Insight

The California Supreme Court will hear oral argument on June 3 in an important "right of publicity" case, *Christoff v. Nestle USA Inc.* Issues include whether the single publication rule applicable to mass communication-based torts applies to right of publicity claims; whether use of another's likeness on a product label is a "publication" for purposes of the rule; whether its continuing use on product labels and in various product advertisements constitutes a "republication" for each use giving rise to new causes of action and whether the discovery rule applies to right of publicity claims.

In its early form, the right of publicity meant "a man has a right in the publicity value of his photograph." Today, the right has evolved into the inherent right of every individual to control commercial use of his or her identity. The right accrues to celebrities and common people alike, and is valuable both to keep one's identity from being commercially exploited and to control and be compensated for approved commercial exploitations.

At common law, the right protected unauthorized uses of identity, name or likeness. Today, through state statutes, the right protects more broadly against commercial uses of name, image, likeness, and other unequivocal aspects of identity, such as signature, voice and "personality." California affords both common law and statutory (California Civil Code Section 3344) rights of action. California's statutory claim redresses the "knowing" use of another's "name, voice, signature, photograph, or likeness" "on or in products, merchandise, or goods" or for the purposes of advertising, selling or soliciting them.

The right protected is always the identity or persona of the person, not the particular photograph, graphic or sculpture in which it is depicted. While "misappropriation" of someone's identity was historically viewed as a violation of privacy, it is now more often viewed as a "property right" that protects economic interests.

The *Christoff* case involved Nestle's use of model Russell Christoff's label without his consent or any remuneration. Christoff was photographed by Nestle Canada in the 1980s, gazing at a cup of coffee "as if he enjoyed the aroma." He was paid $250 for his time and received a contract that required payment for future uses of his image.

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Eleven years later, Nestle used Christoff's image on its redesigned coffee label without his consent. When Christoff discovered the ad campaign, he sued for violation of his statutory and common law rights of publicity. The case was tried by a jury, which concluded Nestle knowingly used Christoff's "likeness" for a commercial purpose without his consent, Christoff did not know and should not have known or reasonably suspected his photograph was being used at a time earlier than his actual discovery long after the ad campaign had begun, Christoff suffered $330,000 in actual damages and was further entitled to $15 million of Nestle's $531,018,000 in profits, which Christoff's expert attributed to the Taster's Choice icon — an attractive person "gazing" at a cup of coffee — as opposed to the other attractive marketing features of the product, e.g., the coffee logo, red colored label, etc. Notably, trial evidence showed Nestle paid another model $150,000 for the use of his image for 10 years, an amount said to be on the low side of fees for similar services.

Nestle appealed. In reversing the jury verdict, the Court of Appeal began by saying, "No social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay."

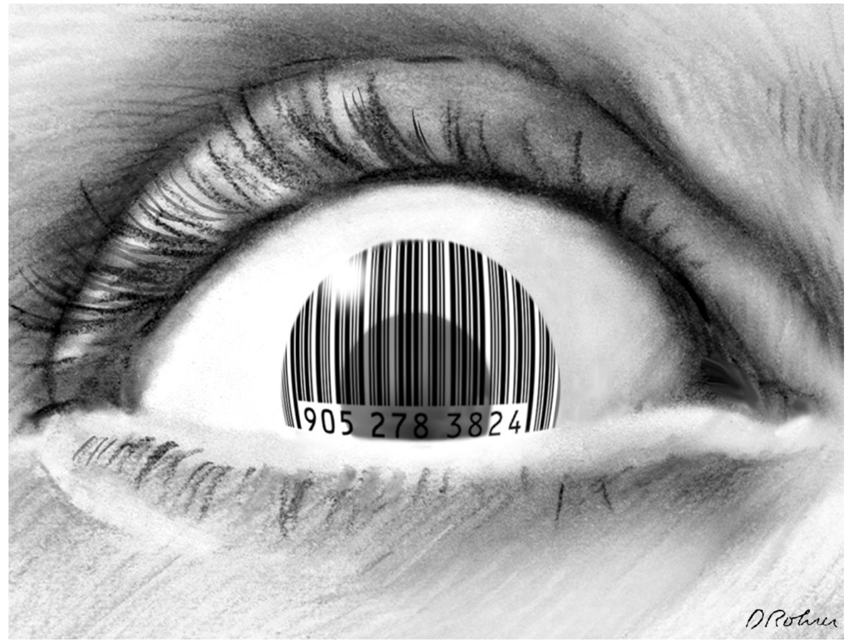
The court then turned to whether the single-publication rule applies to right of publicity claims. The rule creates a legal fiction to deem one issue of a publication a single publication for tort purposes, regardless of whether the issue consists of one copy or a million copies. The rule precludes an overwhelming number of lawsuits that could be brought in multiple jurisdictions based on the mass distribution, and starts the statute of limitations on the date of publication, rather than the date of "discovery" of the wrong.

California's single-publication rule provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to any audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions."

The single-publication rule has been applied to many types of lawsuits, including civil rights, fraud and deceit and personal injury actions. It has been interpreted to apply not to specific torts, but rather to the manner in which the tort is executed, i.e., where the wrong arises out of a mass communication. The discovery rule may still be applied if the wrongful conduct has been "hidden" from public view, as opposed to being used in a public manner.

The *Christoff* court held the single-publication rule applies to right of publicity claims, finding that otherwise "the litigation would have become unwieldy and potentially endless with every coffee can, print, television and electronic advertisement generating a separate cause of action." Yet, while Nestle's advertising campaign was not "hidden," the court remanded this issue as the record failed to show how large the initial distribution of Christoff's likeness was, and whether a reasonable person in his position had a meaningful ability to discover the violation earlier.

Christoff also argued Nestle "republished" the label for each



use on different flavors of coffee, labels showing different amounts of Christoff's face, coffee distributed in foreign countries, etc. The single-publication rule does not apply to a "republication," such as a different edition of a newspaper, a rebroadcast of a television show or a softcover publication of a hardcover book. While advertising cases are sparse, courts look to whether use of a photographic likeness on brochures, signs, billboards, calendars and the like constitutes part of the same marketing campaign or part of incremental publications designed to appeal to different audiences. The verdict was remanded on this issue as well.

The court also applied the two-year statute of limitations that protects property rights (California Code of Civil Procedure Section 339), rather than the one-year statute of limitations that applies to privacy torts (Code of Civil Procedure Section 340), to right of publicity claims in keeping with the modern notion that the right of publicity protects an economic property interest.

The court also addressed the $15 million profits award. Section 3344 allows recovery of profits "from the unauthorized use" that is attributable to the use and is "not taken into account in computing actual damages." Christoff's expert, a marketing professor, testified the "taster" on the Taster's Choice label is a "visual cue that becomes a … link back to the product, a way to further identify the product" and effect the sale. He attributed 5 to 15 percent to the Taster's icon. The jury awarded 10 percent of the sales or $15 million of Nestle's profits to Christoff, who was the Taster's icon for the labels at issue.

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The Court of Appeal remanded this issue for a determination of whether the icon of a image with a handsome man generated the sales, or whether Christoff's distinctive identity attracted and evoked the desired response in consumers, as the right of publicity protects only the commercial value of an individual's identity. Because Christoff provided no evidence that his specific characteristics created a value in the icon, and since his "identity" or "persona" is the "crux" of a right of publicity claim and the basis for disgorgement of wrongfully acquired profits, such evidence was required.

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