



Marginalia

Misappropriation

Eric E. Johnson

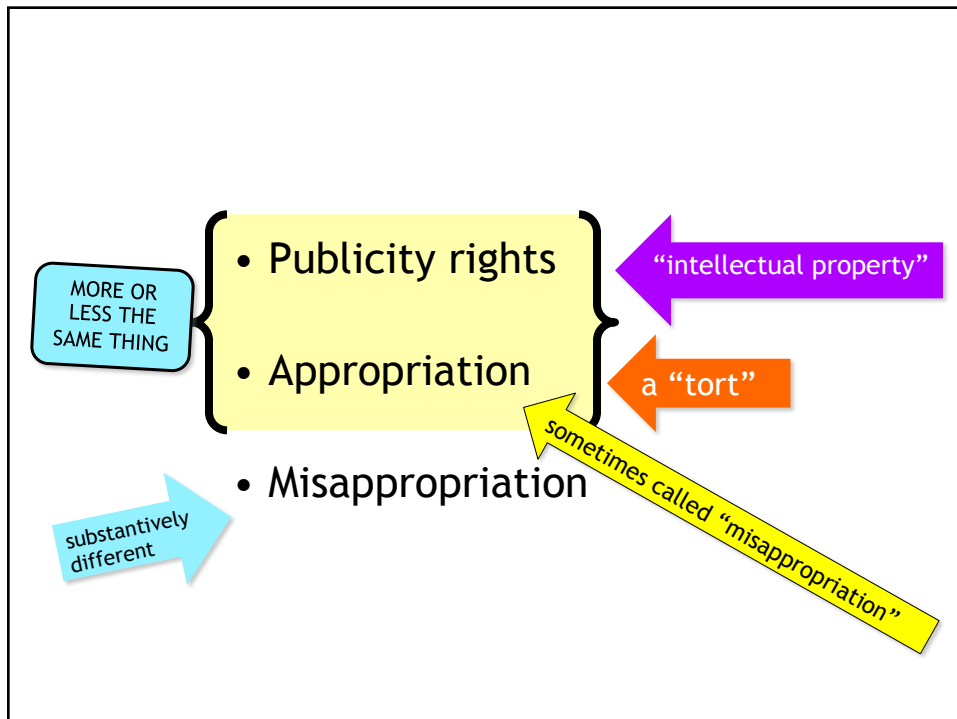
ericejohnson.com



Konomark
Most rights sharable

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

- Publicity rights
- Appropriation
- Misappropriation



Misappropriation



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

“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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The public goods problem



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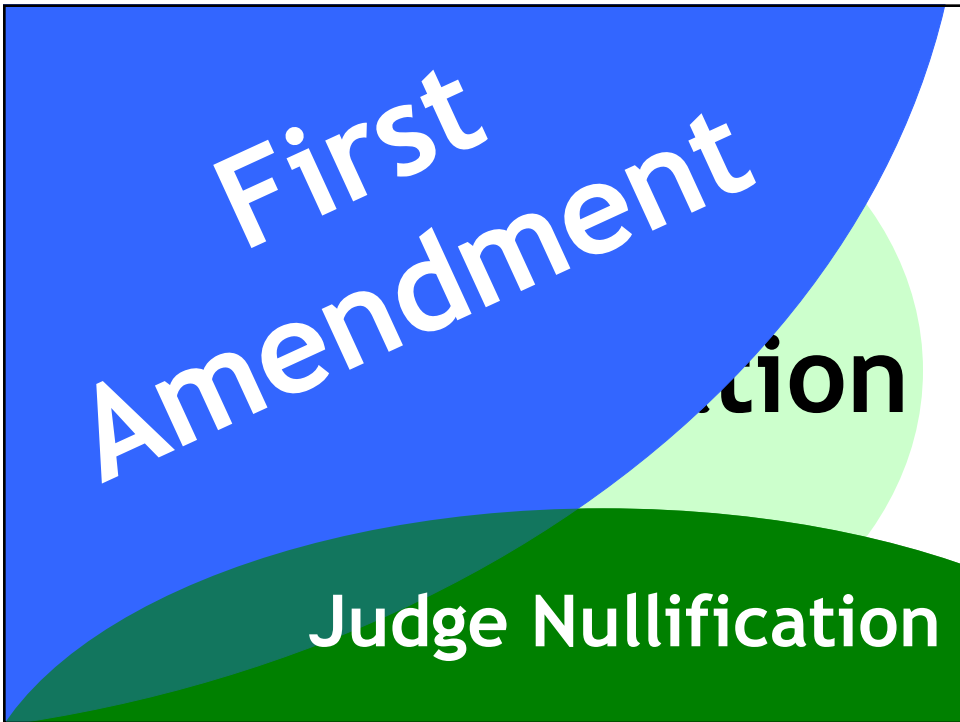
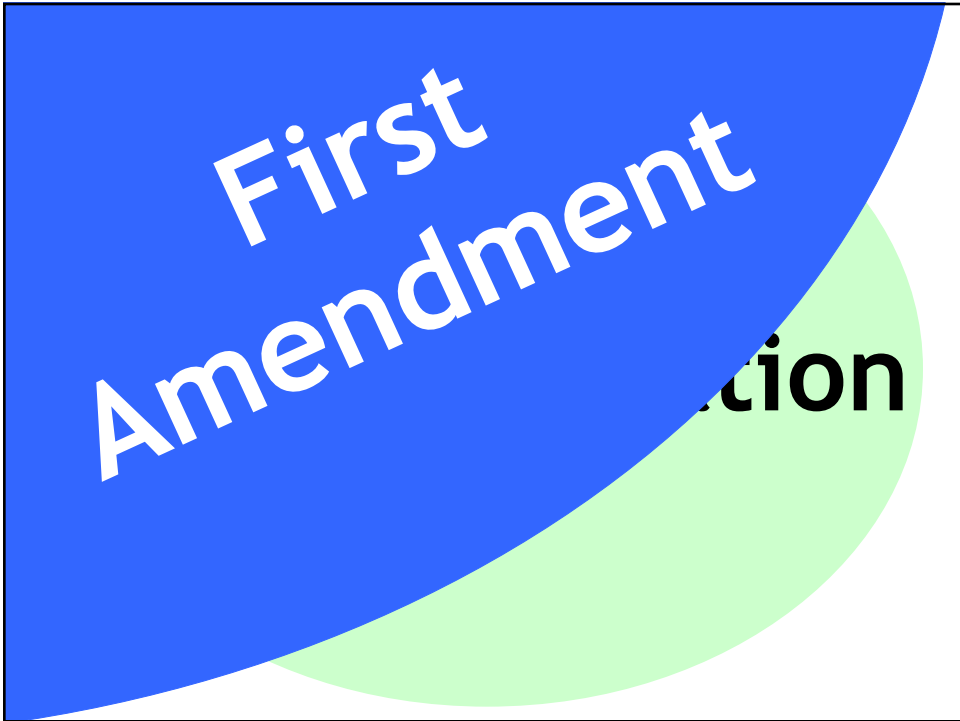
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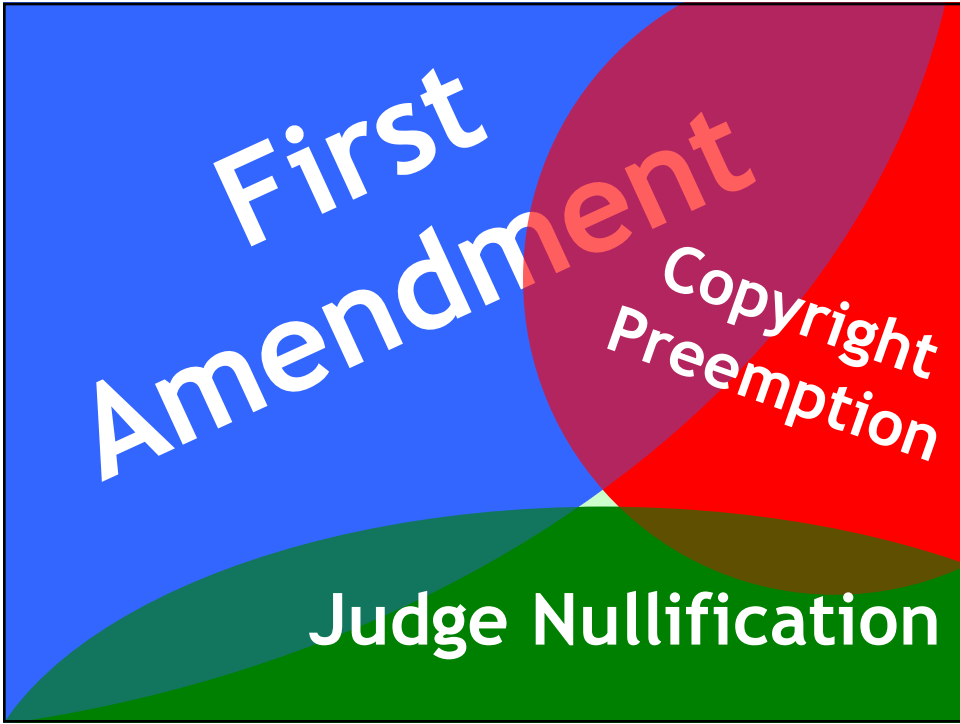
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one of unfairness, not of
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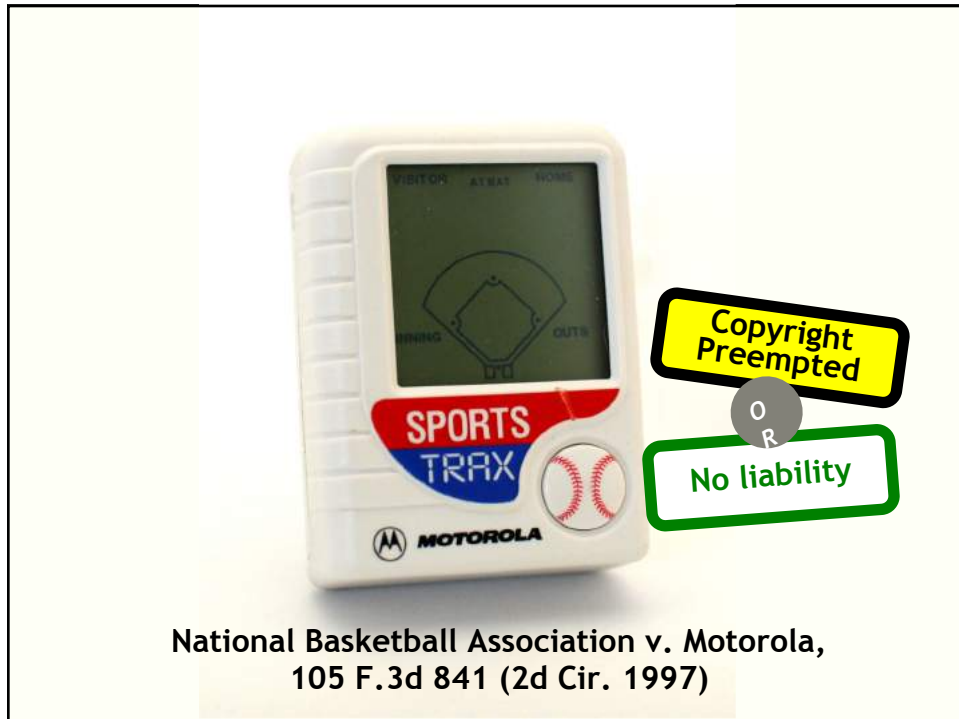
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Probably not good law anymore

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

What is left of misappropriation?

- “Hot news”
- ???



“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.”

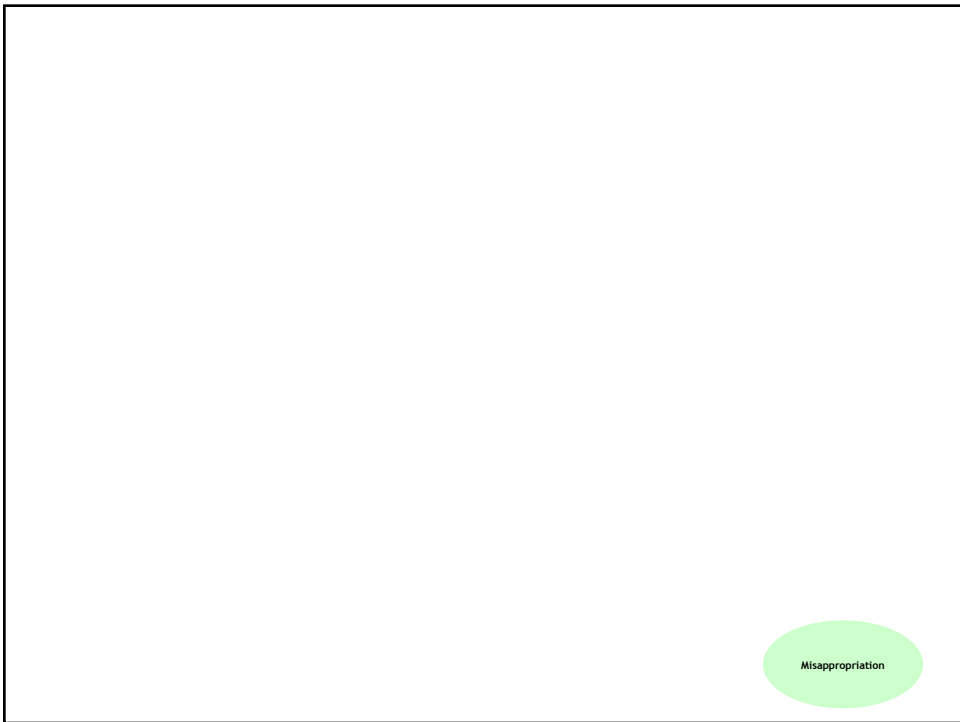
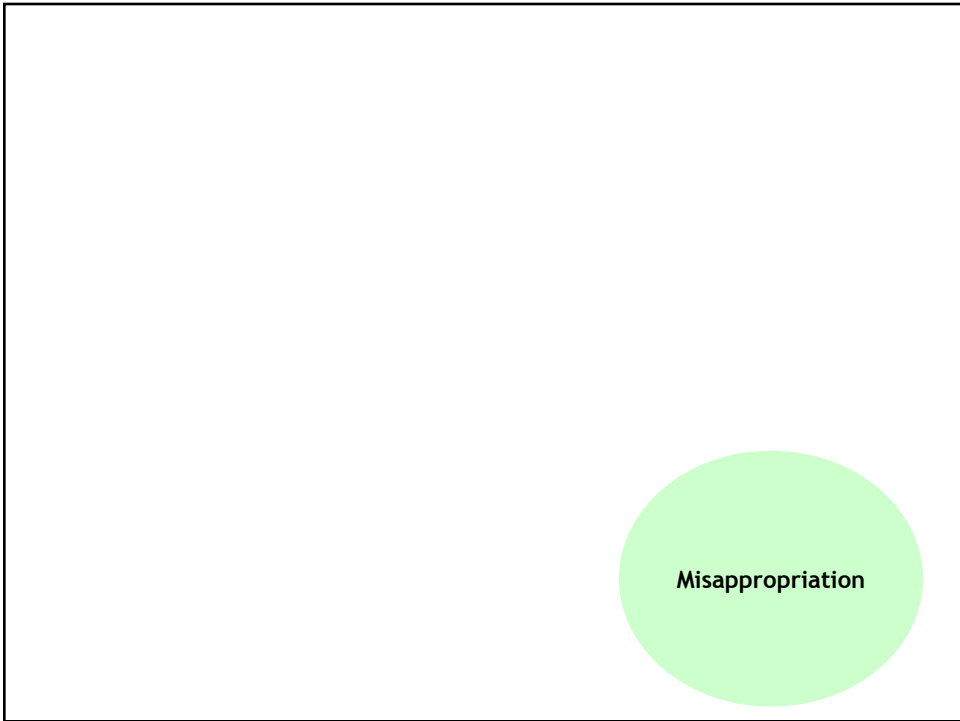
**National Basketball Association v. Motorola,
105 F.3d 841 (2d Cir. 1997)**

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



Misappropriation applications

(at least theoretically, since case law is scarce)

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

Misappropriation

