

Advertising and the Law:



“LAST NAIL IN DRACULA’S COFFIN”

Outside Counsel™ with Roy S. Gordet

Last month we saw that despite any common sense reasons we may have for not using someone’s name or likeness in an advertisement without that person’s permission, the California State Legislature has seen fit to write a statute which expressly forbids such practice. Such a statute makes it much easier for someone to claim that his or her rights have been violated. It simplifies the process by which a judge can award damages to a person whose name or likeness has been used in advertising without permission.

This month we are going to look at a related, but at the same time, quite distinct aspect of the problem; the use of one’s likeness for commercial purposes.

In December of 1979, a sharply divided California Supreme court decided that the heirs of Bela Lugosi were not entitled to receive money from Universal Studios for the use by Universal of Bela Lugosi’s likeness on merchandising properties. The basic question was whether, in the course of his movie contracts with Universal, Bela Lugosi had actually granted Universal the right to make use off his likeness in merchandising properties separate from the movies themselves. Secondly, even if Lugosi had indeed granted such rights to Universal, the question was raised as to whether these rights descended to the heirs of Lugosi following Lugosi’s death.

The facts as explained by the Court are quite fascinating, but limitations of space prevent me from exploring all of the facts and the different ramifications that could flow from conflicting interpretations of the facts. The varying interpretations of the contract between Lugosi and Universal, although important, are probably less significant to those of you in the advertising industry, as opposed to the movie industry. The case turned on the fact that Bela Lugosi himself, during his own lifetime, never sought to commercially exploit his name or likeness in connections with the operation of any business or the sale of any product or service. Such use of one’s name or likeness with a business, product or service, according to the Court, would have created a tangible and sellable product in much the same way as property may be created by one who organizes a business under his name. As we noted in last month’s column, such a right is considered to be a part of the law of privacy. It has generally been held that the “right of privacy,” in its more general interpretation, does not survive the death of the person who would claim such right of privacy.

(Continued on page 20)

SFAC MEM
Mark Your C

DECEMBER 10: Christmas Party
St. Francis Hotel

JANUARY

14: Direct Marketing Group Meeting
T.B.A.

21: Luncheon Meeting
Speaker: Robin Wolaner,
Parenting Magazine

FEBRUAR

4: Direct Marketing Day
Hyatt on Union St

18: Point of Purchase Show
SF Hilton

APRIL

1: Comedy Day
(Humor in Advertising)

15: Cable Car Awards
(tentative)

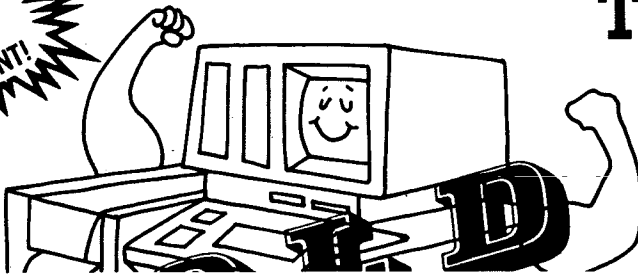
MAY

6: Hispanic Day
20: Luncheon Meeting
T.B.A.

FOR RESERVATIONS (th
AND FURTHER INFO

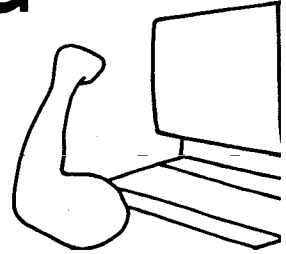
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Fantastic Bargain In USED EQUIPMENT!



PUT THESE TYPESETTING TWINS

To Work In Your



DRACULA

(Continued from page 10)

THE OREO PHENOMENON

Goldman Mariposa Press

I love to twist the chocolate wafer of an Oreo white cream filling, then with your teeth, scrape last? Others have been squeezing down into the middle-size smaller quantity print projects. I sometimes and scraping the cream from the top of the entering into the middle-size printers' market, support it and I hope you won't either.

ly entering into et...."

t, a spokesman said that R.R. Donnelly was identity work that normally they wouldn't touch to the competition that they could compete e short-term, a larger firm can price cut and

er struggling to survive are the recent closings ng and Western Lithograph.

Phenomenon is that San Francisco is based on and Los Angeles. There have been many rinter in San Francisco is Graphic Arts Center,

de the area and

on Emporium-Capwells, Macy's, I. Magnin, son, J. Walter Thompson and Del Monte, tion is not only in Northern California...the nters. In general, we're competing with much -area printers can be so effective is two-fold. tter capitalization and the ability to buy

ing sales professionals that were groomed e with the rest of the area...

In other words, it was necessary for Lugosi to go beyond the mere "right of privacy" and to have expressly transformed this "right of publicity" to a tangible commercial exploitation. The majority of the Supreme Court deemed it unreasonable for Lugosi's heirs to urge that even though their immediate ancestor did not exploit the flood of publicity he received in his lifetime for commercial purposes, the opportunity to have done so is property which descends to his heirs. The Court held that such an "opportunity" cannot descend after death of the person who originally had the right to make such claims.

As we noted last month, there is no doubt that a "right of publicity" has been upheld in courts throughout the country. I would not advise going out and using someone else's name or likeness without that person's permission. But, in California at least, pursuant to the Lugosi case, you are entitled to use the name and likeness for commercial purposes of someone who is no longer alive, assuming that person did not commercially exploit his or her name or likeness during his or her lifetime. However, you should also be aware that some cases have held that commercial exploitation of a person's name or likeness after his or her death may infringe upon the "right of privacy" of the immediate family of that person. This situation probably would not arise in the context of an advertisement, but it may arise in the context of a fictional rendition of real events. Furthermore, there may be several ways to define "commercial exploitation."

For your information, (and I write this before knowing the eventual fate of the Chief Justice) Rose Bird dissented from the majority opinion of the California Supreme Court. She thought that the heirs of Bela Lugosi did have the right to exclusively exploit Mr. Lugosi's rather distinctive features, even after his death. Ms. Bird proposed that the California Legislature adopt a 75-year period as a time during which only the heirs may continue to exploit a living person's name or likeness. (The 75-year period was derived from that used in the copyright statute.) According to the Chief Justice, any commercial right inherent in Mr. Lugosi's features necessarily descends to his heirs. The closeness of the Court's ruling would indicate that had the specific facts of the case been slightly different, the majority of the Court may have held in favor of Lugosi's heirs. It should also serve as a warning signal that you should not go out and begin using a real person's name or likeness in your next multi-million dollar advertising campaign, merely because that person is now deceased. Some serious investigation, legal or otherwise, is warranted before putting that person's face on a billboard.

Next month we will discuss some basic issues concerning registering a real person's face or name as a trademark at the U.S. Trademark Office.

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