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Can a selfie change the rules of the commercial speech game?

David Ortiz, known affectionately as “Big Papi,” is larger than life. As a clutch hitter for the Boston Red Sox, Ortiz’s swing is only matched by his big, friendly personality — both of which have served him well.

With a reported \$5 million in commercial endorsements, his brand relationships are as varied as JetBlue airline, Vitamin Water makers Glaceau and food company Wise Snacks.

But it was Ortiz’s deal with Samsung that caused more talk recently than his spring training batting average. When the World Series-winning Red Sox went to the White House to meet President Barack Obama, Big Papi requested a selfie with the president.

Of course, Ortiz sent it out on social media. And, of course, the selfie was retweeted and publicized and picked up all over the world.

At the time, everyone in attendance — even the president — laughed off “the Big Papi selfie” (as Obama labeled it) simply as classic Ortiz — a bold move by a bold man.

Or was it? The day before going to the White House, Ortiz had signed a deal with Samsung to be their “social media insider.” Samsung retweeted the image to its 5.2 million Twitter followers and otherwise publicized that the Papi-presidential selfie was taken with a Samsung Galaxy Note 3 smartphone.

Coverage of the deal in the sports media prior to the White House visit also indicated that Ortiz would be “tweeting and sending photos on Samsung’s behalf” at the White House, leading many to believe that the Obama selfie was a paid marketing stunt — something both Samsung and Ortiz deny.

According to Alex Radetsky, president and founder of Radegeen Sports Management which represents Ortiz, the deal with Samsung doesn’t require Ortiz to snap selfies with the president or anyone else, and the act was completely spontaneous on Ortiz’s part. Radetsky also indicated the deal to make Ortiz the brand’s social media insider — an often-repeated but never explained position — was not related to the White House visit.

Samsung reportedly started talks with Ortiz much earlier, at the end of last season, and finalized the deal during spring training. How much Samsung is paying Ortiz and for what is also unclear.

Of course, the Obama-Ortiz selfie isn’t Samsung’s only famous selfie. In March, the company sponsored the Oscars by contributing \$20 million to the award show’s budget. The Wall Street Journal reported the sponsorship of the show included an ad pact, and Samsung’s media-buying firm, Starcom MediaVest, wanted the Galaxy smartphone integrated into the show.

During the broadcast, rather than using her personal iPhone, host Ellen Degeneres took a star-studded selfie with a Samsung phone. The comedienne’s tweet was a hit and was sent around the world, garnering more than 3 million retweets. Marketing experts said the \$20 million price tag was well worth it for the exposure Samsung products received.

When he appeared on Ellen’s talk show after the Oscars, Obama jokingly chided her for what he called a “pretty cheap stunt.” The White House had decidedly less good humor after Samsung retweeted the Big Papi selfie. A day after the photo, White House press secretary Jay

SPORTS MARKETING PLAYBOOK

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Carney said, “I can say that as a rule, the White House objects to attempts to use the president’s likeness for commercial purposes. And we certainly object in this case.”

This is not the first time that a brand has attempted to associate Obama with its products. In 2010, Weatherproof Garment Co. created a billboard in New York City’s Times Square and two other New York City locations that featured an Associated Press photo of the president wearing one of the company’s coats on a trip to China with the caption, “A Leader In Style.”

The White House took issue with the billboard because the president had not explicitly endorsed the company. Three days after it unveiled the billboard — and after a conversation with White House counsel — the company agreed to remove the larger-than-life advertising.

After the Big Papi pix, White House lawyers reportedly spoke with Samsung representatives about the incident, although no complaints were filed. There were also rumors about a presi-

dential “selfie ban” that seems yet to materialize.

In an interview with his hometown newspaper, The Boston Globe, Ortiz said the photo with the president was spontaneous.

“That was one of those things that just happened. I gave him the jersey, and the photographers were going to take their pictures, and I thought, really at the last second, maybe I should snap a shot with my phone while I have the chance. It had nothing to do with no deals,” Ortiz said. “You don’t get a chance to get a photo with the president every day. That’s one thing in life. ... it happened and I appreciate it. It’s an honor for us to get to hang out with him for a short period of time.”

Samsung, in a statement to The Boston Globe, also asserted there was nothing premeditated on their part leading to Ortiz’s photo, but it was “thrilled to see the special, historic moment David Ortiz captured with his Galaxy Note 3.” The company did admit, however, that when it knew about the White House

visit, “it worked with David and the team on how to share images with fans. We didn’t know if or what he would be able to capture using his Note 3 device.”

Ortiz said the selfie wasn’t the only photo taken during the visit — in fact he took a lot of pictures that day, but it wasn’t anything planned, just a reaction to the “super cool way everybody was at the White House,” including the president, who Ortiz described as “the person we all know, how humble and how cool he is. It was a great experience.”

From a legal perspective, whether and to what extent Samsung’s retweeting of the selfie would be considered an actionable unauthorized use of the president’s likeness would depend on whether it is deemed commercial speech or non-commercial speech protected by the First Amendment. The constitutional issues surrounding the use of celebrities and famous people such as Obama are complex, regardless of the media in which the use appears.

For example, after the federal district court found that a Sports

Illustrated tribute ad honoring Michael Jordan was not commercial speech, even though it included the name and logo of the Chicago supermarket that sponsored it, the 7th Circuit recently reversed the lower court’s decision in *Jordan v. Jewel-Osco, No. 12-1992* (Feb. 19, 2014).

In reinstating the case against the supermarket chain, the court concluded the print ad was properly classified as a form of image advertising aimed at promoting the Jewel-Osco brand based on its content and context.

The court cited the danger that classifying that kind of use as constitutionally protected, non-commercial speech would allow advertisers to misappropriate the likenesses of athletes and other celebrities with impunity.

When the medium is a social media platform such as Twitter, the issues are no less complex, and a number of celebrity suits against brands for tweeting their picture without authorization are making their way through the courts. The outcome of these suits will shape the landscape for commercial speech.