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MY PUNIM FOR \$15M

By: Jim Astrachan

Some folks attribute, "Sometimes a cigar is just a cigar" to Sigmund Freud. Others say that the quote was merely a reference to Freud in that someone said, "Even for Freud, a cigar must have been just a cigar." Who said it is of no moment. What is important, though, is when is a coffee label more than just a coffee label? The answer is when it inadvertently costs the advertiser more than \$15 Million.

Twenty years ago Russell Christoff, today a kindergarten teacher, modeled for a Nestle's Taster's Choice ad. Lots of photos were taken, for which Christoff was paid \$250 and promised \$2,000 if any photos of him were used in Nestle's advertising. To his knowledge, his photos were never used and so he thought not of the matter until 2002 when the day's shopping brought him to a Rite-Aid store.

There, on the shelf, staring back at Mr. Christoff from dozens of jars of Taster's Choice coffee was a photograph of him taken at the photo session twenty years earlier. Nestle had placed his photo on the label – exactly the sort of friendly face with whom you'd like to share your morning cup of coffee. Nestle, Mr. Christoff learned, had used his likeness in its marketing and never told him; never paid him nor even offered to buy him even a cup of coffee. Because Nestle had failed to pay the agreed \$2,000 to Mr. Christoff, his lawyers opined that Nestle had not merely breached its twenty year-old contract, but that its unauthorized use of his photo was a violation of Christoff's right of publicity. A jury agreed, but that's not the point.

The right of publicity is a property right and is violated when a third party uses a person's name, voice, photograph or likeness for purposes of selling or promoting products or services without permission. There are common law rights and statutory rights. Mr. Christoff alleged that Nestle violated his statutory rights under California law. No matter that Christoff was not a celebrity.

No big deal, one might think. After all, the original fee was only \$2,000 and certainly that fee, plus interest, ought to be the measure of damages should the teacher prevail. So with hat in hand Nestle's lawyers approached Christoff's lawyers

and eventually offered a settlement of \$100,000. But Christoff, who saw liability and damages from a different angle, demanded \$8.5 Million and the case could not settle. As non-settled cases do, it eventually went to trial before a jury.

Damages under the California statute are reminiscent of damages under the Copyright Act in that they include damages suffered by the person whose right of publicity is violated and any profits attributable to the unauthorized use which are not taken into account when calculating damages. And to add a healthy shake of piquant spices to the mixture, the statute allows punitive damages and attorneys' fees.

Through discovery, the kindergarten teacher learned that Nestle had begun to use his photo in 1986 and from 1997 to 2003 had placed his punim on Taster's Choice labels in the United States, Mexico, Canada, Korea, Japan, Israel and Kuwait. Nestle, apparently must have seen something in Christoff's face that caused it to believe that his face would sell coffee.

After hearing six days of testimony from fact and expert witnesses the jury concluded there was a connection between his face and the sale of coffee and rendered a verdict in Christoff's favor for a massive \$15.6 Million! Of this amount, \$15.3 Million represented 5 percent of Nestle's Taster's Choice profits, being those profits the jury believed were attributable to Mr. Christoff's smiling face on the Taster's Choice label.

I know what you're thinking: "That was California and this is Maryland. Such a thing could not happen to a Maryland-based advertiser." But reconsider. National advertising crosses state lines, especially when the advertiser's website is a medium of that advertising or national media is bought. And even in Maryland where there is no right of publicity statute there is the concept of unjust enrichment.

Any advertiser who wants to avoid litigation must impose and enforce the absolute requirement that before any advertising employing a likeness is run, the agency or advertiser establishes that a release exists. And it is equally critical that the release allow the commercial use of the likeness or identity. The only way to assure that a release exists is to read it carefully. Anytime a photo is taken for possible use in advertising, the signed release should be attached to the photo, or if digital, in the file there must be a reference to a release, a copy and the whereabouts of the hard copy. In no other way can an advertiser protect itself.

One well known New York Justice, commenting on the New York right of publicity statute said, "... all persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation." But, as the Ninth Circuit has observed, the greater the fame and notoriety of the person whose identity has been taken, the greater the damages. Damages couldn't have been much greater.

I am glad I was not asked whether the use of a non-celebrity's face could warrant such a huge award. I would have answered "No". I am certain Nestle's lawyers felt the same. Perhaps this is where common sense parts company with good lawyering and a great expert witness.

James B. Astrachan is a principal of Astrachan Gunst & Thomas, P.C. and teaches trademark and unfair competition law at the University of Maryland Law School.