



Right of Publicity

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Most rights sharable



Right of Publicity



Right of Publicity Infringement

(a/k/a "Appropriation" or "Commercial Misappropriation")

The Elements:

1. A commercial use
2. Of a person's name, likeness, voice, or other indicia of identity

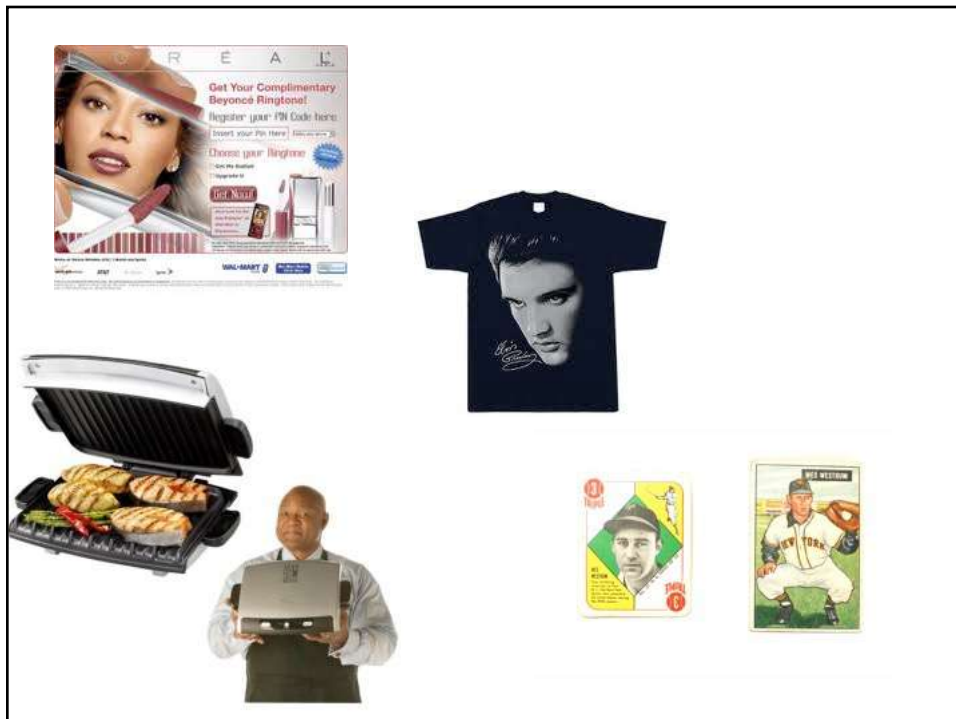
Three circumstances where rights of publicity actions are commonly recognized:

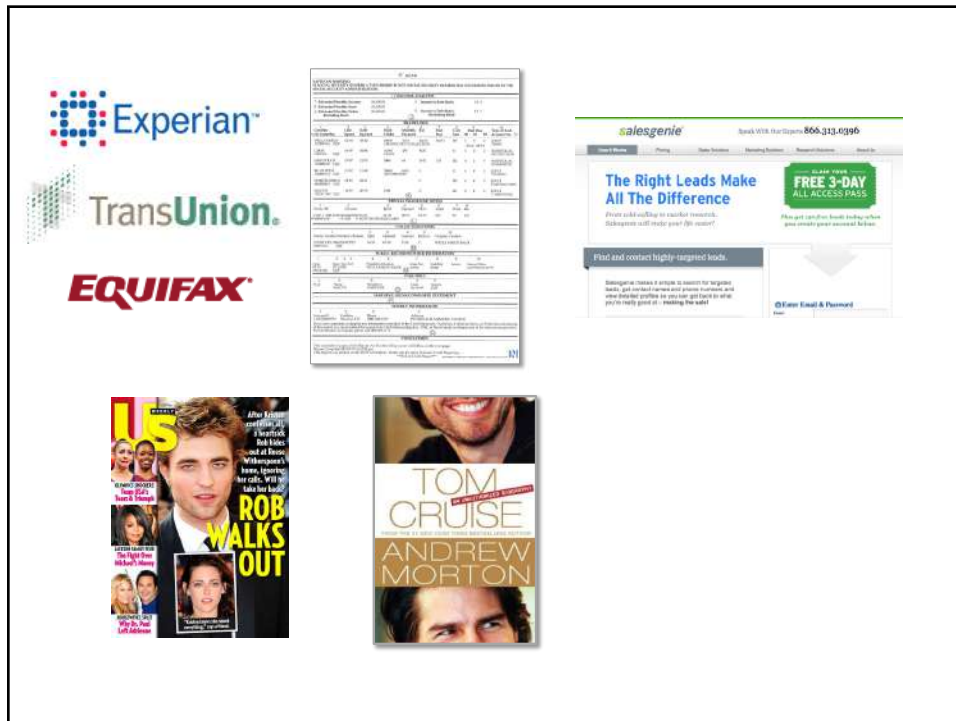
- Endorsement/advertising
- Merchandising
- "Virtual impressment"

“The elements of a common law action are the unauthorized use of the plaintiffs identity to the defendant's advantage by appropriating the plaintiffs name, voice, likeness, etc., commercially or otherwise, and resulting injury.”

**Kirby v. Sega of Am., Inc.,
144 Cal.App. 4th 47 (2006)**

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Publicity





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**Right of
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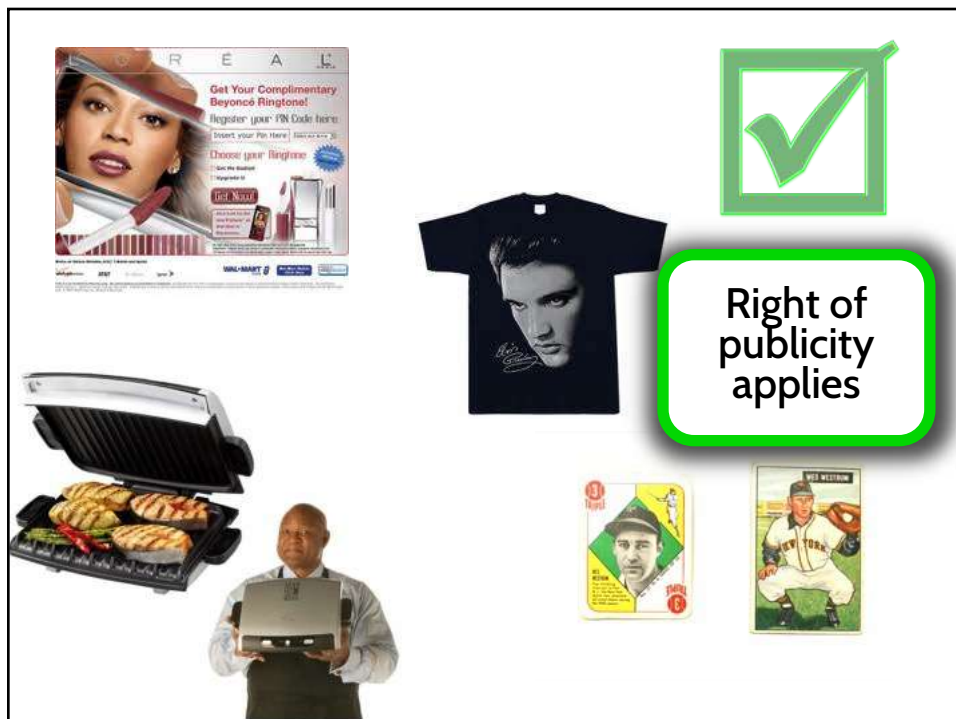
- “The elements of a common law action are the unauthorized use of the plaintiff’s identity to the defendant’s advantage by appropriating the plaintiff’s name, voice, likeness, etc., commercially or otherwise, and resulting injury.”

Right of Publicity

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Reality check: The
blackletter scope is
much broader than
the real scope.



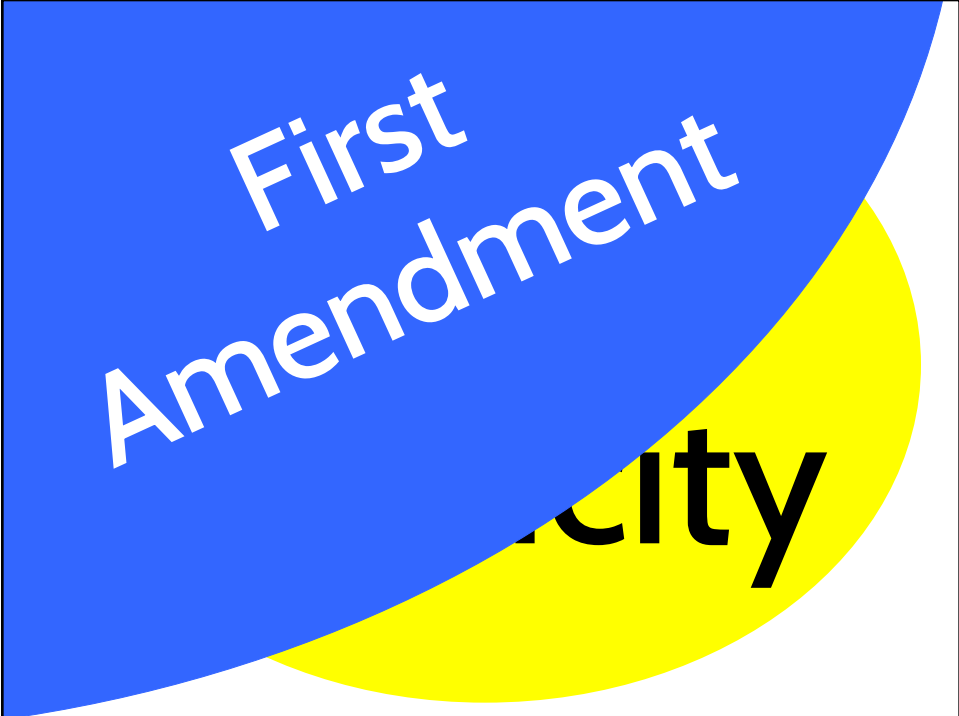


Observation:

As an analytical matter, the scope is primarily determined subtractively.



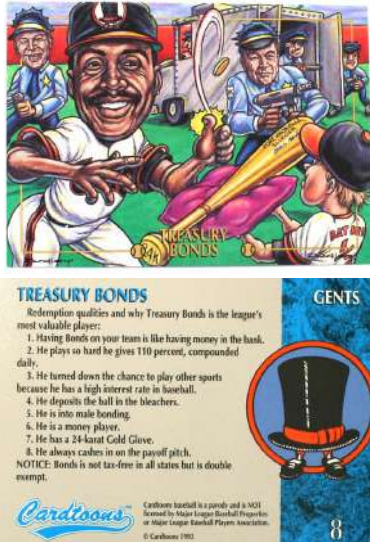
**Right of
Publicity**



**First
Amendment**

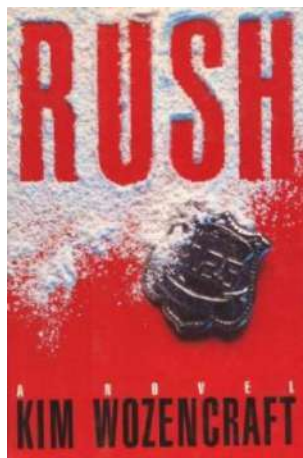
city

Cardtoons, L.C. v. MLB Players Ass'n 95 F.3d 959 (10th Cir. 1996)



Parody baseball cards presented no actionable violation of players' rights of publicity because of a First Amendment fair use defense for commercial parody speech.

Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994)



First Amendment barred a right-of-publicity claim by a former law-enforcement officer for portraying his life in a book and movie.

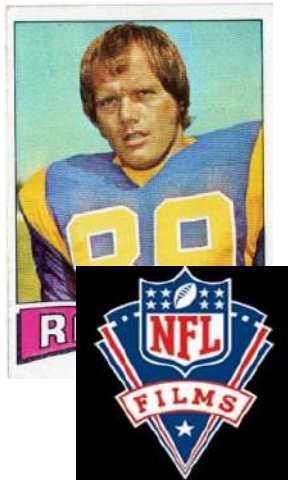


**Stephano v. News Group Publications,
474 N.E.2d 580 (N.Y. 1984)**

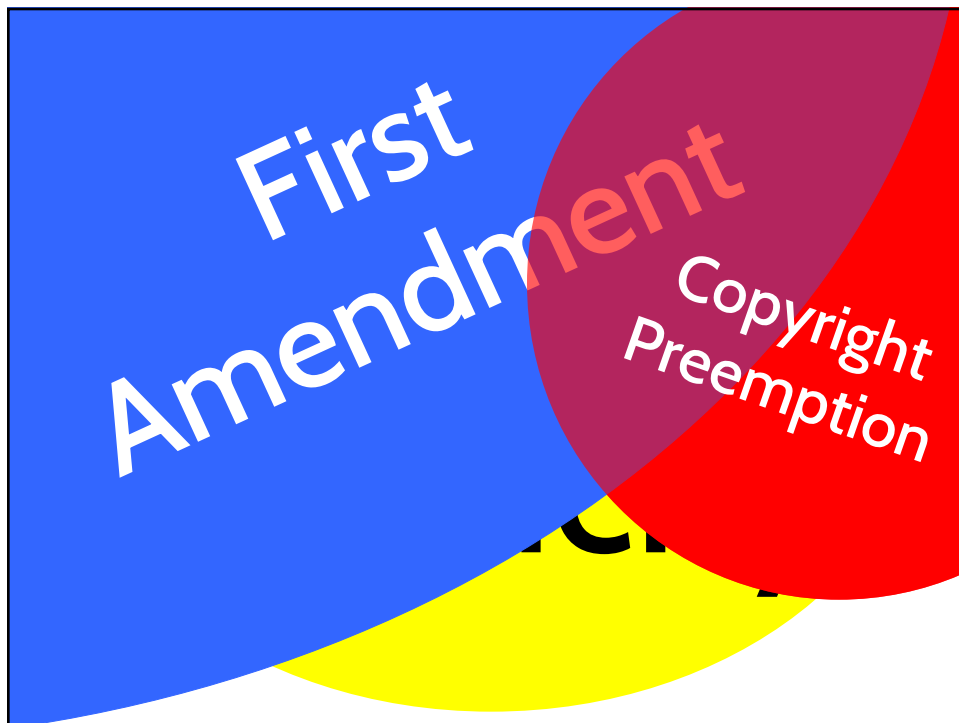


A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

Dryer v. NFL,
55 F. Supp. 3d 1181 (D. Minn. 2014)



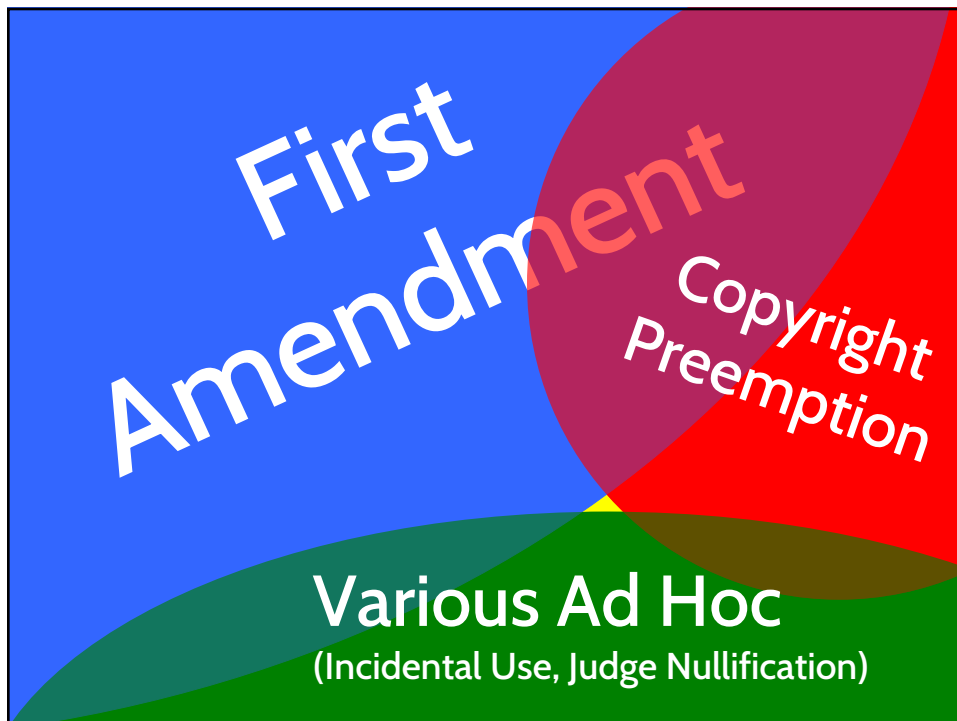
Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred by the “newsworthiness exception” – notwithstanding the passage of three or four decades.

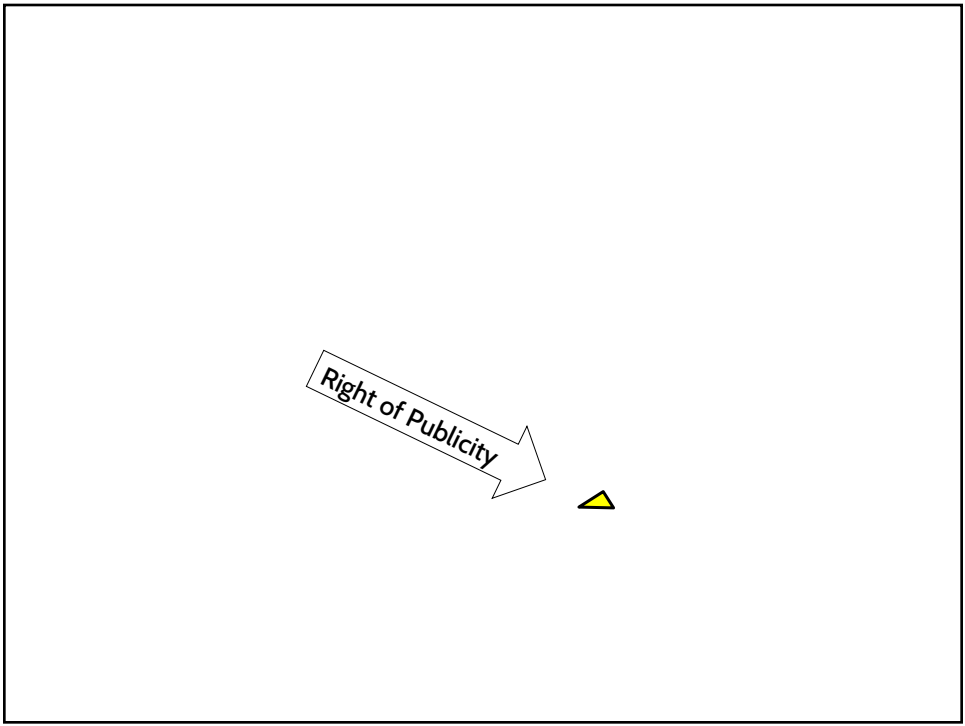


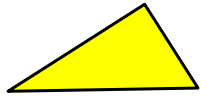
Laws v. Sony Music, 448 F.3d 1134 (9th Cir. 2006)



Right-of-publicity claim for unauthorized use of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have" held preempted because of copyright preemption on the basis that Laws' voice was lifted from a copyrighted recording.

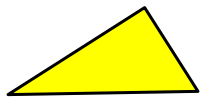






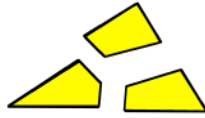
We know what this is not:

- First Amendment protected
 - (or newsworthiness excepted)
- Copyright preempted
- Ad hoc excluded



But what is it?

Right of publicity violations tend to come in three varieties. If the claim doesn't fit one of these three varieties, chances are a court will reject it on some basis (whether that be First Amendment, copyright preemption, or something else).



Three patterns of rights of publicity claims that are successful:

- Endorsement/advertising
- Merchandising
- “Virtual impressment”

claims for unauthorized endorsement/advertising use

Courts seem to recognize that a person has a right not to be represented as making a commercial endorsement or appear in an advertisement in such a way that suggests endorsement absent that person's specific consent.



claims for unauthorized merchandizing

Courts seem to recognize that persons have the exclusive privilege to exploit their name and likeness in merchandising.

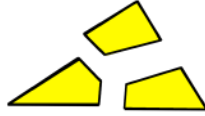
The sale of t-shirts or coffee mugs with the person's name or likeness violates.



claims for virtual impressment

Many (but not all) courts recognize claims against defendants who exploits a plaintiff's name, likeness, or voice in such a way that the plaintiff has been unwittingly employed to produce a performance that might otherwise require voluntarily supplied labor.





How this
arguably makes
sense of the
cases ...

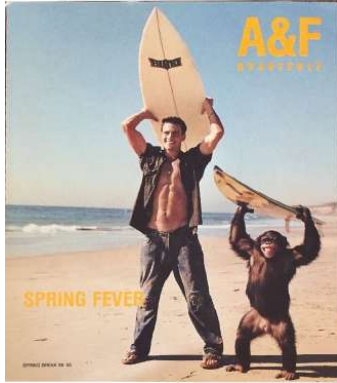
EEJ's way of looking at this
... FWIW

Stephano v. News Group Publications,
474 N.E.2d 580 (N.Y. 1984)



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Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001)



Rejected First Amendment defense and upheld right of publicity violation for a 700-word story, “Your Beach Should Be This Cool,” describing the history of surfing at a California beach. The court noted “The following page exhibits the photograph of Appellants. The two pages immediately thereafter feature [clothing for sale].”

