



# Torts: Invasion of Privacy, Right of Publicity

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Konomark  
Most rights sharable

## Privacy Torts

- False Light
- Intrusion
- Public Disclosure
- Appropriation / Right of Publicity

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## False Light

The Elements:

1. A public statement
2. Made with actual malice
3. Placing the plaintiff in a false light
4. That is highly offensive to the reasonable person

## False Light

Defenses:

- Essentially the same as for defamation
- So, for example:
  - A public figure will have to prove actual malice.\*
  - A private figure, if a matter of public concern, must prove actual malice or negligence + special damages.\*

\*That is, if actual malice is not required as a prima facie element, which it generally, but not always, is.

## Intrusion

The Elements:

1. Physical or other intrusion
2. Into a zone in which the plaintiff has a reasonable expectation of privacy
3. Which is highly offensive to the reasonable person

# Disclosure

The Elements:

1. A public disclosure
2. Of private facts
3. That is highly offensive to the reasonable person

## Some general notes about false light, disclosure, and outrage:

- They are available for natural, living persons only - not for corporations
- Much of defamation doctrine applies
  - Identification of plaintiff
  - Fact vs. opinion
  - Substantial truth (but not for disclosure)
- The First Amendment can substantially limit any of these torts
  - State action hurdle overcome a la *NYT v. Sullivan*

## Right of Publicity



“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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## Right of Publicity

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144 Cal.App. 4th 47 (2006)

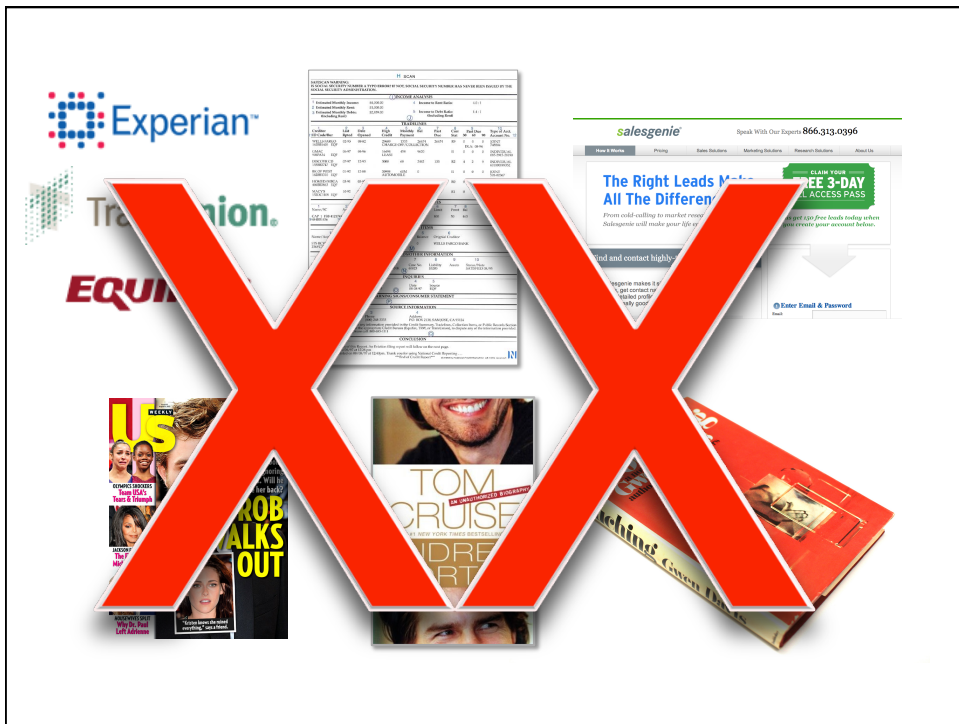
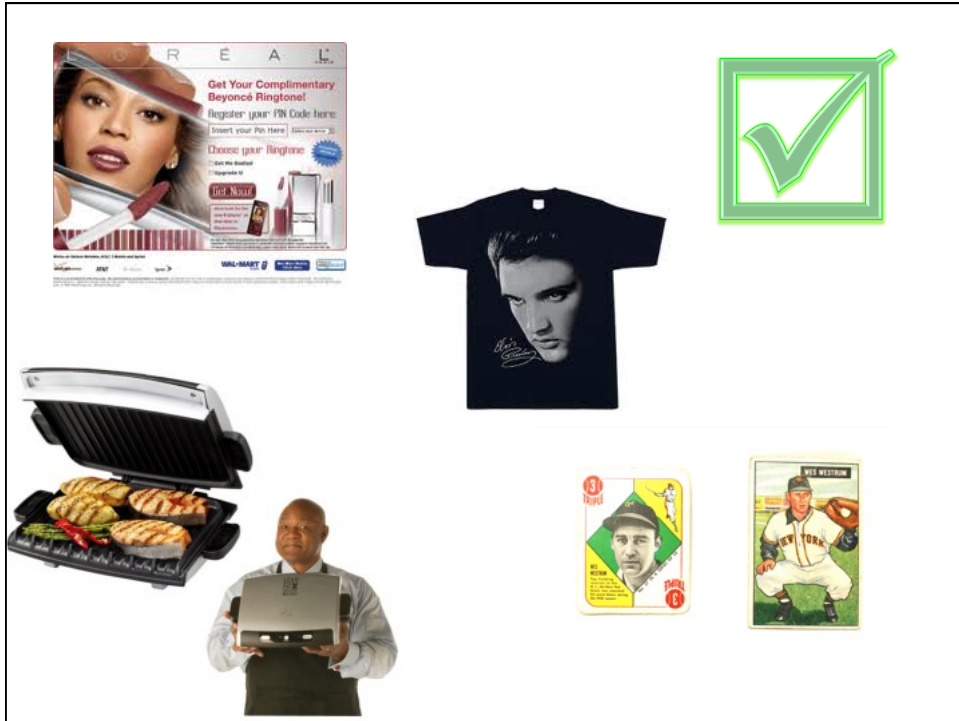
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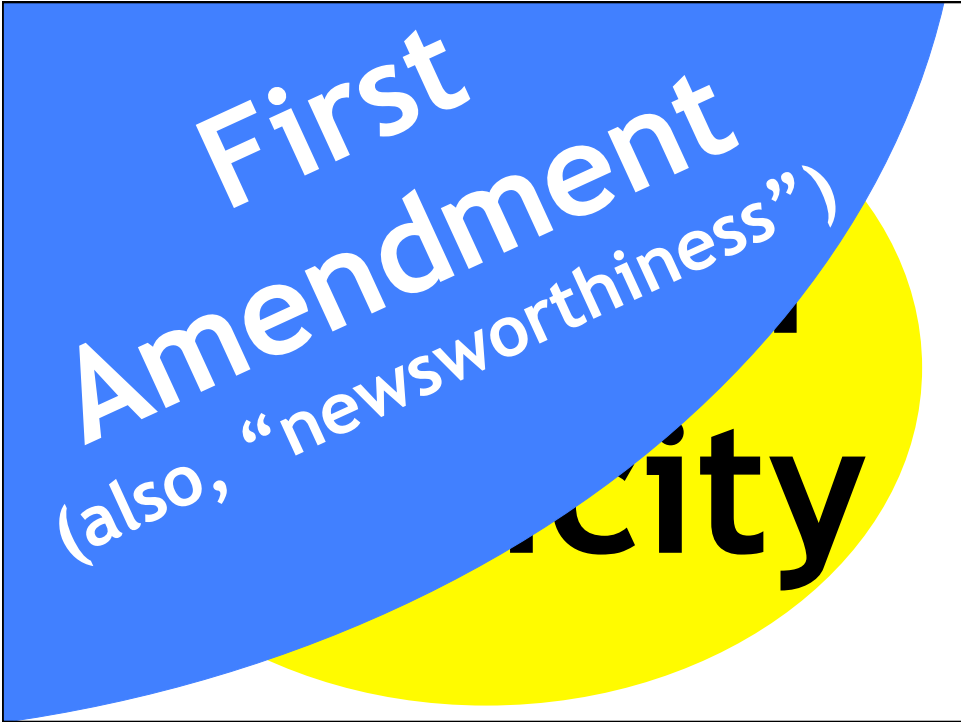
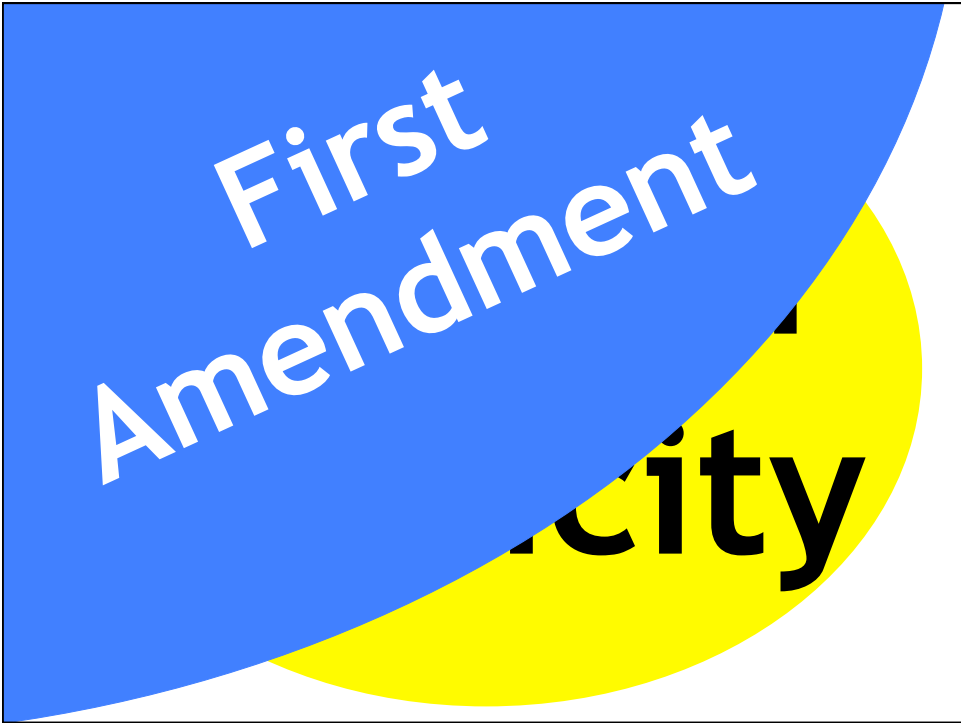
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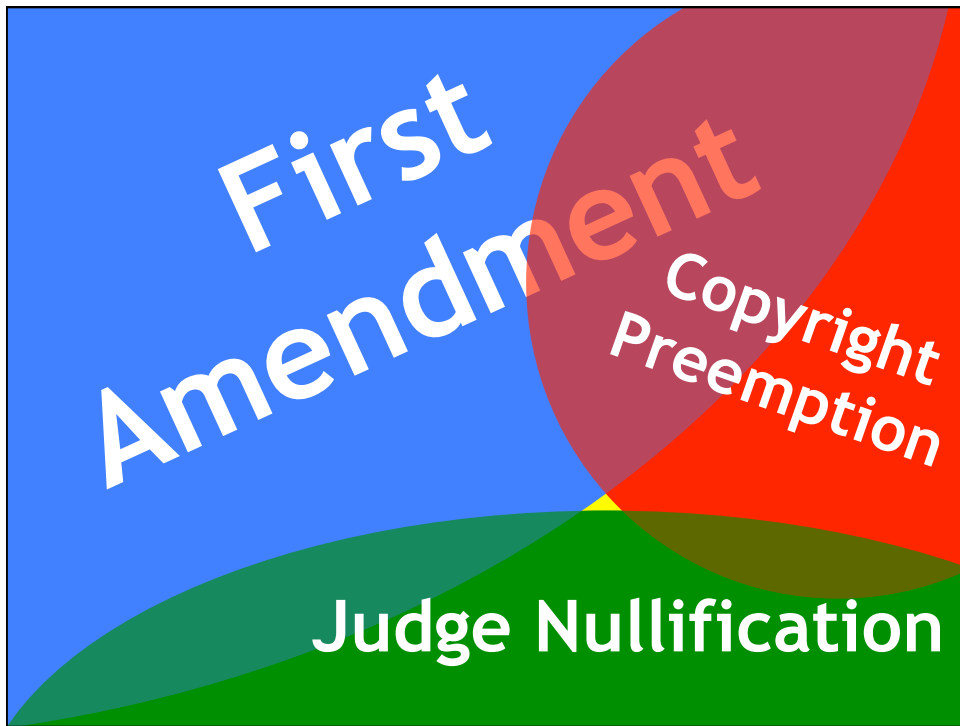
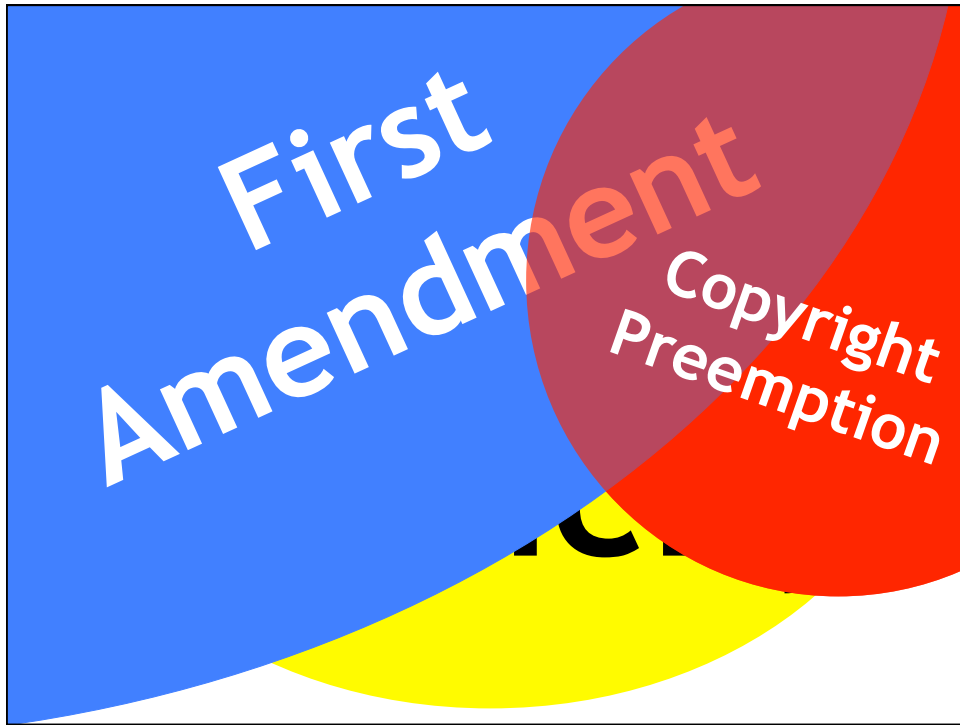
# Right of Publicity

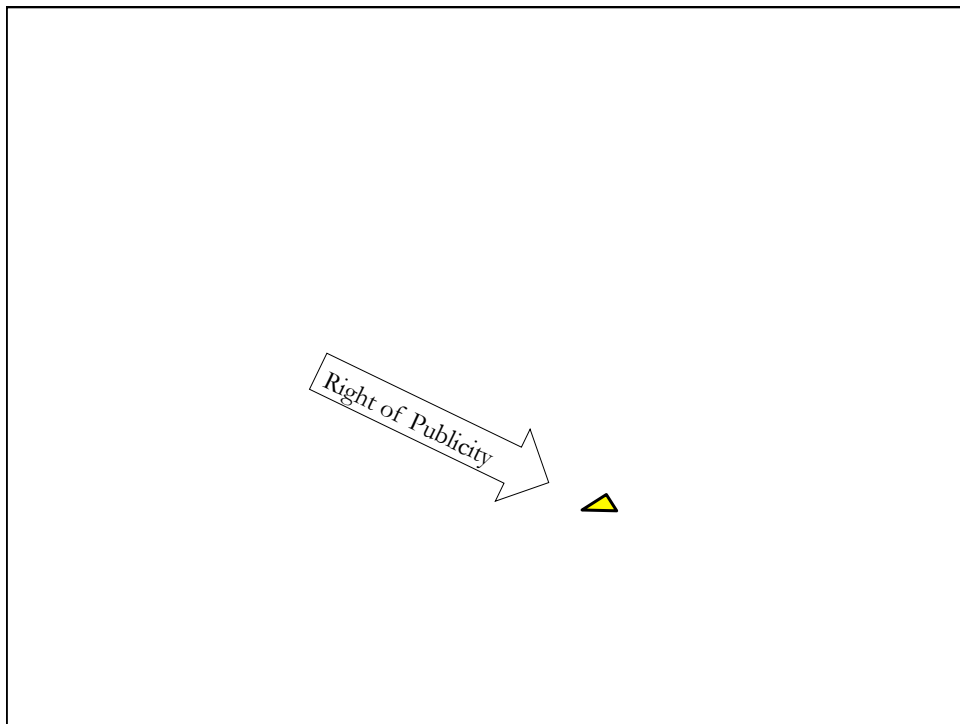
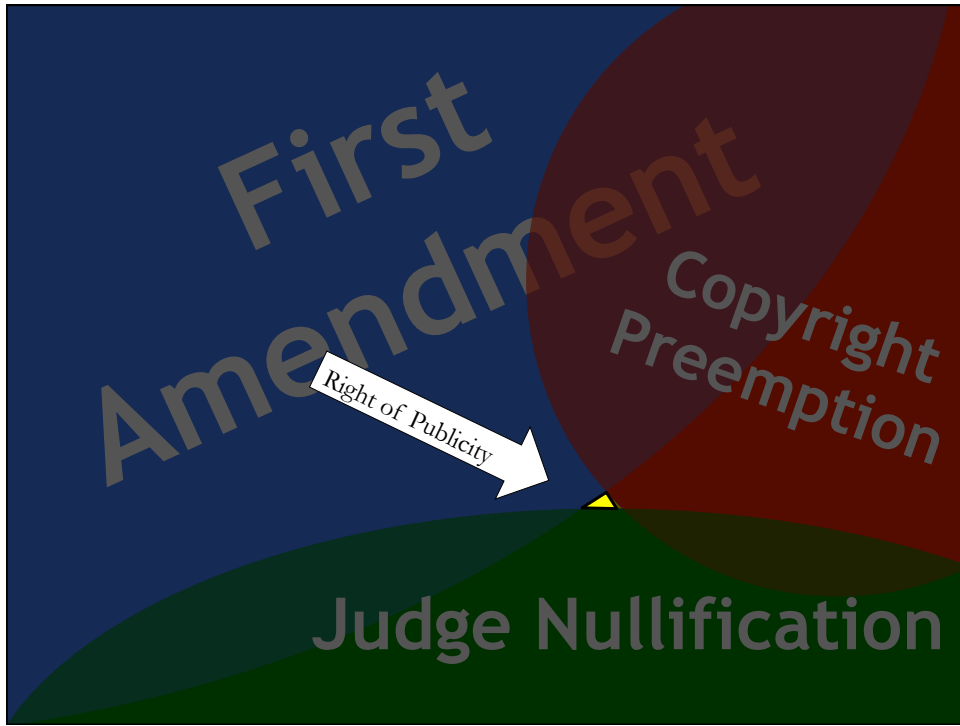
Reality check:  
The blackletter  
scope is much  
broader than the  
real scope.

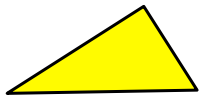






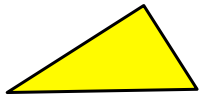




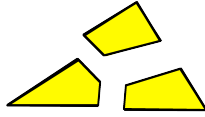


We know what this is not:

- First Amendment protected
  - (& “newsworthiness”)
- Copyright preempted
- Judge nullified



But what is it?






## Breaking it down:

Vast majority of of right-of-publicity cases are of two types:

- **Endorsement/advertising**
- **Merchandising**

Some other successful cases can be categorized as:

- **“Virtual servitude”**

Action	examples	
Endorsement/ advertising	<ul style="list-style-type: none"> <li>• Using image or voice in ad</li> <li>• Using name to vouch for quality of product</li> <li>• People buy the product mostly for its utilitarian function</li> </ul>	
Merchandising	<ul style="list-style-type: none"> <li>• Putting name or image on product</li> <li>• People buy the product more for its image-carrying role than its utilitarian function</li> </ul>	
“Virtual servitude”	<ul style="list-style-type: none"> <li>• Virtual representation in sports or music videogames</li> <li>• Virtual actor in film</li> <li>• Celebrity impersonator (e.g., “Elvis” concert)</li> </ul>	



## The Indignancy Matrix

	To how many?	True or false?	Highly offensive?	Intent requirement?	After death?
Intrusion					
Disclosure					
False light					
Defamation					
Outrage / IIED					
Publicity right					

## 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 &amp; outrageous)</small>	intent <small>(or recklessness)</small>	n/a
Publicity right	commercial	either	no	none	often

Note: Outrage/IIED is not a topic of Torts II, but is included here for comparison purposes.)