



Marginalia

# Misappropriation

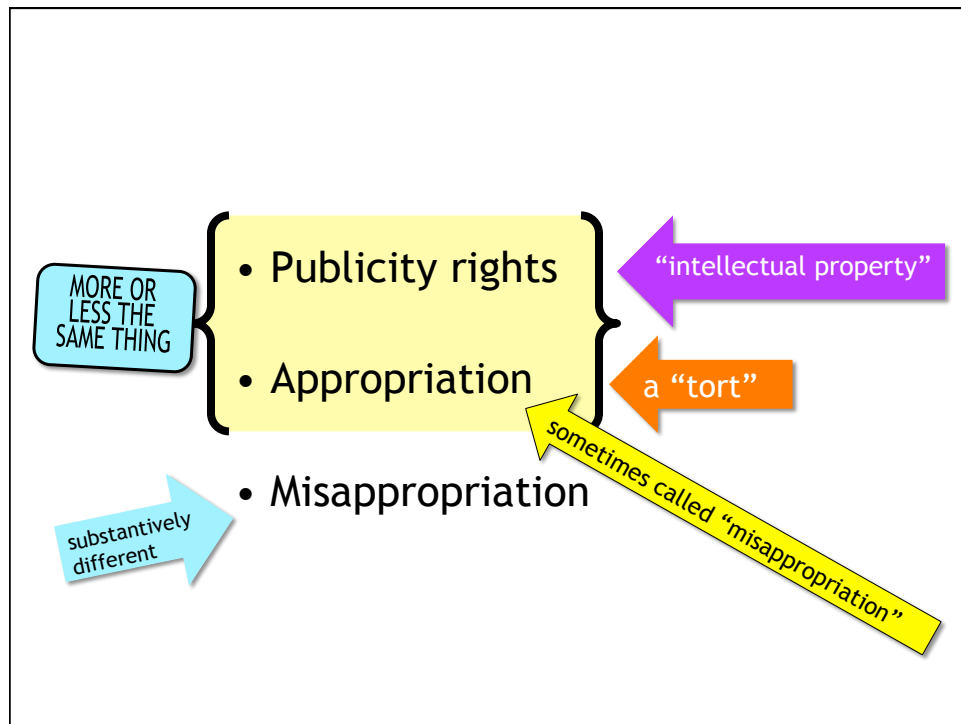
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Konomark  
Most rights sharable

The terminology can be very confusing, especially vis-à-vis right of publicity actions.



# Misappropriation

Liability



International News Service v. Associated Press,  
248 U.S. 215 (1918)

nonexcludable  
nonrival



# The public goods problem



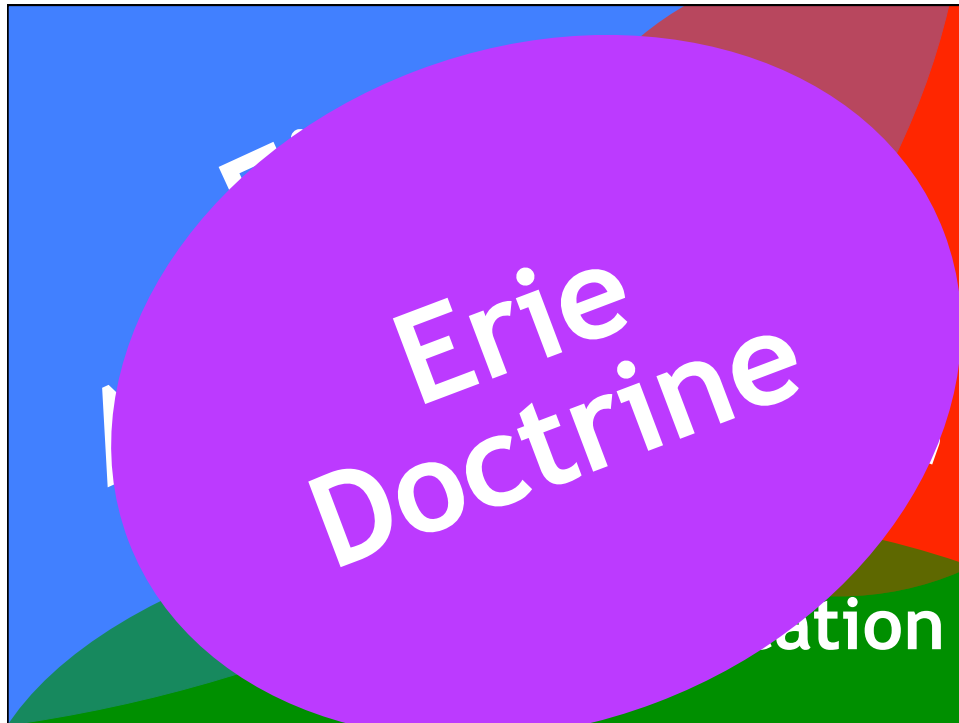
“But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.”

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Probably not  
good law  
anymore

**International News Service v. Associated Press,  
248 U.S. 215 (1918)**

# What is left of misappropriation?

- “Hot news”
- ???



National Basketball Association v. Motorola,  
105 F.3d 841 (2d Cir. 1997)

“We hold that the surviving "hot-news" INS-like claim is limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. We conclude that SportsTrax does not meet that test.”

**National Basketball Association v. Motorola,  
105 F.3d 841 (2d Cir. 1997)**

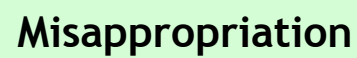
**NBA v. Motorola elements of hot-news  
misappropriation:**

- (i) a plaintiff generates or gathers information at a cost;
- (ii) the information is time-sensitive;
- (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts;
- (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and
- (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.





**Misappropriation**



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## **Misappropriation applications**

(at least theoretically, since case law is scarce)

- Real-time stock quotes
- Play-by-play of live sports
- ???

Misappropriation