

California Supreme Court Rules on Right of Publicity Claims

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On August 17, the California Supreme Court unanimously ruled in *Christoff v. Nestlé USA, Inc.* that right of publicity claims are subject to the single publication rule. But the court left for another day determination of whether use of an individual's likeness for a product label and in various forms of advertising over a five-year period constituted a "single publication." With potentially millions of dollars at stake, the case is a stark reminder to advertisers of the importance of securing permission to use a person's image, name, or likeness for commercial purposes.

The case involves the picture of a professional model, Russell Christoff, used by Nestlé USA, Inc. on the label and in advertising for Taster's Choice coffee. According to the court, Mr. Christoff was paid \$250 in 1986 for a photograph to be used in Canada on a label for bricks of coffee. Sixteen years later, he saw his face on a jar of Taster's Choice coffee in the United States and discovered that his image had been used without his consent on millions of labels sold internationally for the preceding five years. Mr. Christoff filed the case less than a year after his discovery, but six years after Nestlé started using his image.

At trial, the evidence established that Nestlé Canada had used Mr. Christoff's image on a coffee brick but had failed to pay him the \$2,000 (plus commission) required under his original contract. Eleven years later, in 1997, Nestlé redesigned its Taster's Choice instant coffee using the photograph of Mr. Christoff that its Canadian affiliate had used. Nestlé allegedly failed to investigate the scope of the consent and allegedly did not ask Mr. Christoff if he consented to the use of his image. The redesigned label was used in several different Taster's Choice jars; labels were produced in different languages and placed on jars sold internationally; and images of jars with Mr. Christoff's image were used in advertising campaigns in transit ads, coupons, magazine ads, and Internet ads. Mr. Christoff's image was altered for certain international markets.

Since Nestlé's profits from Taster's Choice were \$531,018,000, Mr. Christoff's accounting expert testified that he was entitled to \$53,101,800. Mr. Christoff's modeling agency expert testified that the value of the use of the photo over a six-year period was \$1,475,000. The trial court applied a two-year statute of limitations and a jury awarded him more than \$15 million in damages, finding that Mr. Christoff should not reasonably have suspected Nestlé was using his image before he saw a jar of Taster's Choice coffee.

The Court of Appeal reversed, holding that the suit was barred by the statute of limitations due to the

single publication rule since Mr. Christoff did not file suit within two years after Nestlé first published the label. But the court remanded the case for further fact finding, holding that if Nestlé hindered Mr. Christoff's discovery of the use of his photograph, or if the label had been republished, then the claims were not barred.

Acknowledging the dearth of law or academic commentary on the issues, the California Supreme Court held that the single publication rule applies to right of publicity cases. Under that rule, a cause of action accrues from the date of first general distribution of the publication to the public. As the court explained, "[t]he rule was created to address the problem that arose with the advent of mass communication from the general rule in defamation cases that 'each time the defamatory statement is communicated to a third person . . . the statement is said to have been published.'" The rule does not, however, address the issue of repeated publications of the same material over a substantial period of time.

Without a fuller evidentiary record, the California Supreme Court expressly declined to rule on whether production of a product label over a period of years constitutes a "single integrated publication" that triggers the running of the statute of limitations, akin to publishing an issue of a newspaper or an edition of a book. Mr. Christoff argued that Nestlé's use constituted a continuing wrong, in which each wrongful act triggers a new limitations period, while Nestlé argued that the use on the product label was a "single overt act" with a "continual effect" relevant to damages but that does not toll the statute of limitations.

The court remanded the case to allow the parties to present evidence as to when production of the product labels started and stopped, as well as evidence regarding use of the image in various advertising campaigns. The court said, "Nestlé may be able to show that the production of some or all of these items were single integrated publications and that the statute of limitations was triggered as to that item when it first was distributed to the public." The majority opinion, however, did not provide much guidance for evaluating what would constitute a single publication.

Justice Werdegar's concurring opinion offered some guidance. She discussed other cases in which the single publication issue has arisen, including those involving multiple broadcasts or displays of identical material, noting that some courts have found that each broadcast or display constitutes a separate publication. She noted also that special difficulties arise involving printed materials as well, particularly if distribution is spread over time.

In closing, Justice Werdegar said, "I doubt defendant's entire five-year course of printing and distributing labels may be deemed a single publication simply because the labels were not substantially altered during that time." In her view, factors to be considered include whether the production and distribution of labels was predetermined by a single decision, and whether Nestlé made a deliberate choice to continue, renew, or expand use.

While further clarity from the Supreme Court on the single publication rule is likely far off, the lesson from *Christoff v. Nestlé USA, Inc.* is clear. To reduce the risk of claims, it is critical to confirm that proper consents and clearances have been secured before the likeness, name, or image of an individual is used for commercial purposes. At the same time, companies also should ensure that their advertising does not infringe the trademark or copyright rights of others, or otherwise run afoul of laws or regulations.

Morgan Lewis's Intellectual Property Practice can provide guidance on these and related issues.

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