

Judicial recognition of the insert business

Allan Sorrell discusses a recent English case which found that publications can have valuable goodwill as providers of inserted advertising material to their readers

The "Insert" business involves the inclusion of supplementary material, especially advertising fliers, within publications such as newspapers. It is a huge business worldwide. The *New Zealand Herald*, has reportedly spent (NZ) \$40 million to exploit this market, including the purchase of a Swiss Ferag insert system, capable of regionalised advertising inserts for any one of six regions.

The English Court of Appeal has recently delivered a blow to some players in the insert business in a decision which was handed down in June last year.

The dispute

Associated Newspaper Plc publishers of the *Daily Mail*, the *Mail on Sunday* and the supplement *You* magazine, sued Insert Media Limited. It sought an injunction to stop Insert Media inserting advertising and other material into Associated Newspapers' publications. Associated Newspapers was already in the business of selling the rights to insert material and wanted to stop insertions of unauthorised material.

After a five day hearing, the Court granted the injunction, but Insert Media appealed. The Court of Appeal judgment gives persuasive guidance as to what would happen in similar situations before the New Zealand and Australian courts. It also assists in identifying what might happen where advertising is attached to other products.

Before the first hearing Insert Media in fact offered to print on each insert a disclaimer dissociating the insert from the particular Associated Newspapers' publication.

Evidence was given that the *Daily Mail*, had a circulation of 1.8 million, while *The Mail on Sunday* and its supplement *You* had a circulation total of 1.9 million.

The source of revenue derived from those publications was interesting. The Court accepted that about 60 per cent of the income from the *Daily Mail* was from actual sales. This figure was 25 per cent in the case of *The Mail on Sunday*. The balance came from advertising revenue. Associated Newspapers charged for the rights to insert advertising material,

either loose or stitched in, at different rates from advertisements incorporated within the copy of the newspapers.

Evidence was given of a boom in inserts over the last five years. The Judge listed the evidence as to the benefits of insert advertising, which included flexibility and more accurate targeting than can be achieved through advertising within the body of the copy.

Goodwill and standards

It was accepted by Associated Newspapers and Insert Media that Associated Newspapers had established goodwill as a media for advertising to their readership. The Court of Appeal was greatly influenced by the benefits advertisers derive from association with a reputable newspaper.

Associated alleged that the unauthorised inserts damaged that goodwill in a number of ways. Loss of control over the content was a major issue. Associated had obligations arising from membership of the Mail Order Protection Scheme and the Newspaper Publishers Association and submissions to the British Code of Advertising Practice. These standards did much to maintain advertising standards and improve protection for readers. The Court found Media Insert did not belong or submit to any similar organisation.

Agreement with wholesalers

Evidence was given that about 75 per cent of the wholesalers had agreed not to make unauthorised inserts while discussions were continuing with most other wholesalers. This practice had been approved by the equivalent of the New Zealand Commerce Commission and the Australian Trade Practices Commission.

Disclaimer and Damages

The Court refused to accept that the disclaimer proposed by Media Insert would be effective. Associated Newspapers' rights for which protection was being sought were broader than rights attaching to

other products. There was a misrepresentation that the insert, albeit loose and only folded in, was produced by Associated to their standards. This is the key finding by the Court of Appeal. It said this misrepresentation, with these facts, could not be undone by a disclaimer.

In another situation consumers of Sony products not backed by manufacturers warranties were considered adequately protected by disclaimer stickers. Purchasers of Seiko watches, in circumstances where the manufacturer's warranty was invalidated, have been held by the courts to be adequately protected by a disclaimer.

A point of distinction may be that the decision to purchase a newspaper will be taken without the careful reflection or examination made by the buyer of a watch or a Sony product. The damage is still hard to identify. A purchaser of the newspaper may be disgruntled by the insert but, at that point would, by virtue of the disclaimer, be aware it was not the newspaper publisher's product.

The Court of Appeal nonetheless found there was damage to reputation and goodwill. They also signalled, but did not determine, the possibility that damage occurred where advertisers were able to use inserts at a lower cost through newsagents with the result that the revenues of Associated Newspapers would be impaired.

The English Court of Appeal has therefore effectively protected the business opportunity represented by the practice of inserting advertising material in publications.

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