

Bask in the Light of Stars Without Paying Them, and You Might Get Burned

Alan L. Friel, Wildman, Harrold, Allen & Dixon LLP

We live in a celebrity-obsessed culture where content abounds concerning every aspect of celebrities' lives. Publishers feature celebrity news because it attracts consumers—and advertising dollars. Advertisers also seek association with celebrities, and increasingly want more exposure and more connection to editorial content as an alternative to traditional advertising. And, when so-called “branded entertainment” or “sponsored content” includes celebrities, the rights of those celebrities to control and profit from the commercial exploitation of their personas arises. This is particularly the case online, where corporate websites feature articles and photos of celebrities using their products or services and where advertisers seek to sponsor content on popular fashion, pop culture, and celebrity gossip sites. Examples include short-form “webisodes” that integrate product promotion and interactive content, such as photo game features that let users “try on” celebrity hairdos or outfits. However, using celebrity images in a way that promotes a sponsor poses the risk of violating right of publicity and false endorsement prohibitions, and the lawyers who represent celebrities regularly extract large settlements from advertisers that arguably cross the line. In light of this, sponsorships and advertisements closely related to celebrity content must be carefully crafted, reviewed, and cleared.

Celebrities Lose Certain Rights of Privacy but Retain Control of the Use of Their Personas for Commercial Gain

Celebrities lose most of their rights of privacy because their lives are a matter of public interest. Accordingly, publishers have certain free speech rights to publish information about celebrities, including their images and personal facts about them. However, the so-called “right of publicity” vests the right to control the commercial exploitation of one’s identity or persona (i.e., one’s name and likeness) with that individual. Further, merely invoking a persona in an advertisement without permission—such as by using look-alikes or sound-alikes, or by referencing even a first name in a context that creates an associative reference—could create liability.¹ Indeed, this month, TV personality Kim Kardashian filed a multi-million dollar lawsuit against The Gap, Inc. for allegedly using a look-alike in an Old Navy ad.²

The right of publicity, however, does not lack limitations and exceptions. There is an inherent tension between an individual’s right to control the use of his or her identity and the free dissemination of speech and ideas guaranteed by the First Amendment. The level of protection given to speech depends on how it is categorized: (1) news (e.g., public issues, real-world happenings, or

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information); (2) stories (e.g., fiction or entertainment); or (3) commercial speech (e.g., advertising), which receives the least protection. First Amendment protection for certain content applies to online publishers just as it does to traditional media. The Supreme Court has ruled that rights of publicity should prevail over free speech when necessary to prevent “unjust enrichment by the theft of [the celebrity’s] good will,” that is, where “the defendant [would] get free some aspect of the plaintiff that would have market value and for which he would normally pay.”³ Although commercial speech is not without First Amendment protection, “the use of a person’s identity for purely commercial purposes, like advertising goods or services or the use of a person’s name or likeness on merchandise, is rarely protected.”⁴

Profit, by itself, does not turn protected speech into commercial speech. While the boundaries of commercial speech have yet to be clearly delineated, at one end of the spectrum is purely commercial speech; at the other is speech that, taken as a whole, expresses “editorial” comment on matters of public interest; and in between is speech that must be weighed looking at all of its characteristics.

For example, politicians have less ability to control their publicity rights, given the public’s interest in most every aspect of their lives, and courts may apply some latitude in treating even highly commercial uses as worthy of free speech protection.⁵ Courts have found it acceptable, for instance, to refer to or depict an artist in connection with the advertising of the sale of that artist’s work in a factual manner that does not suggest false endorsement of the work being promoted.⁶ Media can also use the personas of celebrities when accurately advertising their appearance in the media that is being advertised (e.g., a sports figure in an article in a sports magazine).⁷ For the most part, the typical advertisers will not fall into one of these categories when trying to associate with celebrities.

In considering whether a condom manufacturer’s educational pamphlets were commercial speech in *Bolger v. Youngs Drug Products Corp.*,⁸ the U.S. Supreme Court noted that determining the correct classification of speech is challenging where the content is informational and not merely a solicitation. The Court found, however, that the combination of economic interest and the reference to one specific product sold by the publisher—even as merely a single reference at the bottom of the last of eight pages—was enough to deprive the publisher of free speech protection.⁹ Subsequent courts have been willing to parse the commercial and expressive elements of even advertising, and not preclude a First Amendment defense to a right of publicity claim, where the commercial elements of the use are “subtle” and “do not advertise or describe the [advertised] product itself.”¹⁰ Further, expression in commercial speech has been found protectable by the U.S. Supreme Court if it concerns lawful activity, is not misleading, and is no more constraining than is necessary to serve a substantial government interest.¹¹

In *Hoffman v. Capital Cities/ABC, Inc.*,¹² the U.S. Court of Appeals for the Ninth Circuit, applying California law, found that *Los Angeles Magazine’s* use of actor Dustin Hoffman’s picture in a fashion pictorial did not violate his right of publicity. In the pictorial, famous movie characters were digitally altered to appear as though they were wearing the latest fashions. Hoffman’s head remained, but his body was replaced with that of a female model wearing different clothing, arguably invoking the role that Hoffman played in *Tootsie*. The caption mentioned Hoffman and the movie, along with a description of the clothing depicted in the photo, including Ralph Lauren shoes. A Ralph Lauren advertisement not featuring shoes appeared elsewhere in the magazine, and a “Shopper’s Guide” indicating the source of the featured products was printed in the back of the magazine. The court found that Hoffman’s image was not used in a traditional advertisement designed merely to sell a product, reasoning that *Los Angeles Magazine* did not receive any consideration to use a designer’s clothing in the pictorial, nor did the

pictorial simply advance a commercial message. Moreover, the court found that an article “meant to draw attention to the for-profit magazine in which it appears . . . does not fall outside of the protection of the First Amendment because it may help to sell copies.”¹³ A New York court ruled similarly in a case with analogous facts involving *New York Magazine’s* “Best Bets” feature of hot products.¹⁴

In contrast, in *Downing v. Abercrombie & Fitch*,¹⁵ the Ninth Circuit, again applying California law, found that unpermitted use of a photograph of surfing legends in an Abercrombie catalog with a surfing theme and accompanying articles on surfing was a use for advertising and was not entitled to First Amendment protection. The *Downing* court distinguished its case from *Hoffman*, stating that while *Los Angeles Magazine* was “unconnected to and received no consideration from the designer for the [clothes] depicted in the article,” Abercrombie itself used the images to promote its clothing sales.¹⁶ The court found Abercrombie’s use to be “much more commercial in nature and, therefore, not entitled to the full First Amendment protection accorded to L.A. Magazine’s use of Hoffman’s image.”¹⁷ New York courts have ruled similarly when the content at issue is essentially an “advertisement in disguise.”¹⁸

In *Stewart v. Rolling Stone LLC*,¹⁹ a California appellate court considered *Hoffman* and *Downing* in addressing whether *Rolling Stone* magazine could be held liable for violating the publicity rights of various independent rock artists. *Rolling Stone* ran an editorial about these artists and the history of the genre, and the issue included rock-themed advertising for a tobacco company. The editorial and advertising content were similarly-themed and in close proximity in the magazine’s pages. The court concluded that the feature was protected editorial speech, finding support in *Hoffman* and *Downing*. It found *Rolling Stone* had no direct financial interest in the sale of cigarettes and that the magazine maintained a separation between editorial content and advertisement sales. This case, and its treatment of *Hoffman* and *Downing*, suggests some latitude for media outlets but should

serve as a warning to advertisers who are looking to add content of interest to consumers on their websites, blogs, newsletters, and other materials that may not be blatant advertisements, but still serve the purpose of promoting the consumer brand.

Courts have also looked to the speaker, its purpose, and its relationship to the content in question in determining where content falls on the continuum of protected and unprotected speech. It is in this context that advertisers and e-commerce operators need to appreciate the unique protection given to editorial publishers that are not themselves selling particular products or services other than the content itself. Further, what a media outlet may be able to publish would be of a different nature if republished by a seller, and what might be protected speech for a content company may not be for a seller that seeks to associate other products with content. Consequently, an apparel brand will not be treated in the same way as a fashion trends blog if it reposts an article depicting a celebrity wearing the brand on the brand’s website. Even if the apparel company had permission from the fashion trends blog to republish the article, the right of publicity of the celebrity depicted or discussed still must be addressed.

This is not to say that a seller’s website, or part of the site, cannot be constructed in a manner that has informative or entertaining content completely separated from advertising and e-commerce such that it may be protected editorial speech. For instance, the U.S. Court of Appeals for the Second Circuit has held that informative nutrition content on the Adkins Diet website, which also sold diet books and products, was protectable content under the First Amendment because the editorial content remained separate from the e-commerce content.²⁰ Advertisers may also be safer when they conjure up celebrities in a highly transformative manner, such as parody. Even the U.S. Supreme Court has found parody to be a potential defense for advertising content—though in the context of a defamation claim, not in the context of a right of publicity claim.²¹ Nonetheless, many courts have held that

parodies in advertisements and non-expressive articles of trade, as opposed to parodies in expressive media such as books, television, and film, are entitled to less indulgence when considering if there has been fair use deserving of protected speech treatment.²²

Technically, in order for speech to qualify as parody, the speech must criticize or poke fun at the underlying work or person. For the defense to be successful, the purpose of the unauthorized celebrity reference—i.e., to comment on or critique the celebrity—must be material and not merely intended to draw the public’s attention to the advertisement of a product. For example, in a case where a robot allegedly resembling *Wheel of Fortune* star Vanna White was depicted in a Samsung commercial, the court noted that the parody defense did not apply because the use involved a “true advertisement run for the purpose of selling Samsung VCRs.”²³ The advertisement’s spoof was “subservient and only tangentially related to the ad’s primary message: ‘buy Samsung VCRs.’”²⁴

A disclaimer or disclosure that the celebrity has not authorized the depiction will not insulate an advertiser from a right of publicity claim, as this claim merely concerns the unauthorized use of persona rather than potential consumer confusion as to whether the celebrity endorses the product. However, to the extent that disclosures are used to clearly and conspicuously label and distinguish editorial content from advertising content, such disclosures may be effective in creating the degree of separation that courts have found compelling when examining the degree of separation between editorial and advertisements. This is important when advertisers sponsor content and an inherent risk for deep brand integrations within risky content.

Content That Creates a False Implication of Celebrity Endorsement Is Also Actionable

Use of a celebrity’s image in connection with advertising may also expose a publisher to liability

for false endorsement under Section 43(a) of the Lanham Act, which prohibits use of a “word, term, name, symbol, or device” that is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association” or “as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”²⁵ An advertiser will be held liable where its use of a celebrity’s image creates a likelihood of consumer confusion as to whether the celebrity has endorsed the product or service. In *Downing*, for example, Abercrombie was also found to have violated the Lanham Act by its use of the plaintiff surfers’ photograph.²⁶ Such false implied endorsement claims may be actionable even where all of the elements of a right of publicity claim do not exist. In addition, the reference to a celebrity in a commercial or other promotional content weighs heavily toward the potential for consumer confusion.²⁷ While free speech interests in expressive messages, such as those raised by parody, are applied to Lanham Act claims, courts “weigh the public interest in free expression against the public interest in avoiding consumer confusion.”²⁸

A disclaimer can help reduce a publisher’s risk of false endorsement liability if the disclaimer obviates the potential for consumer confusion as to the source of an implied endorsement.²⁹ Even if a publisher includes a disclaimer, however, it may still end up litigating a Lanham Act action because whether a disclaimer cures consumer confusion is an issue of fact that must be determined in the context of a particular case.³⁰ Further, a celebrity may still have a right of publicity claim notwithstanding a disclaimer’s effectiveness in mitigating against consumer confusion.

Guidance from Industry Organizations

The American Society of Magazine Editors’ (“ASME”) *Guidelines For Editors And Publishers Counsel* requires clear and conspicuous labeling, as prominent as the publication’s normal type face, of any advertisement or promotion that could be mistaken for editorial content.³¹ Ads also should not

be placed immediately before or after editorial pages that discuss, show, or promote the advertised products. Additionally, sponsorship language should not appear in connection with regularly occurring editorial content. Sponsorship language may be used in connection with special issues, inserts, contests, and the like, however, so long as: (1) the editorial content does not endorse the sponsor's products; and (2) any page, or section thereof, noting the sponsorship is clearly an ad or is labeled as such.

The ASME's *Best Practices for Digital Media* advises that all web pages should clearly distinguish between editorial content and sponsored or advertising content, and that any content from a source other than the web page's editors should be labeled in a clear way, such as by boxing and labeling sponsorship messages to distinguish them from editorial content. Also, a website should disclose its sponsorship and advertising policies, either on a disclosure page or in text accompanying an article. While following these industry self-regulatory best practices is not dispositive with regard to rights of publicity or Lanham Act claims, they are based on the principles of the applicable laws and regulations, and are designed to avoid an overlap between editorial and commercial speech. Following the industry best practices should help publishers and advertisers avoid legal liability.

Where to Draw the Line in the Digital World

As outlined above, the lines are not clearly drawn between immunized uses and those which will be deemed violative of a celebrity's rights. This uncertainty is even greater in the evolving arena of interactive digital publications that allow users to interact with both content and advertising. Based on the key principles articulated in case decisions and the author's experience in guiding publishers and advertisers, the following suggestions provide some basic guidance on how to avoid liability:

- DO separate advertising and e-commerce from editorial feature

content as much as possible, and identify which is which.

- DO NOT create a branded catalog, calendar, poster, or any other promotional item that contains an unauthorized use of a celebrity's identity.
- DO NOT accept any consideration to include products or services in editorial features where a person's identity or persona is featured without permission.
- DO NOT use for a commercial purpose a look-alike, a sound-alike, or any other portion of a celebrity's identity by which he or she can be identified.
- Disclaimers are only of limited help.
- BEWARE of limitations of the parody, or expressive transformation, defense.
- CONFIRM that third parties claiming rights have such rights to convey.³²

Advertisers, even those seeking to distribute informational or entertaining content to the public, need to tread particularly carefully to avoid expensive legal claims by celebrities, whose representatives troll for claims. Most claims, however, settle before a suit is filed. In addition to the July 2011 Kim Kardashian suit discussed above, examples of suits actually filed include: *Lohan v. E*Trade Securities LLC* (suit by actress Lindsay Lohan, where character in ad referred to "That milkoholic, Lindsay," settled);³³ *Allen v. American Apparel, Inc.* (\$5 million settlement for use of Woody Allen's image on billboards by clothing company);³⁴ *Cruise v. Sephora USA LLC* (suit filed by Tom Cruise and Nicole Kidman, alleging that ad depicting them on the red carpet and calling them an inspiration was a false impression of makeup products, settled);³⁵ and *Parker v. Sephora USA LLC* (suit by another A-list couple, alleging that ad indicating what products matched their personalities created a false endorsement, settled).³⁶ Examples of suits filed and actually litigated, and which did not end well for the advertisers involved, include: *Facenda v. N.F.L. Films, Inc.* (use of football narrator's recorded voice in sponsored documentary about the making of a

video game)³⁷ and *Yeager v. Cingular Wireless LLC* (reference to Chuck Yeager's breaking of the sound barrier in press release about new phone service).³⁸ Following the above guidelines will help prevent such lawsuits.

Alan Friel is a partner at Wildman, Harrold, Allen & Dixon LLP, where he counsels clients in the advertising, media, and technology industries. This article is intended to spot issues and does not constitute legal advice.

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1 See, e.g., *Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 692–93 (9th Cir. 1998) (persona) (holding that use of a modified copy of former baseball pitcher's World Series photograph for beer advertisements potentially constituted impermissible use of the player's likeness); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (persona) (9th Cir. 1974) (holding that cigarette advertisement incorporating stock photo of race cars with certain distinctive decorations gave rise to potential right of publicity claim for driver, even though driver not depicted); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097–99 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993) (sound-alike) (holding that imitation of singer's voice in commercial supported jury award for right of publicity and false endorsement claims); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (sound-alike) (holding that use of sound-alike singing a song associated with Bette Midler improperly evoked the artist's persona); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835–36 (6th Cir. 1983) (persona) (holding that "Here's Johnny" play on words improperly evoked Johnny Carson's persona); *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390, 392, 394–96 (E.D. La. 1992) (look-alike) (holding that coffee commercial using look-alike actor resembling

celebrity chef was sufficient to proceed on rights of publicity and Lanham Act claims); and *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137–38 (Wis. 1979) (nickname) (holding that use of football player's nickname in "Crazy Legs Shower Gel" advertisement infringed upon Elroy "Crazy Legs" Hirsch's right of publicity).

- 2 *Kardashian v. Gap Inc.*, No. 11-CV-05960 (C.D. Cal. filed July 20, 2011).
- 3 *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (internal quotations and citations omitted).
- 4 *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003).
- 5 See, e.g., *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674, 680 (11th Cir. 1983) (concluding that "while private citizens have the right of privacy, public figures have a similar right of publicity, and that the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user"); *Jackson v. MPI Home Video*, 694 F. Supp. 483, 492 (N.D. Ill. 1988) (limiting presidential candidate Jesse Jackson's right to control the commercial use of his name and likeness in news media and the sale of videos of his 1988 speech at the Democratic National Convention, and explaining that these uses likely constituted a form of news reporting such that Jackson's "chances of success on [his] right to publicity claim appear less than negligible"; noting, however, that use of Jackson's photograph on packaging could potentially support a claim of false implied endorsement under the Lanham Act); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 507 (Sup. Ct. 1968) ("A poster which portrays [the candidate] in that role, and reflects the spirit in which he approaches said role, is a form of public interest presentation to which protection must be extended.").

- 6 *See Astaire v. Best Film & Video Corp.*, 136 F.3d 1208, 1208–09 (9th Cir. 1998), *amending* 116 F.3d 1297 (9th Cir. 1997), *cert. denied*, 525 U.S. 868 (1998); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792–94 (Ct. App. 1993); *Shaw v. Time-Life Records*, 341 N.E.2d 817, 819–20 (N.Y. 1975).
- 7 *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Ct. App. 1995) (newspaper’s relatively contemporaneous reproduction of previously published pages in poster for sale at its reproduction cost, or distributed for free, was protected speech alone, and as a form of advertising, the paper’s newsworthy First Amendment protected content outweighed publicity rights, and the depiction did not suggest an implied endorsement of the paper); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (App. Div. 1975) (football player depiction that appeared in *Sports Illustrated* and was reproduced in an ad related to the magazine’s sports coverage of the player was protected speech when ads promoting the magazine appeared in other publications), *aff’d*, 386 N.Y.S.2d 397 (1976); *Booth v. Curtis Publishing Co.*, 223 N.Y.S.2d 737, 738–39 (App. Div. 1962) (magazine’s reproduction of actress’s picture from earlier edition to advertise the periodical).
- 8 463 U.S. 60 (1983).
- 9 *Id.* at 65–68.
- 10 *See, e.g., Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 457 (S.D.N.Y. 2008) (permitting parody defense where animated M&M candies were used in advertisements to depict a well-known New York figure).
- 11 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).
- 12 255 F.3d 1180 (9th Cir. 2001).
- 13 *Id.* at 1187.
- 14 *See Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584–86 (N.Y. 1984).
- 15 265 F.3d 994 (9th Cir. 2001).
- 16 *Id.* at 1002 n.2.
- 17 *Id.*
- 18 *See, e.g., Beverley v. Choices Women’s Medical Center, Inc.*, 587 N.E.2d 275, 278 (N.Y. 1991).
- 19 105 Cal. Rptr. 3d 98, 104-06, 114-18 (Ct. App. 2010).
- 20 *See Gorran v. Atkins Nutritionals, Inc.*, 279 Fed. Appx. 40, 41–42 (2d Cir. 2008).
- 21 *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).
- 22 *See, e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1300 (C.D. Cal. 1995) (rejecting parody defense when car advertisement portrayed James Bondlike spy character); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 831–32 (S.D.N.Y. 1990) (holding that even if fair use were a viable defense in the ad context, the commercial nature of the potential profitability in this case precluded a parody defense, and further opining that “the commercial in no manner ‘builds upon the original,’ nor does it contain elements ‘contributing something new for humorous affect or commentary’”) (citing *Elsmere Music, Inc. v. Nat’l Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980)).
- 23 *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993).
- 24 *Id.*
- 25 15 U.S.C. § 1125(a)(1)(A).
- 26 *Downing*, 265 F.3d at 1008.
- 27 *See, e.g., Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 412–13 (9th Cir. 1996) (noting that television advertisements are a

- venue where celebrity endorsements are expected by consumers); *Burck*, 571 F. Supp. 2d at 456 (“[C]onsumers may mistakenly believe that The Naked Cowboy himself endorsed the copying of his ‘trademarked likeness’ because the M & M Cowboy characters appear in a commercial setting (i.e., on the video billboard and inside the M & M World store).”).
- 28 See, e.g., *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 776 (8th Cir. 1994) (holding that survey evidence establishing likelihood of consumer confusion resulting from advertisements critical of Anheuser-Busch precluded a parody defense under First Amendment analysis) (quoting *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989)).
- 29 See, e.g., *Balducci*, 28 F.3d at 776 (“By using an obvious disclaimer, positioning the parody in a less-confusing location, altering the protected marks in a meaningful way, or doing some collection of the above, Balducci could have conveyed its message with substantially less risk of consumer confusion.”); *Jackson*, 694 F. Supp. at 492 (“But an appropriate form of disclaimer would be an adequate remedy and once approved by this Court would obviate the need for injunctive relief insofar as the Lanham Act is concerned.”).
- 30 See, e.g., *Balducci*, 28 F.3d at 771–72 (holding that survey evidence establishing likelihood of consumer confusion resulting from advertisements critical of Anheuser-Busch precluded a parody defense, despite use of disclaimers); *Prudhomme*, 800 F. Supp. at 392, 394–95; *Allen*, 610 F. Supp. at 627–29.
- 31 ASME *Guidelines for Editors and Publishers*, ASME (revised Jan. 25, 2011), available at http://www.magazine.org/asme/asme_guidelines/guidelines.aspx (last visited Aug. 1, 2011).
- 32 Television and film producers sometimes, but not always, have the right to feature actors in commercial tie-ins and co-promotions. In 2009, a watchmaker settled a suit by actors Robert DeNiro and Al Pacino arising out of their depiction in an ad promoting both a film they were in and the watches. See *De Niro v. Overture Films, LLC*, No. 09-CV-01988 (S.D.N.Y. dismissed Dec. 2, 2009).
- 33 No. 601016/2010 (N.Y. Sup. Ct. dismissed Sept. 2010).
- 34 No. 08-CV-03179 (S.D.N.Y. dismissed May 22, 2009).
- 35 No. 03-CV-00636 (C.D. Cal. dismissed June 22, 2004).
- 36 No. 03-CV-01489 (C.D. Cal. dismissed Feb. 17, 2004).
- 37 542 F.3d 1007, 1016–18 (3d Cir. 2008).
- 38 673 F. Supp. 2d 1089, 1096–97 (E.D. Cal. 2009).

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