



Right of Publicity

Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable



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"

“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)**



“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.”

Right of Publicity

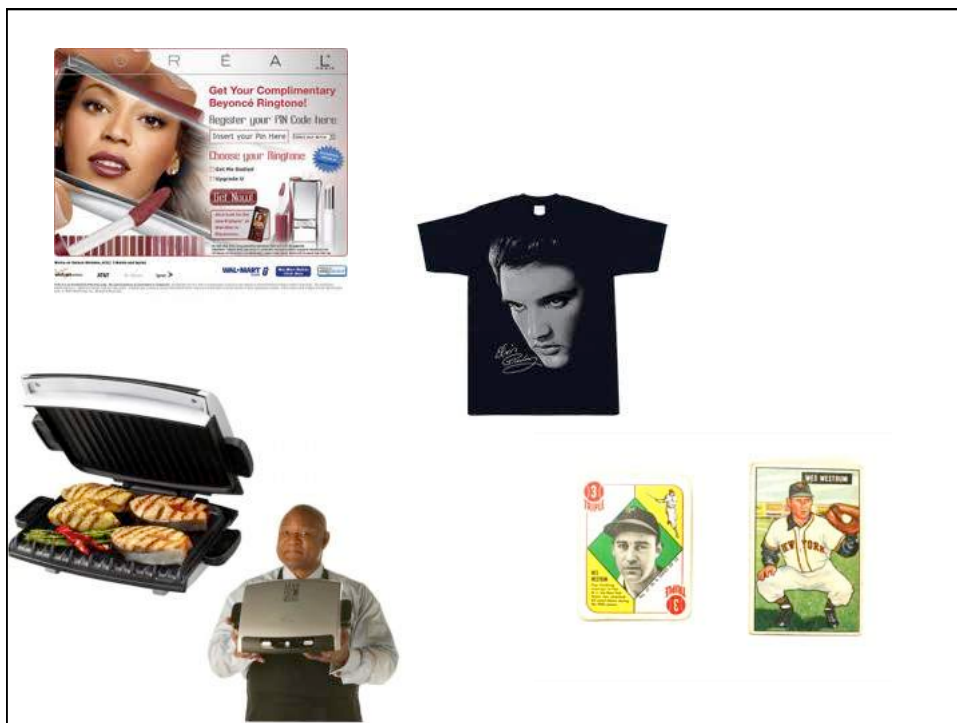
Kirby v. Sega of Am., Inc.,
144 Cal.App. 4th 47 (2006)

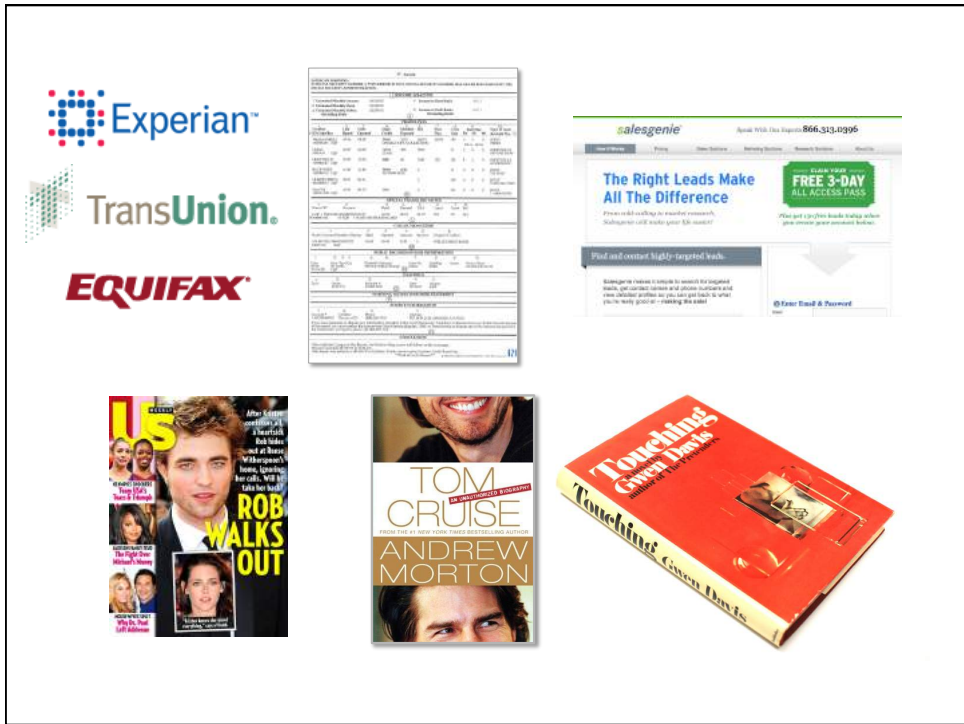
- “The elements of a common law action are the unauthorized use of the plaintiffs identity to the defendant's advantage by appropriating the plaintiffs name, voice, likeness, etc., commercially or otherwise, and resulting injury.”

Right of Publicity

Kirby v. Sega of Am., Inc.,
144 Cal.App. 4th 47 (2006)

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





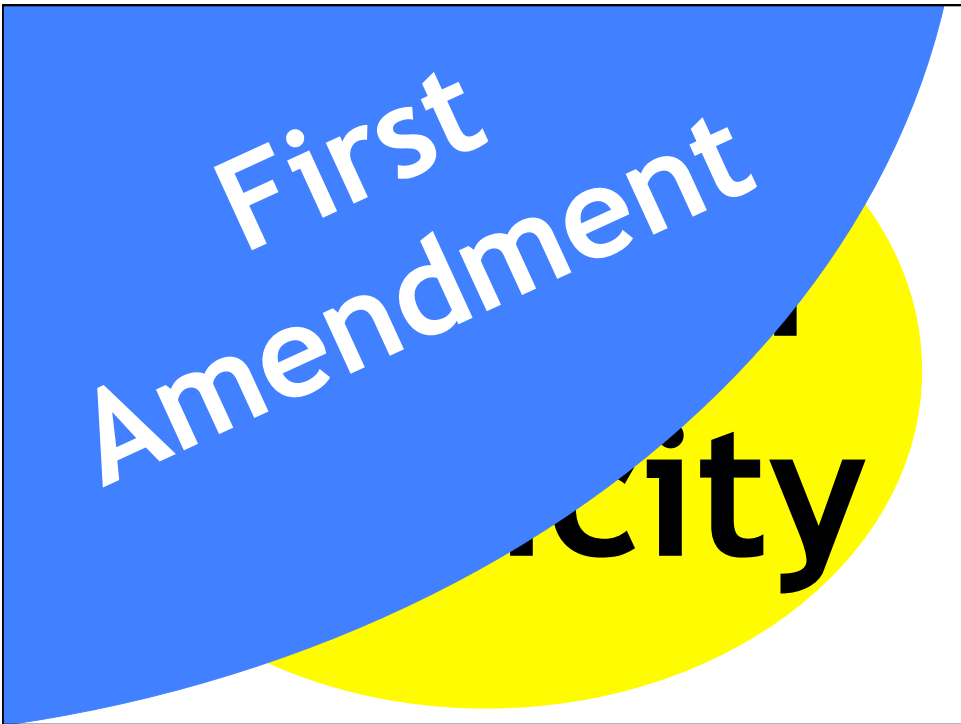


Observation:

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

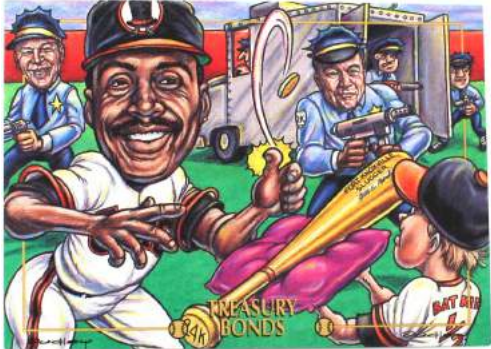


**Right of
Publicity**



**First
Amendment**

**Right of
Publicity**




TREASURY BONDS
 Redemption qualities and why Treasury Bonds is the league's most valuable player:

1. Having Bonds on your team is like having money in the bank.
2. He plays so hard he gives 110 percent, compounded daily.
3. He turned down the chance to play other sports because he has a high interest rate in baseball.
4. He deposits the ball in the bleachers.
5. He is into male bonding.
6. He is a money player.
7. He has a 24-karat Gold Glove.
8. He always cashes in on the payroll pitch.

NOTICE: Bonds is not tax-free in all states but is double exempt.

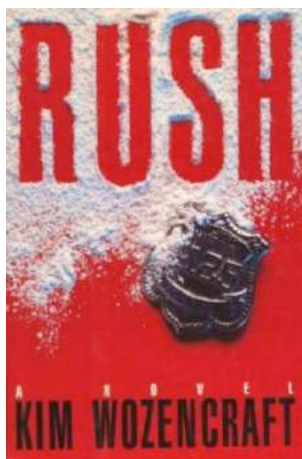
Cartoons
Cartoons baseball is a parody and is NOT licensed by Major League Baseball Properties or Major League Baseball Players Association.
 © Cartoons 1993

GENTS



8

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.

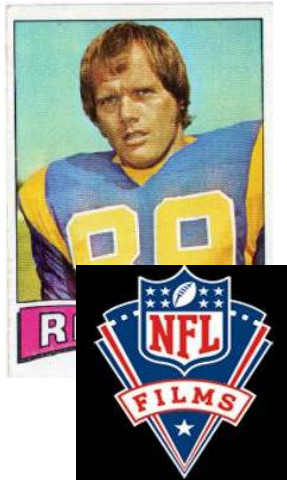


Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)

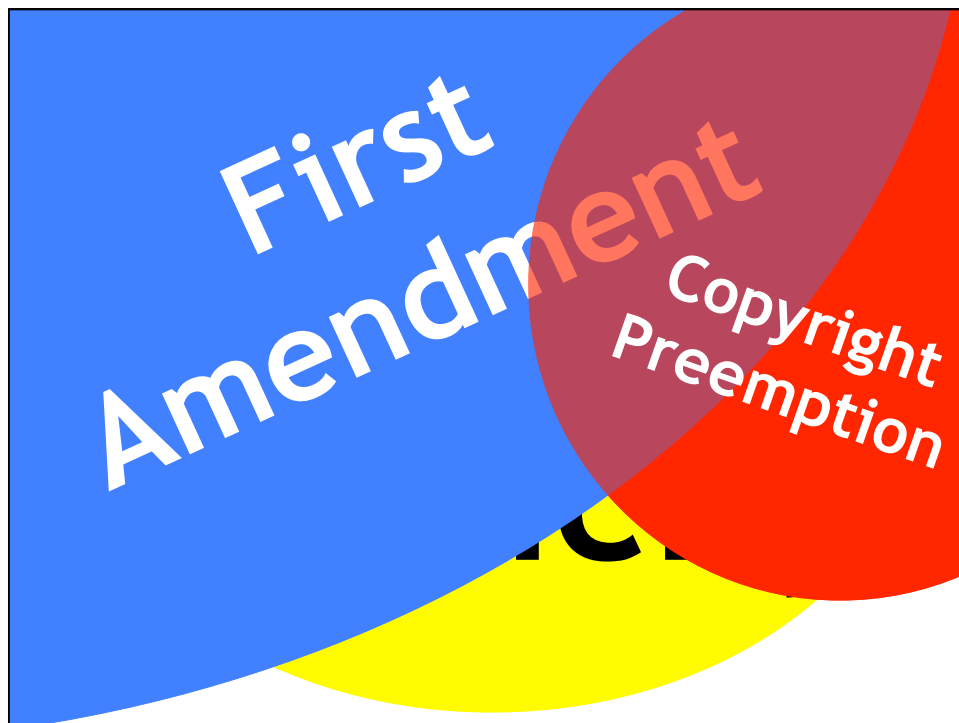


A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

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



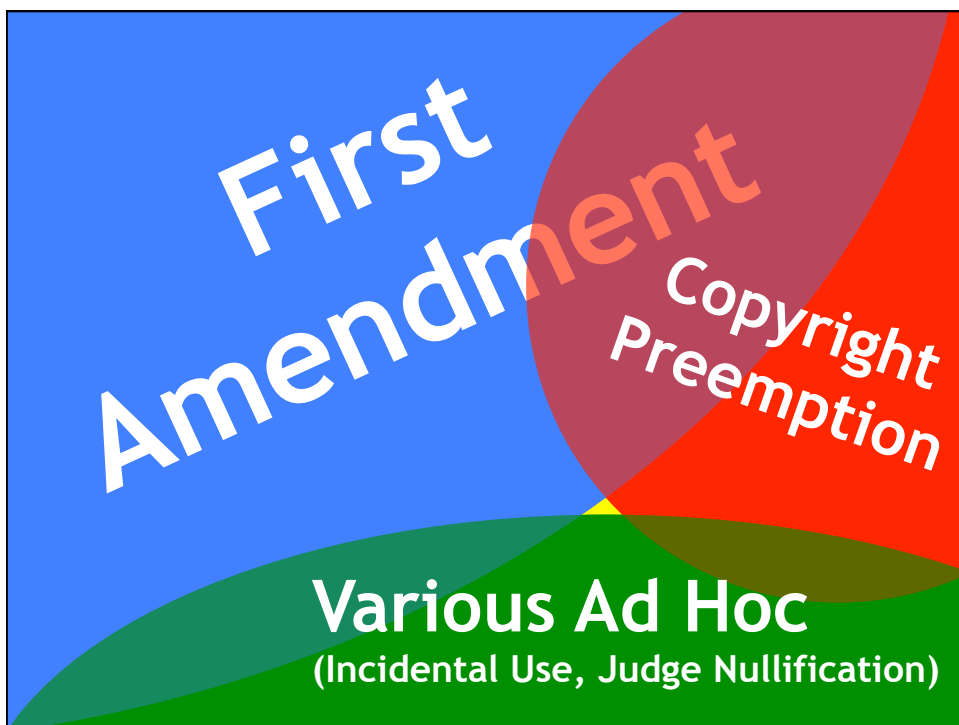
Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred on by the “newsworthiness exception” - notwithstanding that the passage of three or four decades.

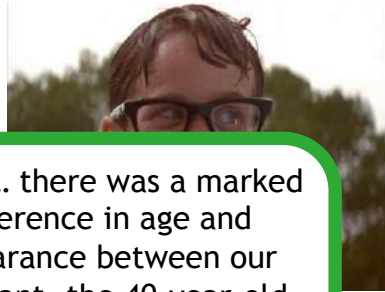


Laws v. Sony Music, 448 F.3d 1134 (9th Cir. 2006)

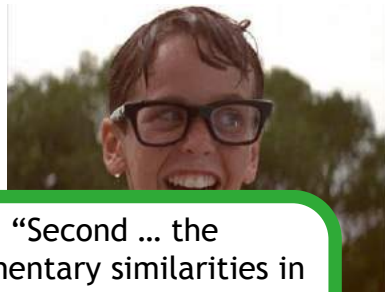


Right-of-publicity claim for unauthorized use of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have" held preempted because of copyright preemption on the basis that Laws' voice was lifted from a copyrighted recording.



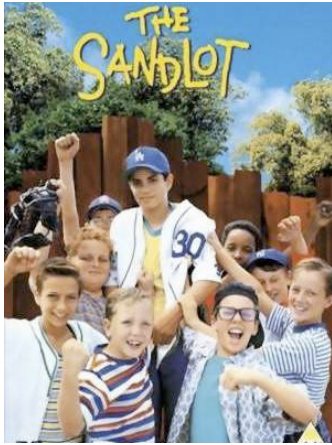


“First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”

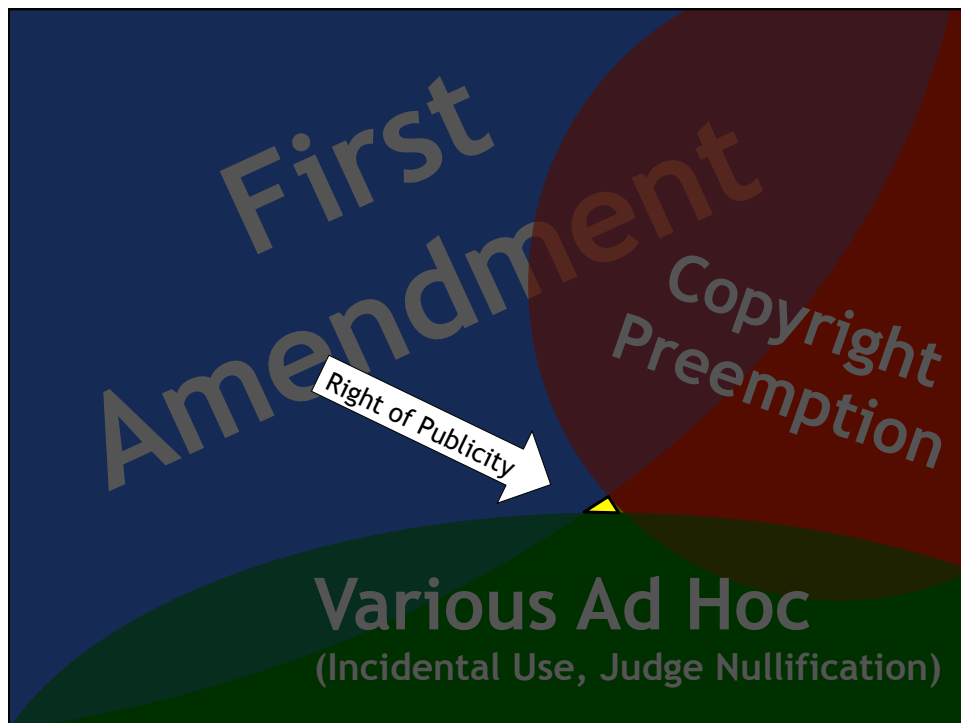


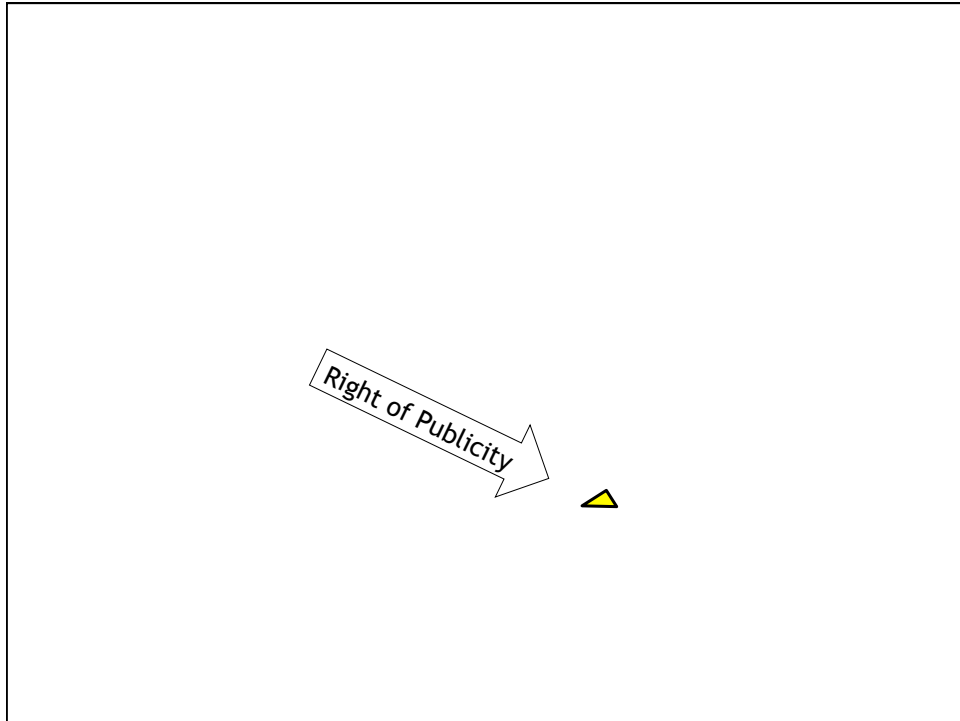
“Second ... the rudimentary similarities in locale and boyhood activities do not make *The Sandlot* a film about appellant’s life.”

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.

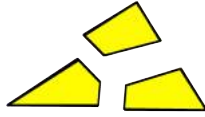






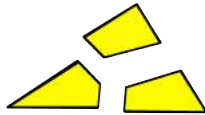
We know what this is not:

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



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 exploits 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.

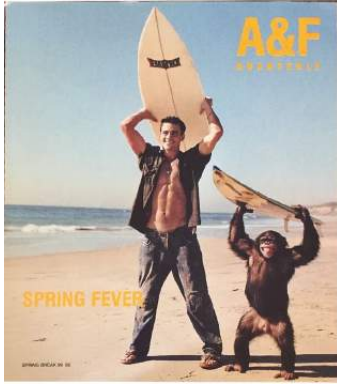


Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)



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.

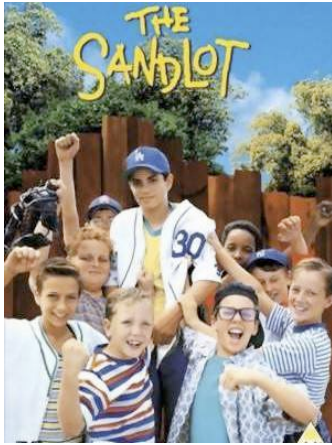
Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001)



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].”

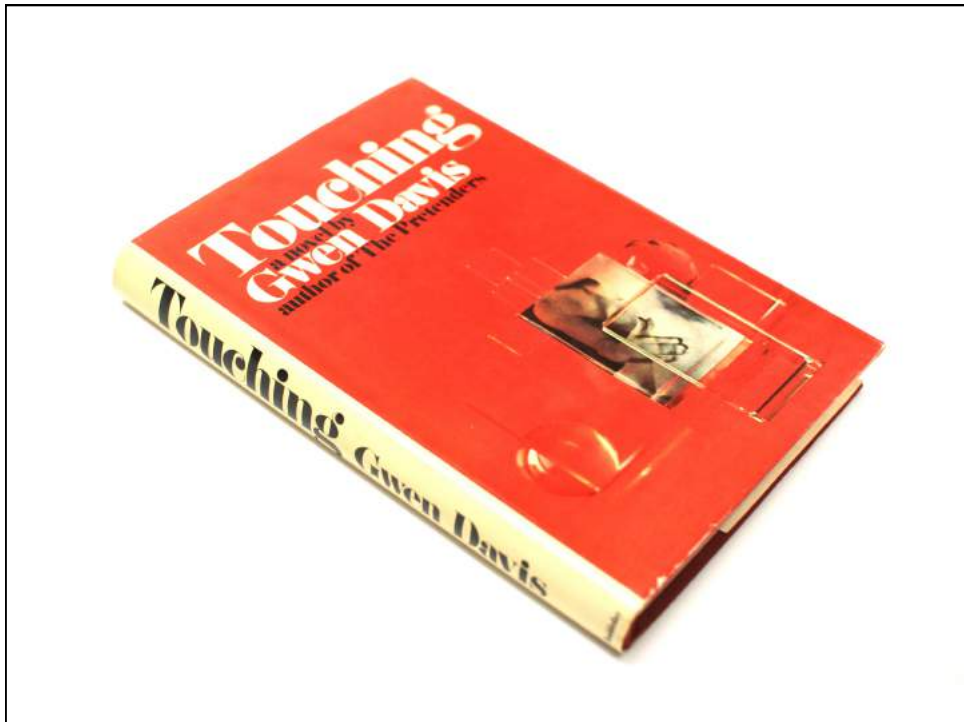


Polydoros v. 20th Century Fox, 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997)



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.

Right of Publicity
Realotheticals



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)

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

