Identity & Origin
Right of Publicity

Right of Publicity

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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
- Various idiosyncratic ad hoc rationales/spin

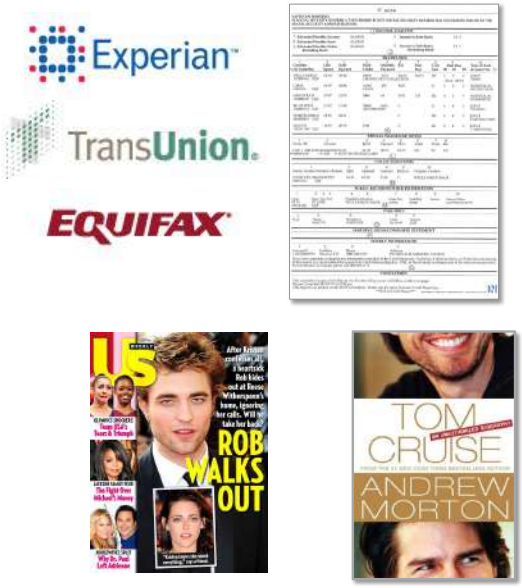
Three circumstances where rights of publicity actions are commonly recognized:

- 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)

Right of Publicity



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- "The elements of a common law action are the unauthorized use of the plaintiff's identity to the defendant's advantage by appropriating the plaintiff's name, voice, likeness, etc., commercially or otherwise, and resulting injury."

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Right of Publicity

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

Right of publicity applies

Observation:

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

First Amendment

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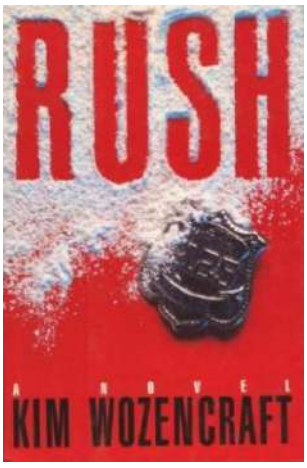
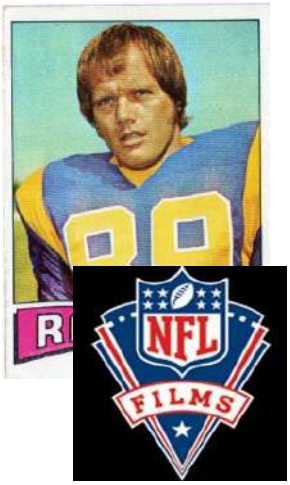
Matthews v. Wozencraft,
15 F.3d 432 (5th Cir. 1994)



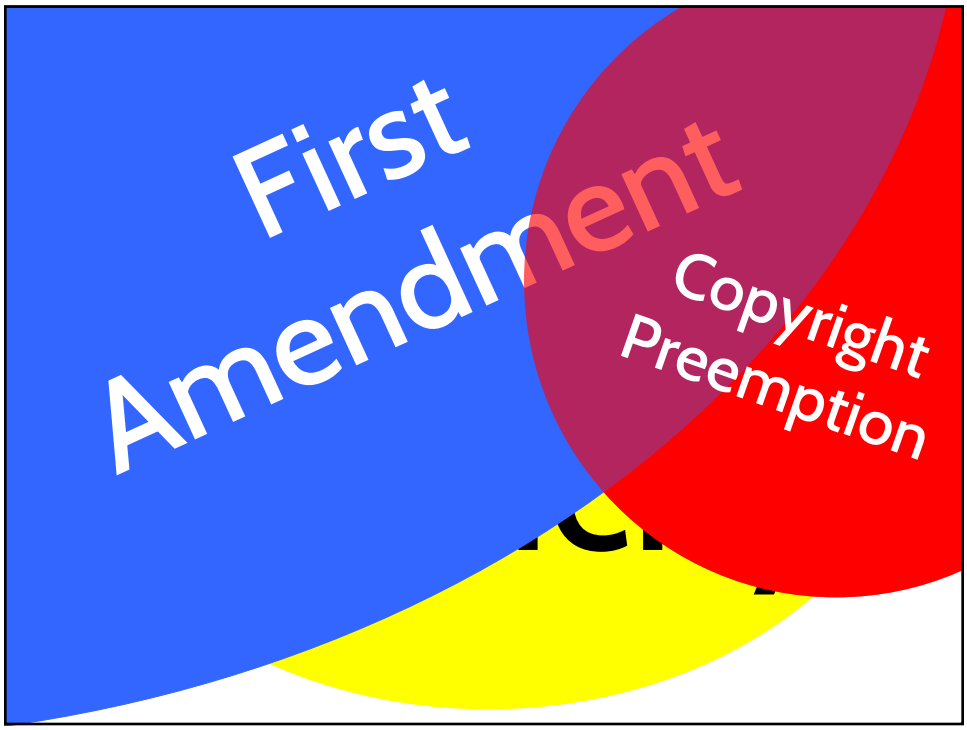
First Amendment barred a right-of-publicity claim by a former law-enforcement officer for portraying his life in a book and movie.

Dryer v. NFL,

55 F. Supp. 3d 1181 (D. Minn. 2014)

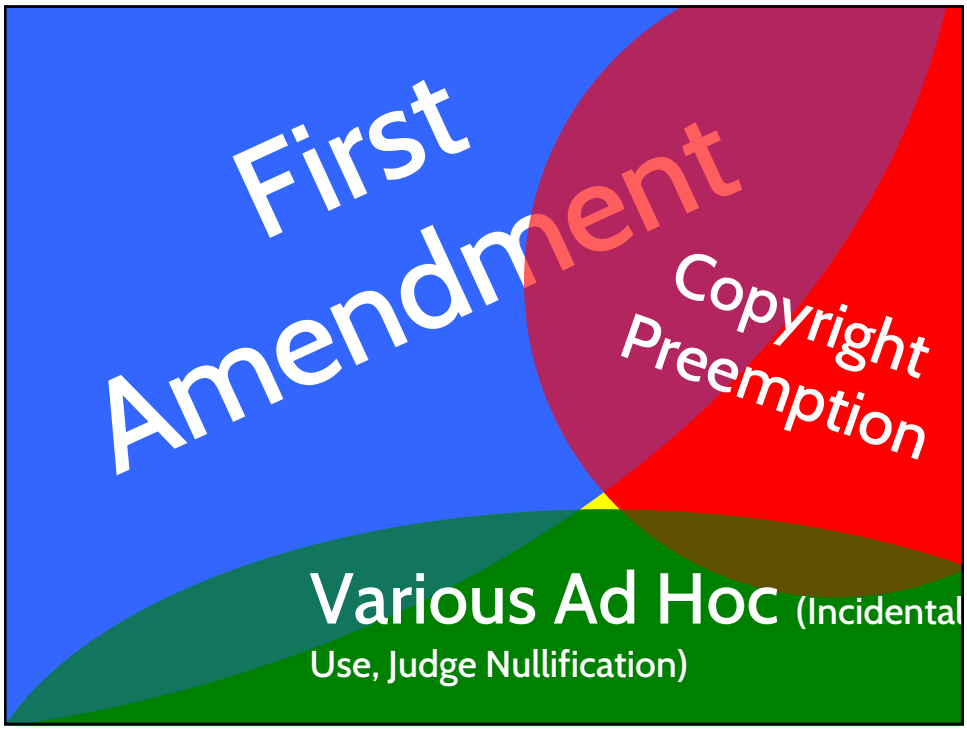


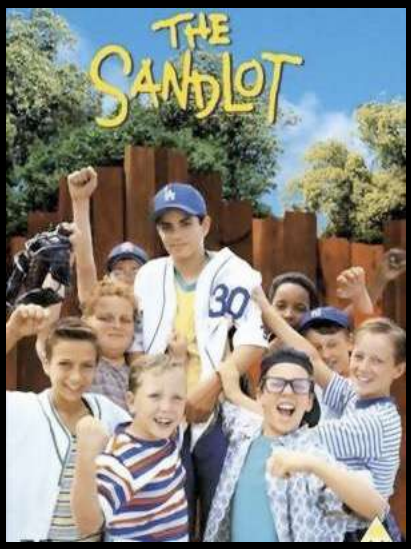
Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred by the "newsworthiness exception" – notwithstanding the passage of three or four decades.

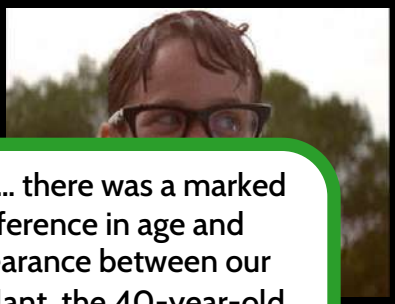


Laws v. Sony Music,
448 F.3d 1134 (9th Cir. 2006)

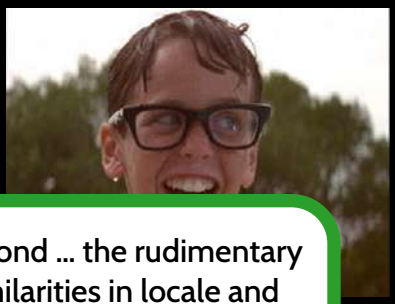
Right-of-publicity claim for unauthorized use of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have" held preempted because of copyright preemption on the basis that Laws' voice was lifted from a copyrighted recording.





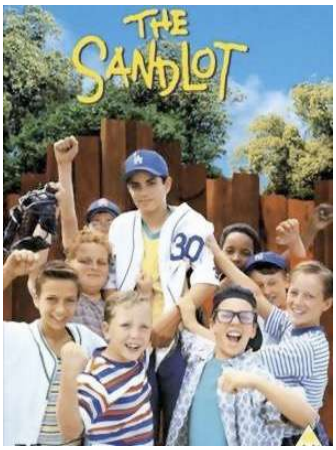


"First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous."

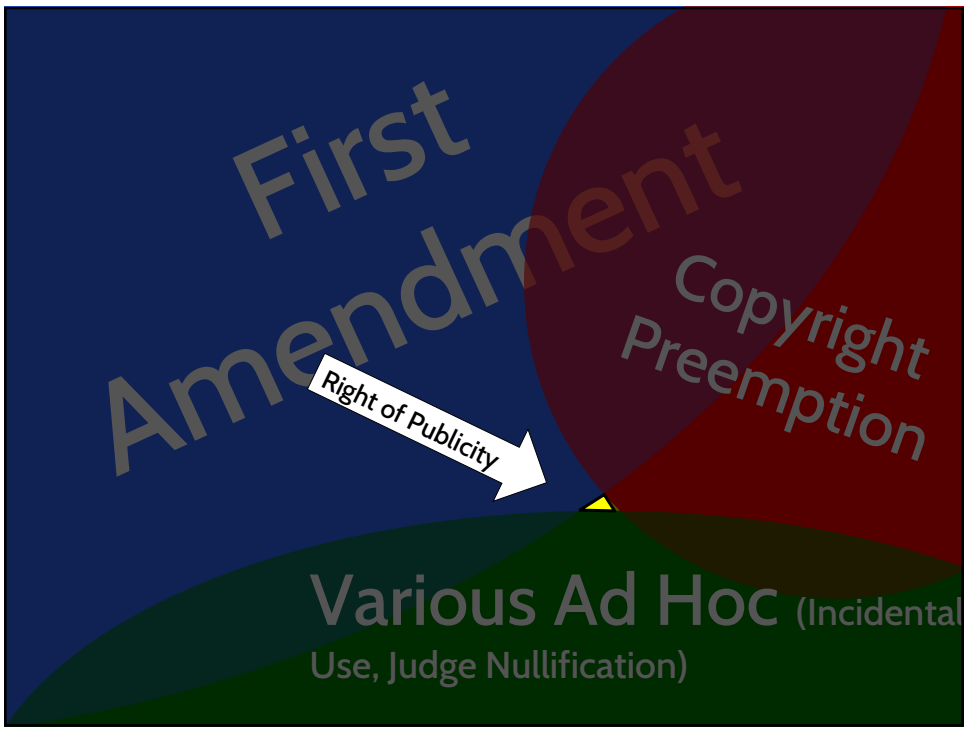


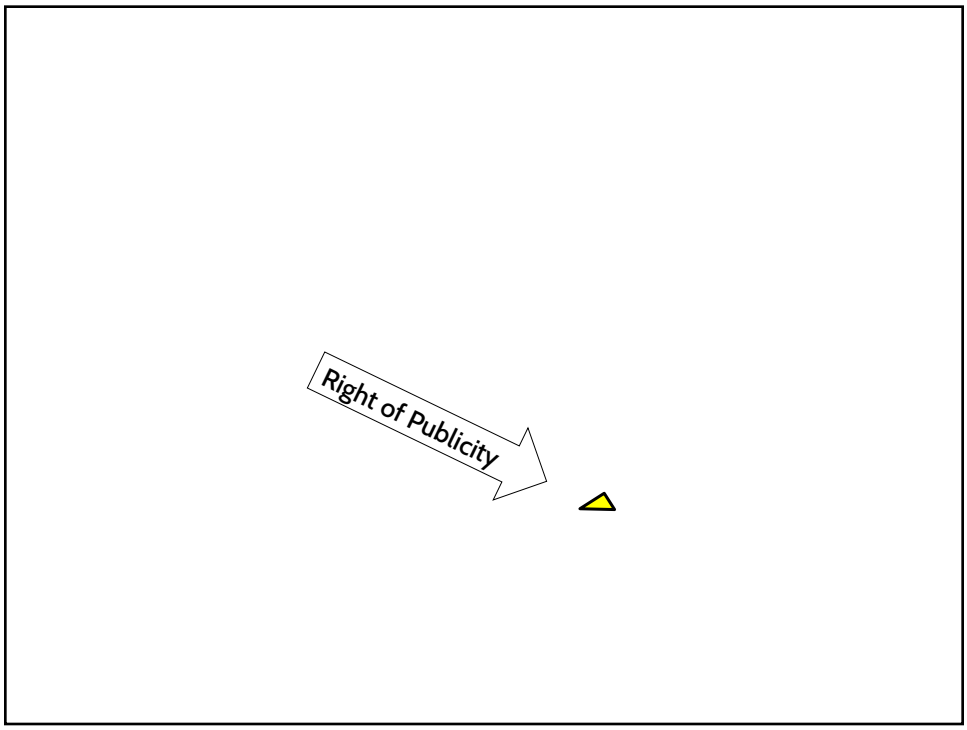
"Second ... the rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about appellant's life."

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.


First Amendment
Copyright Preemption
Right of Publicity
Various Ad Hoc (Incidental
Use, Judge Nullification)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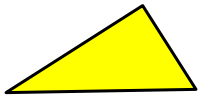
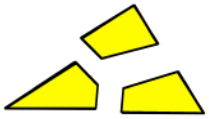


We know what this is <u>not</u>:

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



Three patterns of rights of publicity claims that are successful:

- Endorsement/advertising
- Merchandising
- Virtual impressment

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

How this might make sense of the cases …

TV commercial used stock photo of Motschenbacher's car, altering 11 to 71, attaching spoiler, and adding Winston logo. Some viewers recognized the car and thought Motschenbacher was sponsored by Winston.

Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir.1974)

Cardtoons, L.C. v. MLB Players Ass'n

95 F.3d 959 (10th Cir. 1996)

Parody baseball cards presented no actionable violation of players' rights of publicity because of a First Amendment fair use defense for commercial parody speech.

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

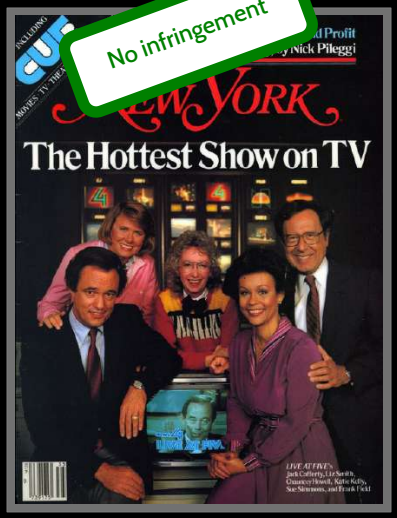
A "newsworthiness exception" defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

No infringement

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]."

Infringement



No infringement

Lane v. MRA Holdings, 2002 U.S. Dist. LEXIS 24111 (M.D. Fla. Nov. 26, 2002)
Gritzke v. MRA Holdings, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. Mar. 22, 2002)

Infringement