COMMERCIAL SPEECH AND THE FIRST AMENDMENT – DRAWING LINE BETWEEN 'NEW' AND COMMERCIAL SPEECH

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Drawing Line Between "News" and Commercial Speech in Context of Private Litigation

- Four Recent Cases Outside of Context of Traditional News Publications
  - Fantasy Sports – *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018)
  - Business Press Release – *Geigtech East Bay LLC v. Lutron Electronics Co.*, 2019 WL 1768965 (S.D.N.Y. Apr. 4, 2019)
  - Album Cover – *Serova v. Sony Music Entertainment*, 26 Cal. App. 5th 759 (2018)
  - Product Review Websites – *GOLO, LLC v. HighYa, LLC*, 310 F. Supp. 3d 499 (2018)

1. Fantasy Sports

- *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018)
  - Challenge under Indiana's right of publicity statute to use by fantasy sports website of names/likenesses/statistics of college football players
  - Seventh Circuit certified question of whether players' consent was required to use names/likenesses/statistics in context where participation requires "payment" and "cash prizes" are distributed
  - Indiana Supreme Court held that use was protected under statutory exception for "[m]aterial that has political or newsworthy value"
    - Court rejected argument that manner in which names/likenesses/statistics were monetized made any difference to commercial speech analysis: "information is not stripped of its newsworthy value simply because it is placed behind a paywall or used in context of fantasy game"
    - Court also held that there was no danger of false endorsement because fantasy games incorporate all players
    - Holding is in tension with *Keller*/*Davis* video games cases, where Ninth Circuit held that, while factual data about past athletic performances is newsworthy, that does not make video games that use that data as inputs for "virtual games" entitled to newsworthiness defense

2. Business Press Release

- *Geigtech East Bay LLC v. Lutron Electronics Co.*, 2019 WL 1768965 (Apr. 4, 2019)
  - False advertising counterclaim based on plaintiff's press release announcing filing of patent/trade dress infringement lawsuit against defendant
  - Press release both touted plaintiff's products and harshly criticized defendant's allegedly infringing business practices
  - Court held that press release was not commercial speech because it "did not contain core commercial information, including price and product information"
  - Court further held that characterizing press release about pending litigation as commercial speech would "pos[e] a chilling effect on the sort of statements litigants can make about pending litigation"

3. Album Cover

- *Serova v. Sony Music Entertainment*, 26 Cal. App. 5th 759 (2018)
  - Class action under California Unfair Competition Law arising out of posthumous release of Michael Jackson album
  - Plaintiffs contended that three tracks on album were not in fact sung by Jackson, and that defendants made false representations to the contrary in marketing album
  - Four types of challenged statements:
    - statements by Sony's attorney describing support for conclusion that Jackson sung disputed tracks
    - statements on Oprah Winfrey show that Jackson performed all vocals
    - statements on album cover implying Jackson performed all vocals
    - statements in promotional video implying Jackson performed all vocals
  - Trial court held that first two types of statements were non-commercial speech, while the album-cover and promotional-video statements were commercial speech
  - Appellate court reversed, holding that challenged representations on the album cover and promotional video were non-commercial because they "did not simply promote sale of album, but also stated a position on a disputed issue of public interest"
  - Court attempted to distinguish case from *Kasky v. Nike*, 27 Cal. 4th 939 (2002) on two grounds:

- Challenged statements involved "publicly disputed issue about which [speakers] *had no personal knowledge*"

- Challenged statements "were directly connected to music that itself enjoyed full protection under the First Amendment"

4. <u>Review Websites</u>

- *GOLO, LLC v. HighYa, LLC*, 310 F. Supp. 3d 499 (2018)

- Diet company brought false advertising and trademark infringement lawsuit against two affiliated product-review websites based on their reviews of plaintiff's diet

- Plaintiff's theory was that review sites were a "fake" review sites, not entitled to protection afforded non-commercial speech

- Specially, plaintiff alleged that, rather than provide actual newsworthy information about products under review, the sites used SEO to divert traffic away from the websites of the products they reviewed, while then directing their readers to purchase rival products from the sites' advertisers or companies with which sites had affiliate relationship

- Plaintiff's factual allegations:

    - Product reviews involved minimal or no product testing or original analysis

    - Review websites were among top search results for word "GOLO"

    - Sites had affiliate relationships with various products (though no weight loss products)

    - Reviews were festooned with ads, placed via Google AdSense, which would often be for products in competition with products under review

- Court held that the reviews were non-commercial speech because:

    - No connection between complained of portions of review and ability of reviews to generate revenue

    - Existence of certain affiliate relationships did not render all reviews commercial speech absent some plausible theory of how reviews were being used to push affiliate products