Nanotreatise **Right of Publicity**

A Very Brief Primer on the Right of Publicity
in the United States

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According to blackletter law, the right of publicity provides to individuals the exclusive right to the commercial use of their name, image, likeness, and voice, as well as other indicia of identity. In reality, however, the right of publicity is not nearly so broad as this statement would suggest. If it were, paparazzi would be out of business, and celebrity gossip magazines would be contraband. They're not. Frustratingly for practitioners and students, the right of publicity is both legally complex and doctrinally disorganized.

There is no federal right of publicity. The right exists purely as a matter of ***state law***, which may be statutory, common law, or both. As a consequence, the right of publicity takes on various embodiments across the several jurisdictions where it is found, and the substantive scope and limitations of the right vary accordingly. Nomenclature differs as well, with some courts titling the same or closely related legal entitlements "appropriation," "commercial appropriation," "misappropriation," or the "right of privacy."

An archetypal violation of the right of publicity occurs when a commercial manufacturer, without permission, puts a celebrity's picture or name on a product's label or into an advertisement. Putting celebrity faces or names on toys, t-shirts, or other merchandise is also a well-worn path to infringement. More fuzzy is whether depicting people in film, on television, or on stage, absent permission, constitutes an actionable violation.

Only individual ***natural persons*** can bring suit under the right of publicity – corporations and business associations have no such protectible interest. Among natural persons, the right of publicity is most typically invoked by ***celebrities***. Some authorities draw a distinction between celebrities and non-celebrities with regard to who is eligible to bring suit, requiring some level of fame as a threshold condition. In general, however, there is no bar to even very private persons bringing suit, although suits by non-celebrities are sometimes put under different labels, such as the "right to privacy."

The right of publicity has its origins in concepts of privacy, and it originated as one of the four branches of the tort of invasion of privacy, alongside false light, intrusion, and public disclosure of private facts. Although often still regarded as a tort, the right of publicity is sometimes considered a property right, and in some states, the right can persist ***post-mortem***, devisable by will.

Because of the largely unbounded nature of the right of publicity in its blackletter formulation, ***defenses*** to right-of-publicity suits are extremely important in defining the true scope of the

right. The ***First Amendment*** does much of the heavy lifting in defining the outer contours of the right. Because the right of publicity is a creature of state law, federal ***copyright preemption*** has also been used to stop many asserted cases. Additionally, uses of personal identity which are "***fleeting and incidental***" or "***de minimus***" are often excluded from the scope of exclusive entitlements under the right of publicity. The defense of ***implied license*** also restricts the scope of the doctrine in important ways.