Publicity Rights, Appropriation, and Misappropriation
Torts

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• Publicity rights
• Appropriation
• Misappropriation

"intellectual property"
a “tort”
sometimes called “misappropriation”
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

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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 (perhaps this requires fame)

- **Appropriation**
  - no fame or commercial value required
  - personal dignitary tort, so
    - inalienable
    - cannot survive person’s death

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Unification reflecting trend
## Right of Publicity

<table>
<thead>
<tr>
<th>Protects</th>
<th>name, voice, image, other indicia of identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requires</td>
<td>nothing; fame in a few jurisdictions</td>
</tr>
<tr>
<td>Vests</td>
<td>automatically</td>
</tr>
<tr>
<td>Sustained by</td>
<td>[nothing]</td>
</tr>
<tr>
<td>Lasts</td>
<td>lifetime; post-mortem in some states</td>
</tr>
<tr>
<td>Theory</td>
<td>? ? ? ?</td>
</tr>
</tbody>
</table>
The Indignancy Matrix

<table>
<thead>
<tr>
<th></th>
<th>To how many?</th>
<th>True or false?</th>
<th>Highly offensive?</th>
<th>Intent requirement?</th>
<th>After death?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intrusion</td>
<td>n/a</td>
<td>n/a</td>
<td>yes</td>
<td>intent</td>
<td>n/a</td>
</tr>
<tr>
<td>Disclosure</td>
<td>public</td>
<td>true</td>
<td>yes</td>
<td>intent</td>
<td>no</td>
</tr>
<tr>
<td>False light</td>
<td>public</td>
<td>false</td>
<td>yes</td>
<td>actual malice</td>
<td>no</td>
</tr>
<tr>
<td>Defamation</td>
<td>1</td>
<td>false</td>
<td>no</td>
<td>[complex]</td>
<td>no</td>
</tr>
<tr>
<td>Outrage / IIED</td>
<td>n/a</td>
<td>n/a</td>
<td>yes+</td>
<td>intent</td>
<td>n/a</td>
</tr>
<tr>
<td>Publicity right</td>
<td>commercial</td>
<td>either</td>
<td>no</td>
<td>none</td>
<td>often</td>
</tr>
</tbody>
</table>

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
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.”


“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.”

The Right Leads Make All The Difference

From cold-calling to market research, Salesgenie will make your life easier!

Find and contact highly-targeted leads.

Salesgenie makes it simple to search for targeted leads, get contact names and phone numbers and view detailed profiles so you can get back to what you're really good at -- making the sale!

Enter Email & Password

---

After Kristen confesses all, a heart-sick Rob hides out at Reese Witherspoon's home, ignoring her calls. Will he take her back?

ROB WALKS OUT
Right of Publicity

First Amendment
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

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)
Misappropriation

“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.”

Misappropriation

Erie Doctrine
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 applications
(at least theoretically, since case law is scarce)

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