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Copyright Suit Alleges Huckabee Campaign Lacks "Eye of the Tiger" Mike Huckabee's poor performance in the Iowa caucuses – leading to his subsequent withdrawal from the race – isn't his only concern lately. Huckabee's presidential campaign organization faces a lawsuit for playing Survivor's "Eye of the Tiger" without permission during a rally for Kentucky County Clerk Kim Davis, who was released from jail for contempt of court stemming from her refusal to issue marriage certificates to same-sex couples in the wake of the Supreme Court's landmark ruling. (See *Rude Music, Inc. v. Huckabee for President, Inc.*, No. 15-10396 (N.D. Ill. filed Nov. 18, 2015)). The plaintiff, Rude Music, Inc., owned by Survivor's guitarist Frank M. Sullivan III, and the publisher of the musical composition, filed a copyright infringement action against Huckabee for President, Inc. in November of 2015. According to the complaint, as Huckabee led Davis from the detention center, a clip from Survivor's Grammy-winning song "Eye of the Tiger" was used for dramatic effect. Rude Music alleged that this public performance infringed its copyright, and is seeking an injunction barring future unauthorized performances and monetary damages.

Made famous in *Rocky III* and regularly blasted from stadium speakers to stoke up the home team and the crowd, "Eye of the Tiger" was a number one hit on the Billboard Hot 100 Chart for six weeks in 1982 and features a catchy melody with lyrics that inspire listeners to prepare for life's battles. In the movie, the song plays over dramatic scenes of Rocky battling opponents in the boxing ring before his triumphant match against Clubber Lang. Not to be outdone, Huckabee's rally for Mrs. Davis attempted to use these same themes to paint a virtuous battle between a defiant state court clerk versus the federal government.

Like trash talk at a pre-fight weigh-in, Sullivan was quick to respond to the rally on his Facebook page: "NO! We did not grant Kim Davis any rights to use 'My Tune -- The Eye Of The Tiger. I would not grant her the rights to use Charmin!"...." After the suit was filed, Mike Huckabee responded, calling the lawsuit "very vindictive" and renewed his support for Mrs. Davis's position. Unsurprisingly, Sullivan expressed his opposing view and went on to state that he does not "like mixing rock and roll with politics; they do not go hand in hand."

In his Answer to Rude Music's complaint, Huckabee asserted several affirmative defenses to the infringement claim, including fair use (arguing that his alleged use of a one-minute clip of the song during a noncommercial and religious rally should constitute fair use). Interestingly, Huckabee also counterpuched that the rally for Kim Davis was not a campaign event at all, rather a religious assembly within the meaning of Section 110(3) of the Copyright Act. Certain provisions of the Copyright Act (17 U.S.C. § 110(3)) create an exemption to copyright requirements for the "performance of a nondramatic literary or musical work or of a dramatic-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly." Huckabee claims that because "Eye of the Tiger" isn't incorporated or performed in musical theater, it is a nondramatic musical work for purposes of the Copyright Act. Therefore, because he considers the Davis rally to be a "religious assembly," the alleged improper use of the song does not constitute infringement under the Copyright Act.

Apparently "Eye of the Tiger" is a popular tune along the campaign trail, as this isn't the first time that Rude Music filed a lawsuit against a presidential candidate for using its song at a rally. Newt Gingrich was sued by Rude Music in 2012 after Rude Music claimed that Gingrich played "Eye of the Tiger" at events going back as far as 2009. In any case, Huckabee will still need to start "risin' up to the challenge of [his] rival," only now his opponent is an 80s rock star instead of other Republican hopefuls, since, as the Iowa Caucus results proved, Huckabee wasn't a Survivor after all.

Cami Li Cannot Compete On November 13, 2015, BPI Sports, LLC ("BPI"), a distributor of sports nutrition supplements, filed a Complaint against its former endorser Camila Figueras – fitness model, glamour girl, reality tv presence, and self-proclaimed Elvis fan (the image of the King graces her right forearm) (*BPI Sports, LLC v. Camila Figueras*, No. 132015CA026411000001 (Fla. 11th Jud. Cir., Miami-Dade Cty. filed 2015)). Camila Figueras, a/k/a Cami Li, gained notoriety through her appearances on Celebrity Big Brother and, it seems, even in the world of social media marketing agreements, Big Brother is always watching. Indeed, the current action stems from Cami Li's Instagram endorsement of a competitor's nutritional products, purportedly a violation of the non-compete clause contained in her endorsement agreement with BPI entered into last year.

The one-year endorsement agreement was set to expire on July 13, 2015, at which point Cami Li met with BPI and apparently swung for the fences when she demanded that BPI renew the agreement and increase her compensation. Unfortunately, as Cami Li learned, when you swing big, sometimes you strike out (who out there remembers slugger Dave "King Kong" Kingman?). BPI balked at her compensation request and the parties ultimately decided to terminate the agreement. While parting ways, BPI allegedly reminded her to stay out of foul territory and not violate any of the covenants contained in the agreement.

BPI claims that the endorsement covenants bar Cami Li from, among other things, endorsing any supplement or nutritional product line, representing any nutritional companies, or providing any nutritional advice without BPI's approval for a period of 12 months after the termination of the agreement. No rookie when it comes to the law, Cami Li thought she was in good shape. According to BPI, she responded to its reminder not to run afoul of the non-compete provisions with a flippant text: "[I] don't care.... Sue me," and proceeded to hit the ground running with other marketing deals.

According to the Complaint, Cami Li almost immediately began a social media marketing campaign through her Instagram account (which currently has over 482,000 followers). Beginning in August 2015 and continuing through November 2015, Cami Li posted Instagram pictures and captions endorsing Raveolution Recovery Formula, Flat Tummy Tea, and Protein World's Carb Blocker and The Slender Bend. These nutrition supplements have uses ranging from replenishing the body and mind to boosting energy and metabolism to weight loss to strengthening skin, hair, and nails.

Not amused by Cami Li's posts, BPI supplemented its stern warnings with direct action. BPI's suit alleges that Cami Li breached the endorsement covenants because her Instagram posts endorsed a competing supplement within the non-compete period, all without BPI's approval.

Recognizing the power of social media in marketing, BPI seeks injunctive relief to prevent Cami Li from endorsing nutritional supplements on social media or otherwise, positing that given the quantity of followers and her image, she holds significant economic endorsement value. According to BPI, Cami Li's influence has the potential to irreparably harm the goodwill and business interests of its company by directing her followers to rival product lines within the sports nutrition industry. BPI seeks monetary damages for breach of contract as well as an order requiring Cami Li to take down the offending Instagram posts and any other related posts she published on the Internet. In her Answer , Cami Li sought to evict BPI from the courthouse, asserting several defenses, including, among others: BPI's selective enforcement or waiver of the non-compete clauses, BPI's alleged failure to meet the requirements for injunctive relief, BPI's alleged failure to plead cognizable damages for breach of contract, and a general assertion that the non-compete clause is overbroad.

Will the restrictive covenant be enforceable under Florida law or otherwise warrant injunctive relief, or will the suit fall flat as a well-sculpted tummy? The answer will have to remain unknown – as, earlier this month, the parties settled the matter on undisclosed terms.

Dutch Privacy Watchdog to Nike - You Can't Just Do It The mobile fitness industry has grown $400 million in the last six years. In 2015, mobile fitness apps generated more than $3 billion in venture-capital investment, up from $1.3 billion in 2012. Millennials, the largest generation since the Baby Boomers, are clearly setting the pace. According to a recent study, one in three Millennials, a group that spends more on health and fitness consumption than any previous generation, shares fitness-related information over text, social media, or email at least once per week. Considering that the wearable technology industry is expected to triple in size in the next five years, growth in the market for fitness and activity tracking apps shows no signs of abating. Yet, at least one European privacy authority thinks developers of these popular apps should slow down, towel off, and re-think data retention and privacy concerns.

In November, the Dutch Data Protection Authority (the "CBP"), a supervisory body engaged to enforce personal data protection laws, published a report outlining several alleged violations of Dutch data protection law following its investigation into Nike's fitness app, the Nike+ Running app ("Nike+"). Nike+ is an app for a smartphone with capability to be synced with tracking sensors in running shoes or with other wearable devices.

The CBP asserted that Nike violated Dutch privacy law based on two premises: first, that the Nike+ app collected "data concerning health" of its users, thereby triggering stricter privacy protections; and second, that Nike did not sufficiently inform users in its privacy notices about the types of personal data it collects and processes and, as such, users of the Nike+ app had not given requisite consent to the specific ways in which Nike processed health data.

The Nike+ app tracks distance, speed, time, and calories burned during a user's running workout. To calculate the amount of calories burned and stride length, users were asked to specify their gender, body length, and weight before the first workout. Using such information in connection with GPS technology, Nike+ is able to track the user's performance over a workout session. According to the CBP, data from individual workout sessions was not only captured on a user's device, but also was retained indefinitely on Nike's servers, allowing Nike+ to build a profile for each user, track workout progress, compare segments of an individual's performance against comparable user groups, and otherwise use the data for its own analytic purposes. The CBP concluded that the collected data, when treated individually, are snapshots of a user's physical condition, but if retained indefinitely as part of a user profile, Nike+ could deduce a user's physical condition over time. Thus, the CBP found that such data qualifies as "data concerning health" and developers of fitness tracking apps must satisfy statutory exceptions and obtain, for example, "explicit consent" before processing such data.

The CBP also found that the disclosures in the Nike+ privacy policy were not sufficient to establish explicit user consent for all the ways the data is used. Specifically, the CBP claimed, among other things, that the Nike+ privacy policy did not clearly explain that collected data was stored indefinitely on Nike servers (absent a user actively deleting her account). The Dutch agency also claimed that the policy did not explain in detail that the aggregation of the data involves an overview of an individual's athletic performance over time, for uses that include research and analysis by Nike. According to the CBP, more specific disclosures about the extent of processing of health data over time were necessary for a user to give "explicit consent" to the fitness app.

Following the CBP's investigation, Nike agreed to take measures to remedy any Dutch privacy violations. These include: notifying existing users of the app (and Nike+ users on the web) that height and weight are optional, and asking them for consent to retain existing data; introducing a single privacy policy with greater disclosures and a data retention period for inactive users. In the end, the Nike+ investigation provides valuable guidance for the mobile health industry regarding privacy issues. Particularly with respect to the privacy of users in the EU, the message to mobile fitness app developers is clear – you really can't just do it (without proper notice).

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