IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

March 9, 2011

Table of Contents

Best v. Berard, USDC N.D. Illinois, March 3, 2011

Click here for a copy of the full decision.

- In right of publicity action relating to reality TV show *Female Forces*, court grants defendants' motion to dismiss after finding that depiction of plaintiff's arrest and its surrounding circumstances were matters of public concern protected by the First Amendment.

Defendants A Day With, Inc. and The Grief Company produce a television show called *Female Forces*, an unscripted reality television series that follows female police officers as they perform their duties and interact with members of the public. Defendant City of Naperville participates in the *Female Forces* program pursuant to a contract which grants the Naperville Police Department the right to review a rough cut of each episode and insist on the removal of material that it chooses. Plaintiff Eran Best was driving in Naperville when she was pulled over and placed under arrest by defendant police officer Stacey Berard because she was driving with a suspended driver's license. Once Best arrived at the Naperville police station, a *Female Forces* producer approached her and urged her to sign a written consent form to allow the footage of her arrest to be used on the television show. Despite the fact that Best refused to sign the consent form, footage of the events surrounding her arrest was broadcast during an episode of *Female Forces*. The footage includes a field sobriety test and Best's arrest, including the moment when she is placed in handcuffs. Best's face is visible and her voice is audible throughout the footage. At one point while Officer Berard was speaking to the camera, the camera focuses on a dashboard computer, on which information about Best – including her date of birth, height, weight, driver's license number, and brief descriptions of previous arrests and traffic stops – was displayed. From December 7, 2008, to December 14, 2008, the *Female Forces* episode featuring Best was

broadcast over thirty times. On December 14, 2009, Best filed suit against the defendants alleging violations of her federal constitutional rights to privacy and freedom from unreasonable search and seizure, unauthorized use of her identity for commercial purposes, invasion of privacy, intentional infliction of emotional distress, and violation of the federal Driver's Privacy Protection Act. Defendants moved to dismiss Best's state law claims under the Illinois Right of Publicity Act (IRPA), for invasion of privacy, and intentional infliction of emotional distress, on First Amendment grounds.

The court initially considered Best's claim that the media defendants violated the Illinois Right of Privacy Act by using her identity for commercial purposes without her consent. The IRPA, instructed the court, defines a commercial purpose as "the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, good, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising." The IRPA exempts from liability the use of an individual's identity for non-commercial purposes, including any news or public affairs.

In support of their motion to dismiss, defendants argued that the First Amendment precludes the application of the IRPA to *Female Forces*. The First Amendment's "core purposes," stated the court, are implicated when the government – either directly or through a legal standard that imposes civil liability – "imposes sanctions on the publication of truthful information of public concern." Privacy concerns give way when balanced against the interest in publishing matters of public importance.

The court agreed with defendants and found that their depiction of Best's arrest and its surrounding circumstances were protected by the First Amendment. First, the court held that the status of *Female Forces* as an entertainment program, as opposed to a pure news broadcast, does not alter the First Amendment analysis. Second, the court rejected Best's argument that her arrest for the "de minimis" crime of driving under a suspended license was not a matter of public concern. Although the court acknowledged that Best's argument had some force, the court found no authority to support Best's distinction. The court noted that an arrest on criminal charges and facts concerning prior arrests or citations were legitimate matters of public concern even if Best's conduct was toward the lower end of the spectrum of criminality.

Finally, the court considered whether the IRPA should be construed in a manner that does not conflict with the First Amendment. IRPA exempts from liability the "use of an individual's identity for non-commercial purposes," including any news or

public affairs. The court held that the IRPA's public affairs exception may be reasonably interpreted to cover the use of Best's identity in an entertainment program that conveys truthful footage of an arrest and thus implicates a matter of public concern. Accordingly, the court granted defendants' motion to dismiss Best's IRPA claim and concluded that defendants' broadcast of the *Female Forces* episode is exempt from the IRPA's coverage.

Finding that its First Amendment analysis also warranted dismissal of Best's claims for invasion of privacy and intentional infliction of emotional distress, the court deferred its dismissal of those counts pending Best's written submission in opposition.

Lapine v. Seinfeld, New York Supreme Court, New York County, February 23, 2011

Click here for a copy of the full decision.

- Court grants Jerry Seinfeld's motion to dismiss defamation claim and grants HarperCollins Publishers's motion to dismiss breach of implied contract, misappropriation, and unfair competition claims in action arising from publication of cookbook about preparing healthy food for kids.

Plaintiff sued book publisher HarperCollins, alleging breach of an implied-in-fact contract and misappropriation arising out of HarperCollins's publication of a cookbook by Jessica Seinfeld. Plaintiff claimed that HarperCollins stole her idea for a cookbook that instructs readers how to sneak healthy food into children's diets. After HarperCollins rejected her book proposal, plaintiff released *The Sneaky Chef: Simple Strategies for Hiding Healthy Foods in Kids' Favorite Meals* through another publisher in April 2007. In October 2007, HarperCollins published Jessica Seinfeld's book, *Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food*.

Plaintiff had previously brought a federal action against Jessica Seinfeld and HarperCollins alleging copyright and trademark violations, which a U.S. District Court dismissed on summary judgment. See Lapine v. Seinfeld, 2009 WL 2902584 (S.D.N.Y. Sept. 10, 2009), aff'd 375 Fed. Appx. 81 (2d Cir. 2010). (We summarized the district court's decision and the Second Circuit's decision affirming dismissal of the claims.) In this state court action, in addition to asserting state-law claims against HarperCollins, plaintiff also sued comedian Jerry Seinfeld, the husband of Jessica Seinfeld, for defamation, because of Jerry Seinfeld's televised remarks about plaintiff.

Defendants HarperCollins and Jerry Seinfeld moved to dismiss all claims, which the court granted. First, with respect to plaintiff's breach of implied contract claim, the court found that a contract could not be implied from the parties' behavior. The court said that even in the area of implied-in-fact contracts, there must be mutual assent by the parties, and that plaintiff did not plead any facts to support a finding that HarperCollins agreed to be bound. Plaintiff had pled that HarperCollins solicited her manuscript, but the court found that plaintiff had not argued that solicitation, standing alone, could give rise to a finding of an implied contract. The court also noted that price is an essential element of a contract, and that the complaint failed to allege the amount of compensation that plaintiff would have been owed under an implied-in-fact contract. Plaintiff had mentioned, in her opposition to defendants' motion to dismiss, that industry custom created the implied contract. While recognizing that industry custom may support an implied-in-fact contract, the complaint – which plaintiff chose not to amend – made no reference to industry custom. The absence of a legally cognizable relationship between plaintiff and HarperCollins also defeated her misappropriation of ideas claim, which must be predicated on a relationship, either fiduciary, or emanating from an implied, express, or quasi-contract.

It what may be dicta because of the court's prior finding of no implied contract, the court also rejected plaintiff's contract and misappropriation claims for the independent reason of lack of novelty in the idea that she alleged had been stolen. In its novelty discussion, the court first rejected the idea that under New York law a breach of implied contract claim required a lesser showing of novelty – that of novelty to the defendant only – than a claim of misappropriation, which required a showing of novelty to the world at large. The court rejected the Second Circuit opinion that it said made this distinction, *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000), and said that under both theories, breach of contract and misappropriation, plaintiff needed to show that her cookbook was novel to the world at large.

The court found that the idea of sneaking nutritious ingredients into children's meals was not novel, and dated at least to the early 1970s. The idea had been the subject of prior books and articles, and plaintiff's book was, the court concluded, "at best, a creative variation on preexisting ideas." Since the idea was already in the public domain, moreover, the court found that plaintiff could not even meet the lesser novelty standard had it applied – that of novelty to the defendant only.

Finally, the court dismissed plaintiff's defamation claim against Jerry Seinfeld, finding that Seinfeld's remarks on *The Late Show With David Letterman* and *E! News* were opinions protected by the First Amendment. While opinions may lose

their constitutional protections when a listener would believe the speaker to be conveying facts, the court found that no reasonable person listening to Seinfeld's remarks would have concluded that he was making factual statements about the plaintiff. Rather, the court said, Seinfeld was making humorously exaggerated remarks about plaintiff that were part of his typically comedic take on events.

For more information, please contact Jonathan Zavin at jzavin@loeb.com or at 212.407.4161.

Westlaw decisions are reprinted with permission of Thomson/West. If you wish to check the currency of these cases, you may do so using KeyCite on Westlaw by visiting http://www.westlaw.com/.

Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we inform you that any advice (including in any attachment) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer, and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.