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Current Legal Issues Affecting the Advertising Industry / Fall 2003

First Amendment Goes to the Back of the Bus in Rosa Parks Court Battle

THROW OUT YOUR PUBLICITY RIGHTS CLEARANCE HANDBOOK, because the Sixth Circuit recently changed the rules. In a late-summer opinion, that court held that the use of the name Rosa Parks in the title of a song could violate Ms. Parks' state law publicity rights, reversing a lower court decision that held the use protected under the First Amendment. Rosa Parks, whose celebrated act of civil disobedience was and still is held out as a symbol for the civil rights movement itself, is a sympathetic plaintiff, which helps to explain why the Sixth Circuit decided to stretch existing jurisprudence and let her claim survive. But the Sixth Circuit's decision disrupts the accepted distinction between "commercial" and "non-commercial" speech in the right of publicity context and thereby threatens to stifle expression that has historically been protected as a matter of law.

The distinction between "commercial" and "non-commercial" speech is fundamental to the rights and risk analysis in the right of publicity context because, although the following statement too simply states the rule, commercial use is not protected against publicity claims while the unauthorized use of a person's name, voice, likeness or persona (collectively, "Image") in a non-commercial or "newsworthy" context is protected against such claims by the First Amendment, so long as the Image used is reasonably related to the aspect of the use that makes it newsworthy (e.g., an article reporting current events *(continued on page 10)*

Chewing the Fat

Do you know that vegetable shortenings, some margarines, crackers, cookies, snack foods and other manufactured foods may not be good for you? Probably. But, do you know that all of these foods generally contain trans fat, or do you even know what trans fat is? Probably not. Well that is about to change with the FDA's recent announcement that, as of January 1, 2006, nutrition labels will be required to include the amount of trans fatty acids, or "trans fat", that a food contains along with the saturated and unsaturated fat content currently listed on food packaging.

Studies have shown that consumption of trans fat contributes to an increase in LDL cholesterol (a.k.a. bad cholesterol) in the blood, which in turn increases the risk of coronary heart disease, the leading cause of death in the United States. While trans fat does occur naturally in certain animal fats, it is more often created artificially through the process of hydrogenation as a means to increase the shelf life and flavor stability of manufactured foods. ***(continued on page 11)***

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Here's to Your Health

Rules recently issued by the Alcohol and Tobacco Tax and Trade Bureau (TTB) allow wine producers and beer and distilled spirit manufacturers to make health related statements about their products. The TTB rules are the product of much debate among a host of interest groups. Fueling the debate are certain medical studies that have concluded that, for certain segments of the population (particularly older drinkers), moderate alcohol consumption may reduce the risk of coronary artery disease.

Citing these and various other health studies, the wine industry has lobbied for years for the right to include statements on wine labels and in advertisements regarding the positive health effects of moderate alcohol consumption. In 1999, the Bureau of Alcohol Tobacco and Firearms (ATF) opened the door to such statements by approving several wine labels that contained so-called "health-related directional statements," or statements that direct consumers to a third party source for information regarding the health benefits of alcohol consumption. One such label read: "The proud people who made this wine encourage you to consult your family doctor about the health effects of wine consumption." These directional statements proved to be highly controversial, with many critics denouncing the labels as advocating alcohol consumption, and bowing to such pressure, a moratorium on such statements was imposed by the ATF after the initial approvals were issued.

The new TTB rules represent an attempt to balance what the TTB describes as a "producer's First Amendment right to label and advertise its products in a truthful and non-misleading fashion and the public's right to be informed on the significant health risks associated with alcohol consumption". Establishing broad guidelines regarding the permissibility of various types of statements, the rules classify such statements into three categories: (1) specific health claims (i.e. claims regarding the relationship between alcohol beverages and a disease or health-related condition); (2) health-related statements (i.e. claims that the alcohol beverage has curative or therapeutic health benefits); and (3) health-related directional statements (described above). The category into which a given statement fits determines the restrictions that apply and the disclaimers that must be included.

The high level of detail and the lengthy disclaimers that must accompany specific health claims and health related statements make it unlikely that alcohol beverage producers will include such claims on labels or in advertising any time soon. But the rules governing health-related directional statements require only "a brief disclaimer stating that the statement should not encourage consumption of alcohol for health reasons, or some other appropriate disclaimer to avoid misleading consumers." Even so, a directional statement will be presumed misleading unless it directs consumers in a "neutral" or other "non-misleading" manner to a third party or other source for balanced information regarding the effects alcohol consumption can have on health.

The wine industry has welcomed the new rule. John De Luca, former President of the California Wine Institute, is reported as saying: "We believe science has prevailed over politics." Although the rules apply equally to wine, distilled spirits and malt beverages, wine producers have expressed the strongest interest to date in utilizing directional statements on labels and in advertising. ■

Just Gag It!

In a decision handed down last year in *Kasky v. Nike,* the Supreme Court of California forgot one thing: the First Amendment. In an unnecessarily broad opinion, a majority of the Court held that Nike could be found liable for false advertising under California Business and Professions Code § 17200 et seq. for statements made in press releases! The claims have now been settled, but the bad court decision still stands.

The case was closely watched by U.S. corporations and the advertising industry, which hoped for the best when the United States Supreme Court granted Nike's cert. petition last fall, but that hope was snuffed out several weeks ago when the federal jurists decided that they didn't want to hear the case after all, and dismissed the prior grant of *certiorari.* Shortly thereafter, Nike announced that it had settled the claims against it, which got Nike out of a pickle. But with the *Kasky* case on the books, businesses would be well advised to examine all public statements they make about their product or services, regardless of the forum in which such statements are made, from the perspective of being a potential defendant.

The Nike case arose after the footwear company tried to defend itself against television and newspaper stories alleging abusive conditions at its overseas factories. A private citizen used California state law to sue Nike and seek monetary damages and injunctive relief against what he claimed were false statements by Nike about its foreign factory conditions. A slim majority of the California Supreme Court held that Nike's statements were "commercial speech" – rather than "noncommercial speech" – meaning that the statements received a lesser degree of First Amendment protection. As a practical matter, this meant that Nike could be sued for its decision to join the public discourse on a topic in the public interest. The court reasoned that "[b]ecause the messages * * * were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages." The court admonished that "when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."

The opinion was not without dissent. The dissenting state court justices warned that it was improper and unconstitutional to restrict Nike's ability to engage in the "important worldwide debate" regarding use of foreign labor to manufacture goods sold in the United States. One dissent emphasized that Nike's campaign had not been made through product labels, inserts, packaging or commercial advertising intended to reach only Nike's actual or potential customers, but rather via press releases, letters to newspapers, and letters to university presidents and athletic directors. As such, Nike's statements (true or false) should have been treated as non-commercial speech entitled to the full breadth of protection under the First Amendment. Another dissent wrote that the majority's decision created an overbroad test that, taken to its logical conclusion, renders *all* corporate speech commercial speech: "Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation's business goodwill and sale value," all statements by a corporation about any topic may be found to be "commercial speech under the articulated test."

The "commercial" vs. "non-commercial" distinction (or lack thereof) made by the Court in *Kasky* has for reaching and likely unintended consequences in other areas as well. For example, under right of publicity law and trademark dilution law, "commercial" speech is most often viewed as a fundamental element of a claim. Are press releases that mention the names of competitors or the names of individuals now going to be open to attack on right of publicity and trademark dilution grounds?

For all its shortcomings, the California Supreme Court decision in *Kasky* at least offers some consistency in its message: Corporations are subject to potential liability if they make false or misleading statements about their products or operations. ■

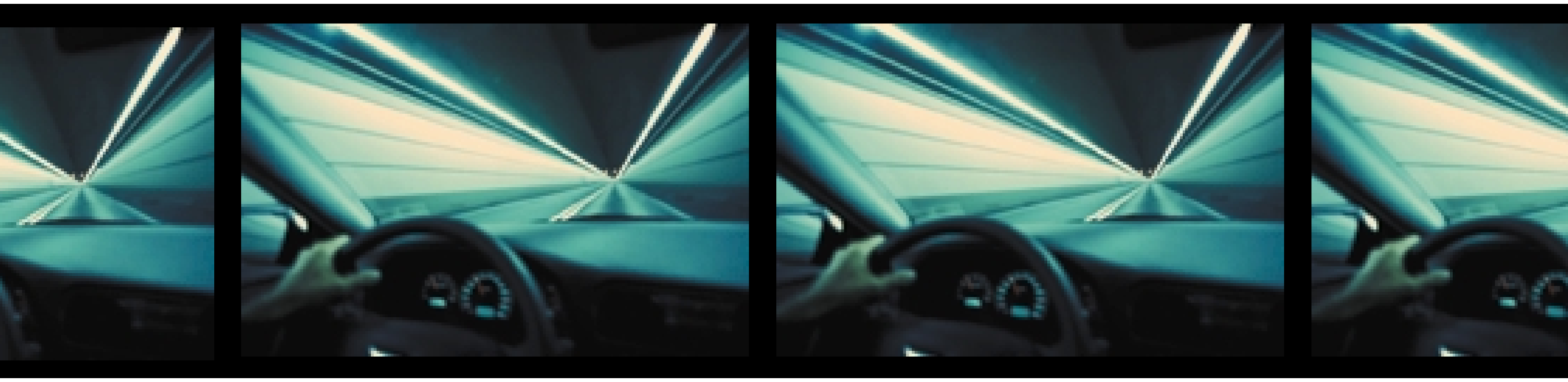
My, What an Advertaining Entertisement!

"View the ad without all those TV show interruptions" reads a banner on Nike.com. This sentiment reflects the increasing willingness of consumers to view advertisements as entertainment, and of advertising and creative executives to blend art and promotional sponsorships into a single entertaining product that (hopefully) sells. Advertisers, concerned about the proliferation of digital technology that allows television viewers to skip traditional commercials entirely, and television networks, steadily losing viewers to cable channels and concerned about the loss of the $15 billion generated by advertising sales annually, are turning to "advertainment" or "branded content" in a creative effort to sell merchandise and subsidize production costs.

Perhaps the best known venture in the burgeoning field of advertainment is BMW's series of film shorts. The six- to eight-minute shorts have been promoted in print advertisements and in letter box commercials on television, are of theatrical motion picture quality, feature the directing talents of Ang Lee, John Frankenheimer and Guy Ritchie, and star mega-watt talent such as Madonna and Don Cheadle. In each short, however, the biggest "star" is a car. According to one BMW exec, "BMW basically fills one of the cast roles. We have not gone above and beyond that." Except, of course, to spend a rumored $15 million on the first set of five films, a cost commensurate with that of a meaningful branding campaign. Armed with the knowledge that 85% of BMW purchasers research their car purchase on the Internet, it was an investment BMW was willing to make.

As for concerns that the marriage of content and advertising will ultimately stifle creative expression, according to Ang Lee, "[c]ompare [the BMW short he directed] with Hollywood or any filmmaking – this has more freedom." Because these short films are typically proliferated to viewers via the Internet, the creative teams behind the "commercials" are not bound by strict television requirements that, for example, would prevent Skyy Vodka from portraying attractive vodka drinkers engaged in adult behavior too risqué for free television on its own series of shorts running on Skyy.com. And generally, no one has suggested that the product claims arguably being made in these "commercials" (think "bullet-proof" BMW's) need to be reasonably substantiated. Moreover, using a product as the inspiration for a creative work generally ensures that the viewer is on notice about the purpose of the work, and will therefore not be turned off by product placement that can sometimes detract from the traditional television and film viewing experience.

In the theatrical motion picture realm, bucking the trend of subversive product placement altogether, Miramax Films employed the "car as star" notion in its search for an automaker willing to pay more than $35 million for the privilege of having one of its cars prominently featured in "The Green Hornet", slated for release in 2005. Miramax purposefully announced its search for the automaker partner prior to engaging a director or hiring script writers in order to provide the automaker with a greater ability to influence how the car would be featured and employed in the film. Other films come already equipped with the potential to seed a major product in the story, such as New Line's upcoming film "Cellular" (think cell phone manufacturer), a thriller about a young man who answers a cell phone call from a kidnap victim and has to track her down while making sure the connection is not lost.



The most recent developments in branded content include television shows based on successful web sites, such as "Classmates" (Classmates.com), which began airing on a number of Fox affiliates this past summer, and eBayTV, slated to air in 2004, and a new digital cable channel dedicated entirely to advertainment: BOB (Brief Original Broadcasts), sponsored by

Anheuser-Busch. BOB will reportedly feature short, one- to eight-minute programs and short films interspersed with long commercials.

In addition, "Cheat! Pringles Gamers Guide", a program set to air on the new 24-hour video game channel G4, will feature the "Mr. P" Pringle's spokesman as a character on the show and in commercials during the show. Victoria's Secret fashion shows have proven to be a successful one-hour special format for ABC, and "Full Frontal Fashion", a fashion news show on the WE network, features L'Oreal as an "integrated sponsor", and includes segments starring L'Oreal stylists and spokespersons in addition to L'Oreal products. Finally, anyone who has seen Bravo's breakout hit "Queer Eye for the Straight Guy" knows the power that a positive plug in a program can have on brand recognition (think DiSaronno on the rocks).

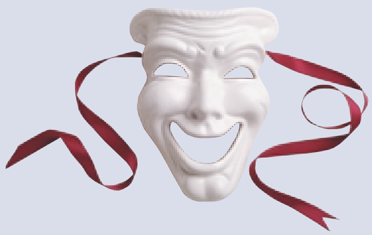
But does advertainment work? After the launch of BMW's film shorts in 2001, which were viewed by more than 14 million people, BMW reported that sales were up 17% in 2002, bucking the trend of most luxury auto sales that year. And in an Advertising Age survey of 500 consumers taken in December 2002, although most of those polled believed that branded content was "distracting", nearly half of 18-34 year old survey participants found the format "entertaining" and 35% stated that the format was *not pervasive enough*!

This innovative creative environment has created a new legal and business environment as well. From the contract between the advertiser and the producer, to the contracts between the producer and the talent (and their guilds), and the producer and

the distributor or television network airing the show, new paradigms of approval, control and profit participation are being created. As Steven Heyer, President and COO of the Coca-Cola Company announced last year, he looks forward to the day when the production companies pay Coke to appear in the film or television program, instead of vice versa. ■

And Now for a Commercial Break:

In a surprising twist, SAG, AFTRA and the advertising industry reached a tentative agreement regarding the SAG/AFTRA Commercials Contract after only two days of negotiations. And an even more promising development was the approval of the proposed agreement by the joint SAG-AFTRA board on September 30, 2003 by a vote of 81% to 19%. Now the only step remaining is ratification of the three-year Contract by the unions' 140,000 members. Completion of the membership ratification process will likely require a minimum of three weeks following the Board's approval of the Contract. A majority vote of the unions' membership is required to ratify the new Contract.



Under the Commercials Contract, which consists of the AFTRA Television Recorded Commercials Contract, the AFTRA Radio Recorded Commercials Contract, and the SAG Commercials Contract, SAG and AFTRA members reportedly earn approximately $700 million annually. The quick resolution of the negotiations appears to be the result of the parties' effort to avoid the type of record-setting work stoppage that occurred when the last Commercials Contract expired without a replacement. The current Commercials Contract expires on October 29.

Prior to the commencement of formal contract negotiations on September 23, the parties' chief negotiators met informally, and in late July, SAG and AFTRA jointly approved a contract proposal that was submitted to the advertising industry. Sources indicate that the proposal was designed to encourage the advertising industry to conclude negotiations as quickly as possible. SAG and AFTRA reportedly agreed to seek the least costly package if the advertising industry agreed to expedite negotiations.

The unions' approach was likely intended to ease the concerns of producers and other unions that SAG and AFTRA intended another fierce battle with the advertising

(continued on page 9)

tough cookies

Until recently, a child could receive a coupon for a free Mrs. Fields' cookie or a chance to win a free box of Hershey's candy by visiting the sponsor's website and providing personal information, including his or her name, home address, e-mail address, and telephone number. Not any more. In February 2003, Mrs. Fields Cookies and Hershey Foods Corporation each agreed to settle Federal Trade Commission charges that their websites violated the Children's Online Privacy Protection Act of 1998 (COPPA) by collecting personally identifiable information from children *without first obtaining the required parental consent*.

In addition, the FTC has alleged that the sites failed to post adequate privacy policies, failed to provide direct notice to parents about the information they were collecting and how it would be used, and failed to provide a reasonable means for parents to review the personal information collected from their children and to refuse to permit its further use. Mrs. Fields will pay civil penalties of $100,000 and Hershey's Foods will pay civil penalties of $85,000. In addition, the settlements bar future COPPA violations, require the companies to delete any information collected in violation of COPPA, and require specific record-keeping to allow the FTC to monitor compliance. These are the largest fines ever collected by the FTC for COPPA violations.

COPPA has been in place for years now. So how did two well-known brands get tripped up by this law?

The FTC charged that Mrs. Fields failed to make any attempt to obtain parental consent before collecting personal information from more than 84,000 children by offering them a chance to join a "birthday club" to receive a coupon for a free cookie or pretzel. The FTC also alleged that Mrs. Fields did not attempt to provide parents with any means to review or delete their children's personal information.

For Hershey's part, the FTC charged that Hershey's failed to take adequate steps to obtain verifiable parental consent on its many candy-related sites directed at children. Although Hershey's directed children under 13 to have their parents fill in an online "Parental Consent" form, it allegedly took no steps to confirm that a parent or guardian either saw or filled out the form. Based on these facts, the FTC asserted that Hershey's "method of obtaining parental consent was not reasonably calculated to ensure that the person providing consent was the child's parent."

The Hershey's case is the first COPPA case to challenge the adequacy of a company's *oversight of its procedures for* obtaining parental consent. These consent decrees have paved the way for more COPPA complaints and signal tougher FTC enforcement. By obtaining and publicizing a combined $185,000 in fines, the FTC is sending a clear message to corporate America that obtaining personal information from children in violation of COPPA will not be tolerated. The FTC's accompanying press release warns: "If your website collects personal information from children, comply with the law or face the consequences."

In light of these developments, companies that collect information on-line from children under 13 would be well-advised to strictly follow COPPA's requirements and, in particular, to take adequate steps to obtain verifiable parental consent before collecting personal information. What are the basic rules your company should follow to comply with COPPA?

First, evaluate whether COPPA applies to your company's website or services. Keep in mind that COPPA only prohibits the *on-line collection of personally identifiable information from children under l3*. It applies to operators of websites and online services directed to children under 13 that collect children's personal information and operators of general audience websites and on-line services who have actual knowledge that information is being collected from children.

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Second, understand that your company cannot collect "personally identifiable information", including the following, without *prior* verifiable parental consent:

1. the child's first and last name;
2. the child's home or other address;
3. the child's e-mail address;
4. the child's telephone number;
5. the child's Social Security number; and

any other identifier that the FTC determines permits the physical or online contacting of a specific individual (*e.g.*, cookies).

Third, determine whether your company is collecting personally identifiable information for one of the following four permitted purposes which may relieve your company of the obligation to obtain prior verifiable parental consent:

1. collection of a child's or parent's e-mail address to provide notice and seek consent;
2. collection of an e-mail address to respond to a *one-time* request from the child (*e.g.*, homework help or to enter a sweepstakes) which is then deleted;
3. collection of a child's name and on-line contact information to solely protect the safety of the child; or
4. collection of the child's name or on-line contact information solely to protect the security or liability of your company's website.

Fourth, if none of the exceptions apply, obtain one of the following forms of verifiable consent from the child's parent or guardian *before collecting* the information:

1. a parent's mailed or faxed signature
2. a parent's digital signature
3. a parent's credit card number
4. a parent's toll free number
5. a call from a parent to the operator's free number

Finally, ensure that your company's website posts a clear and prominent privacy notice which includes the following information:

1. the name and contact information of all website operators collecting or maintaining children's personal information;
2. the kinds of personal information your company collects from children and how it is collected;
3. how your company uses the personal information;
4. whether your company discloses the personal information to third parties and if so, to whom and for what purpose;
5. notice that the parent has the option to agree to the collection of the child's personal information without consenting to the disclosure of the information to third parties;
6. notice that your company may not require a child to disclose more information that reasonably necessary to participate in an activity; and
7. notice that the parent can review the child's personal information and ask to have it deleted, and refuse to allow any further collection or use of the child's information.

By following these basic rules, your company will be well on its way to ensuring that it has complied with COPPA and avoiding the expense and adverse publicity which is the inevitable result of any FTC or other enforcement action that is brought in the name of children's privacy. ■

A New Groove:
The Marketing and Music Industries Hit Their Stride

The successful marriage of entertainment and brand names has grown ever since E.T. memorably grabbed fingerfuls of *Reese's Pieces* onscreen in 1982. Today, marketers are increasingly turning their attention from the big and little screen to the music industry, and especially to one of the most profitable and fastest growing sectors, hip-hop.

For advertisers and brand managers, hip-hop has at least two distinct advantages over the more traditional methods of product placement: its surprisingly broad appeal, and its unique openness to new and creative forms of integrated marketing.

Long seen as solely appealing to an African-American demographic, hip-hop is now "less defined by race but by a shared lifestyle that transcends race, age and gender, especially given the globalization of hip-hop," says Erin Patton, president of TMG, a New York-based marketing and communications think tank. In other words, hip-hop has gone mainstream and now embodies an "urban" demographic made up of 16-34 year olds (and 25-54 year olds, if you include R&B), which is estimated to represent over 100 million consumers and $300 billion in buying power. Hip-hop's core audience can be further expanded to include the United States teen market of over 32 million 12-19 year olds. To strengthen its appeal to such a vital teen market, videogame giant Electronic Arts reportedly works closely with record labels and artist managers to market its products and even has a game, *Def Jam Vendetta*, which pits players against characters based on Def Jam artists. Another EA game, *Madden 2004*, includes a special version of the song "Rock U" performed by the Roots.

In addition to offering access to a broad and growing demographic, the marriage of advertisers and hip-hop artists offers the brands a unique opportunity for more fully integrated marketing, which does more than just plug an artist into a product endorsement hole. For example, in April 2, 2003, Reebok launched Jay-Z's limited edition signature shoe line, a quick sell out both in the United States and internationally. Coca-Cola's multifaceted "Real" marketing campaign features spots with R&B, neo-soul and hip-hop artists, such as Mya, but to further the campaign, Coca-Cola also sponsored intimate concert performances with several of the campaign's artists. In one of the most recent hip-hop marketing marriages, the Gap launched its new ad campaign featuring Madonna and Missy Elliot in July, 2003, and in which Gap will also release an exclusive CD of the two artists. The Gap's campaign, appropriately named "A New Groove", mirrors the new mind of the marketing industry as it literally places a hip-hop artist, Missy Elliot, alongside both a pop music icon, Madonna, and the ultimate American classic, jeans and a white t-shirt.

The openness of many hip-hop artists to such creative endorsement deals (as opposed to many of their rock peers who fear that their "artistry" may be compromised) allows for marketing relationships that feel and are more natural and real, where the personality of the artist has a tangible impact on the product (Jay-Z's design of a line of Reebok sneakers) and the product has a tangible impact on the music. In a May, 2003 deal, trading card company the Upper Deck reportedly agreed to sponsor a United States and European tour for a certain pop group in exchange for a song about a new game it is introducing. The deal includes radio play for the new song which will promote the product and, inescapably, the pop group. Other R&B and hip-hop artists that have entered into various endorsement deals include Beyonce Knowles (Pepsi), LL Cool J (Dr Pepper), Snoop Dogg (Cadillac), Mary J. Blige (M.A.C.) and Tweet (Verizon), with a typical agreement paying the artist a flat fee ranging from $500,000 to $5 million and more, depending on the artist's star quality, market value and the scope of the partnership and campaign.

Today, some hip-hop artists are no longer waiting for marketers to approach them for product placement deals. Instead, the artists are dropping their favorite brand names directly into their songs. Lil' Kim wins the greatest number of brand mentions per song this year, with 14 different references in her recent single "The Jump Off". Singing "Black Barbie dressed in Bulgari, I'm tryna leave in somebodies Ferrari," Lil' Kim goes on to mention Bentleys, Hummers, Mercedes Benz, Timberland, Range Rover and Jaguar, among other brands. An artist may mention a specific brand because of a genuine affinity for the product or in the hopes of obtaining free goods and even a strategic endorsement deal.

And the gamble has paid off in some cases. Run-D.M.C. was inspired to write the song "My Adidas" as a dedication to their favorite sneaker. But after record label executives invited Adidas executives to a Run-D.M.C. concert where thousands of fans held up their shoes during the live performance of the song, Adidas created a shoe named after the band and hired them for promotions. While Run-D.M.C. was not paid for writing the song, the group has since profited from Adidas promotional performances and attendance at Adidas events.

But this form of artist-driven product placement is not always music to the ears of advertisers. After MCA's group, Aqua, gained popularity with the song "Barbie Girl", Mattel sued the record company for trademark infringement and dilution. While the Ninth Circuit Court of Appeals ultimately ruled in favor of the band, subsequent Circuit Court decisions don't hit as nice a note for artists and record labels (see adbriefs article re: Rosa Parks). Regardless, the union of popular products with hip-hop and other music artists is only growing. ■

Commercial Break (contined from page 5)

industry like the one that occurred in 2000, which was caused largely by a stalemate over cable payments and the jurisdiction of commercials streamed over the Internet. The prospect of a strike in 2000 prompted nervous producers to rush to stockpile certain commercials, drove commercial production "offshore," and ultimately gave SAG and AFTRA the membership support they needed to push their "Global Rule 1" agenda, which purports to assert the unions' jurisdiction around the world.

Highlights of the new Contract are as follows:

- **7% gain in session, holding, foreign, theatrical/ industrial and internet fees (television and radio)**
- **5% increase in wild spot use (television only)**
- **14% increase in the ratio applied to the off-camera principal performers in cable (television only)**
- **5% increase in cable for on-camera performers (television only)**
- **7% increase in wild spot use (radio only)**
- **1% pension and health plan contribution increase (from 13.3% to 14.3%) (television and radio)**
- **The creation and implementation of Standard Employment Contracts (radio only)**
- **15% increase in Spanish language program use (television only)**
- **6.1% increase in session fees for background performers and an increase of 5 covered jobs (television only)**
- **The creation of a special subcommittee of the Industry Union Standing Committee to study the issue of "multiplexing," the practice of broadcasting two or more programs simultaneously over different channels of the same network. (television only)**

With the ratification vote to be completed before expiration of the current contract, it appears that advertisers and producers can be assured of certainty in the commercials workplace. Nevertheless, it will be interesting to see how the increase in branded-reality programming plays out in the future. Reality programming produced outside of the guilds' jurisdiction is frequently used to sell products and it remains to be seen whether the guilds will, over time, seek to bring such "commercials" within the purview of the Commercials Contract, as opposed to other guild agreements. ■

First Amendment Goes (continued from page 1)

or discussing matters in the public interest or arguably a song about the civil rights movement or defiance in general that uses the name Rosa Parks in its title).

In many right of publicity cases, the First Amendment question does not arise because the challenged use of the person's identity occurs in a conceded advertisement that "does no more than propose a commercial transaction" and is, therefore, clearly commercial speech that must yield to the plaintiff's publicity rights. *See, e.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (9th Cir. 1992) (use of imitation of singer's voice in radio snack food commercial not protected); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (use in television car commercial of "sound-alike" rendition of song singer had recorded not protected).

In contrast, Courts have at various times recognized that expressive, artistic or entertainment content itself is a significant medium for communicating ideas (i.e. non-commercial expression) and, therefore, entitled to the full breadth of First Amendment protection. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777 (1952) (explaining that film is a "significant medium for the communication of ideas", and whether exhibited in theaters or on television, a film is a medium which is

The Sixth Court's decision in *Rosa Parks v. LeFace Records* forces the authors of creative works to evaluate whether the use of someone's image is sufficiently relevant to the creative message so as to be protected against publicity claims

protected by the constitutional guarantee of free expression); *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948) (holding that entertainment is entitled to the same constitutional protection as the exposition of ideas, and explaining that "The line between the informing and the entertaining is too elusive for the protection of a basic right"); *Polydoros v. Twentieth Century Fox Film*, 67 Cal. App.4th 318 (1997) (holding that the defendant's use of a character in the fictional motion picture entitled "The Sandlot", which character shared a similar name and similar characteristics with the plaintiff, was entitled to the same constitutional protection as the exposition of political ideas). Indeed, in a case relating to a movie title, much like the song title involved in the *Rosa Parks* case, the Second Circuit stated in *Rogers v. Grimaldi* that "Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion", and held that if the title is artistically relevant to the protected work, the slight risk that such use of a celebrity's name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression and the Lanham Act must yield to the First Amendment, unless the title has no artistic relevance to the underlying work whatsoever or, if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work through an over reference, as would be the case with a book entitled "Ben Mulcahy on Advertising" in which Ben Mulcahy had no involvement or affiliation or a book or program entitled "Bob Darwell – An Authorized Biography", which in fact was unauthorized. *See Rogers v. Grimaldi*, 875 F.2d 994, 997 (2nd Cir. 1989).

The Sixth Circuit in *Rosa Parks v. LeFace Records* purported to embrace the *Rogers v. Grimaldi* test as the most protective of First Amendment interests. But in effect, the decision dilutes the protection given to expressive works and opens the door to protracted litigation, making it harder for authors of expressive works to achieve satisfactory resolution of publicity lawsuits brought against them through a motion to dismiss or motion for summary judgment.

The *Rosa Parks* case involved "a dispute over the name of a song." That song, a rap medley entitled "Rosa Parks", was recorded by the band OutKast and produced by LeFace Records, two of the defendants in the case. The album cover included an "explicit content" parental advisory, and the song itself included lyrics suggesting, among other things, that OutKast was back with some new music and so all others should step aside or "move to the back of the bus", a phrase that was used repeatedly in the chorus of the song. Rosa Parks apparently didn't want to be associated with the song, so she sued the defendants for defamation, tortious interference with business relationships, and for violating her publicity rights under the Lanham Act and Ohio state law. The district court granted the defendants' motion for summary judgment, holding that the defendant's song was expression entitled to the protection of the First Amendment. The Sixth Circuit, however, rejected the district court's conclusion as a matter of law that the defendant's performance and exploitation of the song was an expressive work protected by the First Amendment, and remanded the case for a trial on the issue of whether the relationship between Rosa Parks and the content of the song was sufficient to entitle the song to First Amendment protection against Ms. Parks' publicity and Lanham Act claims.

The Sixth Circuit's decision in *Rosa Parks* forces the authors of creative works to evaluate whether the use of someone's Image is sufficiently relevant to the creative message so as to be protected against publicity claims. If the opinion were limited to the context of evaluating the situation where someone's Image is used in the title of an artistic work, that would be one thing because it is at least an arguably straightforward exercise to determine if a title of a work is relevant to its content. But in more recent decisions, the Sixth Circuit has broadly proclaimed that its rule may extend to the use of someone's Image in the content of the work itself! *See ETW Corp. v. Jireh Publishing*, 332 F.3d 915 (6th Cir. 2003) (stating the test is "generally applicable to *all* cases involving literary or artistic works where the defendant has articulated a colorable claim that the use of a celebrity's identity is protected by the First Amendment.") (emphasis added). For those creative authors who are not willing to have the content of their speech chilled by liability exposure, there will likely be even more legal fatalities in this area as the courts struggle to find a workable standard for evaluating whether the use of someone's Image in the content of an artistic work is protected speech, versus when it can support a publicity claim. ■

cover story

Chewing the Fat *(continued from page 1)*

The FDA indicated that the labeling requirement is intended to raise consumer awareness and help individuals make informed decisions about their diet. The FDA, however, has not provided consumers with any guidelines as to acceptable consumption levels or required any specific warnings on products about the risks associated with trans fat consumption, and it's hard to imagine that consumers weren't already aware that eating cookies and other snack foods might be bad for them. It seems the practical impact of the new regulation on consumers may come from the food manufacturers themselves.

As it becomes en vogue for health conscious consumers to trim trans fat intake, food companies, and their advertising agencies, may try to cash in on claims that their products are low in trans fat. Frito-Lay and Kraft have already publicly announced plans to reduce the use of trans fat in their products, and, along with other food manufacturers, have indicated their intent to phase in the new labels immediately, despite a grace period that lasts until 2006.

Nevertheless, without additional information, it may be impossible for consumers to evaluate whether a particular snack food is actually better for them than others just because it is "low in trans fat", or contains slightly less trans fat per serving. Advertisers should approach such claims by ensuring that there is adequate substantiation for the claim and that the claim being made is not otherwise false or misleading, as they do (or should do) for other types of product claims. To help manufacturers make those determinations, the FDA has stated that the labeling requirement is only the first step in the initiative and that it is considering criteria for evaluating which products can be classified as "lean", "extra lean" and "low in trans fat". ■

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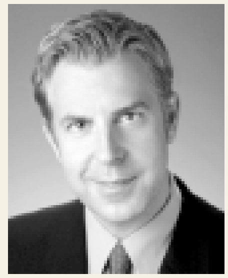

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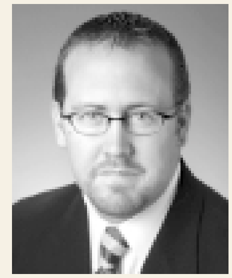

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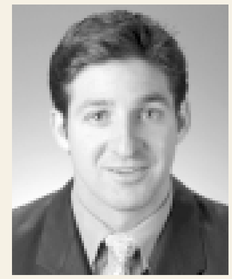

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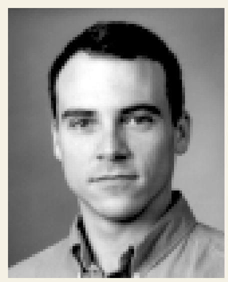

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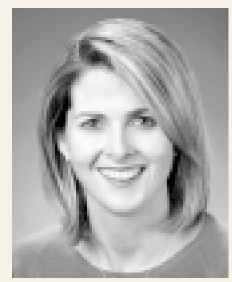

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save the date

Advertising Law Group member Benjamin Mulcahy will moderate a panel on Feature Film Tie-Ins at the ACI Advertising Law Conference December 15-16, 2003 in New York