

NYT v. Sullivan as a Commercial Appropriation Claim

What if Commissioner Sullivan sued for Commercial Appropriation? He could still claim that his identity is implicated in statements about police actions that are necessarily associated with him as Commissioner of Police (numerous witnesses testified to the association), and he was used for commercial purpose (advertisement and fundraising). Would there be any First Amendment protection to save the New York Times from financial ruin?

The media that merely publishes the advertising may be strictly liable for use of person in an ad without permission under State law. See Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379 (Ct. App. 1984). A jury merely decides if the person was used without permission in an advertisement and awards damages (emotional anguish at being commercially exploited, the unjust enrichment, a portion of the defendants' profits....). (This also avoids the hurdle in a truthful publication of embarrassing private facts claim where the publication has to be shocking and without any newsworthy value.) With the accusation that "it's all fake news/entertainment what is the scope of state law "newsworthy exceptions"? Fund raising alone has been held to defeat a defense based on discussion of history, biography, news or matters of public interest. See Beverley v. Choices Women's Med. Ctr., Inc., 78 N.Y.2d 745 (Ct. App. 1991).

In NYT v Sullivan the Supreme court held that a Paid Advertisement was entitled to full First Amendment protection where "it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern". New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

How does the First Amendment protection of content and content distributors and authors apply to common law and statutory tort claims of invasion of privacy by commercial appropriation of identity?

I. First Amendment limit on who can sue? : Definition of the "Identity":

NYT: constitutional "Of and concerning": the Supreme Court held that there is a First Amendment bar to a claim that criticism of governmental actions can be deemed to refer to Sullivan by virtue of his position. Notwithstanding several witnesses' testimony of associating him with the statements in the ad, this burden is not met.

ROP: context is sufficient to implicate a person's identity. ROP claim can be based on the claim that context alone identifies a plaintiff (even where, as in New York Times, no use of the

person). See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992). Indeed, a ROP claim can survive a motion to dismiss simply based on plaintiff's claim that she recognizes herself in the ad. See e.g., Cohen, 63 N.Y.2d at 385-86. Does the Magistrate's decision in C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 1077 (E D Mo. 2006), aff'd on other grounds, 505 F.3d 818 (8th Cir. 2007) provide a framework for a more meaningful requirement or a First Amendment limitation to State law?

II. First Amendment limit on what is "commercial" in commercial appropriation?

NYT: First Amendment protection for content in a paid advertisement... at least addressing a subject of public importance: "[I]f the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement." New York Times, 376 U.S. at 267.

ROP: There is a First Amendment limitation, but Supreme Court is unable to define it (or apply it). Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (the Know it when I see it test, and this is not it).

Is there a First Amendment limit to State court's definitions of what content is actionable even if it is commercial?

Parody: See, e.g., Cardtoons, L.C. v. Major League Baseball Player Ass'n, 95F.3d 959 (10th Cir. 1996); But see, White, 971 F.2d 1395.

Art: ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003); But see, Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001); Doe, 207 S.W.3d 52; Wendt, 125 F.3d 806 (an art installation that sells beer).

ENTERTAINMENT: See, e.g., Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016); Porco, 147 A.D.3d 1253 (2017).

Video games: Brown v. Entertainment Merchants Ass'n, 131 S.Ct. 2729 (2011); Kirby v. Sega of America, (Calif 2d Ct. App. 2006), but see Hart, *supra*.

Gossip: See Bollea v. Gawker Media, L.L.C., No. 522012CA012447, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016)

Newsworthy? (Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002), *cert. dismissed*, 539 U.S. 654 (2003)) Virtually any brand media insertion (Jordan v. Jewel Food Stores, Inc., 83 F. Supp. 3d 761 (7th Cir. 2015)).

III. **NYT: First Amendment requirement of clear and convincing evidence of reckless disregard for the truth**

Time, Inc. v. Hill, 385 U.S. 374 (1967): First Amendment limitations on the private tort of damage to reputation under New York Times requires application of the same First Amendment protection to the private tort of false light....one of the four privacy torts.

Commercial Appropriation is a private tort claim derived from the right of privacy same as false light and therefore requires application of the First Amendment protections for freedom of speech and expression and the right of the public to receive information. Thus, in Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001), the 9th Circuit reversed the jury verdict (for use of Hoffman's picture in conjunction with arguably native advertising---editorial feature depicting fashions, their price and where they could be purchased) due to the failure of plaintiff to show clear and convincing evidence of reckless disregard for the truth of what was depicted or the fact that plaintiff was not a willing participant. Does Hoffman suggest that the First Amendment requires a ROP plaintiff to prove some falsity with respect to the association of the plaintiff with the content (Lanham Act § 43(A) (i)(a); 15 U.S.C. § 1125(a)(1)(A)is this requirement limited to editorial/reasonable relationship

IV. **Is there a First Amendment limit to holding the media strictly liable?**

NYT: Justice Black's concurrence states that there needed to be a First Amendment protection against efforts to use tort litigation to put the NYT out of business.

What replaces the wall between advertising and editorial to protect non-advertising from ROP claims? (Media strictly liable for use of person in an ad — is knowledge and intent required by the First Amendment? See Cohen, 63 N.Y.2d 379 (irrelevant))

Media exception

Media Company advertising that truthfully describes the content of the media. Cher v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982); Eastwood v. Nat'l Enquirer, 123 F.3d 1249 (9th Cir. 1997); Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (Cal Ct App. 1995).

Artists' Exception

Advertising the sale or performance of the artist. *Astaire v. Best Film & Video Corp.*, 136 F.3d 1208 (9th Cir.), cert denied, 525 U.S. 868 (1998).

Newsworthy Editorial Advertising

Advertising that does not make a claim about a product or service or influence propose a commercial transaction or influence a purchasing decision may be labelled “Advertisement” to comply with Native advertising regulations or simply to disclose a corporate speaker.

Corporate Entity has First Amendment rights: See, e.g., First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010); Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). But a corporation must have some purpose to benefit the shareholders, so all corporate speech is commercial. Speech to influence consumers about the brand? See Kasky, 27 Cal. 4th 939.

V. Does Every attempt to provide a First Amendment limit on the Definition of “Commercial” in Commercial Appropriation result in a content based distinction ?

Transformative (Winter v. DC Comics, 30 Cal. 4th 881 (2003))

Predominant Purpose (Doe v. McFarlane, 207 S.W.3d 52 (Mo. Ct. App. 2006))

First Amendment Balancing (Rogers v. Grimaldi, 875 F.2d 994 (6th Cir.1989); but see, Rosa Parks v. La Face Records, 329 F. 3d 437 (6th Cir.2003); Hart v. Elec. Arts, Inc. 717 F.3d 141 (3d Cir. 2013)

– Reasonable relationship? Stephano v. News Group Publ., Inc., 485 N.Y.S2d 220 (1984), but see, (Nieves v. Home Box Office, Inc., 30 A.D.3d 1143 (N.Y. App. Div. 2006))

Incidental? Notre Dame du Lac v. Twentieth Century-Fox, 256 N.Y.S 2d 301 (1st Dept) aff’d on op. below, 259 N.Y.S.2d (1965); but see, Nieves, 30 A.D.3d 1143, supra.

---- Not Fictionalization? Binns v. Vitagraph, 210 N.Y. 51 (1913); Spahn v. Julian Messner, Inc., 18 N.Y.2d 324 (Ct. App. 1966), , Porco v. Lifetime Entm’t Servs., L.L.C., 147 A.D.3d 1253 (N.Y. App. Div. 2017)

What scrutiny?

Even if the rule is that only advertising which is a discussion of issues of public importance/ criticism of government (“core First Amendment speech”) is protected, is that a content based distinction/strict scrutiny (See, e.g., Reed, 135 S. Ct. 2218)

Speech expressing a POV on Public Issues

Speech about a controversial subject: health (See, e.g., R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012))

Speech about a cultural vent or a hero or role model (See, e.g., Jordan, 83 F. Supp. 3d 761)

Posadas supports a Primary purpose test? (Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); Compare, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) and Reed)