

Unauthorized use of professional narrator's voice constitutes passing off

Unfair use
Passing off

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In *Koren-Israeli v Cohen* (Case CC534-08, March 11 2010), the Tel Aviv District Court has held that the unauthorized use by the defendant of a voice recording of a professional narrator constituted passing off.

The plaintiff, a professional narrator, maintains a website advertising her website promotion services. Among other things, the website contains audio samples of her voice. The defendant runs a website advertising his website construction and promotion services. The defendant placed on his website an audio track containing a sample voice-over taken from the plaintiff's website. The defendant removed the sample upon receipt of a cease and desist letter. Nevertheless, the plaintiff sued for compensation based on:

- passing off and false description under the Commercial Torts Law (5759/1999); and
- unjust enrichment under the Unjust Enrichment Law (5739/1979).

The Tel Aviv District Court held that the unauthorized use by the defendant of an audio sample featuring the plaintiff's voice constituted passing off. The court noted that, while the concept of 'goodwill' is difficult to define and characterize, the plaintiff had proven that she had goodwill in her voice with respect to narration services.

As to the likelihood of confusion, the court held that use of the sample voice-over on the defendant's website was liable to mislead consumers into associating the narrator's voice with the defendant's website, whether they were able to identify the plaintiff by name (in which case misrepresentation would be easier to establish) or not (in which case consumers may nevertheless associate the defendant's website with the plaintiff's voice, as heard in the media and in commercials). The court ruled that the plaintiff needed to show only that a likelihood of connection between the defendant's services and the plaintiff was probable or highly probable. It concluded that the plaintiff had successfully demonstrated that such connection was probable.

As to the other causes of action, the court held that the defendant had not made a false description of the plaintiff or her services. Moreover, while an action for unjust enrichment was available in principle, the defendant's enrichment was presumed to be small, as his business did not include voice-over services, and no evidence was provided as to the duration of use and the scope of his business activities. Further findings were unnecessary in light of the plaintiff's entitlement to compensation under the tort of passing off.

In the absence of evidence of actual damage, and taking into consideration the lack of evidence as to the duration of the defendant's use and the scope of his business activities, the court awarded the plaintiff statutory damages in the amount of IS20,000 (the maximum being IS100,000) and attorneys' fees of IS3,500.

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