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What's Wrong with this Picture?

In early January, the Weatherproof outerwear company blatantly challenged a request from the White House to dismantle a massive advertisement the company placed in Times Square, New York. The ad prominently featured the President wearing a Weatherproof jacket. The Weatherproof outerwear company ultimately dismantled the ad but not before benefiting by a great deal of publicity both in Times Square and in the general media.

The unauthorized use of a photograph featuring a celebrity wearing a particular brand raises interesting questions in intellectual property law. Copyright law, which protects an individual's original expression, would provide the photographer of such a photograph with protection, such that third parties would be prohibited from reproducing the photograph without the photographer's consent. Copyright law, however, would not provide the subject of the photograph with any legal rights with respect to reproduction and public display of the photo. In the Obama Weatherproof case, the company obtained a proper license from the Associated Press for the reproduction of the image, so no copyrights were infringed upon.

Traditional trademark law, which protects brands and the public's association of a brand name with a particular producer, likewise is inapplicable to the Obama Weatherproof advertisements. President Obama does not necessarily own trademark rights in his name or likeness. Trademarks are not protected in a vacuum; to obtain trademark rights, one must actually use the mark continuously in connection with a particular good or service. President Obama is not in the business of selling outerwear and his image is therefore not associated with the production of outerwear.

To fill this gap in intellectual property law, states have developed a branch of intellectual property called the Right of Publicity. California and New York, because of their large entertainment industries, have been ahead of the curve in developing a comprehensive set of laws dealing with the right of publicity. The right of publicity is the inherent right of every human being to control the commercial use of his or her identity. This legal right is infringed by unpermitted use which will likely damage the commercial value of this inherent right of human identity. Infringement of the right of publicity is a commercial tort, and a form of unfair competition.

In New York, for example, the elements for a right of publicity case are: (1) the use of a person's name, portrait, picture or voice (2) within the State of New York (3) for advertising purposes or the purposes of trade, (4) without written consent.

Applying these elements to the Obama Weatherproof ad, it is clear that President Obama's right of publicity was infringed when the Weatherproof ad was assembled in Times Square: (1) The Weatherproof company used a picture featuring the President; (2) the ad was placed within the boundaries of New York; (3) this was done for advertising and commercial purposes; and (4) the ad was posted without Obama's consent. That Obama in fact was wearing a Weatherproof product in the photo is not a defense, as the company used the image to sell its goods.

It appears that Weatherproof took a calculated risk that even if the White House took legal action against it, the value of publicity to the company would outweigh the cost of the lawsuit and any damages that a court would order.

Takeaway lesson:

When using advertisements that feature a person it is important to ensure that the individual featured in the ad has provided the proper consent and has allowed his or her image or likeness to be used for commercial purposes. This applies not only to traditional print ads but also to online and website advertisements.

You may also learn more about our trademark and other services here:
<http://www.lanternlegal.com/trademarks.php>

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