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Right of Publicity in Puerto Rico

By: Laura Beléndez-Ferrero, LLM

The Supreme Court of Puerto Rico recently addressed a novel question pertaining to rights of privacy and publicity. In the case of Vigoreaux, et al. v. Quizno'Sub, et al., 2008 T.S.P.R. 38, plaintiff Mr. Roberto Vigoreaux (hereinafter, "Vigoreaux") claimed that his rights to privacy and publicity were infringed by Quizno's and the advertising agency who created the advertisement because his image was used, without his consent, as part of an advertisement. The advertisement depicted photographs of Vigoreaux and Mr. Carlos Pesquera ("Pesquera"), both of whom had recently lost the 2003 primaries in their respective parties. Underneath the Vigoreaux and Pesquera photographs, the advertisement read "Para los que se quedaron con las ganas" ("For those who were left wanting something more") and underneath this phrase a picture of a sandwich was depicted and the phrase "Vuelve el Delicioso Chicken Carbonara" ("The delicious Chicken Carbonara is back"). Vigoreaux claimed that the right to his image, privacy and right of publicity were infringed by Defendants. Defendants claimed that Vigoreaux's privacy right was not infringed since he was a public figure and that this advertisement was clearly a political satire protected by the First Amendment. The Supreme Court concluded that Vigoreaux had the right to participate economically in the commercialization of his image, name and likeness, recognizing a patrimonial right to one's image. Furthermore, the Supreme Court concluded that Vigoreaux could be entitled to the moral damages he suffered due to a violation of the right to his image, which is part of the privacy right.

The Supreme Court concluded that the photographs included in the advertisement were commercial expression. As such, the Supreme Court stated that Quizno's commercial expression was not the most adequate medium to market its products stating for the first time that the right to privacy includes a cause of action against anyone who appropriates, without authorization, the name and/ or image or likeness of a person for commercial purposes. The right to your own image is part of the right to privacy. Every person has a right to control where, when and how his image is used or reproduced. Thus, every time a photograph of a person is used that person must have authorized such reproduction. The only exception, whereby a photograph may be used, without consent, is only if there is a serious public interest, for example, manifestations, or other public events where the photographed person is an accessory figure or when the constitutional right to freedom of speech would prevail over the subject photographed.

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As to the defense raised by defendants (that it was a parody and/or satire), the Court concluded that the principal function of the publication at issue was commercial, that is, to sell a product. The advertisement was neither to entertain nor to serve as social criticism. Furthermore, the Court clarified that the advertisement did not constitute a parody, as it did not take elements from an existing original expression; to create a new work that parodies the original work. Nor was it a satire because a satire utilizes an original work to criticize another social element.

This landmark case clearly establishes that even public figures have a right to control how their image is used, when such use is clearly commercial in nature.It also stresses the importance of releases for talents and other persons that form part of a commercial advertisement. From now on any public and/or private person who does not wish to be associated with a commercial expression, such as an advertisement of a product, and who has not consented to such use, may file an action claiming violation of his image and right of publicity. **-&-**

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The Non-Obviousness Patentability Requirement

By: Eugenio J. Torres-Oyola

A patent application undergoes substantive examination during which a patent examiner decides whether or not the invention is patentable in view of the "prior art" uncovered during the examination process. Generally speaking, "prior art" is technology which predates the filing of a patent application on an invention.

Patentability is dependent upon three separate statutory requirements all of which must be satisfied before a patent may be issued:

(i) Novelty: a new invention is not novel if at the time of its invention there was another invention in existence which is the same or virtually identical to the new invention;

(ii) Utility: an invention must have a useful purpose; and

(iii) Non-obviousness: an invention, even though not exactly described by the prior art, may be denied a patent if it would be obvious to one of ordinary skill in the area of technology related to the invention to make such an improvement.

A rejection for obviousness does not require that each precise element of an invention be found in the prior art. Moreover, it is immaterial that no single specific prior art reference teaches the overall invention claimed, because the test is whether it would have been obvious to one skilled in the art to produce, from the combined teachings of the references, the invention claimed by the applicant.

The importance of the non-obviousness doctrine rests on the relative ease with which inventions pass the novelty and usefulness requirements. To comply with the utility requirement, an invention only needs to be minimally useful. To be novel, an invention must merely have a single difference from a piece of prior art. Therefore, the non-obviousness doctrine often acts as the gatekeeper to patentability.

However, the non-obviousness doctrine is the most difficult of the three to access because it attempts to measure technical accomplishment, a quality more abstract than novelty or utility. When performing a non-obviousness analysis, the question is whether the invention is a significant enough technical advance in the field in question to merit the award of a patent. A new and useful invention does not rise to the level of patentable invention if it represents merely a trivial change and is obvious in view of the prior art.

Over forty years ago, in Graham v. John Deere Co., the U.S. Supreme Court instituted a test for performing a non-obviousness analysis: (i) determining the scope and content of the prior art; (ii) ascertaining the differences between the prior art and the claims at issue; and (iii) determining the level of ordinary skill in the pertinent art. Courts and patent examiners employed this three step test and looked at secondary considerations such as commercial success, long felt unsolved needs of the market and failure of others to "give light to the circumstances surrounding the origin of the subject matter sought to be patented" to determine whether the new invention was obvious.

Seeking more uniformity in the obviousness analysis, courts devised the teaching, suggestion, and motivation ("TSM") test. Under TSM, an invention was obvious only if the prior art, the nature of the problem being solved, or the knowledge of the person of ordinary skill in the art revealed some motivation or suggestion to combine the teachings of the prior art to create the new invention.

In April, 2007, in KSR Intl' Co. v. Teleflex Inc., the U.S. Supreme Court changed the way in which patent claims are to be analyzed for obviousness purposes by creating a new approach to determine whether an invention is non-obvious. An initial question to ask is whether the invention is merely a predictable variation of known elements or techniques in the prior art. If there was a reason apparent to a person of ordinary skill in the art to combine the known elements or techniques in the way claimed in the new invention resulting in a combination functioning as expected, it is likely that the new invention will be deemed obvious under KSR. On the other hand, if the combination yields an unexpected and beneficial result, it is likely that it will be deemed non-obvious.

In KSR, the court underlined the importance of common sense. Patented devices have uses beyond their primary purpose. A person having ordinary skill and common sense recognizes this and puts his skill and common sense to use, combining devices and their secondary purposes to design a new product. Under TSM, the primary purposes were evaluated to determine whether to grant a patent.

Under KSR, secondary purposes are part of the analysis increasing the likelihood a new invention will be deemed obvious.

Until the ruling in KSR, the common sense inquiry was rejected by the courts. Now it must be taken into account. The focus now turns on market forces and needs driving the want to solve a problem with limited identifiable solutions. A person of ordinary skill motivated by these forces, but limited by the number of known solutions, should be encouraged to pursue these limited options even though the result will likely be predictable. Predictable results satisfy market needs but are the product of ordinary skill and common sense and, therefore, not likely to be patentable.

In a fashion similar to its use of "obvious to try" and common sense, the Supreme Court resurrected the use of hindsight in determining whether a new invention is obvious. Hindsight, like obviousness to try, was consistently rejected by courts applying TSM prior to KSR. The Supreme Court acknowledged the main concern associated with hindsight, the danger of using what is widely known today to analyze decisions made years ago, yet elevated hindsight to the same importance as common sense believing it to be a useful tool in determining whether an invention is obvious.

The Supreme Court has lessened the impact and reach of TSM. After KSR, TSM is viewed only as a "helpful insight" in the determination of non-obviousness. Even though KSR does not provide a test for determining obviousness, it sets forth certain factors, including predictability, common sense, and hindsight, as guides to evaluate a new invention as to obviousness. No longer will the obviousness be viewed solely through TSM. This new approach suggests that there will be more findings of obviousness on the part of the patent office and the courts, but it is still too early to tell. **-&-**

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The Job Interview and the Doctrine of Negligent Hiring

By: María Judith Marchand-Sánchez

Traditionally employment laws hold an employer responsible for the actions of his employees while performing those duties inherent to their employment. However, recent jurisprudence is expanding such employer responsibility by finding employers liable for the negligent hiring of an employee.

Under the emerging doctrine of negligent hiring, an employer could be held accountable for the damages suffered by a third party resulting from its employee's negligent acts if the acts are in any way related to the employment of that employee. Furthermore, this doctrine could also hold the employer liable for acts of an employee outside the scope of his or her work. This responsibility occurs when the employer knows, or should have known, that the employee possesses some attributes of character or prior conduct that makes him or her unfit for the job.

In order to establish if the employer has conducted such negligent hiring, courts usually assess whether the employer exercised the level of care which, under the circumstances, a reasonably prudent person would exercise in selecting or retaining an employee for the duties that the position requires. In determining whether an employer has exercised reasonable care in hiring its employees, the courts have considered whether the employer knew or should have known that the employee presented a risk or a possible threat to others. The reasonable care expected of the employer in the hiring process will depend on the type of position being recruited, the level of contact the position requires with third parties and will be evaluated on a case by case basis.

In a negligent hiring complaint, since the plaintiff is the party that alleges having suffered harm as a result of the employer's neglicence in the employee selection process, a plaintiff has the burden of proving the following:

(1) that at the time of the injury an employment relationship existed between the employer and the employee;
(2) the employee was "unfit" for the position;
(3) the employer knew, or should have known, that the employee was unfit for the position;
(4) the employee negligently or intentionally caused the third party's injury; and
(5) the employer's negligence in the hiring process was the proximate cause of the third party's injury.

There are, according to several cases and law reviews, various ways that can help you protect your business and avoid liability, or at least minimize the possibility of hiring and retaining an unfit employee. In general, pre-employment screening would ensure that employers are informed of all

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possible dangers that an employee could bring into the workplace, while post-employment programs would monitor employees at risk and alert employers to possible problems.

First, the employer as part of the pre-employment screening should require all candidates to fill in a job application prior to the job interview. From the perspective of defending a negligent hiring claim this job application should request: (1) name, address and telephone number of the candidate; (2) a copy of their identification card; (3) employment history which should include past employers with their names and addresses, date of hire, date of termination, position occupied, description of functions performed, name and address of the supervisor while at that position, reason for termination and salary. Regarding this particular information, inquire about any gaps in the employment history. Gaps in employment history should be carefully examined; (4) personal and professional references with their names and addresses and their relationship with the candidate; (5) request a copy of the criminal record of every jurisdiction where the candidate has lived, (6) if applicable, request a copy of the driving record of the candidate, certain cases have held employers liable for hiring an unfit driver when the position required driving skills; (7) education history, with the information of the educational institutions attended by the candidate, years they attended such entities, degrees obtained, information about extracurricular activities while at school, if there are any gaps in their educational history, inquire about such gaps; and (8) request a written authorization to investigate all information provided by the candidate in the application.

The next due care that all responsible employers should take is to pre-screen the candidate during a job interview. The employer should train properly the persons that are going to be in charge of performing the interviews. It is recommended that the person that is going to be responsible for supervising the candidate during their employment performs the interview or at least be one of the interviewers. During the job interview, the interviewer should: (1) pay close attention to the demeanor, eye contact and tone of voice of the candidate; (2) keep notes of the facts discussed in the interview and other statements provided by the candidate; and (3) corroborate the information that the candidate provided in the job application form. The employer should consider performing more than one interview with different interviewers and later have those interviewers comment their findings.

The last step in the pre-employment due diligence of the employer is to corroborate the references that the candidate provided in his application. The employer should always find out: (1) since when and how do the references know the candidate; (2) inquire whether the candidate possesses the qualities necessary for the position and require those references actual facts that support their opinion; (3) keep records of the conversation with the reference which should include the date, time, name of the person, position occupied and what was discussed about the candidate in the conversation; and (4) request the ex-employer of the candidate to make references in his records of the particular conversation regarding your inquiry.

As to post employment steps that could be taken to protect your business from a negligent hiring claim, the most important one is to train your supervisors to detect any unacceptable or unfit conduct and about the importance of notifying such conduct. Once the employer has been informed by a supervisor of said conduct, the employer should take immediate action.

Even though there is no perfect method of ensuring that a fit employee will be hired, these recommendations are a way of complying with the duty of reasonable care that the courts will be evaluating when a negligent hiring complaint is under their consideration and also a valuable way of protecting your business. **-&-**

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THE LLC ALTERNATIVE

By: Carlos Muñiz-Cotté

On September 23, 2004 the limited liability company (LLC) was adopted by the Puerto Rico Legislative Assembly as the most recent addition to Puerto Rico's legal entities. Until recently, the most common forms of corporate organization had been limited to "stock corporations", "close corporations", "limited liability partnerships" and "professional corporations", although other less used business vehicles, such as civil partnerships, were available.

Traditionally, when faced with the decision to determine which legal entity is the most appropriate for any given venture we have always been faced with the dilemma of trading off between the more formal and rigid but simple and cost effective corporation based entities and the more flexible but costly partnership based structure. The LLC has become the alternative to bridge the gap between corporate and partnership structures.

Although the LLC offers a great number of benefits, we will focus on those major shortcomings embedded in traditional business vehicles which this type of entity tries to overcome. For purposes of simplicity, when referring to corporations we mean "stock or close corporations" and

when referring to partnerships we mean "limited liability partnerships".

Ownership Structure. One major handicap partnership structures have always had is that they require more than one partner to be constituted and the inclusion or withdrawal of any partner typically requires an amendment to its partnership deed. Corporations may be solely owned but their ownership structure is limited by their authorized capital (how many shares of stock where set forth in the certificate of incorporation). LLC's in contrast may be organized by one or more members and their capital structures need not be registered nor authorized by the Department of State giving unlimited flexibility as to the form, privileges, and amount of ownership interest they may wish to issue. From a capital structure perspective, an LLC offers a great advantage since it can be tailored to each client's needs, without onerous registration requirements, and the addition or removal of members is as simple as the transfer or issue of membership certificates and an amendment of the LLC's membership register (usually set forth as a schedule to the LLC's Operating Agreement).

Simplicity of Organization. LLCs are organized by filing a simple certificate of organization with the Department of State which need only set forth the LLC's name and applicable suffix (LLC, CRL, Compañía de Reponsabilidad Limitada or Limited Liability Company); address (postal and physical); name of resident agent and address (postal and physical); name of the manager(s) or member(s) and their respective address (postal and physical); the company's purpose; and its duration. This makes LLCs as easy and efficient to set up as corporations which counters with the more cumbersome and costly organization associated with partnerships.

Formalities. The most cumbersome aspect of organizing and operating corporations from a legal stand point is the plethora documentation needed. Corporations require, beyond the Certificate of Incorporation, By-Laws, Subscription Agreements, Organizational Meeting Resolutions, Annual Shareholders Resolutions, and/or Board of Directors Minutes or Written Consents, Annual Reports which require the preparation of balance sheets, and Shareholders Agreements, if necessary, among other formalities. Partnerships require the drafting of a partnership deed, registering a certified copy of the deed with the Department of State and the deed may need to be amended to reflect any change in partnership's structure. In the case of LLCs, other than the Certificate of Organization, the Operating Agreement combines the corporate By-Laws, Shareholders Agreement, Organizational Meeting and Subscription Agreement into one single document. Furthermore, LLCs need not have boards, annual meetings nor any typical corporate formalities, they may be set up as formal or as lax as its members desire.

Privacy. Limited Liability Partnerships are required to file their partnership deed with the Department of State and renew their registration annually so although the partnership's financial information is not publicly available the composition of its partners and their business arrangements are.

Corporations afford their shareholders total privacy but the requirement that they file a statement of financial situation annually makes the corporations balance sheet public to whomever wishes to review them at the Department of State. The LLC requires in its certificate of organization to list its managers or members at the moment of organization so it provides the alternative to disclose a non-member manager and maintain the identity of its members anonymous, and all future members and/or managers would be completely anonymous. More importantly, no financial information is required to be disclosed with their Annual Fee granting even greater privacy to the company's internal affairs.

Limitation of Liability. Both corporations and limited liability partnerships grant their shareholders/partners limited liability against claims brought against these legal entities but the LLC takes that limitation of liability even further. LLCs, unlike any other legal entity in Puerto Rico, grants limitation of liability not only to its members but grants limited liability amongst its own series of membership interest. The limited liability Act states that if notification is given in the LLC's certificate of organization that each series of membership interest will have limited liability in front of its other series of membership interest and each series' assets and liabilities are appropriately segregated then any claim against a particular series be limited to the assets of such series. For purposes of clarity, the way this works is that if the members of XYZ, LLC wish to operate a restaurant, a shoe store and a hotel without having to set up multiple corporations or partnerships in order to shield each operation from the possible claims of the others, all they would have to do is issue series A Membership interests, which would hold claim to all the assets and liabilities of the restaurant, issue series B Membership interests, which would hold claim to all the assets and liabilities of the shoe store, and issue series B Membership interests which would hold claim to all the assets and liabilities of the hotel. Provided, that all businesses' assets, liabilities and operations are appropriately segregated (separate bank accounts, separate liabilities, etc.), the law extends limited liability for each business (if the hotel gets sued the plaintiff will not be able to reach the assets of the restaurant or the shoe store nor those of its members) without having to set up a corporation or partnership for each and avoid the compliance costs associated with each separate entity.

As mentioned above, these are only some of the advantages that the LLC holds over its older counterparts. In the end we can summarize the LLC alternative as the business vehicle which provides the greatest flexibility, privacy and simplicity regardless of the needs of each particular client. **-&-**

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THE LLC Operating Agreement: The Entity Within the Agreement

By: Fernando J. Rovira-Rullán, LLM

Puerto Rico's youngest legal entity, the limited liability company (LLC), can be organized with the same ease and cost effectiveness as its elder half brother, the corporation. All that is required is to file with the Puerto Rico Department of State a Certificate of Organization which is similar to the Certificate of Incorporation pursuant to which corporations are organized under Puerto Rico's General Corporations Law of 1995, as amended (the "Act"). Both of which certificates shall contain some basic information about the new entity such as name and address of its registered agent, type of business and duration.

One striking difference between the LLC and the corporation is where the rules pursuant to which the entity is to be regulated as well as where those that shall regulate the relationship among the owners are to be set forth. For corporations, such corporate governance matters are generally addressed in the By-Laws and, if entered into, in a Shareholders Agreement, while the members of an LLC address such matters in an Operating Agreement.

The Operating Agreement is very similar to a partnership agreement as it offers great flexibility as to its terms and conditions and, in the context of corporations, can be described as a hybrid among a Subscription Agreement, By-Laws and a Shareholders Agreement, as it sets forth the percentage of the total LLC membership interests to be held by each member (as a Subscription Agreement), contains certain rules regarding the management of the internal affairs of the LLC such as meetings and governance in general (as the By-Laws), as well as, restrictions in the transfer of the membership units and other agreements that directly affect the rights and obligations of the members (as a Shareholders Agreement).

Nevertheless, to our surprise, the Act does not expressly require the adoption of an Operating Agreement neither for the valid organization of an LLC with the Department of State nor for it to operate in Puerto Rico. Notwithstanding the foregoing, this agreement is extremely important for the LLC's internal governance and it should be carefully prepared for the benefit of the LLC and its members.

Matters generally contained in an Operating Agreement include, but are not limited to: (a) purpose; (b) duration; (c) initial and additional capital contributions; (d) management of capital accounts; (e) allocation of profits and losses; (f) distributions; (g) management (by members or managers); (h) meetings of members and/or managers; (i) books, records and accounting; (j) indemnification; (k) transfers of interests and applicable restrictions; (l) withdrawals of members; (m) confidentiality provisions; and (n) dissolution and termination.

The drafter of an Operating Agreement must bear in mind certain default provisions that, under the Act, apparently cannot be modified nor contracted away pursuant to the Operating Agreement.

For example:

1. Dissolution – shall be managed in the same manner as the dissolution of a corporation.

2. Fiduciary Duties – shall be applicable to managers and administrators as to the LLC in the same manner imposed on fiduciaries of a corporation.

3. Mergers and Consolidations – the merger or consolidation of the LLC with or into another domestic or foreign entity must be performed following the Act's provisions regarding mergers and consolidations involving corporations.

4. Amendments to the Certificate of Organization – shall also be performed in compliance with the requirements of the Act for corporations.

However, under the Act, other default provisions can be modified pursuant to the Operating Agreement. Thus, when working on an Operating Agreement, the drafter must also keep these provisions in mind since they shall be applicable if the agreement is silent as to the same.

For example:

1. Transferability of Membership Interest - unless otherwise agreed in the Operating Agreement, LLC membership interests shall be freely transferable. As is customary in the

context of close corporations, many Operating Agreements restrict the transferability of membership interests pursuant to one or more mechanisms such as prior approval and right of first refusal, among others.

2. Limitation of Liability – unless otherwise agreed in the Operating Agreement, members and managers liability shall be limited to their capital contribution.

3. Profit and Loss Allocation – unless otherwise agreed in the Operating Agreement, profit and loss allocation among the members follow the value of member contributions (note that this may only be relevant if the LLC is a disregarded entity such as an SE).

4. Distributions - unless otherwise agreed in the Operating Agreement, distributions also follow value of member contributions.

5. Management – unless otherwise agreed in the Operating Agreement, the LLC shall be managed by the members holding a majority interest. Need to include a specific provision if a Board of Managers is desired and/or to create officer positions in order to run the LLC.

6. Admission of a New Member – unless otherwise agreed in the Operating Agreement, new members shall only be admitted if the members holding 100% of the membership interest provide their consent.

7. Quorum for Meeting and Proportion of Votes Needed to Make a Decision - unless otherwise agreed in the Operating Agreement, at least a majority of the total membership interest must be present or represented at a meeting of the members in order for there to be quorum and a majority of those present needed to make decisions that are to be binding on the LLC.

8. Right to Information – unless restricted in the Operating Agreement, members shall have the right to receive, upon request, certain information regarding the LLC, its finances, and operation.

Besides keeping an eye on how to handle the Act's multiple default provisions, careful consideration should be given in the Operating Agreement to the provisions that are to govern initial and additional capital contributions as well as distributions since they will impact if, when and how much money will the members have to contribute to and receive from the LLC. In addition, it is of considerable importance to advice clients on the importance of including an integration clause as to avoid the allegation that other agreements outside the Operating Agreement are to be applicable to the members. Not to mention, stressing on the proportion of votes needed to amend an Operating Agreement as well as whether it is advisable that the LLC be a party to the agreement.

Finally, although some of the following provisions may be inapplicable in particular circumstances, other Operating Agreement provisions which could be worth considering are: (a) a covenant not to compete; (b) piggyback rights; (c) tag along; (d) drag along; (e) non-solicitation; (f) intellectual property assignment; (g) put option; and (h) buy-sell, among others. **-&-**

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