

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

U.S. NEWS & WORLD REPORT, INC.,		
Plaintiff,		
v.		At Law No. 95-1318
RAM AVRAHAMI,		
Defendant.		

RAM AVRAHAMI'S TRIAL BRIEF

Ram Avrahami's name is his personal property. Virginia law prohibits anyone else from using his name for advertising purposes or purposes of trade without Mr. Avrahami's written consent. In violation of Virginia law, U.S. News & World Report has so used Mr. Avrahami's name.

On April 12, 1995, U.S. News shipped a mailing list of 100,000 names and addresses to the Smithsonian Magazine. U.S. News made the shipment under a List Exchange Agreement that the two publishing companies had made on March 3, 1995. The transaction was for advertising purposes and for purposes of trade. U.S. News wanted to sell subscriptions to readers of the Smithsonian Magazine. The Smithsonian Magazine wanted to sell subscriptions to readers of U.S. News. By exchanging their subscriber lists, the two publications acquired the names and addresses of prospective new customers to whom they could send promotional materials.

The mailing list shipped by U.S. News included Mr. Avrahami's name and address, although his name was misspelled Ram Avrahani. Mr. Avrahami introduced the misspelling when he subscribed to U.S. News so that he could identify U.S. News as the source of any mail solicitations he received with his name misspelled in that way. Mr. Avrahami soon received a mail solicitation from the Smithsonian Magazine, addressed to his home, with his name misspelled Avrahani. Subsequently, he received solicitations from other organizations with his name identically misspelled.

Mr. Avrahami seeks an injunction restraining U.S. News from continuing to sell, lease or trade his name without his consent. U.S.

News, in contrast, seeks a declaratory judgment that it may continue to sell, lease and trade Mr. Avrahami's name, irrespective of whether he has consented. This Trial Brief will show why the Court should grant Mr. Avrahami's request for an injunction and deny U.S. News' request for a declaratory judgment.

ARGUMENT

By Virginia Code § 8.01-40 (A), the General Assembly established and protected a person's property right in his own name. The statute provides:

Any person whose name, portrait or picture is used without having first obtained the written consent of such person ..., for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against such person, firm or corporation so using such person's name, portrait or picture to prevent and restrain the use thereof; ...

Va. Code Ann. §8.01-40 (A) (Michie 1995). The statute also provides that a person aggrieved by the unlawful use of his name may recover his actual damages and, if the defendant "knowingly" used his name, punitive damages.

According to the Virginia Supreme Court, Virginia Code § 8.01-40 (A) "creates in an individual a species of property right in their name and likeness." *Lavery v. Automation Management Corporation*, 234 Va. 145, 154 (1987) (misappropriation of a person's name is subject to the 5-year statute of limitations applicable to injuries to property). "In Virginia, one holds a property interest in one's name and likeness." *Town & Country Properties v. Riggins*, 249 Va. 387, 397 (1995).

Virginia's privacy act has two branches. It prohibits the unauthorized use of a person's name either for "advertising" or for "purposes of trade." These are "separate and distinct statutory concepts." *Town and Country Properties v. Riggins*, supra, 249 Va. at 387. Therefore, U.S. News violated the statute if it used Mr. Avrahami's name, without his consent, for either purpose.

U.S. News' transmittal of Mr. Avrahami's name to the Smithsonian Magazine pursuant to the List Exchange Agreement plainly was for advertising purposes. The object of the List Exchange Agreement was to permit each publication to send promotional materials through the mail to the other's subscribers. Therefore, Mr. Avrahami is entitled to recover under the "advertising" branch of the privacy act.

U.S. News's transmittal of Mr. Avrahami's name was also for the

purposes of trade. U.S. News received valuable consideration in exchange for providing Mr. Avrahami's name to the Smithsonian Magazine. Because Mr. Avrahami's name is his property, U.S. News has no right to profit from selling, leasing or trading Mr. Avrahami's name without his consent. By exchanging Mr. Avrahami's name for something of value, U.S. News committed the tort of conversion, the civil wrong that occurs when "a defendant uses another's property as its own and exercises dominion over it without the owner's consent." *Town & Country Properties v. Riggins*, supra, 249 Va. at 397.

The value that U.S. News attached to Mr. Avrahami's name may be gleaned from Direct Marketing List Source, a national bi-monthly publication that serves the direct marketing industry. The April 1995 edition, which appeared shortly before U.S. News transmitted Mr. Avrahami's name to the Smithsonian Magazine, contains a notice that offered the names and addresses of U.S. News' subscribers for rental at a price of \$80.00 per one thousand names.<1> The same notice stated that special segments of U.S. News' subscriber list were available at an extra charge. A separate notice on the same page offered the names of subscribers to a "blue chip" edition of U.S. News & World Report "distributed to subscribers in affluent neighborhoods and quasi-public locations" for rental at a higher base price of \$85.00 per thousand names. The obvious purpose of these rentals was U.S. News' own pecuniary gain, clearly a purpose of trade.

Mr. Avrahami need not be a celebrity to prevent U.S. News from exploiting his name, nor must he show that the pecuniary benefit to U.S. News was substantial. "[H]owever little or much plaintiff's likeness and name may be worth, [a] defendant who has appropriated them for commercial benefit should be made to pay for what he has taken, whatever it may be worth." *Lavery v. Automation Management Corporation*, supra, 234 Va. at 153, quoting *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 75 (N.J. Super. 1967).

The original "privacy act," New York Civil Rights Law §§ 50 and 51 (from which Virginia Code § 8.01-40 (A) was derived), was intended to protect ordinary citizens. The New York legislature enacted the privacy act in 1903 in response to *Robertson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), where the plaintiff, a little girl who was not a celebrity, sued the defendants for using her picture to promote the sale of flour. The New York Court of Appeals held that the little girl had no common law "right to privacy," but observed that the legislature could create such a right. The New York privacy act was enacted in response to this observation. See *Time, Inc. v. Hill*, 385 U.S. 374, 380

- 381 (1967); Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 544 (N.Y. 1966).

The privacy act not only prohibits the use of a person's name to promote a product or service, but also prohibits any other commercial exploitation of a person's name. The "social desirability and remedial nature" of the privacy act require a "liberal construction" of the phrase "for the purposes of trade." Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 544 (N.Y. 1966). In Spahn the court held that a fictitious biography of baseball pitcher Warren Spahn violated New York's privacy act because the publication constituted "an unauthorized exploitation of his personality for purposes of trade." Id., 221 N.E.2d at 546. If a fictionalized biography is a misappropriation of a person's name for purposes of trade, then an outright sale, rental or exchange of a person's name must likewise constitute a prohibited misappropriation.

Many cases decided under the "purpose of trade" branch of privacy acts have dealt with the unauthorized sale of a person's photograph. Generally, privacy acts prohibit photographers from selling photographs of a person without that person's consent. See, Arrington v New York Times Co., 434 N.E.2d 1319 (N.Y. 1982); Barrows v. Rosansky, 489 N.Y.S.2d 481 (A.D. Dept. 1 1985); Holmes v. Underwood, 233 N.Y.S. 153 (A.D. Dept. 1 1929); Mendonsa v. Time, Inc., 678 F.Supp. 967 (D.R.I. 1988). The only exception to this rule applies to photographs appearing in publications protected by the First Amendment.

Arrington illustrates both the rule and the exception. The court in Arrington held that "a picture illustrating an article on a matter of public interest is not considered use for the purposes of trade or advertising within the prohibition of the statute ... unless it has no real relationship to the article ... or unless the article is an advertisement in disguise. ..." 434 N.E.2d at 1318. Based on this principle, the court held that the New York Times could not be held liable under the New York privacy act for publishing the unauthorized photograph of a Afro-American man, Arrington, in an article concerning the role of the expanding black middle class in today's society. However, the court held that Arrington had nevertheless stated a claim under the privacy act against the photographer who took Arrington's photograph and sold it to the New York Times. The photographer's sale of Arrington's image was for purposes of the photographer's trade and was not an expression protected by the First Amendment<2>.

The court came to a similar result in Mendonsa v. Time, Inc., supra, regarding Time, Inc.'s commercial exploitation of the famous photograph

of a sailor kissing a nurse in Times Square at the end of World War II. Mendonsa contended that he was the "kissing sailor" and that Time, Inc., had violated his rights under Rhode Island's privacy act by making commercial use of his photograph. The United States District Court for the District of Rhode Island held that the initial publication of the photograph in Life Magazine did not violate the privacy act because that publication used the photograph to illustrate a newsworthy event. However, Time's subsequent offer to sell reprints of the photograph to the public at \$1,600.00 a copy violated the "purpose of trade" branch of the privacy act by exploiting Mendonsa's likeness for commercial purposes.

Arrington, Mendonsa and the other photograph cases show that privacy acts prohibit the unauthorized sale of a persons' likeness. The same rule applies to the unauthorized sale of a person's name because Virginia's privacy act (like New York's and Rhode Island's) prohibits the commercial exploitation of a person's "name, portrait or picture" (emphasis supplied). Therefore, a person's right to his own name is entitled to the same protection as his right to his own likeness. A person's name can neither be sold without the owner's consent, nor rented, nor exchanged, nor otherwise exploited for commercial purposes.

Although the courts have created exceptions to privacy acts in order to protect freedom of expression, none of those exceptions apply here. One such exception is the "incidental use" doctrine, which holds that the publication of a person's name in a book, newspaper or magazine generally cannot give rise to a claim under a privacy act, unless the name had no real relationship to the article or was an advertisement in disguise. Although mentioning a person's name in an newspaper article may promote the sale of newspapers, that use is regarded as "incidental" to the newspaper business, and therefore outside the prohibition of a privacy act. The rationale for the incidental use doctrine and similar exceptions is that, "ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." Spahn v. Julian Messner, Inc., supra, 221 N.E.2d at 444 - 445. As noted above, the court in Spahn held such exceptions inapplicable to a fictionalized biography.

Privacy act exceptions designed to protect freedom of expression plainly are inapplicable here. U.S. News' use of Mr. Avrahami's name was not "incidental" to any protected expression. Although U.S. News must use the names of persons like William Clinton or Robert Dole as an

incident of reporting newsworthy events, reporting the news does not require U.S. News to rent or exchange the names of its subscribers.

Nor can subscriber names be characterized as merely "incidental" to U.S. News' mailing list exchange with the Smithsonian Magazine. The whole object of the transaction was to exchange subscriber information, and the subscribers' names were hardly "incidental" to that purpose in the ordinary sense of the word. More important, the exchange of subscriber lists was hardly an expression of "thoughts, ideas, newsworthy events or matters of public interest" as described in Spahn; rather, the exchange was simply a commercial transaction to facilitate each publication's marketing efforts. Therefore, the mailing list exchange was not the kind of transaction that comes within any constitutionally-based exception to the privacy act.

U.S. News argues that Avrahami has no privacy interest in his name because his name is printed in the telephone book. This argument is specious. In *Town & Country Properties v. Riggins*, supra, a former professional football player, John Riggins, sued a real estate agency for using his name in an advertising flier for the sale of Mr. Riggins' former home. The real estate agency argued that, because Mr. Riggins' former ownership of the home was information "freely available to the general public from the Fairfax County land records," Mr. Riggins had "no privacy interest" in the subject matter of the advertising flier. 249 Va. at 394. The Virginia Supreme Court rejected this argument, holding that the flier used Mr. Riggins name for advertising purposes and that this use violated Virginia Code § 8.01-40 (A). 294 Va. at 396. Thus, the availability of Mr. Avrahami's name from the telephone book neither deprives him of his statutory right to privacy nor constitutes the consent required for U.S. News to use Mr. Avrahami's name for the purposes of trade.

Nor did Mr. Avrahami forfeit his rights under the privacy act by changing one letter of his name when he subscribed to U.S. News. Mr. Avrahami's intention plainly was to order a subscription for himself, not for a non-existent person named Ram Avrahani at the same address. As stated above, the purpose of the misspelling was to enable Mr. Avrahami to detect and trace any misappropriation of his name. Now that U.S. News has been caught red handed, it complains of Mr. Avrahami's "trickery." This is a bit like a bank robber complaining that the bank tricked him by marking the \$100 bills he stole.

The misspelling did not mislead U.S. News concerning the identity of its subscriber. The surname Avrahami is uncommon in Virginia. Mr.

Avrahami's first name, Ram, is likewise uncommon. The Bell Atlantic White Pages for Northern Virginia for the period January 1996 through December 1996 has only one listing for the surname Avrahami, and that is for Ram Avrahami, the party in this case; the telephone book has no listings for the surname Avrahani.

U.S. News accepted Mr. Avrahami's check in payment of his subscription, although his name on the check was Avrahami, not Avrahani. The United States Post Office successfully delivered copies of U.S. News & World Report to Mr. Avrahami, notwithstanding the misspelling of his name on U.S. News' address labels. The misspelling was so minor that it could not have misled anyone as to the identity of the person to whom the name Ram Avrahani referred, especially since the name was accompanied by Mr. Avrahami's first name and his address.

The object of the privacy act is not to protect names. A name is only a symbol for a person. The true object of the privacy act is to protect a person from an "unauthorized exploitation of his personality for purposes of trade." *Spahn v. Julian Messner, Inc.*, supra, 221 N.E.2d at 546. Such an exploitation can be accomplished by any combination of pictures or symbols that "unmistakably identify" the individual to whom they refer. See *Orsini v. Eastern Wine Corporation*, 73 N.Y.S.2d 426 (Sup. Ct. 1947) (use of surname accompanied by coat of arms); *People ex rel Maggio v. Charles Scribner's Sons*, 130 N.Y.S.2d 514 (City Mag. Ct. 1954). Here, the individual that U.S. News identified to the Smithsonian Magazine cannot be mistaken for anyone other than Ram Avrahami.

When U.S. News traded or rented Mr. Avrahami's name and address to the Smithsonian Magazine and others, it identified Mr. Avrahami and enriched itself just as surely as if Mr. Avrahami's name had been spelled correctly. Mr. Avrahami's privacy was invaded to the same extent as if his name had been spelled correctly because U.S. News' rentals or exchanges of his name exposed Mr. Avrahami to unwanted attention from the Smithsonian Magazine and other strangers, who proceeded to contact Avrahami by direct mail at his home in Arlington. Therefore, the minor misspelling introduced by Mr. Avrahami works no forfeiture of his right of privacy under Virginia Code § 8.01-40 (A).

In a prior pleading filed with this Court, U.S. News cited three cases purportedly for the proposition that courts "have uniformly found that no rights of the individuals whose names are on the lists results from the exchange of mailing lists." U.S. News' Opposition to Ram Avrahami's Motion to Compel, pp. 10-11. However, none of U.S. News' cases arose under a privacy act. Two of the cases involved common law

claims for invasion of privacy in states that have no privacy act³; the third challenged a statutory exception to New York's privacy act that specifically authorized New York's Commissioner of Motor Vehicles to make lists of registered vehicle owners available to the public⁴. Thus, U.S. News's cases have no bearing on Mr. Avrahami's claim, which arises under a Virginia statute that not only forbids others from using a person's name for advertising or trade, but also establishes that a person's name is his property.

Because Mr. Avrahami's name is his property, U.S. News had no right to use his name for advertising or trade without Mr. Avrahami's consent. U.S. News' list exchange with the Smithsonian Magazine and its other rentals or exchanges of Mr. Avrahami's name constituted a conversion of his name for U.S. News' own selfish purposes. Therefore, Mr. Avrahami is entitled to relief.

CONCLUSION

For the foregoing reasons, the Court should grant the injunctive relief and damages requested by Mr. Avrahami and should deny the declaratory judgment requested by U.S. News.

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Footnotes:

<1> A copy of U.S. News' listing in Direct Marketing List Source, Volume 29, No. 2 (April, 1995) is attached to this trial brief. Further evidence concerning U.S. News' use of its subscribers' names will be presented at trial, but will not be cited in this trial brief because of a protective order.

<2> After Arrington was decided, the New York legislature amended §51 of the Civil Rights Law to create a privilege to supply names or photographs to newspapers and other organizations for lawful use. The amendment added the following language to §51:

[N]othing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article.

The Virginia General Assembly has made no corresponding amendment to Virginia Code §8.01-40 (A); therefore, U.S. News cannot justify its commercial exploitation of Mr. Avrahami's name by showing that the Smithsonian Magazine's use of his name was lawful.

<3> Dwyer v. American Express Co., 652 N.E.2d 1351 (Ill. App. 1995); Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio App. 1995).

<4> Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), aff'd, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968).

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 1996, a copy of the foregoing and annexed pleading was served by hand delivering a copy thereof to:

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