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Time for your close-up: The right of publicity in the social media era

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Michael Jordan is one of America's most revered and iconic professional athletes. He spectacularly led the Chicago Bulls to six NBA championships, was named league MVP for five years and, off the court, reached a stratospheric level for endorsements, such as his Air Jordan line of Nike basketball shoes.

Maintaining the cachet of Jordan's brand as a celebrity requires savvy management of endorsements. It also requires vigilance in preventing his brand from being exploited, because the unauthorized commercial use of his name or likeness deprives Jordan of compensation and potentially tarnishes his brand value.

The right of publicity was developed to give people like Jordan the ability to prevent others from exploiting their name, voice or likeness without permission.

In a 2014 decision, the 7th U.S. Circuit Court of Appeals considered what was — and wasn't — commercial speech in the context of false endorsement and false publicity claims that Jordan brought against Jewel Food Stores.

The court found that the supermarket chain's one-page tribute in a Sports Illustrated commemorative issue marking Jordan's induction into the Basketball Hall of Fame was an unauthorized use of Jordan's name and likeness in advertising.

Although a lower court ruled the tribute page featuring a pair of basketball shoes and Jordan's No. 23 to be non-commercial speech, and therefore protected by First Amendment, the 7th Circuit reversed, finding that despite being framed as an homage, the tribute was more akin to an advertisement because it associated Jordan with the supermarket, enhancing its image.

The line between commercial and non-commercial speech can be blurred even further on social media platforms such as Facebook or Twitter. Many companies will attempt to bootstrap on the popularity of stars to promote their own brands.

Last year, for example, Katherine Heigl brought a false advertising and right of publicity suit against a New York pharmacy chain over Facebook posts and tweets showing a paparazzi photo of the actress exiting a store carrying branded shopping bags.

Although the case ultimately settled before a court decision that could have potentially provided guidance, it highlights the risks of the unauthorized use of a famous person's image.

The right of publicity is not reserved for the famous. Anyone can claim the unauthorized use of his or her name or likeness. Several consumer class actions have been filed by ordinary people against the likes of LinkedIn and Facebook, alleging the unauthorized use of their names and likenesses in advertisements.

A number of lawsuits in recent years have raised common law and statutory right of publicity theories to attempt to prevent social media sites from turning use of those platforms into unauthorized endorsements.

The theme of the suits is this: The social media site is trading on the user's behavior to economically benefit the site, without the user's permission. The LinkedIn cases also allege reputational harm by using a person's participation in a way that may damage the individual's reputation.

In *Lea v. LinkedIn Corp.*, the most recent class action, which was filed in the U.S. District Court for the Northern District of California, the plaintiff alleged LinkedIn employed the names and likenesses of users to promote its contact uploader, which permits LinkedIn to send invitations to the user's e-mail contacts. LinkedIn offers the service to new users and periodically e-mails existing users to urge them to upload their contacts.

The plaintiffs claim the messages contain the names and pictures of four people within the particular user's existing network and state that these four people endorse and have benefited from using the contact uploader.

These members allegedly never gave LinkedIn permission to use their names or likenesses and may not have been aware that the platform had done so, perhaps repeatedly. The plaintiffs also allege the majority of the members whose names and pictures appeared in the e-mail never used the contact uploader function. The complaint asserts that LinkedIn violated the users' right of publicity.

In another case against LinkedIn in the Northern District of California, the plaintiffs alleged the site tapped into members' third-party e-mail accounts to "bombard" contacts with messages repeatedly advertising the service.

While the judge in *Perkins v. LinkedIn Corp.* held that the plaintiffs consented to the platform accessing their e-mail contacts and sending the first promotion containing the user's name and likeness, she also concluded that the plaintiffs had adequately pleaded their lack of consent to second and subsequent e-mail promotions, which may have caused actionable independent harm.

Finally, in the most well-known social media right of publicity case, the plaintiffs claimed Facebook's sponsored stories advertising services allowed advertisers to include users' names and likenesses in advertisements without consent. Facebook paid $20 million to settle these claims.

As of now, the trickle of cases has not (yet) become a flood. Still, social media has dramatically altered the advertising and brand promotion landscape, and traditional right of publicity laws are being stretched in unanticipated ways to accommodate the seemingly unlimited advertising and endorsement potential that the digital world presents.

Within their culture of shares, retweets and likes, social media platforms present endless new opportunities and methods of using an individual's name or likeness in an advertisement or endorsement.

Consumers may perceive that it's one thing to like a business or product on Facebook (motivated perhaps by updates or occasional sale offers) but another thing entirely when that like is being announced on your connections' news feeds, as part of an advertisement.

And while users may not object to their likes simply being counted and used as currency in the digital advertising market, a number of lawsuits in recent years have raised common law and statutory right of publicity theories to attempt to prevent social media sites from turning use of those platforms into unauthorized endorsements.