



# Right of Publicity

Torts  
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# Right of Publicity



## 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"

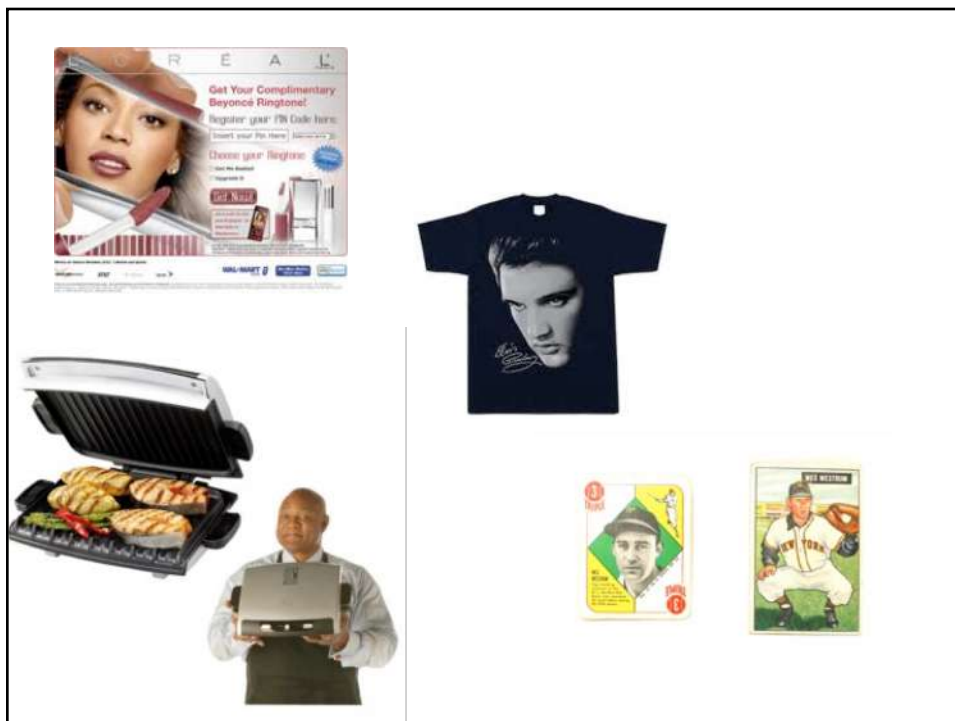
**Three circumstances where rights of publicity actions are commonly recognized:**

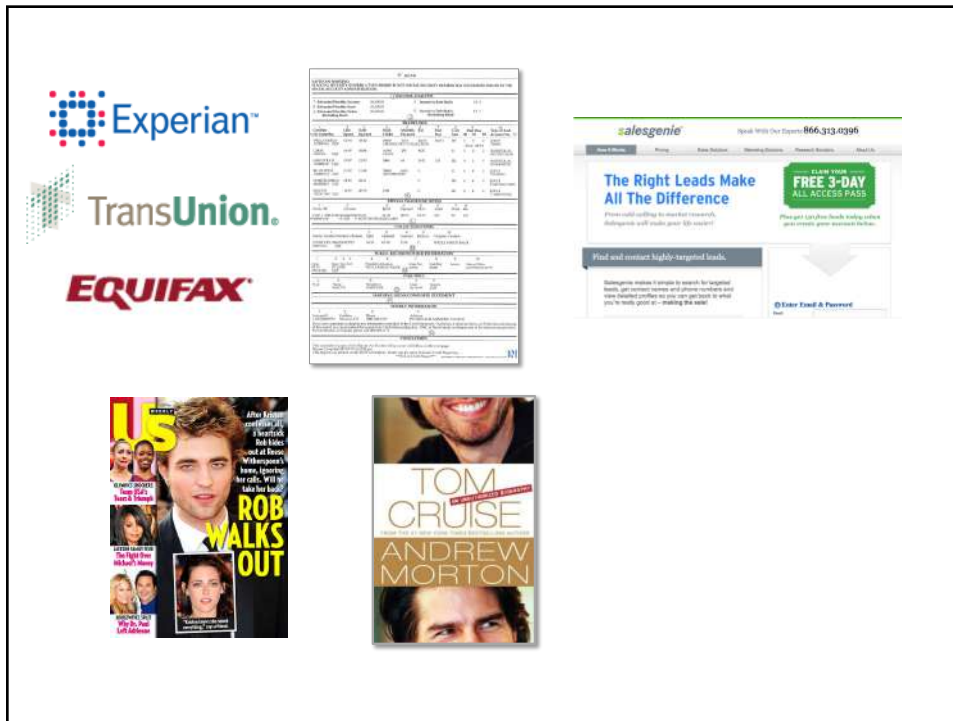
- **Endorsement/advertising**
- **Merchandising**
- **"Virtual impressment"**

“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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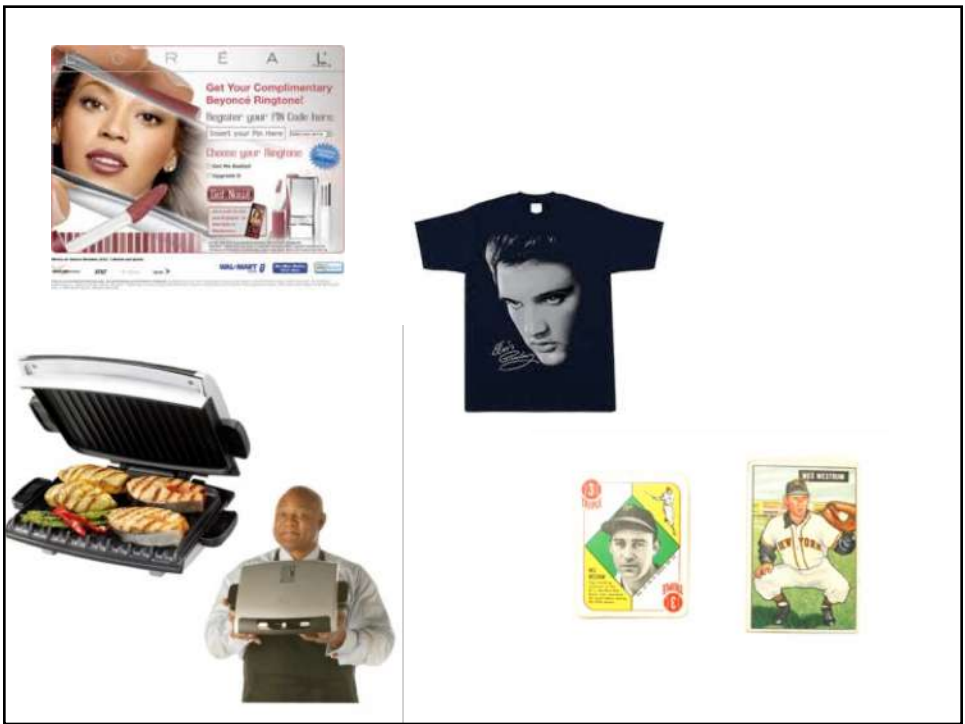
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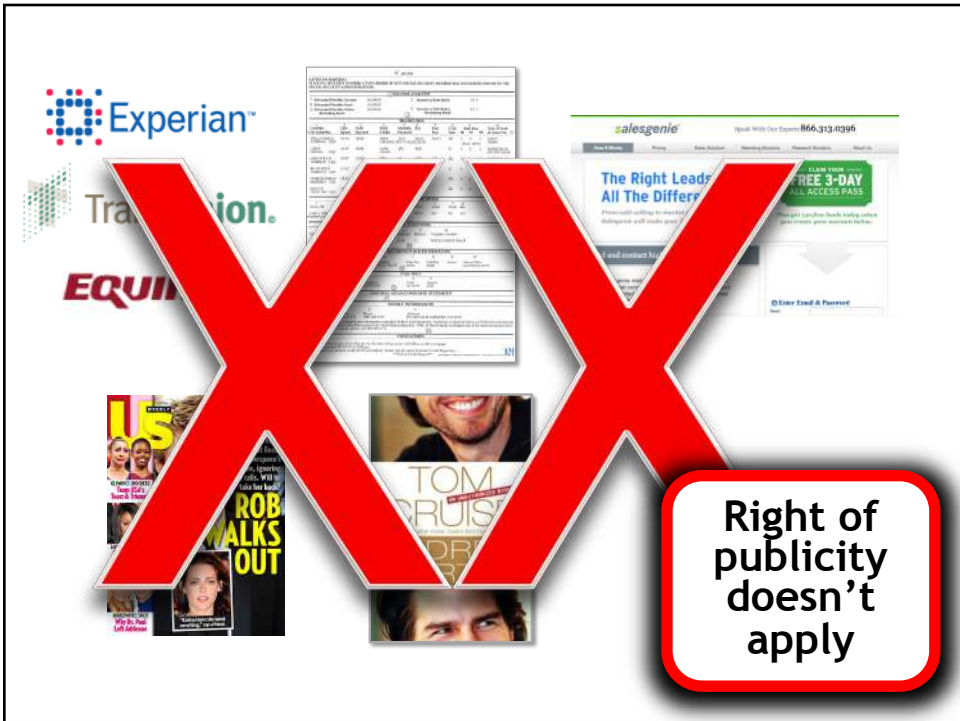
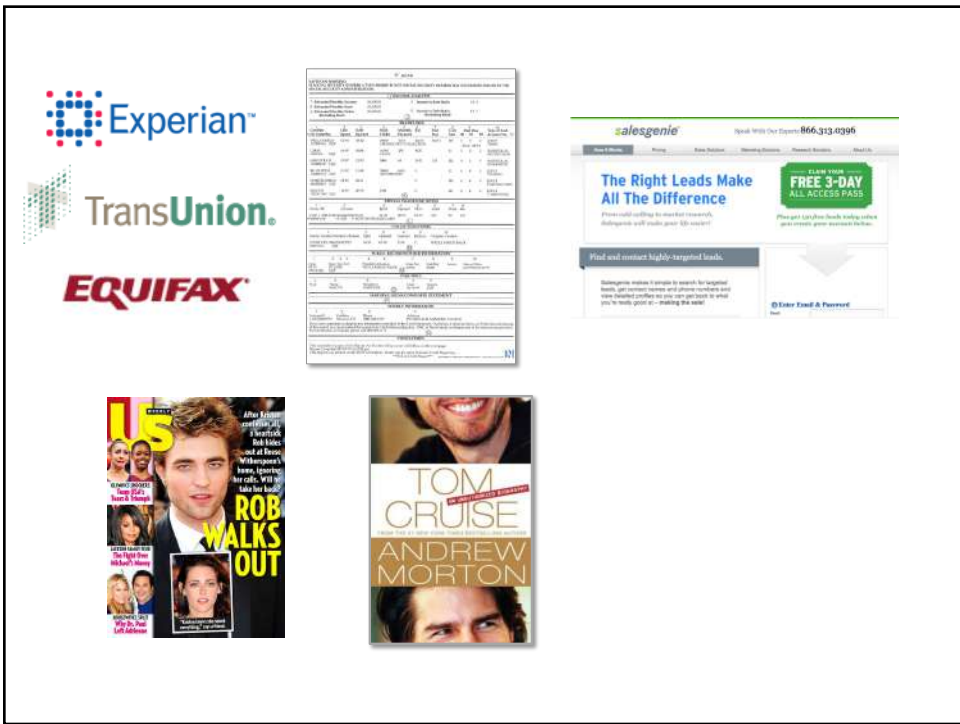
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# Right of Publicity

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





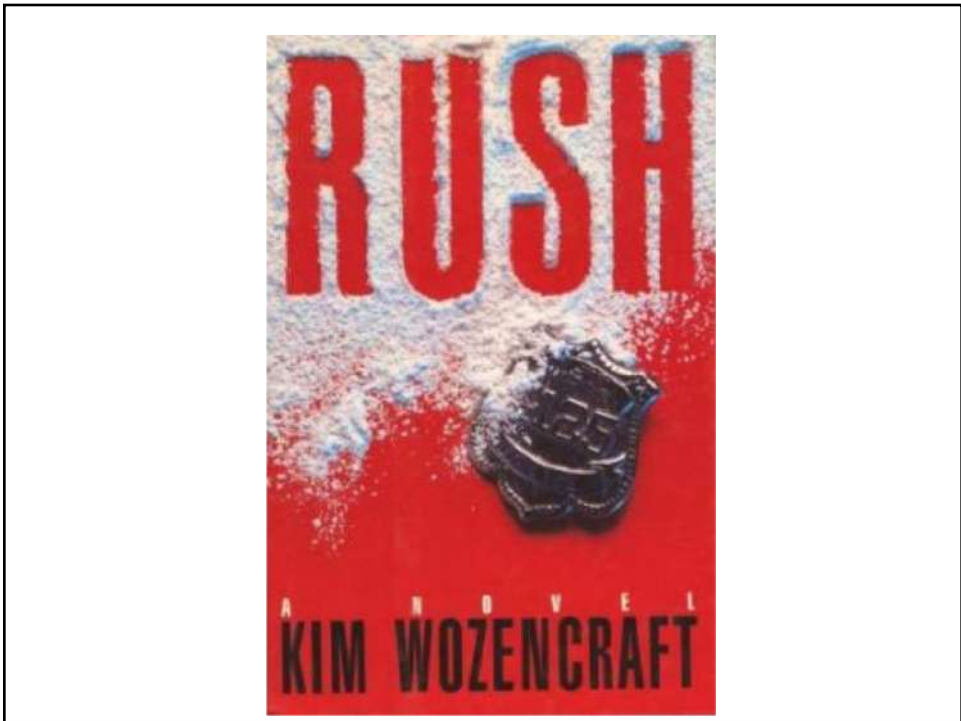


## Observation:

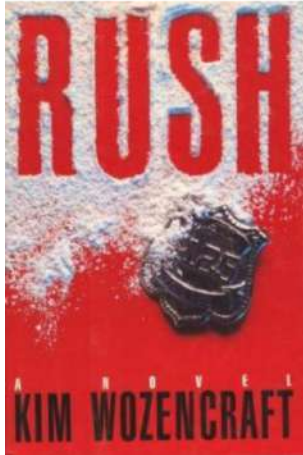
As an analytical matter,  
the scope is primarily  
determined subtractively.

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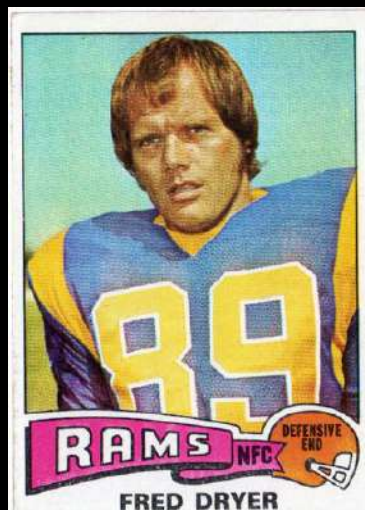
First Amendment of  
Publicity



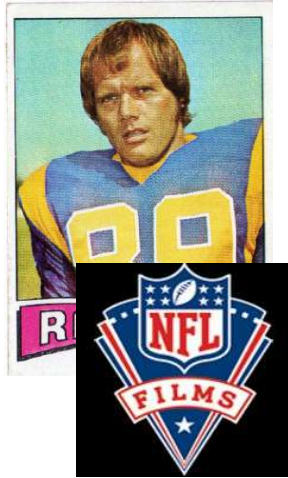
**Matthews v. Wozencraft,**  
15 F.3d 432 (5th Cir. 1994)



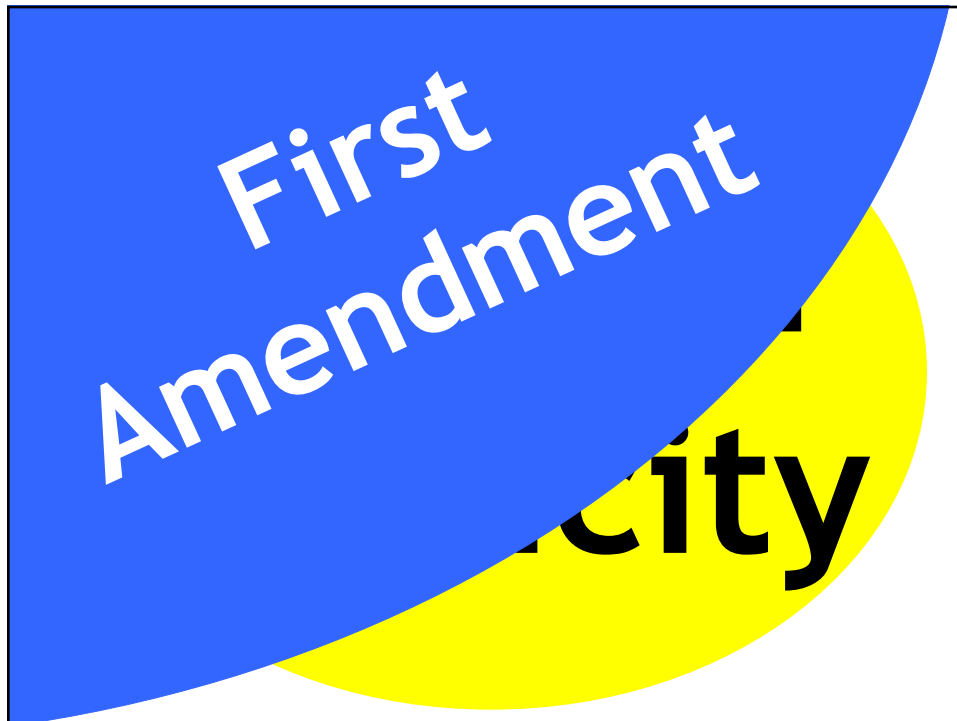
First Amendment barred a right-of-publicity claim by a former law-enforcement officer for portraying his life in a book and movie.

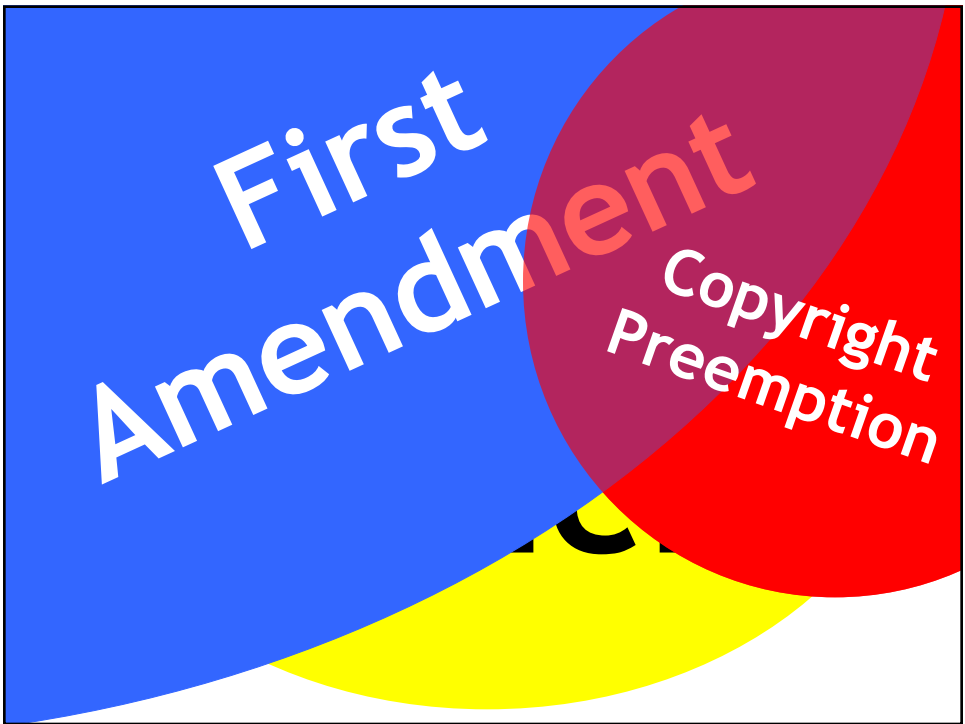


**Dryer v. NFL,**  
55 F. Supp. 3d 1181 (D. Minn. 2014)



Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred on by the “newsworthiness exception” - notwithstanding that the passage of three or four decades.



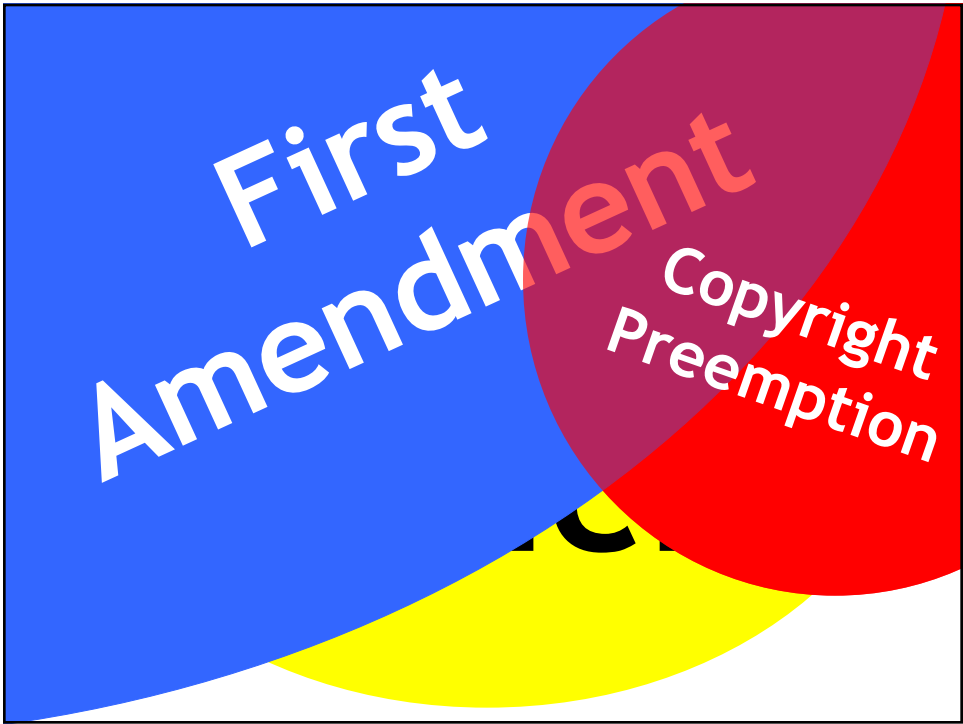


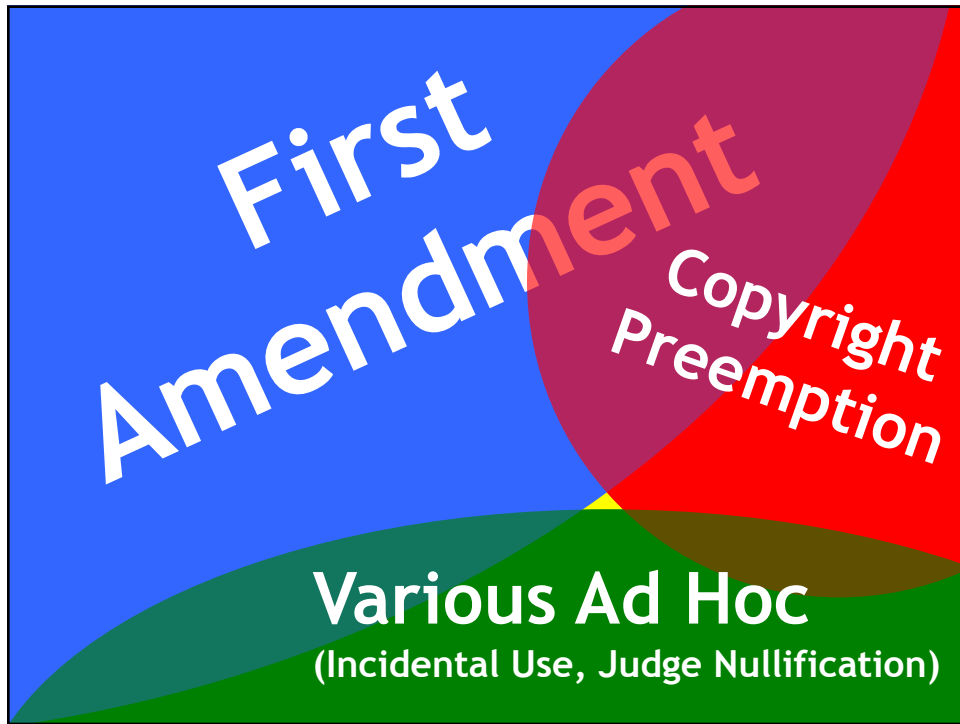
## Laws v. Sony Music, 448 F.3d 1134 (9th Cir. 2006)



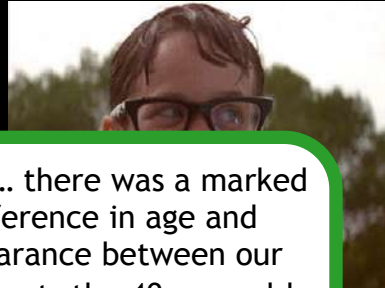
Right-of-publicity claim for unauthorized use of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have" held preempted because of copyright preemption on the basis that Laws' voice was lifted from a copyrighted recording.



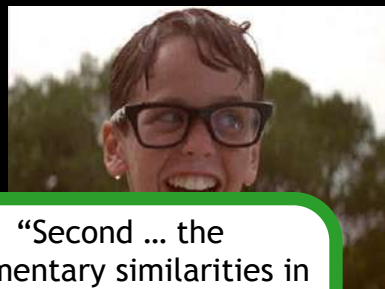






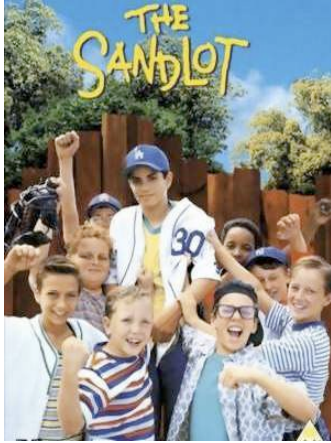


“First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”



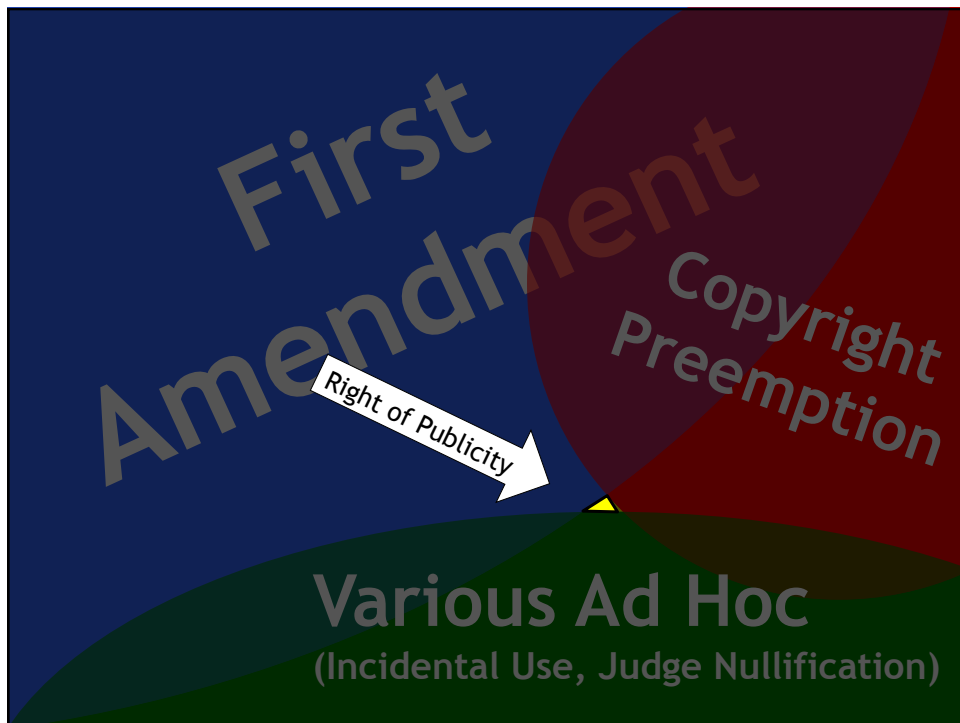
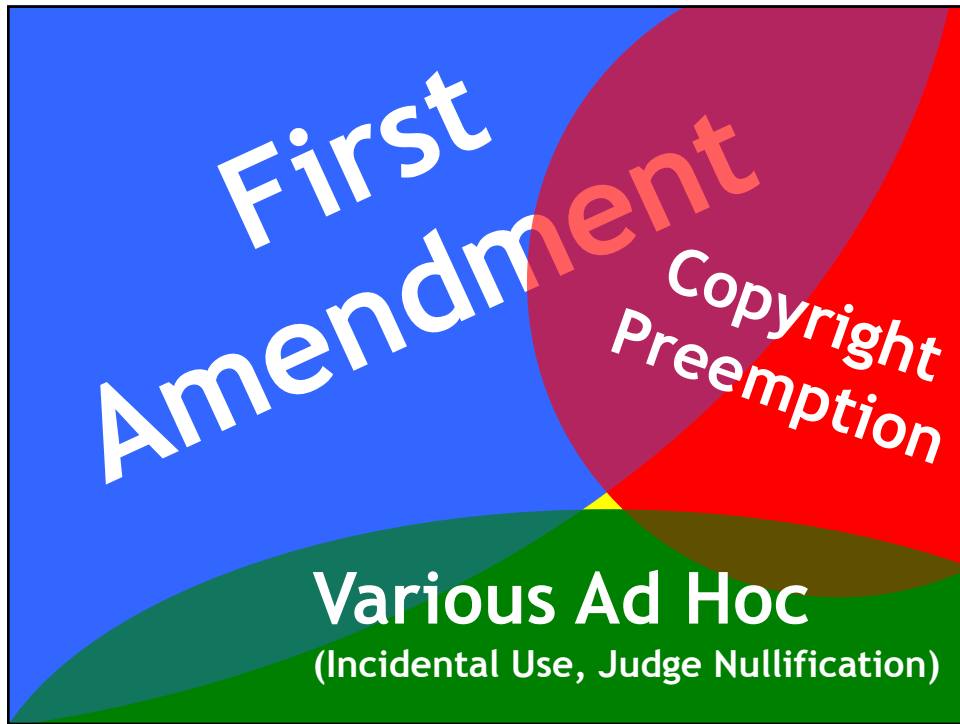
“Second ... the rudimentary similarities in locale and boyhood activities do not make *The Sandlot* a film about appellant’s life.”

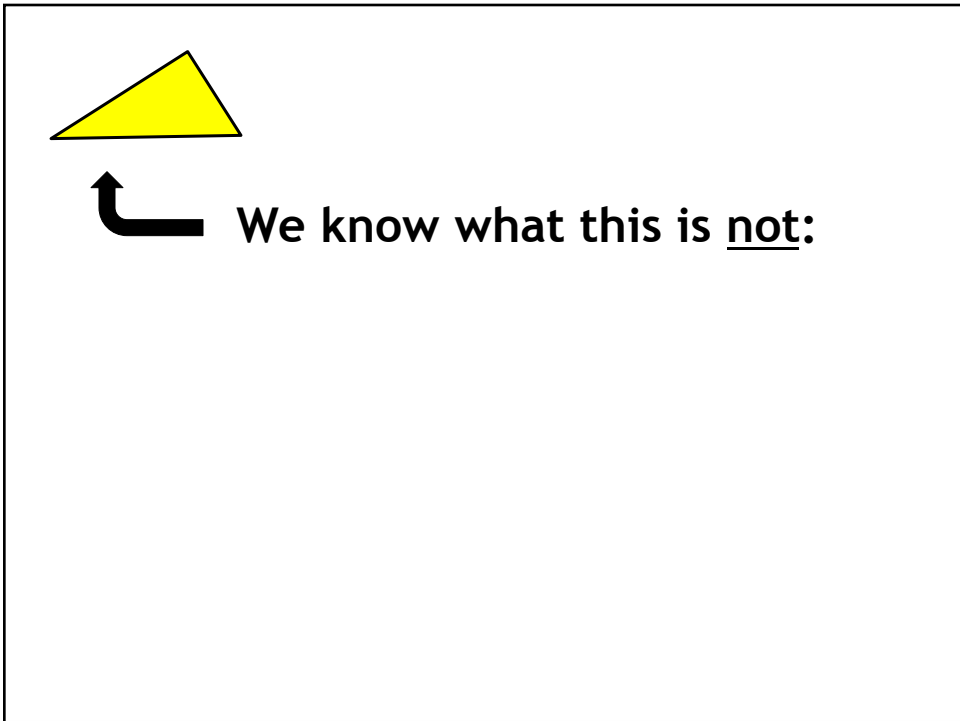
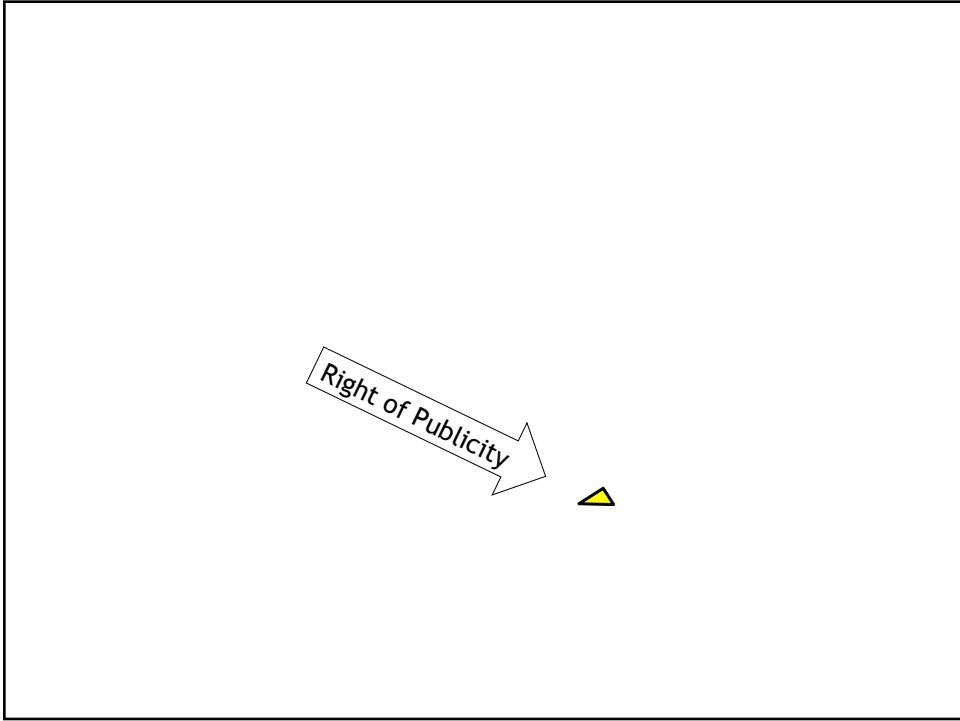
**Polydoros v. 20th Century Fox,  
79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997)**

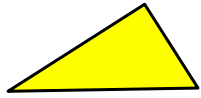


Where writer used a whole constellation of the plaintiff's indicia of identity, including name and likeness, and where people recognized the plaintiff as being portrayed in the film, the court rejected the right-of-publicity claim on summary judgment because of "a marked difference in age and other awkward characterizations of the facts and assertions irrelevant to the law.

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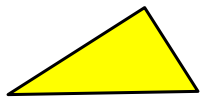




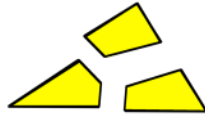


We know what this is not:

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

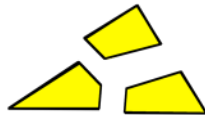


But what is it?



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

EEJ's way of looking at this ... FWIW

## 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

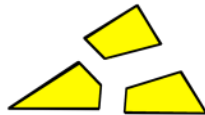
Courts seem to recognize that persons have the exclusive privilege to exploit their name and likeness in merchandising.

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 exploit 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.



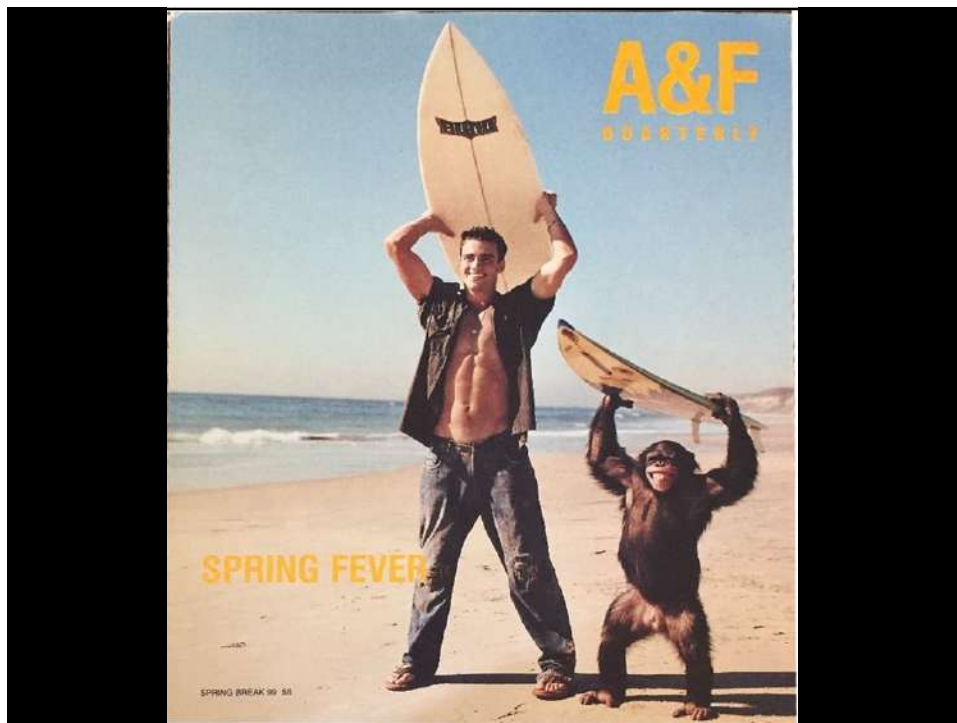
**How this might  
make sense of  
the cases ...**



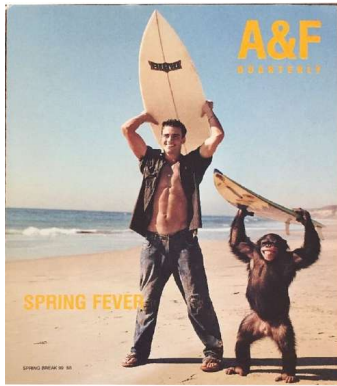
## Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)



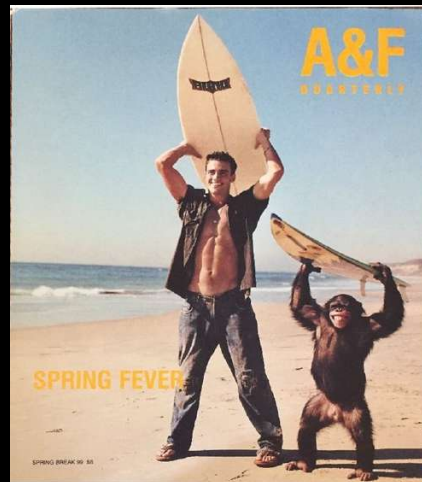
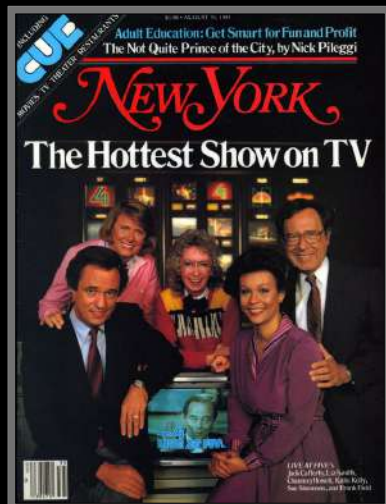
A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.



## 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].”





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November 7, 2003

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600 Third Avenue  
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Attention: Douglas P. Jacobs, Esq.  
Executive Vice President and General Counsel

Re: Catherine Zeta-Jones/Atkins Diet  
Our File No.: 2307-81

Dear Mr. Jacobs:

We are litigation counsel for Catherine Zeta-Jones.

It has come to Ms. Zeta-Jones' attention that her valuable name, likeness and persona have been improperly linked by the media to the world-renowned Atkins diet, and certain publications have falsely stated that my client has used and/or endorsed the Atkins diet. Please be advised that Ms. Zeta-Jones has never been on the Atkins diet, does not endorse the Atkins diet, either implicitly or explicitly, and has never authorized the use of her name, likeness or persona in any way to endorse or promote the Atkins diet, either commercially or otherwise.

According to publications around the world, the Atkins diet has been derided by nutritionists and other health care officials for decades. Indeed, within the past three months, numerous publications have reported that many doctors refer to the Atkins diet as "pseudo science," and blame the diet for an assortment of serious health problems and other negative side effects, including constipation, kidney problems, bone loss, decreased sex drive, and increased odds of getting particular types of cancer. At least one publication has reported that the Atkins diet was blamed for the heart failure and death of a 16-year old girl. By stating that Ms. Zeta-Jones uses and/or endorses the Atkins diet, these publications are falsely representing to the average reader, including many young women who look up to my client and desire her beautiful