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Internet Law Update

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By Cecily Anne Snyder and Patrick T. O'Regan, Jr.*

NEWS WOMAN'S CLAIM FOR RIGHT OF PUBLICITY CLAIM TO VIDEO OF WET T-SHIRT
COMPETITION UPHELD

[Catherine Bosley v. Wildwett.com, 2004 U.S. Dist. LEXIS 5124 (N.D. Ohio
March 31, 2004)]

Catherine Bosley brought an action against Wildwett.com, and others, for invasion of privacy based on the distribution on the internet of a video taken of Catherine Bosley (a Youngstown Ohio anchorwoman) at a wet t-shirt contest in Florida. On March 8, the Ohio court issued a Temporary Restraining Order ("TRO") prohibiting Defendants from selling the video of Bosley's performance or otherwise using depictions of Bosley on their websites. The court did not, however, go so far as to enjoin Defendants from mentioning Bosley or engaging in public comment about the incident. The Sixth Circuit subsequently issued a stay with regard to the TRO. In this decision the Ohio court rules on the merits of the Motion for Preliminary Injunction.

Invasion of the Right of Privacy

There are four separate causes of action that fall under the umbrella of right to privacy: (1) intrusion on plaintiff's seclusion or solitude, (2) public disclosure of private facts; (3) publicity which plaintiff is portrayed in a false light; and (4) appropriation the name or likeness of plaintiff for defendant's advantage.

* Cecily Anne Snyder is the Vice President of Legal Affairs at Imaging Therapeutics, Inc., Lexington MA. She handles a wide range of intellectual property matters, including developing market focused patent strategies. She can be reached at cecily@imatx.com. Patrick T. O'Regan, Jr., is a principal of O'Regan & O'Regan in Falmouth MA. He works with local Cape Cod businesses handling a wide variety of both litigation and transactional matters. He can be reached at patrick@oreganlaw.com.
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In this case, Bosley had worked as a news reporter for WKBN in Youngstown Ohio and had become a regional celebrity. While on vacation in 2003 she participated in a wet t-shirt contest which was being videotaped for Dream Girls, Inc. During her participation she removed her clothing. The unedited video of Bosley's performance was made available on sexbrat.com, and other websites. The publicity surrounding the videotapes ultimately resulted in Bosley resigning from her position with WKBN.

Bosley asserts the fourth type of invasion. Namely, that defendant's used her name and likeness for their advantage. Ohio law "prohibits the publication of another's name or likeness in a commercial use that draws from that person's 'reputation, prestige, or other value associated with him, for purposes of publicity.'"¹ There are, however, exceptions.

Commercial Purpose

Bosley argues that the use of her image in connection with the sale of a product (i.e., the video) is a commercial use of her image. The court concluded that defendants were "using the images of Catherine Bosley to directly promote the sale of videos and memberships."² Defendants assert that the Restatement (Third) of Competition section 47 controls because it defines the purpose of trade as "'the name, likeness and other indicia of a person's identity are used 'for purposes of trade' under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connected with services rendered by the user.'"³ The court, however, was unpersuaded by this argument noting that "[t]he prominent display of Plaintiff Bosley's name, image, image and likeness on the cover of the WildWett video – as well as other promotional images of Plaintiff Bosley posted on WildWett.com – clearly constitutes an advertisement for the video."⁴ The court noted that "the standard for determining what constitutes promotional material is quite broad."⁵ Under the Restatement (Third) of Unfair Competition it includes "proof t hat prospective purchasers are likely to believe that the identified person endorses or



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sponsors the user's goods or services is not required for the imposition of liability..."⁶

First Amendment

Defendants also claimed that their use of Bosley's image is protected under the First Amendment. The court notes, however, that "the realm of commercial speech is an area of limited protection under the First Amendment ... There are areas of commercial activity which the First Amendment does not protect at all."⁷ In balancing the First Amendment rights against the Right to Publicity, the court focused on the fact that the videos produced by Defendants did not contain artistic expression or significant editorial comments and therefore were distinguishable from other cases where the First Amendment rights controlled. "[T]he images of Catherine Bosley are mere copies of Catherine Bosley's performance and are not protected material."⁸ It would seem that, had the video images been artistically edited or editorialized, the court would have considered the First Amendment arguments more favorably. "The Court concludes that if any speech interest is at issue here, it is commercial speech."⁹

Prior Restraint

Defendants also attempt to argue that "injunctive relief would constitute prior restraint of speech."¹⁰ Although, the threshold for injunctive relief for speech is quite high and requires that "...the publication ... threaten an interest more fundamental than the First Amendment itself"¹¹ this case did even rise to considering the test. As noted by the Supreme Court, the prior restraint doctrine does not apply to commercial speech.¹² Further, the court noted that "the prior restraint doctrine is inapplicable in cases where one's proprietary interests are at stake, such as infringements of copyright or trademark."¹³

The remaining arguments presented by Defendants for consent to the video, laches, harm caused by the injunction and public interest, are disposed of by the Court. In a telling comment, the Court observes that "the right to publicity is not coterminous with the right to privacy. Although



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Plaintiff Bosley may have relinquished certain aspects of her right to privacy, her actions do not imply that she intentionally or voluntarily relinquished the right to be free from the appropriation of her persona for another's gain."¹⁴ The court ultimately concluded that Plaintiff was entitled to enjoin Defendants from "selling, distributing for sale, promoting for sale, or placing on 'member's only' websites any and all images of Plaintiff Catherine Bosley. . . ." ¹⁵

¹ Id. At 9.

² Id. At 15.

³ Id. At 16.

⁴ Id.

⁵ Id. At 25.

⁶ Id. Citing to Restatement (Third) of Unfair Competition, § 46, cmt. a. (emphasis added).

⁷ Id. At 26-27.

⁸ Id. At 34.

⁹ Id. At 35.

¹⁰ Id. At 40.

¹¹ Id. At 40 citing County SEC Agency v. Ohio DOC, 296 F.3d 477 (quoting Proctor & Gamble Co. v. Bankers' Trust Co. 78 F.3d 219, 226-27 (6th Cir. 1996)).

¹² Id. At 40.

¹³ Id. At 42.

¹⁴ Id. At 51.

¹⁵ Id. At 60.