



Right of Publicity

Trademark & Unfair Competition
Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable



Right of Publicity

Endorsement/
Advertising Right

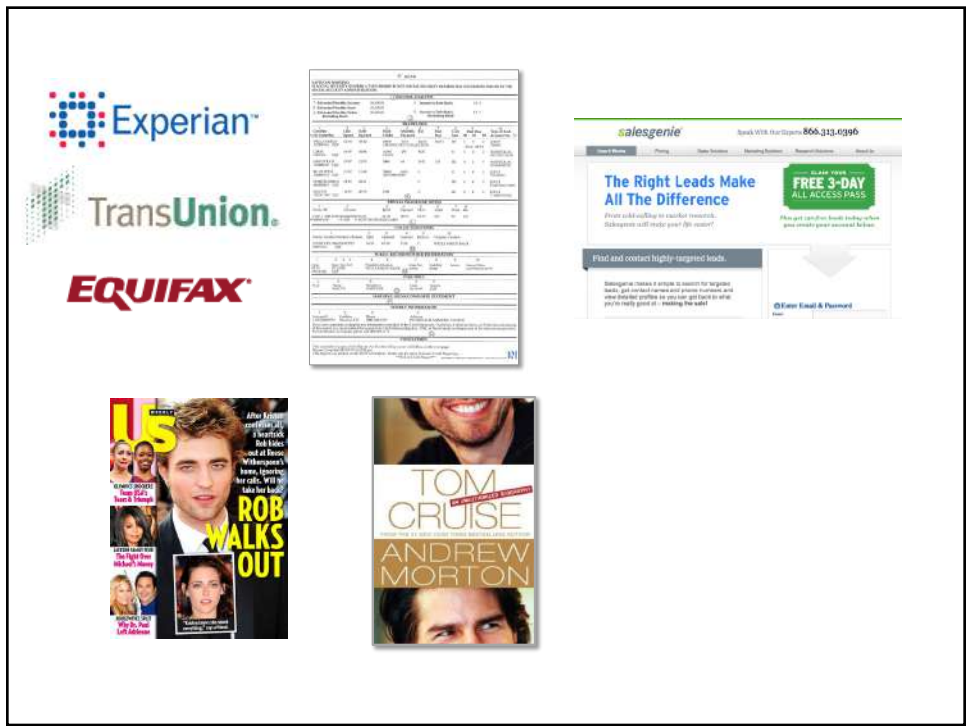
Merchandizing
Right

*Right against
virtual
impressment*

“[A]n individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”

Violation if there's “appropriation of one’s name or likeness,” without consent, “of a benefit to someone other than the claimant.”

Fleet v. CBS (Cal. App. 1996)
R.I. Gen. Laws § 9-1-28.1



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



Get Your Complimentary Beyoncé Ringtone!

Register your FM Code here:

Insert your FM here:

Choose your Ringtone

Get Now

Right of publicity succeeds

Experian

TransUnion

EQUIFAX

Account Type	Account Number	Balance	Payment Status
Auto Loan	123456789	\$10,000.00	Current
Credit Card	987654321	\$500.00	Current
Mortgage	567890123	\$150,000.00	Current
Student Loan	345678901	\$20,000.00	Current
Auto Loan	234567890	\$8,000.00	Current
Credit Card	123456789	\$1,000.00	Current
Mortgage	987654321	\$120,000.00	Current
Student Loan	876543210	\$15,000.00	Current
Auto Loan	765432109	\$6,000.00	Current
Credit Card	654321098	\$750.00	Current
Mortgage	543210987	\$90,000.00	Current
Student Loan	432109876	\$12,000.00	Current
Auto Loan	321098765	\$4,000.00	Current
Credit Card	210987654	\$300.00	Current
Mortgage	109876543	\$70,000.00	Current
Student Loan	098765432	\$8,000.00	Current
Auto Loan	987654321	\$2,000.00	Current
Credit Card	876543210	\$150.00	Current
Mortgage	765432109	\$50,000.00	Current
Student Loan	654321098	\$3,000.00	Current
Auto Loan	543210987	\$1,000.00	Current
Credit Card	432109876	\$50.00	Current
Mortgage	321098765	\$20,000.00	Current
Student Loan	210987654	\$1,000.00	Current
Auto Loan	109876543	\$500.00	Current
Credit Card	098765432	\$25.00	Current

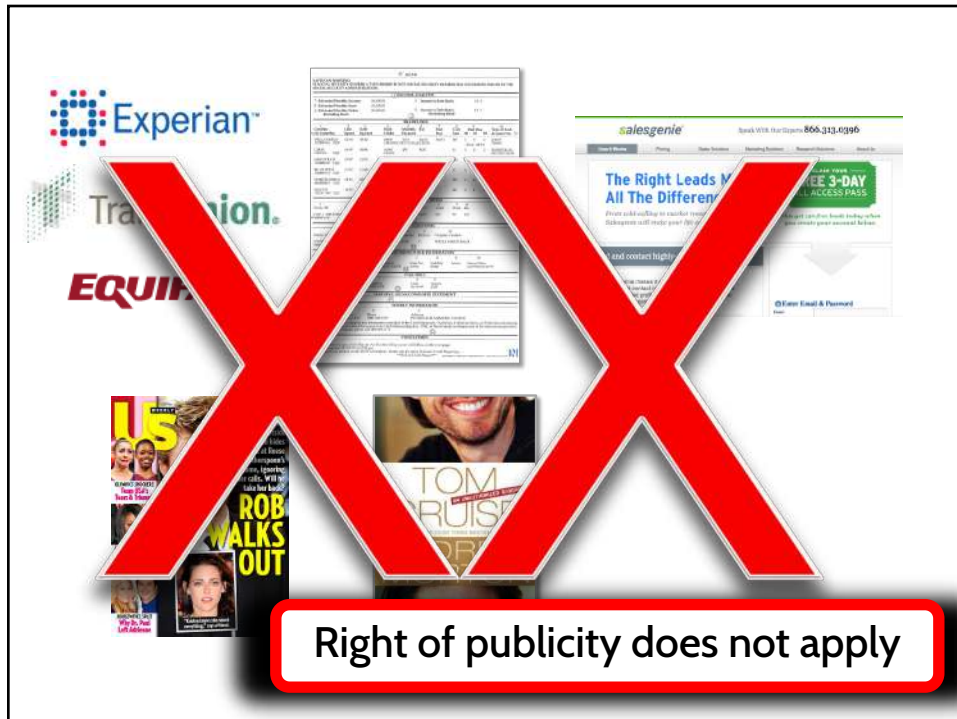
The Right Leads Make All The Difference

FREE 3-DAY ALL ACCESS PASS

Tom Cruise

Andrew Morton

ROB WALKS OUT



“[A]n individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”

Violation if there's “appropriation of one’s name or likeness,” without consent, “of a benefit to someone other than the claimant.”

Fleet v. CBS (Cal. App. 1996)
R.I. Gen. Laws § 9-1-28.1

Right of
Publicity

“[A]n individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”

Violation if there’s “appropriation of one’s name or likeness,” without consent, “of a benefit to someone other than the claimant.”

Right of Publicity

Fleet v. CBS (Cal. App. 1996)
R.I. Gen. Laws § 9-1-28.1

“[A]n individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”

Violation if there’s “appropriation of one’s name or likeness” without consent, “of a benefit to someone other than the claimant.”

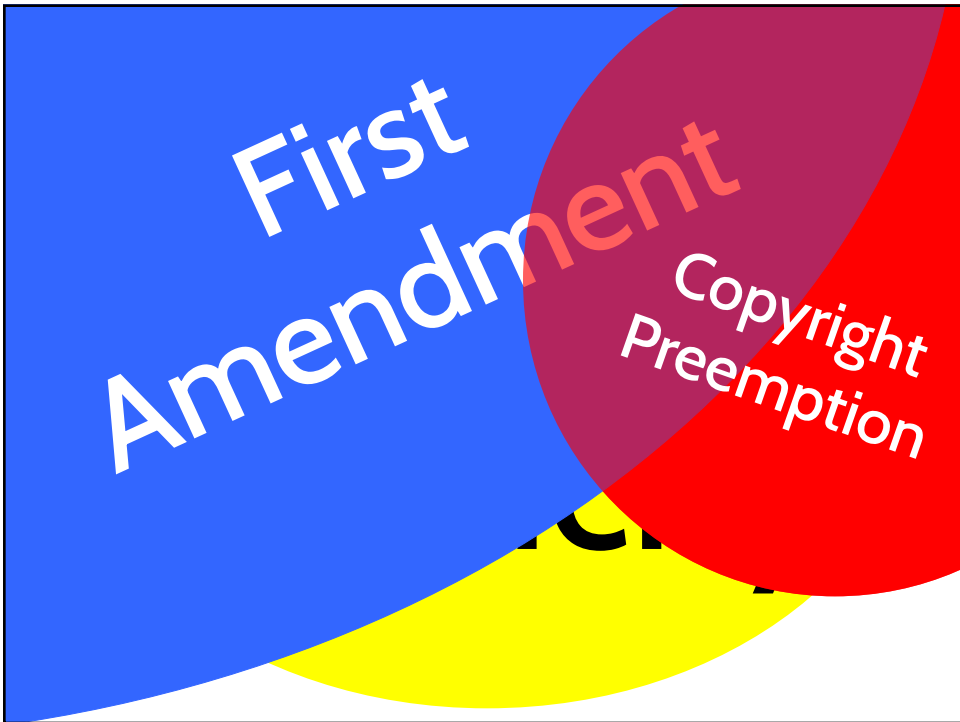
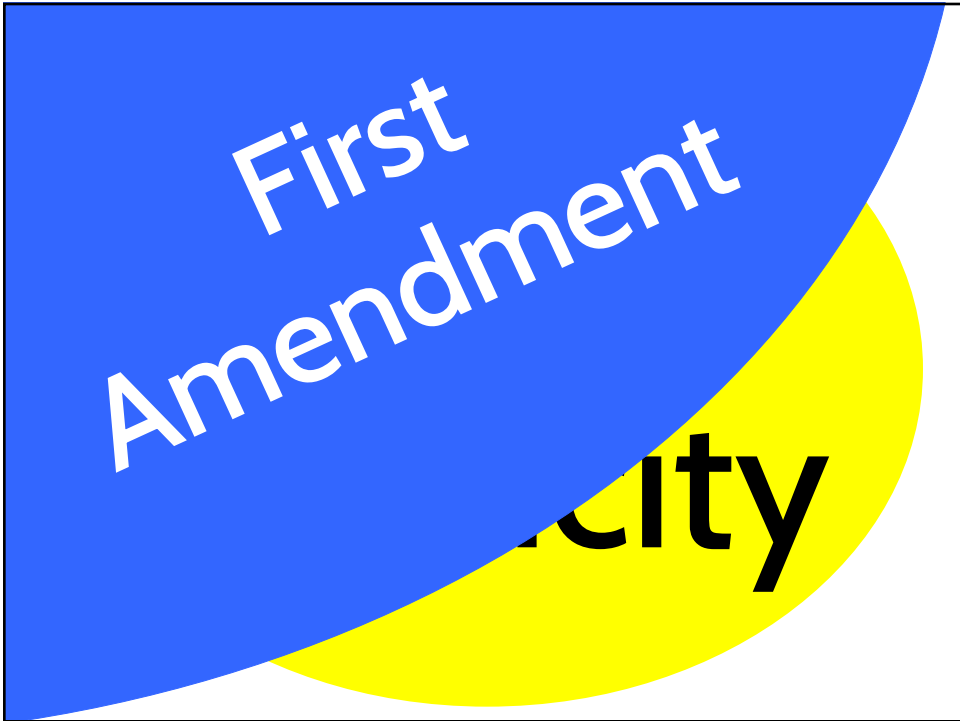
Right of Publicity

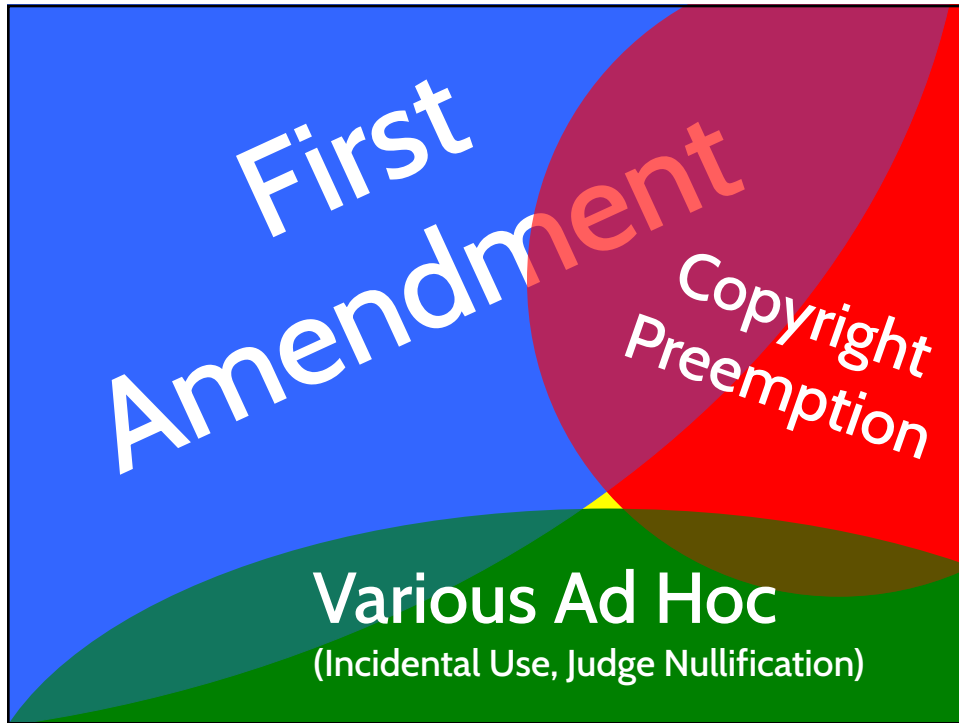
Fleet v. CBS (Cal. App. 1996)
R.I. Gen. Laws § 9-1-28.1

Observation:

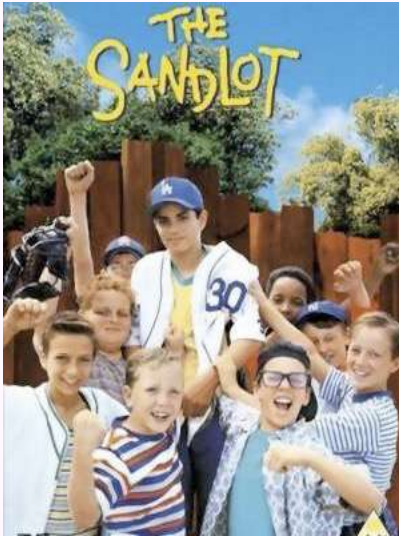
As an analytical matter, the scope is primarily determined subtractively.

**Right of
Publicity**

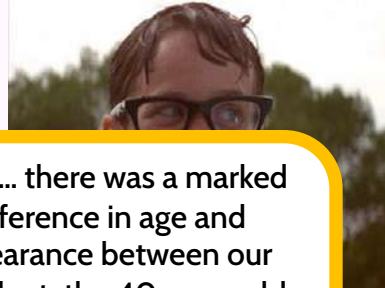




Polydoros v. 20th Century Fox,
(Cal. App. 1997)

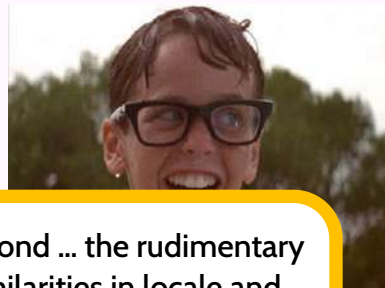
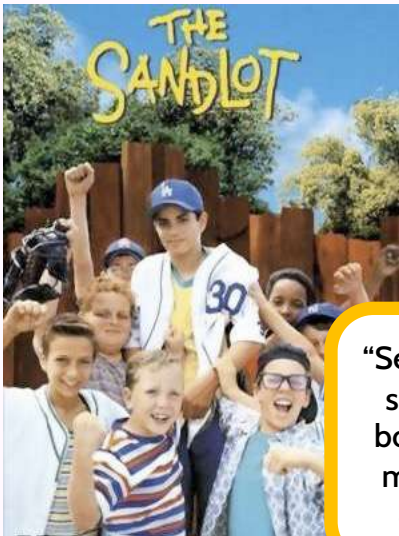


Polydoros v. 20th Century Fox,
(Cal. App. 1997)



“First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”

Polydoros v. 20th Century Fox,
(Cal. App. 1997)



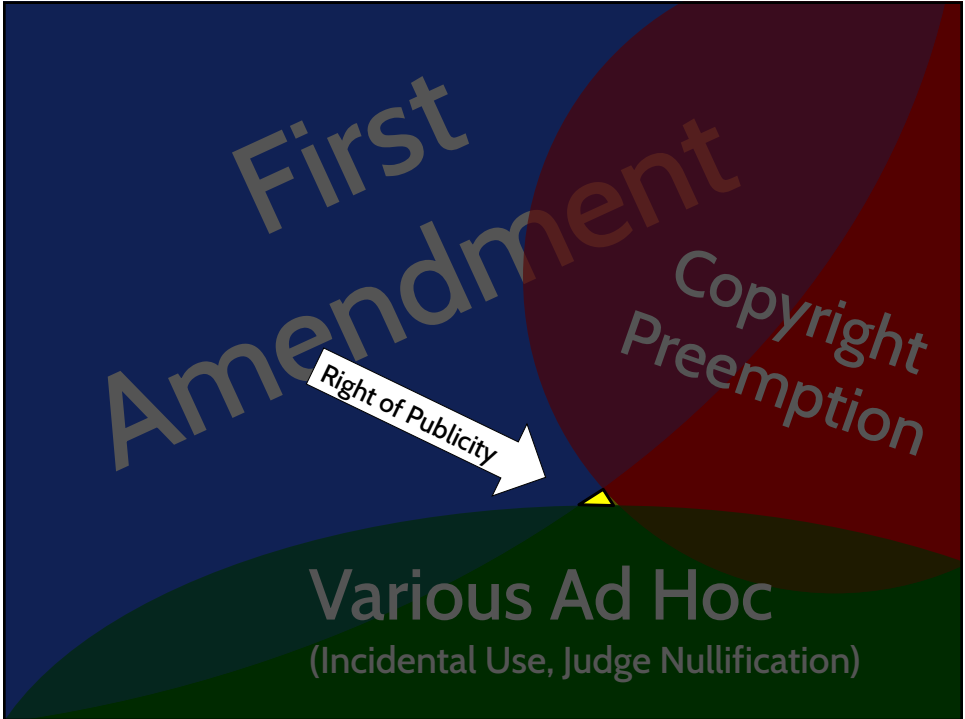
“Second ... the rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about appellant’s life.”

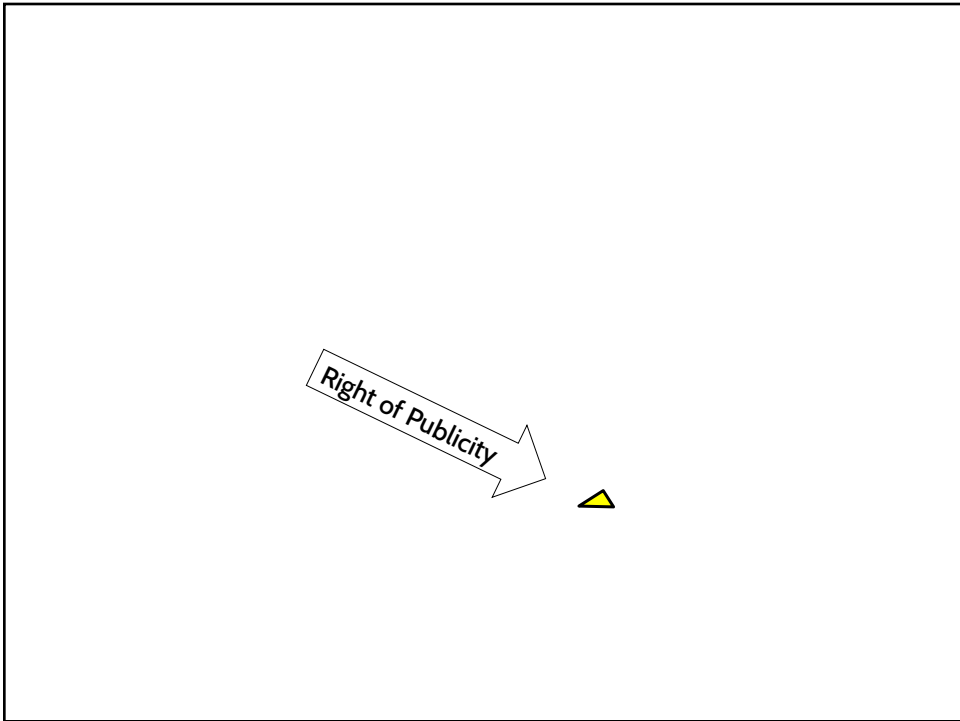
Polydoros v. 20th Century Fox,
(Cal. App. 1997)



“a marked difference in age” and other awkward characterizations of the facts and assertions irrelevant to the law

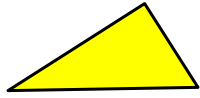
Right of publicity
REJECTED





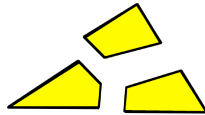
We know what this is not:

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



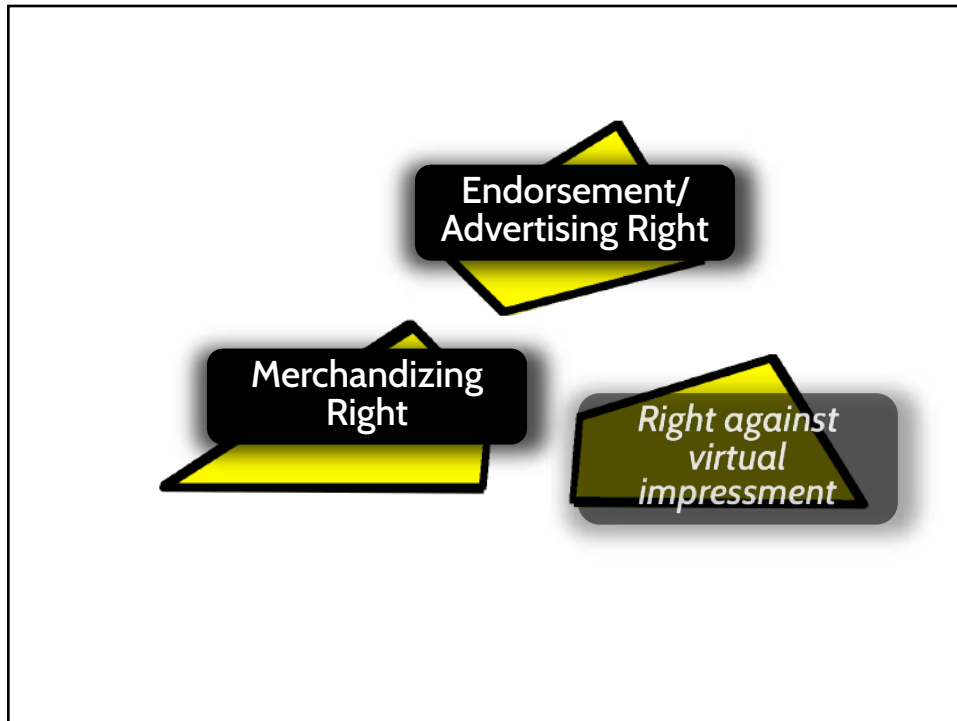
But what is it?

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.

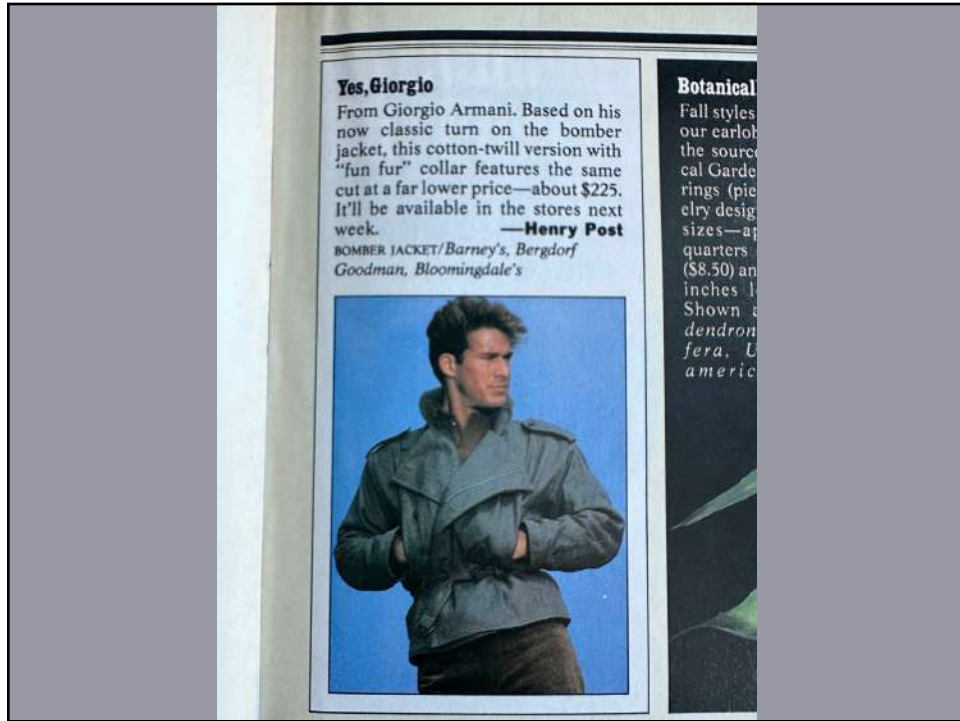
The sale of t-shirts or coffee mugs with the person's name or likeness violates.

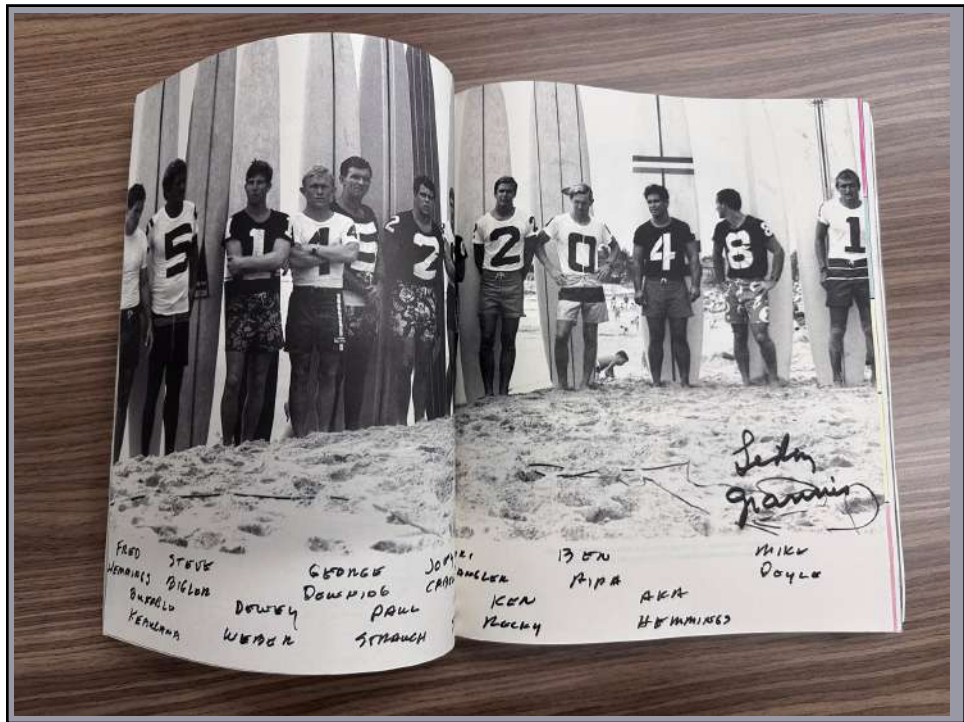
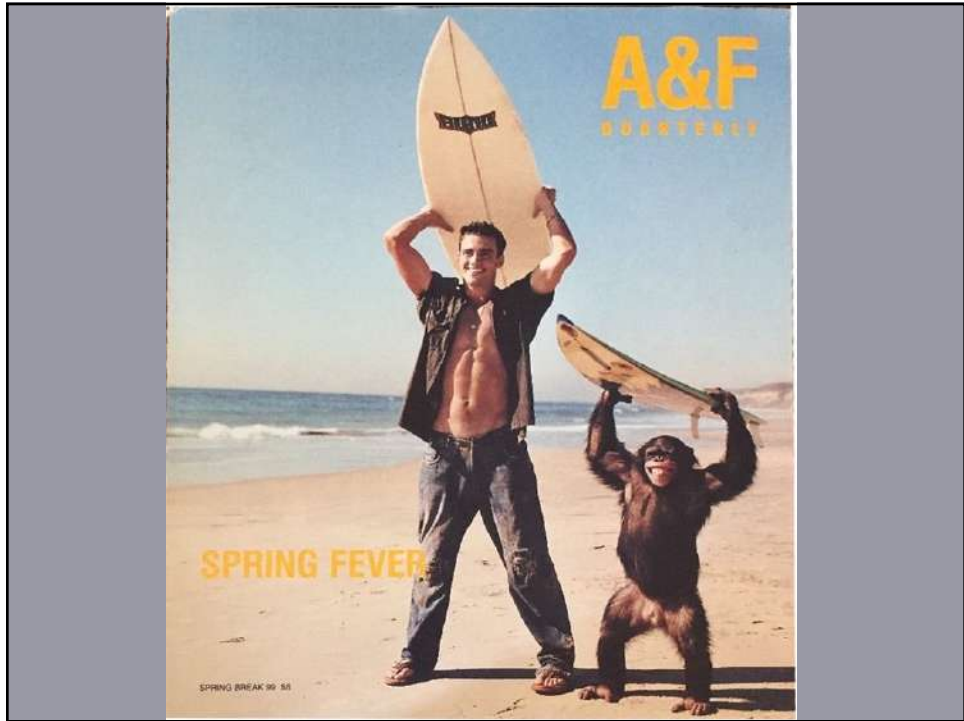


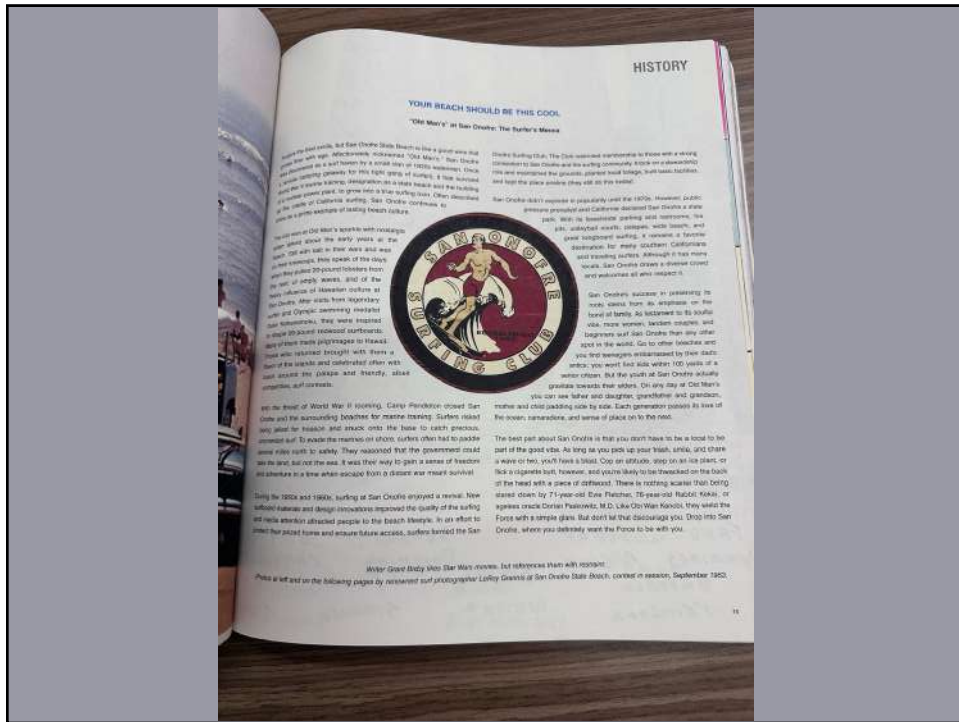
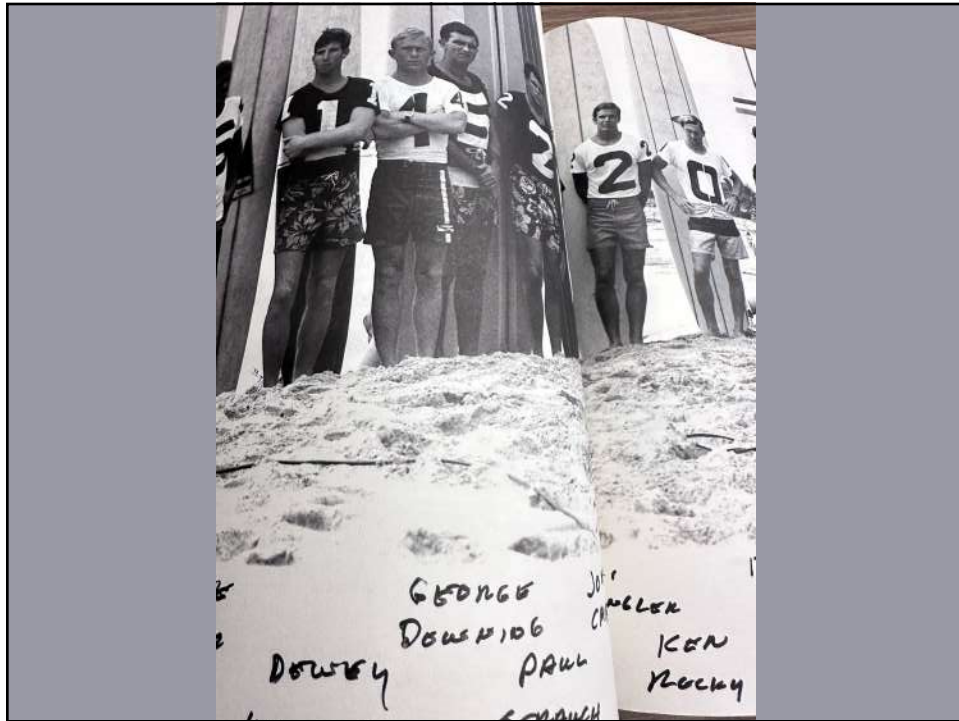
claims for virtual impressment

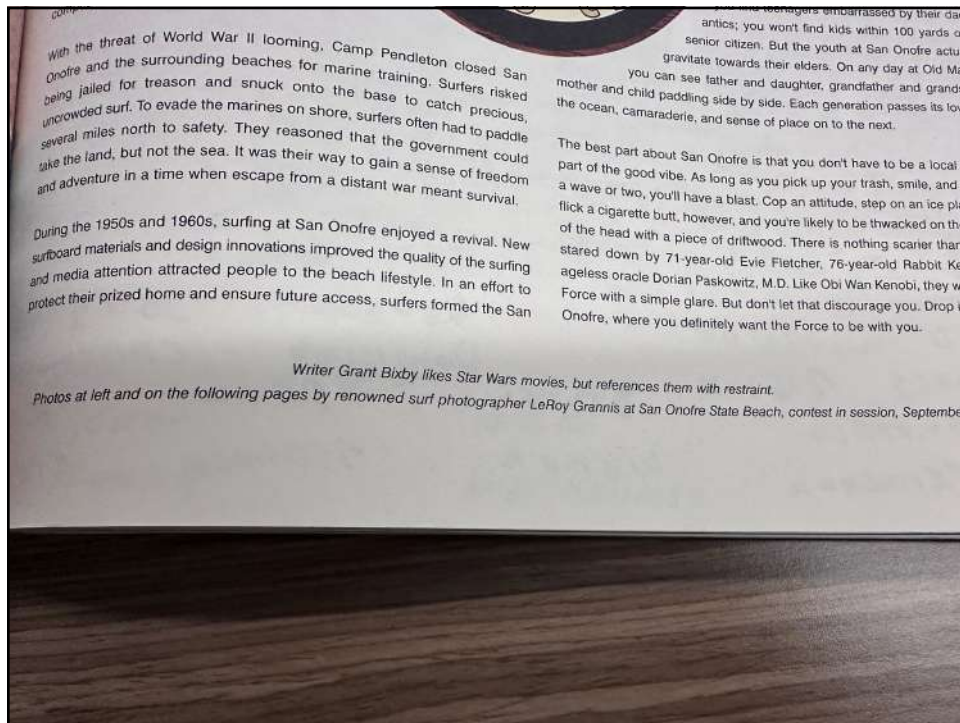
Many (but not all) courts recognize claims against defendants who exploits a plaintiff's name, likeness, or voice in such a way that the plaintiff has been unwittingly employed to produce a performance that might otherwise require voluntarily supplied labor.









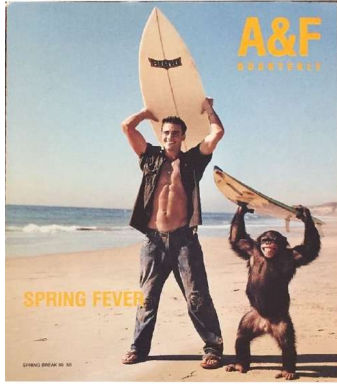


Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)



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.

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].”

Right of publicity **REJECTED**

Right of publicity **succeeds**

NOT endorsement or advertising

advertising

Bar Exam Tip:
If you see a right of
publicity issue,
consider whether
there are additional
indignancy-type tort
issues.

The
**Indignancy
Matrix**

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action after death?
Intrusion					
Disclosure					
False light					
Defamation					
IIED					
Right of publicity					

**See the Defamation Flowchart.*

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action after death?
Intrusion	<i>N/A</i>	<i>N/A</i>	yes	intent	
Disclosure	public	true	yes	intent	
False light	public	false	yes	actual malice	
Defamation	one person	false	no <small>(instead, must be reputation harming)</small>	<i>[it's complicated!*</i>	
IIED	<i>N/A</i>	<i>N/A</i>	yes+ <small>(extreme & outrageous)</small>	intent or recklessness	
Right of publicity					

**See the Defamation Flowchart.*

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action after death?
Intrusion	<i>N/A</i>	<i>N/A</i>	yes	intent	<i>N/A</i>
Disclosure	public	true	yes	intent	no
False light	public	false	yes	actual malice	no
Defamation	one person	false	no <small>(instead, must be reputation harming)</small>	<i>[it's complicated!]</i>	no
IIED	<i>N/A</i>	<i>N/A</i>	yes+ <small>(extreme & outrageous)</small>	intent or recklessness	<i>N/A</i>
Right of publicity	<small>the usual requirement is just that it be</small> commercial	either	no	none	often

**See the Defamation Flowchart.*