked at similar initiatives, arguing that they could and should not be responsible for policing online content, given its dispersed and largely unregulated character.

The three ISPs will bar access to newsgroups that traffic in pornographic images of children on Usenet, as well as to child pornography Web sites. To effectuate the agreement, the ISPs must check sites against a registry of explicit sites maintained by the National Center for Missing and Exploited Children. They will also provide a total of \$1.125 million toward efforts by Cuomo’s office and the Center to rid the Internet of child pornography.

In a June 10 announcement of the deal, the attorney general said negotiations to strike similar agreements with other service providers are ongoing.

The agreements stemmed from an eight-month probe in which agents from Cuomo’s office posing as subscribers complained to ISPs that they were letting child pornography flourish on the Internet, in contravention of customer service agreements discouraging such activity. After the companies allegedly disregarded the complaints, the attorney general’s

[Practice Group Members](#)

INFO & RESOURCES

- [. Subscribe](#)
- [. Unsubscribe](#)
- [. Sarbanes-Oxley Act](#)
- [. Newsletter Disclaimer](#)
- [. Technical Support](#)
- [. Manatt.com](#)

office threatened to prosecute them for fraud and deceptive business practices. At that point, the companies agreed to cooperate and started negotiating an agreement.

Cuomo's office said its new strategy of targeting the ISPs moves beyond the traditional one of going after producers and customers of child pornography, a strategy that has had limited success because much of the material comes from overseas, especially Eastern Europe.

The National Center for Missing and Exploited Children worked with Cuomo's office in the investigation. Under federal law, ISPs must report child pornography to the Center, but it usually takes customer complaints to produce a report, which doesn't happen very often since many of the visitors of illegal newsgroups are pedophiles themselves.

Investigators said America Online and a few other ISPs had already taken significant steps on their own to address the problem.

[back to top](#)

FTC To Focus on Green Building and Textile Claims

The Federal Trade Commission will turn its sights on green marketing claims made by building and textile firms as part of its ongoing review of agency guidelines regulating such claims.

The FTC said it would host a public workshop on the issue on July 15. In particular, the discussion will center on consumer perception of green claims, third-party verification schemes, and whether additional or updated guidance is needed on acceptable and unacceptable green claims.

Two topics on the table: how claims on the use of organic cotton and bamboo fibers in garments are verified, and what comprises a green building or green building product.

The workshop is the third in a series reviewing the agency's Green Guides, in light of the surge in the number of green claims being made and rising concerns over greenwashing since the Green Guides were last reviewed a decade ago.

Although the workshops have been welcomed by environmentalists, some advertisers argue that current rules are sufficient and that stiffer rules could dampen the

enthusiasm for green initiatives by business. A group of leading advertising trade groups put in a joint filing cautioning the agency to take its time in reaching any decision on new guidelines.

[back to top](#)

Topps Aims for Upper Deck

Topps Co., the legendary baseball card manufacturer, has sued Upper Deck Co., charging its rival with trademark infringement over the planned use of the names and images of eight Hall of Famers.

According to the complaint filed in federal court in Indianapolis, California-based Upper Deck is getting ready to launch a series of "Legendary Cuts" baseball cards with the Hall of Fame players, whose name and image rights are licensed by Topps. The players are Lou Gehrig, Jackie Robinson, Mel Ott, Jimmie Foxx, Rogers Hornsby, Thurman Munson, George Sisler, and Johnny Mize.

The complaint states that Upper Deck's right to use the players' names, images, and statistical data ended upon the expiration last year of agreements with celebrity-licensing agency CMG Worldwide, Inc. After negotiating with both companies, in March, CMG entered into an exclusive agreement with Topps, the New York company claims. Topps filed the complaint jointly with Indianapolis-based CMG. The complaint seeks unspecified money damages and an injunction preventing Upper Deck's use of the names and images in its new line of cards.

[back to top](#)

Pet Owners Sue Over Misleading Food Labels

A putative class action brought by 30 pet owners moved forward when the court rejected the defendants' motion to dismiss.

The case, pending in federal court in Florida, contends that claims made by leading pet food manufacturers in ads and on labels are misleading pet owners. In fact, the complaint argues, the "wholesome," "quality," "premium," or "gourmet" foods that owners are feeding their pets "are made of wholly or partially of inedible garbage unfit for human consumption."

The lawsuit alleges that defendants “humanize” pet food by including pictures or drawings of human-grade ingredients and with other marketing ploys. But in fact, among the ingredients in most pet foods, the plaintiffs say, are “restaurant grease, road kill, hair, blood, pus, esophagi, chicken heads, feet and intestines, cow brains, excrement, fetal tissue, moldy grains, hulls, Styrofoam packaging from discarded supermarket meat, euthanized animals—including dogs and cats—and/or diseased dying, disabled and dead animals.”

The pet food companies claimed that they are allowed to use words such as “complete and balanced,” “veterinarian recommended,” and “natural” in advertising, as authorized by the Association of American Feed Control Officials and approved by the U.S. Food and Drug Administration. The defense argued that the claims made in the complaint condemning the entire pet food industry come from questionable sources on the Internet.

The court rejected the defendants’ claims, writing, “Defendants do not assert that the FDA or any other regulatory body has specifically approved the advertisement or statements at issue in this action, and nothing in the AAFCO standards authorizes defendants to engage in false advertising.”

The fourth-amended complaint, filed April 11, names seven pet food manufacturers: Tennessee-based Mars Petcare, Ohio-based Iams, Kansas-headquartered Hill’s Pet Nutrition (makers of Science Diet), California-based Del Monte Foods, Missouri-based Nestlé Purina Petcare, California-based Nutro Products, and California-based Natura Pet Products. Also named are some large retailers, as well as pet specialty stores PetSmart, Pet Supermarket, Petco Animal Supplies, and Pet Supplies “Plus/USA.”

The pet owners seek damages and injunctive relief to prevent pet food companies from advertising their product is akin to human food. In addition to alleging the false and deceptive marketing and sale of pet food, the complaint alleges fraudulent misrepresentation and concealment, violation of Florida’s Deceptive and Unfair Trade Practice Act, negligence, and unjust enrichment.

[back to top](#)

