Right of Publicity Claims and Brand Integration

Rick Kurnit
Frankfurt Kurnit Klein & Selz, PC
488 Madison Avenue
New York, New York 10022
(212) 826-5531
rkurnit@fkks.com

Brand integration programs are increasingly created internally, by independent content creation companies, or by the media in which the content may appear. The advertising agency (previously the gatekeeper of all marketing communications) is removed. In its place may be a contractual provision requiring "vendors" to clear all necessary rights to use any materials that are supplied to the advertiser. But advertising agencies have professionals who are trained to watch out for potential repurposing and republishing rights and the right of publicity in particular. In addition, advertising agencies supply their clients with insurance against any such claims by maintaining advertising agency E & O insurance coverage that specifically covers the contractual indemnification that they supply to their clients. A company's internal communications professionals and the content creators employed by publishers may not be as focused on these potential claims. Advertisers who create their own content and contract directly for the creation of content by these new suppliers, may face claims that arise from the internal creative process, from repurposing the content, and depending on the context maybe even from just taking credit for supplying free information and entertainment. Consequently advertisers must pay attention to the clearances necessary to repurpose and republish brand integration and custom content.

Brand integration raises two major concerns: (1) the liability for failure to disclose a material connection between the author/publisher and someone seeking to influence consumers' purchasing decisions, and (2) the liability that may be imposed when editorial content is "commercialized" and loses First Amendment protections, most importantly protection against right of publicity claims. The content creator may clear rights for editorial use only, and not be concerned with what kind of credit for its underwriting might be attached to the publication. As

the credit or acknowledgement of brand underwriting or sponsorship of content gets more and more product specific, the association with the content may inspire a right of publicity claim. Indeed, overzealous labelling of content as "advertising" in an effort to communicate even immaterial influences on selection of subject matter may heighten the risk of a right of publicity claim.

BRAND INTEGRATION that is NOT ADVERTISING

Brands support dissemination of general interest information and brand-building content. Sometimes it is the editorial content that provides a more hospitable environment for separate marketing communications. Sometimes it is simply connecting with events and content that reflect a perspective on living and playing that comports with the brand's image. Product placements and merely underwriting the creation of content are not typically cleared for advertising use. Media advertising a publication for sale may include truthful descriptions of the content, including the names and images of the celebrities, authors, actors or anyone else who is discussed or performs in the publication. The Federal Trade Commission allows that sponsored content that does not address a product or service or the company or its competitors may be published as editorial content not advertising. For example, the National Advertising Division of the Council of Better Business Bureaus (the leading advertising self-regulatory agency "NAD"), determined that while Mashable.com should disclose that an article was "sponsored content" when an advertiser paid for the content to be on the site, it did not have to continue to disclose the brand's support for the creation of the content after the sponsorship ended. Even editorial content on a brand's own website is entitled to First Amendment protection as editorial content when it is separated from the opportunities to purchase products.

As users become more sophisticated about the different connections between brands and content, it will become increasingly possible to avoid thinking about all brand integration as "advertising." Content creators today are working to find the best ways to provide users with the necessary context, including the degree of independence of the author or source, to permit commissioned content to be seamlessly integrated into the flow of "editorial" content. The ability to avoid labelling content as advertising because readers understand the relationship of a brand to the content may permit more robust content that addresses popular culture and events without incurring right of publicity claims.

It may not be possible to clear all of the people who might bring a right of publicity claim. The expansion of what is protectable as an indicia of a person's identity or a context that implicates a celebrity's identity makes it difficult to identify all of the celebrities that might assert a right of publicity claim if the content is deemed to be commercial. In addition, the analysis for determining whether custom content has to be labelled "advertising" is different from the analysis of whether the content might be deemed to be "advertising" to support a right of publicity claim.

Right of Publicity Claims beyond "Advertising"

The definition of commercial speech for Right of Publicity goes beyond speech whose sole purpose is to propose a commercial transaction. In California, where the Right of Publicity may extend to celebrities who just imagine that they are referenced or conjured up by the content, commercial speech may also extend to include any speech by a company that sells products or services and seeks to influence how consumers view the company. The Ninth Circuit's extension of the California common law right of publicity to include a celebrity's persona without any use of name or likeness, coupled with the California Supreme Court's

expansive definition of commercial speech as any communication by a company that seeks to influence consumers, invites celebrity claims based on virtually any content on a corporate website or any form of brand integration or custom content.

While it is only a short hop from creating content that creates a hospitable environment for advertising of a particular product to creating actual advertising for that product, media companies' producers, authors and editors (unlike advertising professionals) have been accustomed to the warm embrace of First Amendment protection against claims by people who see themselves in the editorial material. Public relations professionals accustomed to supplying content to First Amendment protected media may be surprised by a claim when their press releases are published on the company website or they create content that truthfully describes the products acceptance or popularity in the marketplace. The "In the News" feature on a company website may result in editorial content republished in a manner that inspires publicity rights claims. Advertisers' bolder efforts to make advertising compatible with the look and feel of editorial content, make it function in tandem with the editorial content, and tie it into web links and interactive content, all create additional causes for concern.

Summary

Venture capital-backed content sites that offer free content with no interruptive advertising have forced new digital media to offer content that is sponsored or underwritten by advertisers, links, and revenue share arrangements. The traditional media, in order to offer better integration of brand messaging, tore down the wall separating editorial from advertising. There is no clear demarcation between advertising and brand integration. Brands must be sensitive to their potential right of publicity liability when media are willing to experiment with

new technology for integration of brand content, including the ability to digitally match the look and feel and even colors and fonts of online media. Publishers may insist on labelling custom content as advertising in order to maintain the separation from purely editorial content or to comply with regulatory concerns, but brands need to consider whether doing so will tip the balance on a right of publicity claim. Insisting that all custom content or brand integration be denuded of any discussion of popular culture, lest a celebrity claim that she is the most popular version of the phenomenon described in the article, is not going to be satisfactory. Advertisers need to be vigilant in assessing the additional rights that may be necessary to the repurposing of content or even presenting the same content in a different context.

Rick Kurnit, a partner in Frankfurt kurnit Klein & Selz, a leading media, advertising, and entertainment law firm, has long been recognized by Adweek, Chambers, Legal 500, Best Lawyers, Super Lawyers, et al., as one of the top advertising lawyers in the United States.

Rick Kurnit
Frankfurt Kurnit Klein & Selz, PC
488 Madison Avenue
New York, New York 10022
(212) 826-5531
rkurnit@fkks.com