

Right of publicity? First, let me take a selfie

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“Oh, he wants to take a selfie,” President Barack Obama observed with amusement before gamely posing with Boston Red Sox designated hitter David Ortiz. Ortiz snapped the shot using his Samsung smartphone during a visit to the White House earlier this month, later tweeting it along with “What an honor! Thanks for the #selfie, @BarackObama.” But when the photo went viral and Samsung – which, unbeknownst to the president, recently signed Ortiz to an endorsement deal to be its “MLB social media insider” – retweeted it, the White House was far from amused. Senior White House adviser Dan Pfeiffer even mused that it might “be the end of all selfies.”

Such incidents have become increasingly common during the age of the selfie. Ellen DeGeneres’ celebrity-filled selfie taken during her hosting of the Oscars stirred up similar attention and criticism when it was later revealed to be a Samsung marketing stunt. The Obama-Ortiz selfie raises a unique set of legal questions, placing a spotlight on how the president’s individual right of publicity conflicts with free speech considerations, colliding against a backdrop of increasingly interwoven contexts: news, entertainment, social media and advertising.

It is hard to imagine that the president of the United States would bring a lawsuit for violation of his right of publicity. But could he?

The Right of Publicity

Broadly defined, the right of publicity is an individual’s inherent right to control the commercial use of his or her identity, including name, image and likeness. Unlike trademark, copyright and patent rights, there is no federal right of publicity. Instead, the scope and application of the right is defined by state law, and varies considerably from state to state, with some states codifying the right in statute only (e.g., New York), others recognizing only a common-law right, and still others recognizing the right in both statute and common law (e.g., California).

Consequently, success in a right of publicity suit could hinge on where the aggrieved plaintiff resides (the place that usually governs which right applies) or where she or he files suit.

This kaleidoscope of right of publicity laws has significant ramifications for how one assesses whether a given use of a selfie violates any individual’s right. Despite state variations in the right, at least two common issues arise when considering whether use of a selfie will violate an individual’s right of publicity. First, the right of publicity typically protects against unauthorized commercial use of a person’s identity. In the case of a selfie, did the person somehow give their consent? Second, and particularly when the subject is one about whom the public is interested, such as the president, does the First Amendment interest in free speech outweigh any potential encroachment on her right of publicity?

Context is crucial. Consented-to use in one context, when shifted to another, may be entirely unauthorized. Similarly, use of the same photo or name or likeness in one setting may be considered speech related to public affairs, while a slight shift in context could render that same speech commercial, and thus deserving of lower protection under the First Amendment. These issues certainly come into play when considering the implications of Ortiz’s tweet versus Samsung’s retweet, as each separate act was a separate use of the selfie in a distinct context.

Consent

States assess the sufficiency of “consent” to a use differently. The statutes of some states require written consent. In other jurisdictions, consent can be implied from the circumstances, but states assess the adequacy of implied consent differently. Additionally, while a person may consent to one type of use of his or her identity, such consent does not necessarily extend to use for other purposes or in other contexts.

Obama seemed to consent to the actual taking of the selfie; he acquiesced to Ortiz's suggestion with a smile and a laugh. Similarly, it would be hard to imagine that Obama, posing with the famous ballplayer, did not expect and therefore consent to the athlete's public use of that photo on Twitter or other social media. He might even have expected Ortiz's other myriad fans and followers to retweet and otherwise share the selfie.

Samsung's use of the selfie, however, is something altogether different. First, there is little doubt that Samsung's retweet of the selfie and proclamation that the photo was taken with a Samsung Galaxy Note 3 were clearly efforts to associate its product with the president for marketing and promotional purposes. Second, while one could imagine Obama implicitly consenting to Ortiz's tweeting the selfie, it's a step further to presume Obama was also implicitly signing off on Samsung's retweet to advertise its smartphone. Indeed, the White House's response to Samsung's retweet seems aimed at making it clear — both for this instance and any that might come up in the future — that the White House “certainly objects” to the president's image being used for commercial purposes.

Newsworthiness and Free Speech Concerns

Even if Ortiz's or Samsung's respective tweets were unauthorized by the president, use of the selfie might still fall under a statutory exception or qualify as protected speech under the First Amendment. Some states (e.g., California, Illinois and New York) exempt from liability noncommercial uses such as newsworthiness, sports, public affairs and political campaigns. Additionally, a use could be protected under the First Amendment. A use relating to public issues or politics would garner stronger First Amendment protection than a commercial use, including advertising.

The commercial versus newsworthy/political distinction is critical here. Because Obama is such a renowned public and political figure, nearly any use of his identity in the media is arguably newsworthy. Similarly, much expression relating to the president would likely be considered political speech at the core of First Amendment protection. On the other

hand, there is also likely a point at which use of the president's image or likeness could be seen as purely an attempt to promote a product by associating it with the president.

In the Obama-Ortiz selfie arena, context is again key. One could certainly argue that Ortiz's tweet of the selfie falls under a “newsworthy” exception; he was visiting the White House to celebrate winning the World Series and snapped a shot of himself with the president. The event was publicized and Ortiz has stated that the selfie was not for promotional purposes, but was instead a spontaneous moment of fun with Obama. However, the Samsung retweet again presents a different use within a different context. Samsung retweeted Ortiz's photo of a newsworthy event in order to promote the Samsung Galaxy Note 3, not to make commentary on a newsworthy or public issue. This type of use garners lesser protection under the First Amendment, and Samsung would likely have a harder time asserting a First Amendment argument in the context of a right of publicity claim. However, the news coverage of the whole incident, which included copies of the selfie, falls back within the newsworthy exception.

Parting Selfie-Assessment

Though the president possesses a right of publicity like any other individual, it is significantly impacted by free speech considerations, not to mention the impracticalities of a sitting president bringing a lawsuit. Instead, the White House will likely continue to make clear that use of the president's image for commercial purposes is unauthorized. Already, Olympians visiting the White House after the Obama-Ortiz selfie scandal were told that they were not allowed to take selfies with the president and must keep their cellphones in their pockets while meeting him.

Even if the selfie was merely a spontaneous moment between Big Papi and the commander in chief, such moments will likely decrease in frequency after this ordeal. Indeed, for Obama, selfies may just be more trouble than they are worth — late last year, the president faced a storm of criticism after posing for a selfie with the Danish prime minister at Nelson Mandela's memorial service, a scandal later coined

“Selfie- Gate.” But this will hardly be the final word on selfie-related legal issues. Would a blanket “no selfie” policy trigger further First Amendment concerns? Would “the end of all selfies” constitute a prior restraint? As technology continues to develop and complicate interactions among public figures in the media, these questions, while entertaining, will also become increasingly tricky to answer.

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