

## Appeals court voids Taster's publicity award

BY LESLIE SIMMONS

In the latest twist in the long-running right-of-publicity battle over a photo on Taster's Choice coffee, a California appellate court has ruled that non-celebrities can recover damages when their image has been misappropriated, but because the single publication rule was misapplied in Russell Christoff's case against Nestle, his \$15.3 million jury award was dismissed and his case was remanded back to state court.

Christoff must now prove his likeness generated profits for Nestle in order to recover damages, the 2nd District Court of Appeal in Los Angeles ruled June 29.

"It may be that the 'generic' nature of Christoff's image helped Nestle appeal to the 'generic' consumer and entice consumers to purchase Taster's Choice," wrote Justice Candace Cooper for the unanimous panel. "But, in order to recover profits on this basis, Christoff must present such evidence."

In 1986, Christoff posed for a two-hour modeling shoot for Nestle Canada. He was paid \$250 and received a contract stating that if Nestle Canada used his picture on a label, he would be paid \$2,000 plus an agency commission and that any additional use of his image would require further negotiation.

Twelve years later, Nestle USA was in the midst of redesigning the Taster's Choice label when an employee came across Christoff's photo and decided his "distinguished" look would work.

His image was used on various flavors of Taster's Choice in the U.S. and in foreign countries, including Mexico, where his complexion was darkened and sideburns were added. Christoff's picture was replaced in 2003 by another model, who was paid \$150,000 for the use of his image for 10 years.

Christoff learned his face was on the label in 2002. A year later, he sued Nestle under California's right-of-publicity statute, Civil Code Section 3344, alleging misappropriation of likeness, unjust enrichment and an accounting of Taster's Choice profits.

The jury concluded Nestle knowingly used his image and that before 2002 Christoff did not know his photograph was being used for commercial purposes. It awarded him \$15.3 million in damages.

On appeal, the court first focused on the single publi-

cation rule, which allows only one misappropriation claim based on the first day of publication of an image. The appellate panel found that the rule applied to Christoff's claim and ordered the trial court to determine whether he should have known about his face on the label prior to 2002. The court of appeal also sent back the issue of whether the numerous variations of his image constituted republications and whether Christoff's claims were time barred by the two-year statute of limitations.

The panel then focused on whether Christoff could collect damages under Section 3344, which includes invasion of privacy and right of publicity claims, even though he wasn't a celebrity.

The critical question, Cooper wrote, was whether the attention generated by Christoff was "a kind of good will or recognition value." After all, the image of a man pleasantly smiling over a cup of coffee was an "icon" that existed before and after Christoff's image was used on the label, Cooper wrote.

"This is not to say that Christoff's photograph did not improve Nestle's profits during his tenure as a taster," she added. "Even though images may be fungible, Nestle may still gain a commercial advantage from the use of Christoff."

Karl Manders, president of Continental Enterprises, an IP consulting firm in Indianapolis, said the appellate court's take on the issue of celebrity status is interesting.

"I think the court clearly indicated, even a noncelebrity can bring value to a product or a company," Manders said.

In a statement, Nestle said of the decision: "We're obviously very pleased with the court's decision, reversing the jury's \$15.3 million profits award to Mr. Christoff, an amount almost 50 times his actual damages. We are eager to move forward toward a fair resolution of this case."

Nestle was represented on appeal by David Axelrad, Jeremy Rosen and John Taylor Jr. of Encino's Horvitz & Levy. The company's trial court attorneys were Lawrence Heller and Shula Barash of Heller & Edwards in Los Angeles.

Christoff's appellate attorney, Colin Claxon of San Rafael, could not be reached for comment. Robert Mayer of Mayer & Glassman and Eric Stockel and David Franklyn of Kibre & Horvitz represented him at trial.

The case is *Christoff v. Nestle USA*, B182880. ◀