



Torts: Invasion of Privacy, Right of Publicity

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Konomark
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Module 20: Invasion of Privacy

Module 21: Right of Publicity

Privacy Torts

- False Light
- Intrusion
- Public Disclosure
- Appropriation / Right of Publicity

Privacy Torts

- False Light
- Intrusion 
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False Light

The Elements:

1. A public statement
2. Made with actual malice
3. Placing the plaintiff in a false light
4. That is highly offensive to the reasonable person

False Light

Defenses:

- Essentially the same as for defamation
- So, for example:
 - A public figure will have to prove actual malice.*
 - A private figure, if a matter of public concern, must prove actual malice or negligence + special damages.*

*That is, if actual malice is not required as a prima facie element, which it generally, but not always, is.

Intrusion

The Elements:

1. Physical or other intrusion
2. Into a zone in which the plaintiff has a reasonable expectation of privacy
3. Which is highly offensive to the reasonable person

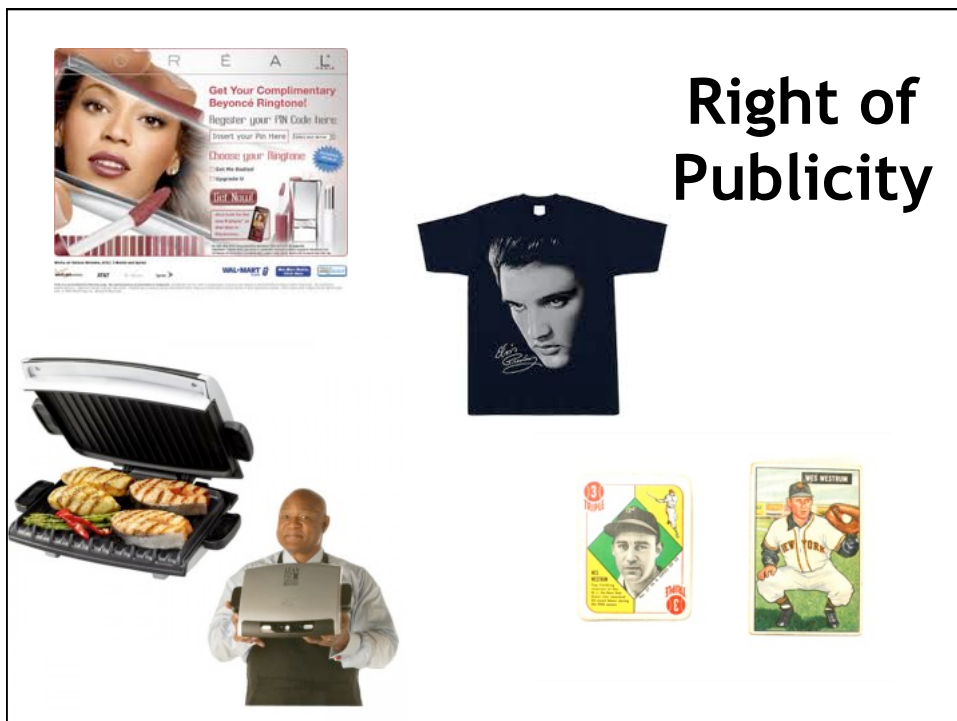
Disclosure

The Elements:

1. A public disclosure
2. Of private facts
3. That is highly offensive to the reasonable person

Some general notes about false light, disclosure, and outrage:

- They are available for natural, living persons only - not for corporations
- Much of defamation doctrine applies
 - Identification of plaintiff
 - Fact vs. opinion
 - Substantial truth (but not for disclosure)
- The First Amendment can substantially limit any of these torts
 - State action hurdle overcome a la *NYT v. Sullivan*



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

NOTE: This blackletter formulation is overbroad.

The scope of the doctrine is greatly limited by:

- First Amendment freedom of expression
- Copyright preemption
- Ad-hoc "spin"

“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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Right of Publicity

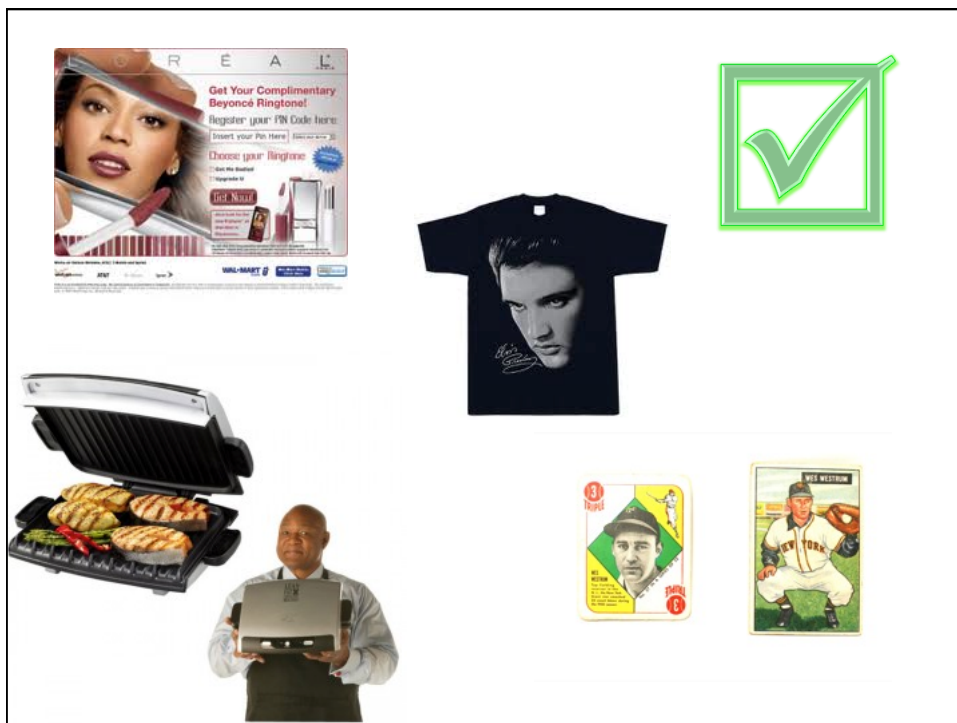
Kirby v. Sega of Am., Inc.,
144 Cal.App. 4th 47 (2006)

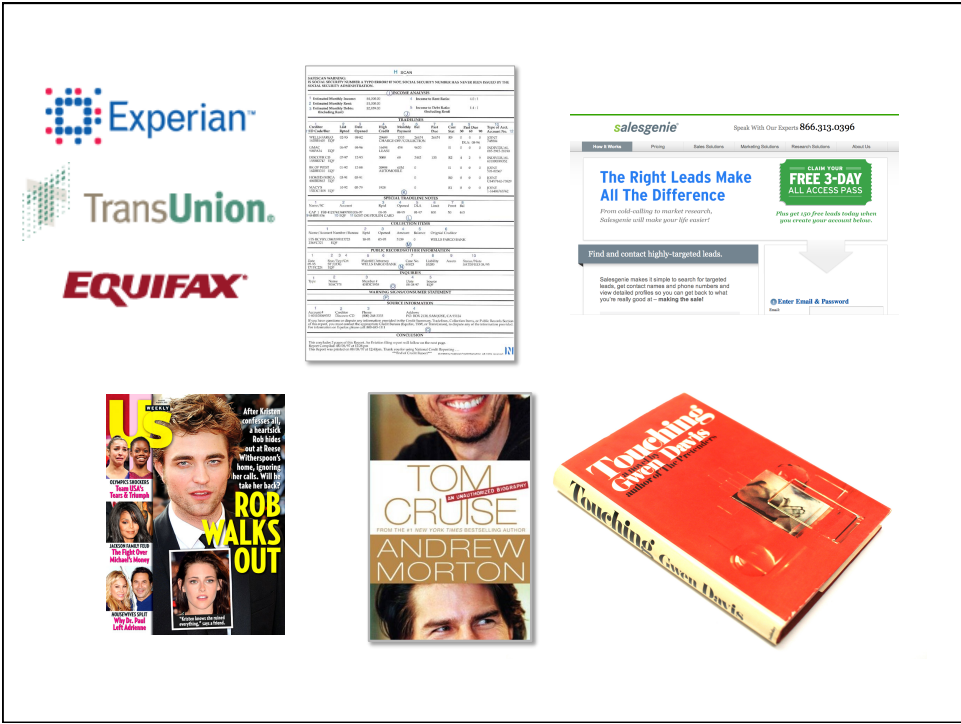
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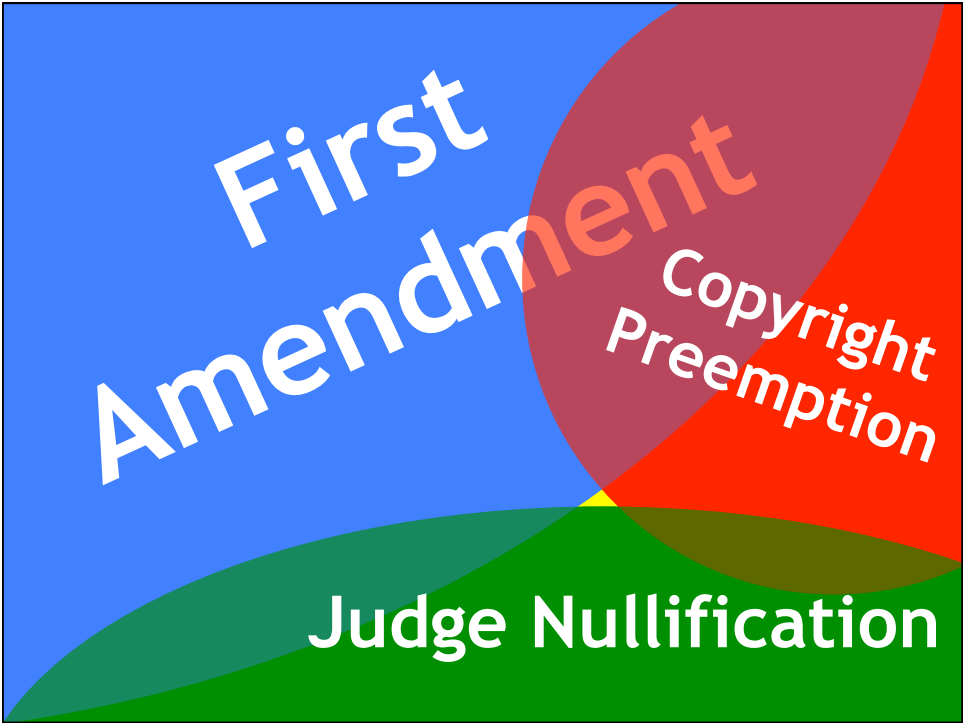
Right of Publicity

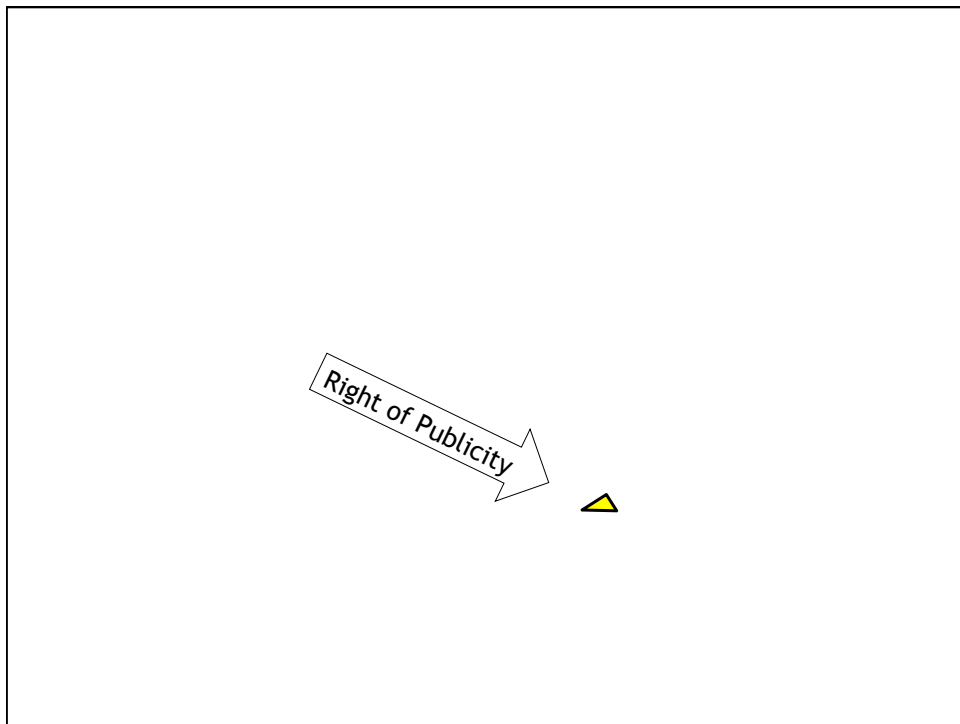
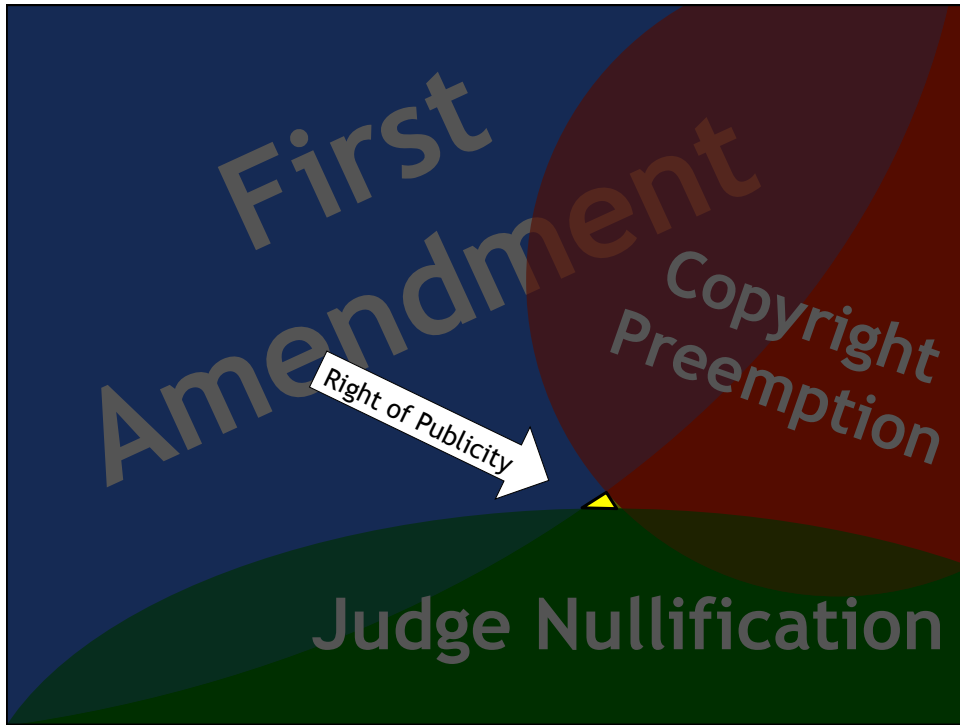
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Reality check:
The blackletter
scope is much
broader than the
real scope.









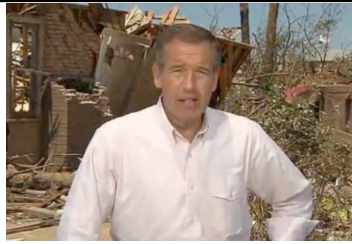
The Indignancy Matrix

	To how many?	True or false?	Highly offensive?	Intent requirement?	After death?
Intrusion					
Disclosure					
False light					
Defamation					
Outrage / IIED					
Publicity right					

The Indignancy Matrix

	To how many?	True or false?	Highly offensive?	Intent requirement?	After death?
Intrusion	n/a	n/a	yes	intent	n/a
Disclosure	public	true	yes	intent	no
False light	public	false	yes	actual malice	no
Defamation	1	false	no	[complex]	no
Outrage / IIED	n/a	n/a	yes+ <small>(extreme & outrageous)</small>	intent	n/a
Publicity right	commercial	either	no	none	often

**Brian Williams
Realoathetical**



§230 Safe Harbor

Applicable to Defamation,
Outrage, and Privacy Torts

47 U.S.C. §230

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(1) TREATMENT OF PUBLISHER OR SPEAKER. – [No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.](#)

(2) CIVIL LIABILITY. – No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

§230 safe harbor provides broad immunity against torts against site owners:

- Includes:
 - Defamation
 - Privacy torts
 - Outrage (IIED)
 - Nuisance
 - and more ...
- Even works with e-mail and other contexts outside the web.
- Does not include:
 - Intellectual property infringement
- Does not apply to the original poster!

Broad applicability

- "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.
- Not limited to special kinds of websites. Includes blogs, Twitter, consumer review sites, etc.

Site operators shouldn't lose immunity by:

- Exercising traditional editorial functions, such as pre-screening, selectively deleting.
- Encouraging or paying third-parties for contributions.
- Editing material (unless the editing materially alter the meaning of the content).

Daily Times Democrat v. Graham

(Ala. 1964)

Woman emerges from a fun house at the county fair. A jet of compressed air blows up her skirt above her waist. A newspaper photographer captures a photo of the woman waist down bare except for her underwear. The photo is run without the woman's consent on the front page a few days later.

What cause of action? Disclosure

Prima facie case? Yes.

Paper says it was newsworthy because it related to a story about the county fair. **Privileged?** No.

Court: "We can see nothing of legitimate news value in the photograph. Certainly it discloses nothing as to which the public is entitled to be informed."

Sipple v. Chronicle

(Cal. App. 1984)

Private citizen and ex-Marine Oliver Sipple becomes a national hero when he foils the attempted assassination of President Ford by grabbing the arm of Sara Jane Moore as she was about to shoot. Columnist Herb Caen outed Sipple as gay.

What cause of action? Disclosure

Prima facie case? [close question]

Argument is that it was newsworthy to dispel false public perception of gay men. **Privileged?** Yes.

Court: Newsworthiness value from from legitimate consideration "to dispel the false public opinion that gays were timid, weak, and unheroic figures."