Rights of Publicity and Brand Promotion via Social Media: Navigating the Complexities

Minimizing Exposure to Infringement Risk Absent Clear Court Guidance While Leveraging Social Media in Advertising

TUESDAY, JULY 21, 2015
1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

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Social Media & Rights of Publicity: Minimizing Infringement Risk

July 21, 2015

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Traditional Privacy Torts

- Intrusion upon seclusion
- Public disclosure of private facts
- Placing a person in a false light
- Misappropriation of a person’s name or likeness—which essentially has become the Right of Publicity (ROP)
Right of Publicity (ROP) is an individual’s right to prevent others from commercially exploiting his or her identity (voice, name, likeness, etc.) without permission. The right is given to **everyone**, not just to celebrities. If you violate someone’s ROP, you can be forced to take down the content in question, and/or pay monetary damages to the individual.
What Does ROP Protect?

- **Name**: Including known nicknames, pseudonyms, and former names of celebrities.

- **Likeness**: Any visual depiction of an individual, including performance, still image, and even look-alike.

- **Voice**: Speaking voice, singing voice, and even sound-alike.

- **Famous phrase**: *E.g.*, “Here’s Johnny,” “That’s hot,” etc.

- **Physical object known to be associated with a celebrity**: *E.g.*, race car of a particular race car driver. (Outlier)
What is Social Media?

- TechTarget.com definition: “The collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration.
  - Facebook, Twitter, LinkedIn
  - YouTube, Flickr, Instagram, Pinterest, Vine, Snapchat
  - Blogs, Wikis
  - Customer Reviews (Yelp, Amazon, etc.)
  - Video Chat, Instant Messaging, etc.
What is Social Media

There were 8m total Tweets about the match during #USA v #POR

#WorldCup #PortugalvsUSA
What is Social Media?

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Get top stories and blog posts emailed to you each day.
What is Social Media?
How Businesses Use Social Media

- Conduct market research about user trends, interests, comments, opinions, etc.

- Conduct advertising, promotion & marketing
  - Many companies are running promotions directly on Facebook, Twitter, YouTube, Pinterest, Instagram, Snapchat, etc.
  - Use social media to measure “popularity” – e.g., using social media to conduct public voting in a prize promotion contest.
  - Running user-generated content (UGC) promotions – e.g., inviting users to create and submit original content for use in a company’s marketing or promotional campaigns.

- Collect information about users who may be existing or prospective customers
How Businesses Use Social Media
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How ROP is Protected

- Presently, 20 states (e.g., IL and NY) protect ROP by statutes and 28 states recognize the right under common law (e.g., NJ), but some states are silent on the ROP issue.

- CA and other states protect ROP via statute and also afford common law protection.

- Several states, including CA, protect ROP post-mortem as well. In CA it continues 70 years after death, in FL, 40 years after death, and in TN, it’s 10 years (or longer with use).

- NY presently recognizes ROP in **living** persons only.

- Legal remedies for violation of ROP include injunction and monetary damages.
Civil Code Section 3344:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.
US and Abroad

**Choice of Law:** Difficult for producers of nationally-accessible content to be assured of clearance due to the huge variance in the jumble of existing state laws and common law protection relating to the Right of Publicity.

- Post-mortem rights are especially problematic, as deciding what law to apply can be outcome determinative.

**International Exposure:** It’s an even thornier issue, as many countries have similar rights (such as personality / “moral rights” in France), but others like the UK, South Korea, etc. do not have such rights.
Potential Issues

- ROP even post-mortem for all faces/voices (parental permission required for kids)
- Even if you own the copyright or have a license, must consider ROP for video clips, social media sites, “internal” advertising, 3D rendering/action figures, etc.
- Trademark issues tied to ROP when name/likeness functions as a source identifier
- Unfair Competition issues if there is false association or sponsorship/false advertising
Copyright and ROP are **different and separate** rights.

Copyright requires **fixation** of an individual’s likeness and/or voice in a tangible medium of expression (e.g., a photograph, painting, film, video/audio recording, etc.) and protects the specific presentation (expression) resulting from such fixation.

In contrast, ROP protects an individual’s likeness and voice as they exist naturally and is **not** conditioned upon any form of fixation or presentation.

Often copyright is owned by someone other than the artist, but ROP is always owned by the person.
Protecting Company Property and Reputation:

- Proper use of company IP (proper TM use; cohesive brand image)
- Monitor social media accounts for misuse, and take action to stop misuse
- Pre-screening before user-generated content is uploaded
- Limit employee access to and authorization to use company social media accounts
- Be careful when dealing with fan or gripe sites (1st Amendment issues; PR backlash)
Distinguish Copyrights and ROP

- **Copyright Clearance ≠ ROP Clearance:** When third-party material clearly uses an individual’s identity, full rights clearance means **both** copyright clearance from the copyright owner of the material **and** ROP clearance from the person portrayed in the material, UNLESS:

  i. it is crystal clear that use of the person’s identity **in the context of your proposed use** falls within the “newsworthy” or “fleeting and incidental” exception; or

  ii. the material’s copyright owner has already secured ROP clearance from the person, and the clearance **covers your proposed use** of the material.

In the case of (ii), the copyright owner should expressly represent and warrant in the license agreement that it has obtained sufficient ROP clearance from all individuals depicted in the material.
The best practice is to obtain written consents/releases from all persons appearing in a work.

Relying on “oral” or “implied” consent is discouraged. It is always recommended to obtain written consent whenever possible.

Generally, avoid repeated or featured showing of a person unless there is written consent (e.g., close-ups).

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.
Rights Clearance for User-Generated Content – If you wish to use user-submitted content in your advertising or marketing campaigns, you need to be mindful about rights clearance issues:

- A written consent and release from the user submitting the content does not mean that you are free to use the content. User-submitted content may contain third-party material and thus implicate third-party rights.
- NEVER trust or rely on users to clear rights for user-submitted content (be careful with consultants and ad agencies too).
- Different types of rights may need to be cleared:
  - Use of an individual’s identity (name, likeness, voice, biographical information, etc.)
  - Use of another’s trademark/logo, video, audio, music, literary or visual content
The Right of Publicity & Brand Protection

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Elements of a Claim

- Identity Rights (right of publicity) claim:
  - Does use (name, likeness, etc.) identify individual?
  - Commercial use?
  - **No** need to show likelihood of confusion or dilution

- State laws vary in scope of protection: Conflicts of law determination a threshold inquiry

- Not all states have statutes, some governed solely by common law or a mix of the two (or no clear protection)
Challenging claim/defenses

Challenge the merits:

- No identification
- Minority of states: insufficient fame/commercial value

Defenses:

- First Amendment
  - Anti-Slapp
- Copyright preemption
- Communications Decency Act
- First sale doctrine
Secondary Liability: Helping others infringe online
Trademark Infringement, Unfair Competition, False Endorsement
U.S. Trademark Office: §2(a) Dispute – Twiggy
Social Media

- Landscape is continually shifting and growing
- Creates potential for right of publicity infringement by: platforms themselves, individual users, corporate users
- Identities of celebrities and regular users at issue
Twitter: Right of Publicity

Scenarios

#TeamBistro @SneakerBistro
Available Now @SneakerBistro! #LINSANITY twitpic.com/a66o3d

View photo
Unauthorized Tweets

Co-workers take over plaintiff’s personal Twitter account to send tweets while she is hospitalized—ROP claim stated.
Claim Against Twitter Dismissed

Tony La Russa

1. Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher... I'd call that an 1-55 series. 8:01 PM Apr 19th from web
2. Fortunately, Ian Snell sucks now... when Molina and Duncan Jr. go deep off of you it's time to look yourself in the mirror, have an ice... 3:33 PM Apr 8th from web
3. Drinking a cold Zima and wishing fucking Hancock was alive. I bet he couldn't've gotten Jack Wilson out. 4:13 PM Apr 7th from web

http://twitter.com/tony larussa

EXHIBIT A

5/5/2009
Katherine Heigl’s Suit
Tweeted Selfie
Room for Parody

Not Mark Zuckerberg
@notzuckerberg
My story is everyone's story: boy meets girl, boy loses girl, boy makes social network, girl and 900 million others join social network.
Palo Alto, CA  http://facebook.com/notzuckerberg.page

Follow Not Mark Zuckerberg

Tweets

Not Mark Zuckerberg @notzuckerberg 5 Jul
Why is Spider-Man being rebooted so soon? What does it think it is, Facebook's Terms of Service?
Expand

Not Mark Zuckerberg @notzuckerberg 4 Jul
Today you celebrate our independence from Britain as I celebrate your dependence on Facebook.
Expand
Infringement by Platforms: Fraley v. Facebook, Inc.

- Class Action suit permitted to proceed
- Settlement: Better notice ordered re terms of use
- Terms of settlement closely analyzed
Infringement by Platforms: Fraley v. Facebook, Inc.
Infringement by Platforms: Perkins v. LinkedIn Corporation

- Class action of LinkedIn users
- LinkedIn was using users’ personal name and contacts to send external emails to gain more users
- Issue of consent to collect contacts and use personal names in email invitations
Infringement by Platforms: Perkins v. LinkedIn Corporation

- Consent for first email sent
- Court found actionable ROP claim based on two additional reminder emails sent by LinkedIn that identified a LinkedIn user
- Settlement pending approval by court: (a) LinkedIn will provide more notice; and (b) a $13 Million settlement fund.
Problem of False Submissions
Games and Avatars: Second Life and Video Games

A scene from Second Life’s web site
First Amendment Question
Over Avatar Use

• Class action suits over use of avatar images of college athletes in video games
• 9th and 3rd Circuits found use not protected by 1st Amendment because not transformative
• Settlements included high $ payments

Musician Chubby Checker sued HP over an app called “The Chubby Checker” that “purports to estimate the size of a man’s genitals based on his shoe size.” Chubby Checker claimed that HP was violating his right of publicity by selling the app in the HP App Catalogue.
Citations in the order presented


• http://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552 (Katherine Heigl dispute; no opinion).

• http://www.newsday.com/sports/baseball/white-house-not-sold-on-david-ortiz-s-selfie-with-obama-1.7683390 (Obama selfie with David Ortiz; No suit filed).
Citations continued

• Perkins v. LinkedIn Corporation, 53 F.Supp.3d 1190 (N.D. Cal. 2014) (motion to approve settlement pending).
• http://secondlife.com/ (Second Life’s web site).
• Hart v. Electronic Arts, Inc., 717 F.3d 141 (3rd Cir. 2013).
• In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013).
RIGHT OF PUBLICITY AND SOCIAL MEDIA:

Potential Strategies for Protection and Clearances

Cydney A. Tune
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Company websites and SM activity will usually be considered to be a “commercial use”

- in furtherance of a for-profit company

- if a company’s tweets are usually advertisements, promotional or commercial, then one not obviously so can be found to be commercial

Remember – the same rules apply; only the context is different
“Commercial Use” On SM

Mixed use is always a particular challenge in ROP

- Even more problematic in SM
  - Primary purpose test
  - What about the purpose of third parties?
  - How does that affect the analysis?
“Commercial Use” On SM

Ad agency often tells client company – “no problem”

Client will tell you:

- everyone does it
- not selling anything so it’s not commercial use
- it’s fair use
- it’s using public domain content
Terms of Use – get express consent for use in SM.

- But that covers the user’s own ROP, not third parties

- If third parties are depicted or if their voice or performance is used in the content, clearance is the only way to avoid risk.
Potential Strategies for Protection and Clearances

Use Contract Terms

In an endorsement, spokesperson or SM transaction, provide that no third parties can be depicted in SM postings without the company’s prior consent.

Provide that no branding from any third party can be included, especially logos.

Make sure the company’s forms of release expressly include SM.

- Don’t just rely on an “any & all media” clause.
Specify the governing law

- State laws vary considerably; pick a state that makes sense and that has favorable laws
- Then you will know which law will apply

Try to control use of hyperlinks

- These can go third party websites in a way that implies endorsement
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

Vet company content before it goes up

- Review carefully and get clearances when and if needed

High risk = clearly to promote the brand or company

Some risk = “newsworthy” use or “political speech” without clearance

No risk = get permission for all uses of third party personas
If it is a significant use, the best practice is a full-on clearance process – unless clearly unnecessary in light of the specific facts, such as

- the state of domicile
- whether the person is deceased
- whether the person is a non-celebrity

Query: Is everyone a celebrity on SM?

Some say it’s OK because an entity’s use of the content increases the content’s exposure, especially if there are links to the source or attribution

- This is not necessarily true and often is not the case
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

Create a SM clearance plan

- to systematically evaluate risks of entity’s own conduct
- to address SM threats to entity’s own brand/image from third party conduct

Promptly remove on receipt of a demand

- But in SM the content has gone viral and you can’t remove it all

Consider if you would be comfortable posting the content on the entity’s own website

➢ If not, should not post on SM
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

Check the Terms of Use on the SM websites

- Consider Pinterest

  - Users are liable for infringement of any IP right and for violating ROP
  
  - Unlike many SM, most content is not created by users or under a Creative Commons license
  
  - What if a user is a commercial entity?
    - Businesses pin and repin for promotional purposes

Many or most SM Terms of Use have statements that:

- provided only for your personal non-commercial use
- expressly prohibit use for any commercial purpose or for the benefit of any third party
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

Have corporate policies for employees or others engaging in SM on behalf of the entity

Educate the SM team and/or others re legal implications

- All happens so fast, they don’t always consult legal

Address SM activity in your employment contract

- Employee acting on behalf of employer in SM raises issues
  - What happens if the employee leaves?
  - If keep using after, can give rise to ROP claims
Before using any SM, review the other relevant SM website policies and consider:

- What is the scope of your permitted use?
- What permissions you would be granting both to the SM company and to third parties

- Terms often grant rights to third parties as well as to the SM Company

Re permissions you would be granting by using SM:

- Sometimes the entity may not want to grant those rights
- Entity could be prohibited from granting those rights by third party contracts, licenses, and the like
Monitor Terms of Use and other policies of key SM sites

- They can be modified at any time
- Changes can be material and significant for the entity’s purposes
  - usually will be bound by the changes
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

Be very careful about redistributing third party content

• user who posted may be making non-commercial use BUT
• an entity’s distribution or public display would be commercial

Before redistributing third party content, try to check for the source

• Click on content to determine, or find other ways to trace back to the source

  ➢ If source is a stock photo site
    • ROP likely fine initially – model release
    • but model release likely will not be for your type of use or extend to third party entities
Potential Strategies for Protection and Clearances

Best Practices For Avoiding Risks

To completely avoid risk, use only content the entity owns or has properly licensed

- Sounds easy but can be challenging to know

  e.g.: • proper work for hire agreement for contractor?
  • effective employment agreement?
  • can be vague terms or limitations in third party licenses

  ➢ marketing and business folks won’t like this approach
GOOD LUCK!

Cydney A. Tune

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