Taming the Wild West of the Social Media Frontier with the Right of Publicity and Copyright Law

September 29, 2016

Facilitated by Deborah Wilcox, Partner
This image says it all. Let's end the politically correct agenda that doesn't put America first. #trump2016

If I had a bowl of skittles and I told you just three would kill you. Would you take a handful?

That's our Syrian refugee problem.

Source: http://ww4.hdnux.com/photos/51/62/76/10956679/5/920x920.jpg
Trump Jr's Skittles graphic deleted from Twitter

By Leo Kelion
Technology desk editor

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Donald Trump Jr's post no longer features the Skittles graphic

Introduction to Social Media Issues

AD AGE SOCIAL MEDIA FACTS 2016
The Right of Publicity

- Definition
- ROP Protections Offered by Various States
- ROP Defenses
  - Newsworthiness Exception
  - Fleeting and Incidental Use Exception
  - First Amendment
Copyright Law

- Definition
- The Digital Millennium Copyright Act (DMCA)
- Intersection with the Right of Publicity
Topics for Discussion: Best Practices and Practical Advice

- Relying on “oral” or “implied” consent over a written consent/release is a recipe for disaster. What tips do you have for securing rights?

- Special care should be taken with respect to depiction of minors. Consents/releases for minors must be signed by parents or legal guardians, and in some states can be disavowed after the child reaches the age of majority. What difficulties have you encountered with such releases?
Topics for Discussion: Best Practices and Practical Advice

- Is there a post-mortem ROP in your jurisdiction and how long does it last?

- Have you ever encountered a laches problem or run afoul of the statute of limitations?

- Even if you own the copyright or have a license, you must consider ROP for video clips, social media sites, “internal” advertising, 3D rendering/action figures, etc. How do you handle a claim that the use is “strictly internal” with respect to rights clearance?
Recent Cases involving Social Media, ROP, or Copyright
Perkins v. LinkedIn Corp., 53 F.Supp.3d 1190 (N.D. Cal. 2014)

Class action suit over “Grow your network on LinkedIn” marketing campaign involving users’ personal name and contacts to send external emails in an effort to encourage others to join LinkedIn.
Perkins v. LinkedIn Corp., 53 F.Supp.3d 1190 (N.D. Cal. 2014)

Class action suit involving the ROP of users displayed on a sidebar advertisement indicating that a particular person or friend “liked” a particular company (shown to generate more revenue than other types of Facebook ads).
Fraley v. Facebook, Inc., 830 F.Supp.2d 785 (N.D. Cal. 2011)


Heigl v. Duane Reade, No. 14-CV 2502 (filed S.D.N.Y. Apr. 6, 2014)

(no opinion—case settled)

Photo of Katherine Heigl carrying bag from a Duane Reade store with the caption “"Love a quick #DuaneReade run? Even @KatieHeigl can’t resist shopping #NYC's favorite drugstore” intimating that she liked shopping at that store.
Heigl v. Duane Reade, No. 14-CV 2502 (filed S.D.N.Y. Apr. 6, 2014)

Source: http://www.sponsorship.com/IEG/files/be/beb71d8b-45c4-4a9d-a777-4b172b19c0ef.jpg
First Amendment not a basis to dismiss right of publicity claims brought by former NFL stars featured in the “historic teams” option of the Madden NFL computer game.
Davis v. Electronic Arts, Inc., 775 F.3d 1172 (9th Cir. Cal. 2015), cert. denied, 136 S.Ct. 1448 (2016)
In a case that has its origins in a 2009 ad in *Sports Illustrated* that congratulated Michael Jordan on being inducted to the Hall of Fame, the district court ruled that the ad was noncommercial speech entitled to First Amendment protection. The Seventh Circuit then reversed and remanded the case for consideration of the merits of Jordan’s claims. The District Court denied Jordan’s motion for partial summary judgment on liability as to his ROP claim.
After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.
On a social media page, Fox News published on social media a photograph that was taken at the ground zero site by a photographer years after the 9/11 catastrophe. The use was found to not fall under the fair use exception.

Source: http://4.bp.blogspot.com/_c6PbbwnFYhM/S-C0d_rKXSI/AAAAAAAAB0/VNi-yaAfw8/s320/iwo-jima-911.jpg
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