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Sasha and Malia Dolls: Legal Remedies for the Obamas

by Mark Goldstein

We've seen that Ty is selling Sasha and Malia dolls. Can the Obamas do anything to stop this? They have a couple of options.

The Obamas could sue Ty for under the federal law of false endorsement as well as for infringing their common law and statutory rights of publicity based on state law. However, there is no federal law that protects the right of publicity. A First Amendment defense of artistic expression can likely be brought in response to a state claim of right of publicity.

A federal false endorsement claim may be based on the unauthorized use of a celebrity's identity when the use of the identity is likely to confuse consumers to believe that the celebrity sponsored or approved the product of another. Sasha and Malia may be able to bring a claims for false endorsement against Ty as their name and likeness is being used to sell the dolls.

The right of publicity protects the commercial value of an individual in the commercial use of that person's identity. Many states protect the right of publicity with regard to name, voice, signature, photograph, and likeness. Some states provide more expansive protection that protects the image, distinctive appearance, gestures and mannerisms of a person.

For example, in California, statutory protection is limited to appropriation of the actual photograph or likeness. For a likeness to be appropriated under California statutory right of publicity, the doll would need to clearly show features of a celebrity. Although the dolls do not have the precise features of the Obama girls on which they are based, the girls have a case because elements evocative of the girls are included in the dolls.



In response, Ty could assert a First Amendment defense. The California Supreme Court stated that there is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” To prevail with a First Amendment defense, Ty must successfully show that “the value of the work does not derive primarily from the celebrity’s fame.” This seems to be near impossible here.

So, Malia and Sasha could take action in federal or state court to have the sale of the dolls stopped. This leaves us with two questions – First, what was Ty thinking when they did this? Don’t they have lawyers on retainer? Second, will the Obamas take action against Ty? Or will Ty stop on their own? We’ll have to wait and see.