



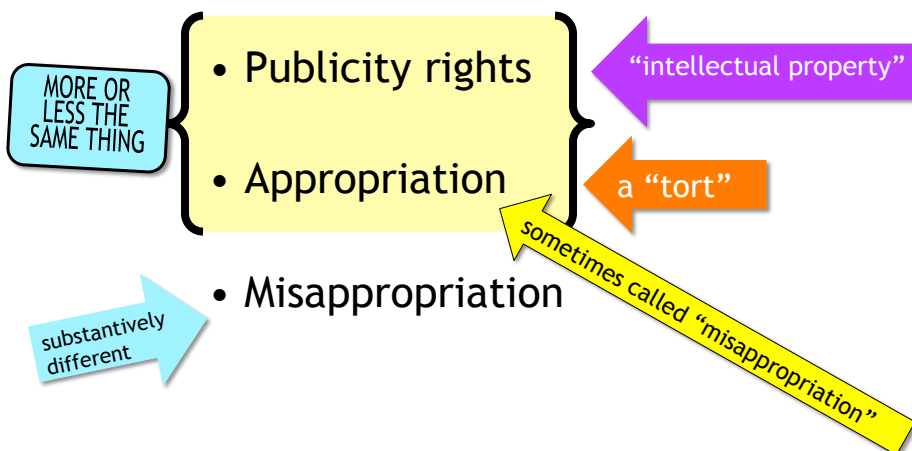
Publicity Rights, Appropriation, and Misappropriation Torts

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Konomark
Most rights sharable



Publicity Rights / Appropriation

Four branches of the common-law right of privacy
(four privacy torts)

- Intrusion
- Disclosure
- False light
- Appropriation
 - ➔ the right of publicity

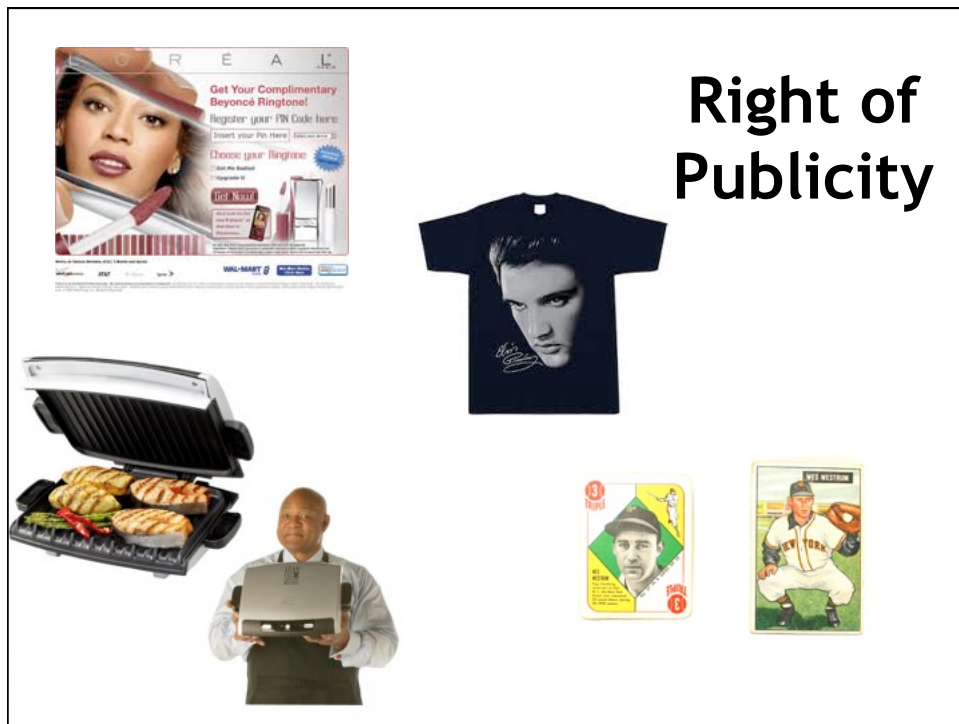
Possible theoretical distinctions between the appropriation tort and the right of publicity (not usually reflective of reality)

- **Publicity rights**
 - require fame or at least a persona with commercial value
 - intellectual property, so
 - can be alienated (assigned to someone else)
 - can exist after death
- **Appropriation**
 - no fame or commercial value required
 - personal dignitary tort, so
 - inalienable
 - cannot survive person's death

~~**Possible theoretical distinctions between the appropriation tort and the right of publicity (not usually reflective of reality)**~~

Unification
reflecting trend

- **Publicity rights**
 - require fame or at least a persona with commercial value
 - intellectual property, so
 - can be alienated (assigned to someone else)
 - can exist after death (←perhaps this requires fame)
- **Appropriation**
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 - inalienable
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Right of Publicity

| | |
|--------------|--|
| Protects | name, voice, image, other indicia of identity |
| Requires | nothing; fame in a few jurisdictions |
| Vests | automatically |
| Sustained by | <i>[nothing]</i> |
| Lasts | lifetime; post-mortem in some states |
| Theory | ??? |

The Indignancy Matrix

| | To how many? | True or false? | Highly offensive? | Intent requirement? | After death? |
|-----------------|--------------|----------------|---|------------------------|--------------|
| Intrusion | n/a | n/a | yes | intent | n/a |
| Disclosure | public | true | yes | intent | no |
| False light | public | false | yes | actual malice | no |
| Defamation | 1 | false | no | [complex] | no |
| Outrage / IIED | n/a | n/a | yes+ <small>(extreme & outrageous)</small> | intent | n/a |
| Publicity right | commercial | either | no | none | often |

Right of Publicity (or “Appropriation”)

The Elements:

1. The commercial use
2. Of a person’s name, voice, likeness, image, or other indicia of identity


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“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)**

“A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”

Eastwood v. Superior Court (National Enquirer), 149 Cal.App.3d 409, 417 (1983)



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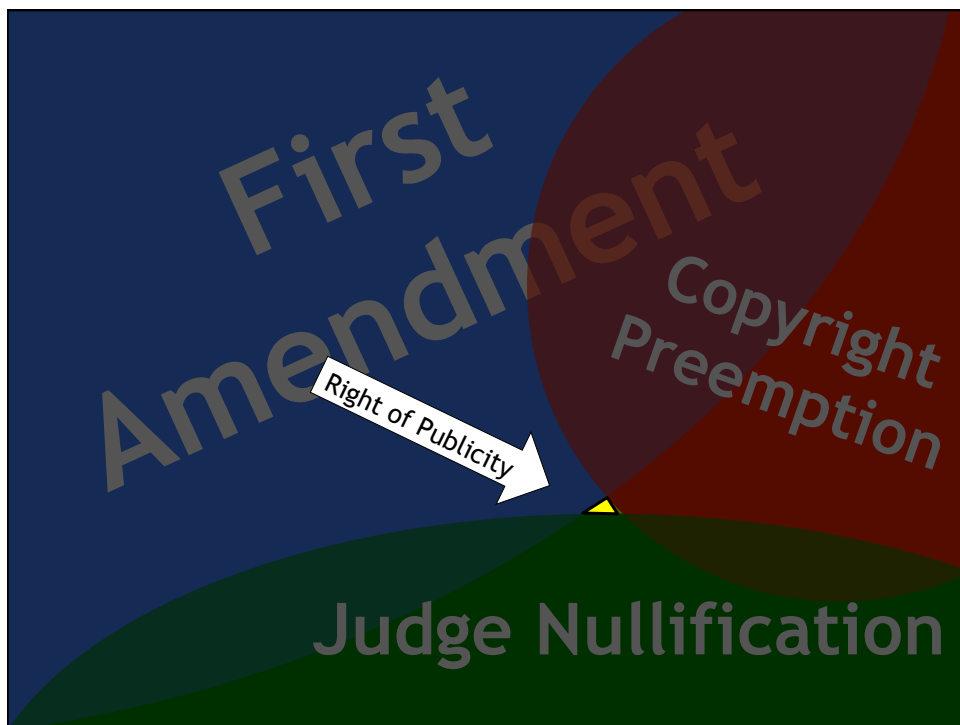
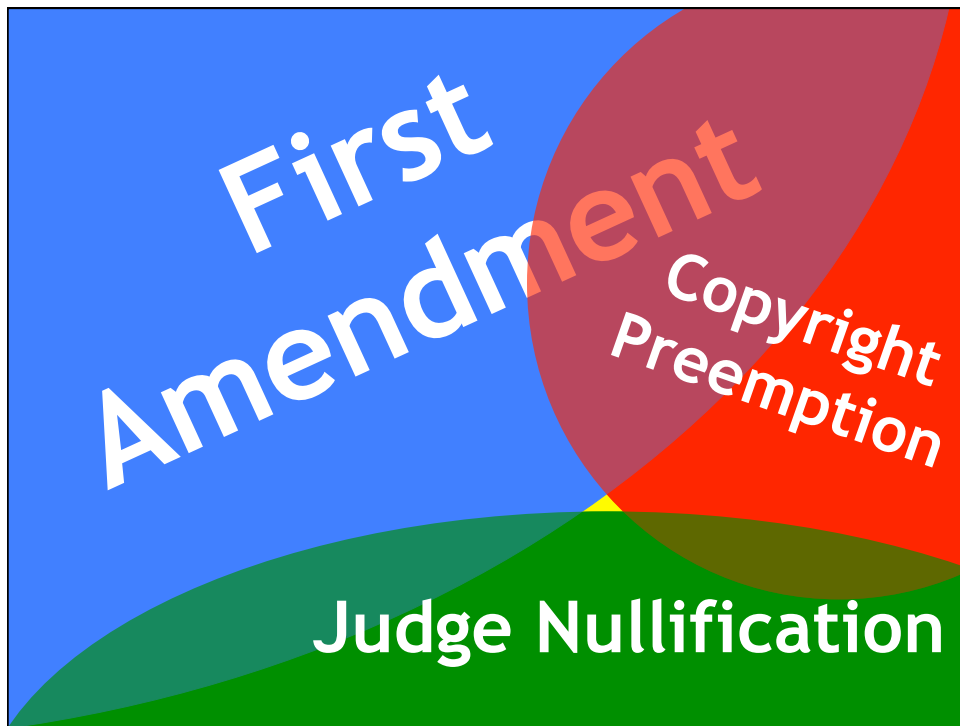
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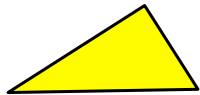
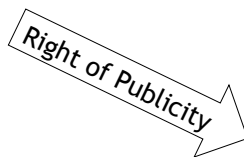
Right of Publicity

First
Amendment

city

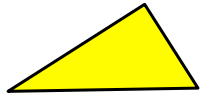


Right of Publicity

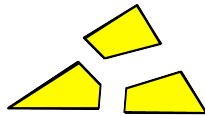


We know what this is not:

- First Amendment protected
- Copyright preempted
- Judge nullified
- First-sale excused
- Newsworthy



But what is it?



Three Rights of Publicity

- Endorsement/advertising right
- Merchandising entitlement
- Unwitting employment
- (... more?)

Endorsement right

Persons have a right not to appear in an advertisement or be represented as making a commercial endorsement absent their specific desire to do so.

An identifiable use of a person in advertising for a product or service or on product packaging is a violation.



Merchandising entitlement

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.



Unwitting employment

Persons may recover from another who exploits their name, likeness, or voice in such a way that they have unwittingly employed them in a manner usually requiring a voluntarily supplied labor.



Infringement

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977)



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



Infringement



TV commercial used stock photo of Mutschlenbacher's car, altering 11 to 71, attaching spoiler, and adding Winston logo. Some viewers recognized the car and thought Mutschlenbacher was sponsored by Winston.
Mutschlenbacher v. R.J. Reynolds Tobacco Co.,
498 F.2d 821 (9th Cir.1974)

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.”

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

Misappropriation

**Erie
Doctrine**

ation

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

Misappropriation applications

(at least theoretically, since case law is scarce)

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