RECENT CASES

Right of publicity expires at celebrity's death, California Supreme Court rules in Bela Lugosi and Rudolph Valentino cases

In two long-awaited decisions, the California Supreme Court has ruled that a prominent person's right of publicity expires when that person dies, and thus cannot be inherited or enforced by the person's heirs. The decisions were rendered in separate cases brought by the heirs of Bela Lugosi and Rudolph Valentino.

The Lugosi case was filed by Lugosi's heirs after Universal had entered into approximately 50 licensing agreements in which it authorized the manufacturers of products such as T-shirts and toys to use the features of Bela Lugosi in the Count Dracula role Lugosi had played in movies produced by Universal. A trial court ruled that Bela Lugosi had a protectable right in his likeness as Count Dracula and that the right did not terminate with Lugosi's death but descended to his heirs. The trial court awarded Lugosi's heirs damages and an injunction.

In a 4 to 3 decision, the California Supreme Court reversed the trial court. Although the majority acknowledged that Bela Lugosi had a right in his name and likeness, it held that the right "is embraced in the law of privacy and is protectable during one's lifetime but it does not survive the death of Lugosi." As a result, the majority ruled that "After Lugosi's death, his name was in public domain. Anyone, including [his heirs] or any other person or Universal, could use it for a legitimate commercial purpose."

The majority's decision is at odds with the result in similar cases involving Laurel and Hardy and Elvis

Presley. Price v. Hal Roach Studios, 400 F.Supp. 836 (S.D.N.Y. 1975); Factors Etc. v. Pro Arts, 579 F.2d 215 (2d Cir. 1978); Factors Etc. v. Creative Card Co., 444 F.Supp. 279 (S.D.N.Y. 1977). Those cases held that the rights of publicity of Laurel and Hardy and Elvis Presley did survive their deaths. The majority in Lugosi made no effort to distinguish those cases, however. It merely referred to them in a footnote and disagreed with their rationale.

Associate Justice Mosk filed an opinion concurring with the majority in which he expressed the view that even if Bela Lugosi were alive today, he would be unable to claim an invasion of his right of publicity, because Universal exploited only his image as Count Dracula, a character which Justice Mosk concluded belonged to Universal.

Chief Justice Bird filed a lengthy dissenting opinion, concurred in by Associate Justices Tobriner and

Manuel, in which she expressed the view that the right of publicity is assignable and descendible, and should be accorded legal protection during the individual's lifetime and for a period of 50 years thereafter.

The Valentino case was filed by the nephew of Rudolph Valentino after ABC broadcast a movie produced by Spelling-Goldberg Productions entitled " Legend of Valentino: A Romantic Fiction." The nephew contended that he had inherited Valentino's right of publicity, and that the movie infringed that right because it was purely a work of fiction to which Valentino's name had been attached merely in order to attract more viewers and sponsors than would have been attracted to the movie if his name had not been used.

In a brief, half-page opinion, the California Supreme Court referred to its holding in Lugosi, stated that Lugosi controlled the disposition of the Valentino case and made it unnecessary to discuss any other issues, and affirmed the dismissal of the nephew's lawsuit.

Chief Justice Bird again filed an opinion of her own. This time, however, she concurred in the result. She nevertheless went on to discuss an additional, significant issue not addressed in the court's opinion: whether the use of a person's name and likeness in a work of fiction, for financial gain, knowing that the work falsely portrays that person's life, is protected by the First Amendment.

Although Chief Justice Bird determined that Valentino's nephew properly alleged the infringement of his uncle's right of publicity, and his inheritance of that right, the Chief Justice concluded that the movie in question was protected by the First Amendment. Her opinion was concurred in by Associate Justices Tobriner, Manuel and Newman; and Justice Newman added a paragraph of his own in which he expressed the view that those portions of the Chief Justice's opinion pertaining to the First Amendment would be equally applicable in a case brought by a still-living celebrity. Accordingly, it appears that a majority of the California Supreme Court is prepared to hold that the First Amendment protects even fictional works from claims that they invade or infringe a person's right of publicity.

Chief Justice Bird distinguished the Lugosi case, where she would have found in favor of Lugosi's heirs and against universal, from the Valentino case, on the grounds that Lugosi involved commercial products such as games, which, "unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated."

Lugosi v. Universal Pictures, 25 Cal.3d 813 (1979); Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860 (1979) [ELR 1:18:1]

Television newscaster is enjoined from appearing on competing station after quitting original job; but newscaster who was fired by original employer is not enjoined from appearing on competing station

A pair of cases decided within a month of one another, one in a Federal District Court in Washington, D.C., and the other in a Federal District Court in Kentucky, illustrate one of the less obvious distinctions between quitting a job and being fired.

In the first case, Gordon Peterson, the news anchorman on Channel 9 in Washington, D.C., quit his job in August of 1979 to accept a similar job at another television station in the same city. Fourteen months before, Channel 9 had been sold by Post-Newsweek Stations, Inc., to its present owner, The Evening News

Association, and Peterson explained his quitting by saying that he was disappointed with the way in which the new owner was running the news operation. However, Peterson had signed an employment contract with Post-Newsweek in July of 1977 which was assigned to the Evening News along with other station assets, and which still had almost a year to run at the time Peterson quit.

When Peterson accepted a job at a competing station, the Evening News filed suit against him, contending that Peterson's employment contract was assignable without his consent, had in fact been assigned to it, and was enforceable. Peterson, on the other hand, contended that his Post-Newsweek contract required him to perform unique services, and because of the personal relationship he had with Post-Newsweek, was not assignable.

The contract itself said nothing at all concerning its assignability or nonassignability. But a Federal District

Court in Washington, D.C., concluded that it was assignable, and enjoined Peterson from appearing on the competing television station. The court reached this conclusion, because contract rights as a general rule are assignable, unless the assignment would materially vary the duty of the obligor, materially increase the burden or risk imposed by the contract, or materially impair the obligor's chance of obtaining return performance. In this case, however, there had been no showing that the services required of Peterson had changed in any way since the station was acquired by the Evening News. Also, although it is the law that contracts requiring unique personal services are not assignable by the person who is to perform the services, the right to receive those services is assignable.

In the second case, Melissa Forsythe was fired from her job as a news anchor for Louisville, Kentucky television station WAVE-TV. She then accepted employment as a news reporter for a competing television station. When she did so, WAVE filed suit against her, seeking to enforce a noncompetition clause in her contract with it. The clause prohibited her from appearing on any competing television station for 12 months following the termination of that contract.

Although Forsythe's contract with WAVE gave WAVE the right to terminate it, so that WAVE had not breached her contract by firing her, a Federal District Court in Kentucky found that the noncompetition clause in the contract lacked mutuality, and thus the court refused to enforce it. Said the court, To hold that Ms. Forsythe, at the whim of [WAVE], could be deprived of her livelihood in a highly competitive market, seems to the Court to be an example of industrial peonage which has no place in today's society.

On the other hand, the court expressly stated that had "Ms. Forsythe voluntarily severed her relationship with

[WAVE], the Court has no doubt that the non-competition covenant would have been enforceable against her."

Evening News Association v. Peterson, 477 F.Supp. 77 (D.D.C. 1979); Orion Broadcasting, Inc. v. Forsythe, 477 F.Supp. 198 (W.D.Kty. 1979) [ELR 1:18:2]

Author states cause of action against Viva magazine based on magazine's publication of author's article in allegedly altered and mutilated form

In a case which touches upon the "moral rights" of authors, the Appellate Division of the New York Supreme Court has affirmed (with modifications) a trial court order refusing to dismiss a lawsuit brought by writer Robert Edison against Viva magazine. The suit was triggered by the magazine's publication of an allegedly altered and mutilated version of an article about Barbara Walters that Edison had written pursuant to a written contract with Viva.

Viva moved to dismiss the case for legal insufficiency. The trial court refused to grant the motion, however. And the Appellate Division has affirmed, holding that Edison had stated a cause of action against Viva for breach of contract. Viva had argued that the contract itself had given it the right to "edit" and "change" the article. But the court held that a contract must be construed according to the custom and usage prevailing in a particular trade, and thus evidence should be taken as to the connotation of the words "edit" and "change" in the publishing industry. "It is quite possible," the court said, "that . . . the agreement merely permits reasonable modification of the original article but does not allow substantial departure therefrom." Furthermore, the agreement could have been construed to require Viva to request Edison's permission before any changes were made to his article.

The Appellate Division did order the dismissal of a second cause of action which appeared to allege the violation of Edison's "moral right" of authorship, because in this case, his moral right was "subsumed in his contractual right," and thus his complaint failed to allege a breach of any duty apart from Viva's alleged breach of contract.

The Appellate Division also dismissed a claim for punitive damages, saying that no "public right" was involved in the case, and that punitive damages are not awarded in New York to redress a "private wrong."

Finally, Viva had moved to dismiss a cause of action alleging that Edison's reputation in the literary community had been damaged by the publication of the article. The Appellate Division ruled that Edison may have had good grounds to plead libel, but that he had not adequately done so in his original complaint. The court said that Edison should specify the particular passages in the published article which expressed sentiments and opinions different from his own and should state how those passages have injured his reputation. In addition, the court said that if Edison believed that he was libeled by Viva's use of an inferior writing style in the published article, he should have stated as much and should have indicated whether the stylistic deficiencies applied to all of the changes made by the magazine or only some of them. Accordingly, the Appellate Division dismissed Edison's libel claim, but gave him 30 days to replead it, if he wished to do so, in the manner described by the court.

Edison v. Viva International, Ltd., 421 N.Y.S.2d 203 (1979) [ELR 1:18:3]

Copyrights to "Flash Gordon" comic strips were infringed by unauthorized distribution of Flash Gordon movies

A Federal District Court in Los Angeles has ordered Thomas William Dunnahoo and his company, Thunderbird Films, to permanently cease selling or distributing the copyrighted films entitled "Rocketship," "Mars Attacks the World" and "Flash Gordon Conquers the Universe."

The "Flash Gordon" comic strip and its principal characters were created and developed by an employee of King Features Syndicate, Inc., commencing in about 1934. Copyrights and renewal copyrights on the comic strip were obtained in the name of King Features as "works for hire."

In 1935, King Features assigned to universal Pictures the right to produce films based on the comic strip. The copyrighted film "Flash Gordon Conquers the Universe" was based in substantial part on the comic strip, as were the serials "Flash Gordon" and "Flash Gordon's Trip to Mars." The movie "Rocketship" was a condensation of the multipart serial "Flash Gordon," and the movie "Mars Attacks the World" was a condensation of the multipart serial "Flash Gordon's Trip to Mars." Universal assigned its rights to prosecute an action for copyright infringement of these works to King Features.

The court found that the defendant had sold and distributed reproductions of the films produced by Universal without authorization from, or payments to King Features or Universal, and that the defendant's actions infringed the copyrights in the "Flash Gordon" comic strips and its copyright interests in the Universal films. The court also held that the defendant's use was not "fair use" under the copyright laws, but rather constituted unfair competition, misrepresentation of its authority to sell the films, trespass on King Features' property rights, and interference with King Features' prospective contractual relations.

In addition to enjoining any further distribution of the films by the defendant, the court ordered the defendant to deliver for destruction all prints of the films and all advertising materials.

King Features Syndicate, Inv. v. Dunnahoo, Case No. 79-1833HP (C.D.Cal., Nov. 15, 1979) [ELR 1:18:3]

California State Board of Equalization rules that Milwaukee Bucks and Boston Bruins must pay California corporate income taxes

The California State Board of Equalization has ruled that the Milwaukee Bucks of the National Basketball Association and the Boston Bruins of the National Hockey League must pay California state franchise or corporate income taxes, even though neither team maintains a place of business in California and even though neither team receives any portion of the gate receipts from games it plays in California.

States are permitted to tax out-of-state businesses, if

within their borders. The Bucks and Bruins argued that although they play games in California, they earn no income in California for it to tax, because under NBA and NHL rules, the visiting team does not share in the gate receipts; the home team retains 100% of the gate receipts. The Board of Equalization ruled, however, that the Bucks and Bruins had to play games in California in order for them to have the right to host California teams in their home arenas where they were permitted to retain 100% of the receipts. Thus, the Board said, when the Bucks and Bruins played games in California in order to earn that right, they were engaged in a money-making activity, even though they did not take money home with them from those games.

Also at issue in these cases was the proper formula for determining how much of the incomes of the Bucks and Bruins were subject to taxation by the state of California. California, and several other states, have adopted a law known as the Uniform Division of Income for Tax Purposes Act which contains a complicated formula designed to apportion a business's income among the states in which it does business. However, the Act's standard apportionment formula would have apportioned none of the Bucks' or Bruins' income to California; and thus the California Franchise Tax Board developed a special formula which did apportion some of their incomes to California.

California law does permit the Franchise Tax Board to devise special formulas where the standard formula does not fairly represent the extent of business activity in the state. Nevertheless, the Bucks and Bruins challenged the special formula devised by the Franchise Tax Board in their cases, on the grounds that it resulted in double taxation in violation of the 14th Amendment to the United States Constitution. The Board of Equalization disagreed, however. Although it acknowledged that there might be "some overlap," it refused to agree that California was at fault, rather than Wisconsin and Massachusetts. If those states had adopted formulas that reflected the fact that a substantial part of the Bucks' and Bruins' business activities took place outside of those states, the risk of "duplicative taxation" could have been avoided, the California Board of Equalization ruled.

Finally the Board of Equalization held that the special formula devised by the Franchise Tax Board was reasonable and proper (with one modification). That formula took into consideration gate receipts allocated according to the number of games played in California as compared to the number of games played elsewhere, radio and television receipts allocated on the basis of games played in California, and the number of "duty days" that players, coaches and trainers spent in California as compared to the number of duty days they spent elsewhere.

According to a recent news account, California, Minnesota and the city of Cleveland also hold individual athletes responsible for personal income taxes if they play games within their borders, even if those games are "away" games and the players live elsewhere. California calculates the amount of income on which players must pay California personal income taxes based on the number of "duty days" they spend in California as compared to the number of such days they spend elsewhere.

Appeals of Milwaukee Professional Sports and Services, inc., and Boston Professional Hockey Association, Inc., CCH California Tax Reports, Para. 206-193 and 206-194 (1979) [ELR 1:18:5]

Newspapers' right to restrict or refuse advertising is upheld

The Adult Film Association of America, Inc., an association of producers and exhibitors of "sexually explicit motion picture films," alleged that the Times Mirror Company, publisher of the Los Angeles Times, had intentionally interfered with its members' relationships with potential customers by refusing to accept advertising from Association members. The Association also alleged that the Times had induced other newspapers to reject its members' advertisements and had conspired with other producers and exhibitors of similar films to publish their advertisements while refusing those of Association members. The California Court of Appeal has upheld a lower court's judgment ordering the dismissal of the Association's action.

The Association contended that it had been denied the opportunity to bring its films to the attention of potential customers. The court noted, however, that the Association had not alleged that the Times had prevented anyone from attending theaters showing those films. The appellate court agreed with the lower court's statement that "No authority is cited for the proposition that any person engaged in a business relationship with another, absent a contractual obligation, a statutory duty, or a duty grounded in public policy, is obligated to continue such relationship, even with the knowledge that such termination will of certainty result in economic injury to the other."

The court also found that the Association had not alleged that the Times sought to have other newspapers adopt a similar advertising policy, and it held that the Times could not be liable merely because other newspapers followed the Times' "example" by adopting such a policy themselves. The Association's charge of conspiracy was rejected since the Times' publisher, in an uncontradicted declaration, stated that the advertising policy was his own editorial decision and that he had not consulted any other newspaper or prospective advertisers. The court concluded by noting that it had based its decision on "principles applicable to all businesses" rather than on the Times' right of free speech.

In a separate case, a Federal District Court in Rhode Island has held that a newspaper's refusal to accept advertising from rental information services that charge a fee to prospective tenants did not violate section 1 of the Sherman Act and has dismissed the plaintiff's complaint. The plaintiff alleged that other referral services, a realty board and various brokers had acquiesced in the defendant's policy, thus establishing "a combination or conspiracy to effectuate a policy in restraint of trade." The court, however, noted that "[t]he announcement of policy and simple refusal to deal, without more, is not barred by Section 1." The newspaper had used no coercive or threatening means to obtain compliance with its policy. And even if the plaintiff had established joint action, there was no proof that the alleged combination unreasonably restrained trade, because classified advertising in the defendant's newspaper was only one of many methods of reaching prospective tenants. The defendant adopted its policy because of concern over the possibility that the plaintiff's advertising was deceptive or misleading and not "to restrain trade or advance its own position in the rental information market."

The plaintiffs claim that the defendant monopolized the market for classified newspaper advertising and controlled the rental information market were also rejected by the court.

The Supreme Court of Tennessee also has affirmed the "well settled" principle that "a newspaper publisher is under no legal obligation to sell advertising to all who apply for it . . ." The plaintiff, Charles Galbreath, had sought to purchase adverusing space from the defendant's newspapers to publish an advertisement for an apartment. The newspaper refused to accept the advertisement unless all abbreviations used by the plaintiff were spelled out.

The court rejected the plaintiff's claim that the defendant had violated the First Amendment and Tennessee's unfair competition laws by requiring him to incur the additional expense of having the advertisement published without abbreviations. The court found that even if the newspaper in question has a "virtual monopoly" in its area, the publisher may refuse advertising or place conditions on its acceptance.

Adult Film Association of America, Inc. v. The Times Mirror Company, 97 Cal.App.3d 77 (1979); Homefinder's of America, Inc. v. Providence Journal Co., 1972-2 CCH Trade Cases Para. 62,791 (D.R.I. 1979); Newspaper Corp. v. Galbreath, 1979-2 CCH Trade Cases, Para. 62,829 (Tenn. 1979) [ELR 1:18:5]

Briefly Noted:

Libel.

In the following cases, courts have generally found that plaintiffs were private individuals who were entitled to demonstrate that media defendants had acted at least negligently in publishing erroneous information:

A newspaper reported that the plaintiff, who was charged with the murder of her husband, had been committed to a state hospital for psychiatric evaluation prior to trial. The account of the commitment was false. A Federal District Court in Virginia, while noting that under Virginia law, the report was not libelous per se, has held that the plaintiff was entitled to sue for libel due to alleged "humiliation, embarrassment, and permanent stigma, occasioned by inquiries about [the] commitment." Although the defendant contended that a mental examination is a common practice in homocide cases, the court stated that it would be the responsibility of the jury to determine whether the report was an imputation of insanity. The court also noted that the plaintiff did not become a public figure merely because of her newsworthiness; and therefore she would only have to show negligence, rather than actual malice, on the part of the defendant in order to recover. (Mills v. Kingsport Times-News).

A Federal District Court in Maryland has rejected a defendant television station's motion for summary judgment in an action for defamation brought by a private individual who alleged that a television news reporter made false or misleading statements relating to the operation of the plaintiffs towing business. The court pointed out that the measure of liability would be the negligence standard and that there were no circumstances giving rise to a conditional or qualified privilege. The court stated that "under Maryland law, a qualified privilege does not exist for the media simply because the alleged defamatory material relates to a subject of general or public Interest." (Yerkie v. Post-Newsweek)

In response to questions certified by the Federal District Court in Maryland regarding the state's libel laws, the Maryland Court of Appeals, in an opinion issued after the opinion in Yerkie, has held that "it is no longer possible in Maryland to recover damages by simply alleging a libel per se." Further, in all libel actions there must be pleading and proof of damages and the only distinction remaining between libel per se and libel per quod is that "[w]here the words themselves impute the defamatory character, no innuendo -- no allegation or proof of extrinsic facts -- is necessary; but otherwise, it is . . . Where extrinsic facts must be shown in order to establish the defamatory character of the words sued upon, the omission to plead them makes the complaint demurrable for failure to state a cause of action." (Metromedia v. Hillman)

A television station in Alexandria, Louisiana relied on an arrest report that had been made out in error in stating that an individual had been charged by police with keeping a disorderly house. The trial court's decision granting summary judgment to the defendants has been reversed by the Louisiana Court of Appeal. The court found that the reported statement was completely false and that there were genuine issues of material fact relating to the defendant's alleged fault in preparing its news report. A dissenting judge noted that the television station had reported correctly what the police had done and, citing the trial judge, stated that "the news media can reasonably rely on information obtained from law enforcement agencies, where there is no reason to doubt the correctness and authenticity of the information received." (Slocum v. Webb)

In contrast to Yerkie and Slocum, the Appellate Division of the New York Supreme Court has found that the defendant newspaper, although in error on the nature of the plea entered by the plaintiff to a criminal charge of harrassment, did not act with "gross irresponsibility." The court found that the plaintiff, a private individual, was nevertheless required to show such gross irresponsibility since his conduct and the subsequent disposition of charges were matters of public concern. The defendant had relied on a police officer's statement as to the plea entered. It had not been a "guilty plea" as reported; rather, the plaintiff was granted an adjournment in contemplation of dismissal; and the court found that the officer's characterization of the plea was "not without partial judicial support." A dissenting judge concluded that there was a triable issue of fact as to whether the defendant acted in a grossly irresponsible manner, particularly,since it appeared that the reporter involved did not have extensive experience, had not personally inspected the court docket and had not ascertained the legal significance of the disposition of the charges. (Grobe v. Three Village Herald)

The Supreme Court of Kansas has found that a real estate agent was a public figure for the "limited area of campaign contributions to political campaigns and reciprocating contract advantages," but has reversed a lower court opinion granting summary judgement to the defendant newspaper which reported on the alleged political payoff. The court noted that there was sufficient evidence of actual malice to proceed to trial. The court also found that the trial court should have allowed discovery regarding prior articles and editorials written by the president of the defendant newspaper in order to establish a possible pattern of reckless reporting. (Gleichenhaus v. Carlyle)

The Supreme Court of Oklahoma has reversed a trial court opinion granting summary judgement to the plaintiffs on the issue of liability in 3 consolidated libel actions. The court noted that although certain statements of the defendants were libelous per se, the trial court had erred in presuming actual malice, particularly when one plaintiff was a public figure or official. Thus, the court remanded the matter for an adjudication on the merits. (Morgan v. Winters)

Mills v. Kingsport Times-News, 475 F.Supp 1005 (W.D.Va. 1979); Yerkie v. Post-Newsweek Stations, 470 F.Supp 91 (D.Md. 1979); Metromedia, Inc. v. Hillman, 400 A.2d 1117 (Md.App. 1979); Slocum v. Webb, 375 So.2d 125 (La.App. 1979); Grobe v. Three Village Herald, 420 N.Y.S.2d 3 (1979); Gleichenhaus v. Carlyle, 597 P.2d 611 (Kan. 1979); Morgan v. Winters, 594 P.2d 1220 (Okl. 1979) [ELR 1:18:6]

Workers Compensation.

The Commonwealth Court of Pennsylvania has held that a jockey was not entitled to workmen's compensation benefits for injuries sustained during employment, because he was an independent contractor rather than an employee. The jockey was paid according to the results of the race. He selected the horse owners for whom he worked as well as the horses he wished to ride, paid his own income tax and insurance, and in general had "actual control of the manner in which [his] work was accomplished."

Reagan v. Workmen's Compensation Appeal Board, 405 A.2d 1085 (Pa.Com. 1979) [ELR 1:18:7]

Admissions Tax.

Admissions taxes on amusement events have been upheld by the Appellate Court of Illinois (racetracks admission tax was not for revenue or an occupation tax but a valid levy by a home-rule unit), and by the Court of Civil Appeals of Texas (ballroom and roller skating rink admission taxes were valid although different tax rates were imposed on various amusement classifications, and statute failed to include roller derby contests).

Carey v. Village of Stickney, 388 N.E.2d 120 (III.App. 1979); Bullock v. Texas Skating Assn., 583 S.W.2d 888 (Tex.App. 1979) [ELR 1:18:7]

Labor Relations.

The National Labor Relations Board has held that the resignation-restriction clause in the constitution of the National Association of Broadcast Employees and Technicians, Local 531, is vague and thus unenforceable. Accordingly, the Board ordered the union to refund any fines it had collected from two former members who had submitted resignations of their union memberships in order to continue working for their boycotted employer. If the fines were not yet collected, the Board ordered the union to cease any further attempts to collect them.

National Association of Broadcast Employees and Technicians and Ross Kelsay, 1979 CCH Labor Law Reports, Para.16,323 (1979) [ELR 1:18:7]

NEW LEGISLATION AND REGULATIONS

Federal Trade Commission adopts guidelines for endorsements and testimonials in advertising

The Federal Trade Commission has adopted final guidelines on the use of endorsements and testimonials in advertising (16 C.F.R. sections 255.1, 255.2 and 255.5). The guides, originally proposed in May of 1975, complement three other guides adopted by the FTC at that time (16 C.F.R. sections 255.0, 255.3 and 255.4).

Section 255.1 requires that "[e]ndorsements must always reflect the honest opinions, findings, beliefs, or experiences of the endorser . . . [and] may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser." An endorsement may not be presented out of context or in any way distort the endorser's experience with the product. An expert or celebrity endorsement may be used only as long as the advertiser has good reason to believe that the endorser continues to hold the views presented, and the endorser's view must be ascertained at reasonable intervals. If the advertisement represents that the endorser actually uses the endorsed product, the endorser must have been a bona fide user at the time the endorsement was given, and the endorser's continued bona fide use must be ascertained periodically by the advertiser.

Advertisements which present the experiences of consumers with a product or service may be interpreted as representing that the endorser's experience will be comparable to the performance consumers will generally achieve, according to the Commission. Therefore, if there is not adequate substantiation for such a representation, section 255.2 requires that the advertisement "clearly and conspicuously" disclose the "generally expected performance" in the circumstances depicted or the "limited applicability of the endorser's experience." Further, if the endorsers appear to be "actual consumers," then either actual consumers must be used or the advertisements must disclose that the individuals shown are not actual consumers of the product. An example given by the Commission notes that when a "hidden camera" situation is depicted, then "[e]ven though the words `hidden camera' are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be disclosed."

Section 255.2 also prohibits lay endorsements regarding the efficacy of any drug, unless the advertiser has adequate scientific substantiation for such claims and the claims are consistent with any Food and Drug Administration determination about the drug.

Section 255.5 of the guidelines provides that any connection between the endorser and seller of the advertised product which might materially affect the "weight or credibility" of the endorsement must be disclosed. The payment to an endorser who is an expert or well known personality, however need not be disclosed since this type of connection might ordinarily be expected by viewers. In other situations, the payment or promise of compensation prior to and in exchange for the endorsement must be disclosed.

In an accompanying statement, Commissioner Clanton expressed his doubts about the need for any guides dealing with consumer endorsements and, in particular, with requirements for disclosure of the fact that professional actors are used to portray ordinary consumers and that consumers were promised compensation to do a commercial. He noted that most consumers would not be misled, and said that if the underlying product claims could be substantiated, no additional disclosure requirements should be required.

Violations of the guides may lead the FTC to issue a complaint.

Further information may be obtained from W. Benjamin Fisherow, Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C. 20580; (202) 724-1511.

Federal Trade Commission, Endorsements and Testimonials in Advertising, 16 CRF Part 255 (January, 1980) [ELR 1:18:4]

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