small number of inquiries, the most important of which will be:

(a) inquiries into the determination of program standards; and

(b) inquiries into licence grants.

All other licensing inquiries (involving "old system" licences) will continue under the old procedures until such time as regulations are made under s98(2) of the Broadcasting and Television Amendment Act 1985. That sub-section allows regulations to apply the new inquiry process to inquiries involving old system licences. These transitional regulations are currently being drafted, and should appear in the Commonwealth Gazette a few weeks after the main body of inquiry regulations. It is expected that the new procedures will not apply to any inquiry which involves an old system licence, and has already commenced.

Leo Grey

IMPERSONATION AND WRONGFUL USE OF NAME AND LIKENESS

Media law in Australia is surprisingly lacking in substantive law on the issue of the wrongful use of a person's likeness or name for commercial gain.

There is, of course, some substantive law in relation to the protection of privacy in a non-commercial context (e.g. Argyll v Argyll [1967] Chancery CH. 302).

This article is restricted to the commercial context although, of course, many of the principles discussed would apply equally to non-commercial invasion of privacy.

Impersonation

It would seem that, so long as it is clear that an impersonation is occurring, there is no rule of law which would prevent an advertiser utilising a public figure in an impersonation occurring in an advertisement, whether authorised or not.

The usual restrictions upon any published material would apply, namely that the usage is not defamatory of the person being impersonated (or any other person or corporation) and that the material is not obscene, blasphemous, an incitement to riot and so on.

The Broadcasting Tribunal has on more than one occasion, and most recently in relation to the use of former President Richard Nixon's impersonation in commercials, intervened to prevent commercials containing impersonations to occur. However, impersonations of Humphrey Bogart, Margaret Thatcher and the Queen have all recently been utilised in commercials without apparent intervention by the Tribunal.

So far as broadcasting regulation is concerned, the following Broadcasting Standards may be relevant - paragraphs 38(a), 38(g), 38(i), 40(a) and 40(b). None of these Standards, however, are directly in point and would only circumscribe the manner in which the impersonation was performed rather than prevent the impersonation per se.

In the United States the commercial exploitation of a person's likeness has now been effectively prevented by developments in tort law. A leading case occurred in California in 1984 and involved the singer, Frank Sinatra, who objected to a lifesize photograph of himself being used

outside a southern Californian store to advertise carpets. However, this decision rested in economic tort, the argument being that on the one hand Sinatra's capacity to earn money from commercial endorsements was being eroded and, on the other hand that the public may be misled into believing that Sinatra actually endorsed these carpets.

It is submitted that a combination of tort law applicable in the Australian states and Federal trade practices law may permit the development of substantive law to prevent impersonation in commercial advertising in this country.

It is suggested that to impersonate a living person in relation to endorsing a product may well be a breach of sections of the Trade Practices Act, being s52 - misleading and deceptive conduct - and perhaps a breach of s53(d) - the prohibition upon claiming an endorsement or sponsorship which does not exist.

The Trade Practices Act arguments will have greater weight if it can be demonstrated that the commercial appears to present the impersonated "celebrity" as endorsing the product or service, the subject of the commercial.

The more interesting area, concerning which there has been no case in Australia, is whether there is an interference with contractual relationships or an inducement to breach contract by unauthorised impersonation.

The argument would be that many persons who might be described as "celebrities" - i.e. persons who are well-known for being well-known (in the definition of James Monaco) - depend in part for their living upon commercial endorsements and sponsorships. One vital aspect of these person's capacity to earn their living is that they are sparing in the products and services they endorse so as not to suffer from "overexposure" and that they are able to give "exclusivity" to a particular product or service for a particular territory. Furthermore, to protect their overall image "celebrities" very carefully select the kinds of products and services they will endorse and the circumstances in which they will endorse them.

Obviously, if they are being impersonated for the purpose of commercial gain in circumstances where they have no control of the type of product or service or the markets in which the product is being sold, the "celebrity" loses the opportunity to represent similar products and services. Further, the impersonation may be for a product competing with one which the celebrity already endorses.

Clearly if the celebrity had authorised the impersonation this may well be a breach of those existing contractual rights. Is the position any different because the impersonation is unauthorised? There is no logical reason why it should be except that, under existing law there is little that the "celebrity" can do about such unauthorised impersonation. Only a third party aggrieved by the unauthorised use could bring action. Is this a circumstance where the tort of inducement to breach contract might be extended by a Court in the appropriate circumstances to permit the "non-aggrieved" party to bring suit?

Unauthorised Use of Likeness or Name

Ironically, the substantive law would appear to be clearer in relation to the unauthorised use of a person's name, or in the jargon of the trade, "biography", than it is in relation to impersonations.

Privacy legislation in several Australian states establishes committees to overview invasions of privacy, substantially without power to penalise. However, naming in Parliament has shown itself to be a substantial deterrent in most instances.

The development of the law has been stunted by the decision of the High Court in Victoria Park Racing and Recreation Grounds Co. Limited v Taylor in 1937 (58 CLR 479) in which Latham CJ expressed the view that no general right of privacy exists. However, the case was not a privacy case as such, involving the use of viewing platforms to overview a race meeting and was really a case dealing with the right to benefit from the publicity value of a public spectacle.

More importantly, the International Covenant on Civil and Political Rights, to which Australia is a party, provides in Article 12 that "no one should be subject to arbitrary interference with his privacy, family, home or correspondence ..." and these concepts are reflected in the Bill of Rights currently being considered by the Australian Federal Parliament. Whilst the fate of this Bill remains in balance, the existence of the Covenant gives some scope for Federal Court action to an aggrieved private litigant.

In passing it should be noted that he Law Reform Commission in its Report No. 11 entitled Unfair Publication - Defamation

and Privacy made extensive recommendations in relation to the introduction of a statutory protection for privacy in the areas of health, private behaviour, home life or personal or family relationships, photographs in private places, persons in distressed, ill or injured condition and in relation to people's criminal records. The privacy provisions were, unfortunately, linked to reform of defamation law and the combined package was greeted with great hostility by established media interests, particularly in the print media area. The report has not been acted upon.

Conclusion

In relation to invasion of privacy involving the impersonation or unauthorised use of the likeness or biography of an individual in relation to commercial announcements, Part V of the Trade Practices Act would seem to offer the most fruitful source of protection. The relief could be both injunctive and by way of damages and can be swift.

Less beneficial to the private litigant because it does not give rise to damages, is pressure upon the Australian Broadcasting Tribunal in relation to broadcast commercial announcements, the Press Council and the various privacy committees in relation to the print media.

Ultimately, the most effective weapon is the advertiser's fear of interference with his expensive and carefully scheduled advertising campaign. The earlier in the process of creating the campaign that the invasion of privacy is complained of, the more likely a positive result. Once the campaign is "to air" the advertiser is more reluctant to withdraw it because of cost and scheduling factors as well as public embarrassment. At this juncture, very commonly the best result that can be obtained is to have the advertisement killed at the end of its initial schedule.

In relation to the campaign which has been completed, there may be some comfort for the aggrieved in the tort of inducing breach of contract where it can be shown that the defendant has prevented the plaintiff performing a contractual obligation owed to a third party. As previously pointed out, the problem with tis action is that the third party must bring the proceedings because it is it which has suffered the damage. It could, of course, only be used as a tactic in circumstances where a specific contractual right existed which was being infringed by the defendant's conduct.

However, this may be the only protection in instances of flippant reverse "endorsement" such as in the recent Golden Lady drinks commercial - "If you would rather spend an evening with Robert Redford than Bernard King, this is the drink for you".

Martin Cooper

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