



# 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
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**NOTE:** This blackletter formulation is overbroad.

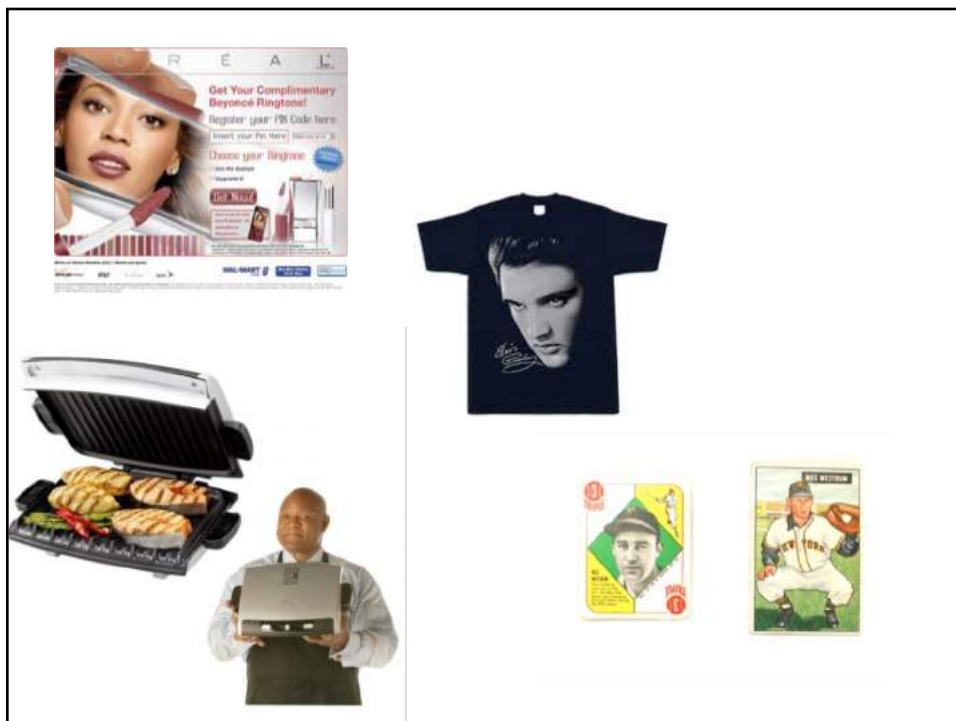
The scope of the doctrine is greatly limited by:

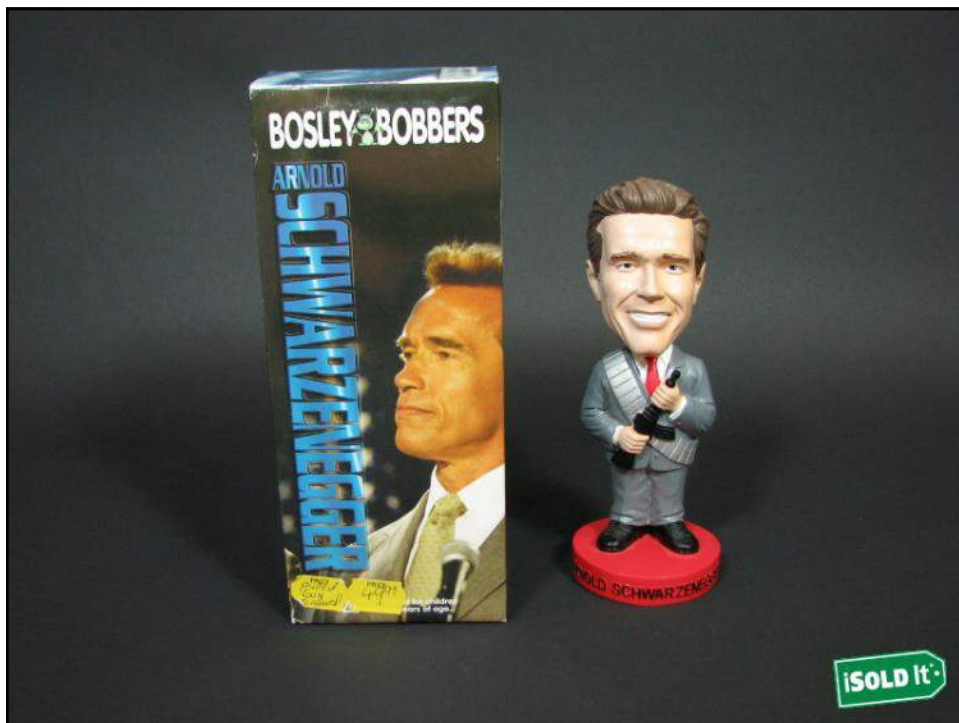
- First Amendment freedom of expression
- Copyright preemption
- Ad-hoc "spin"

“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.”

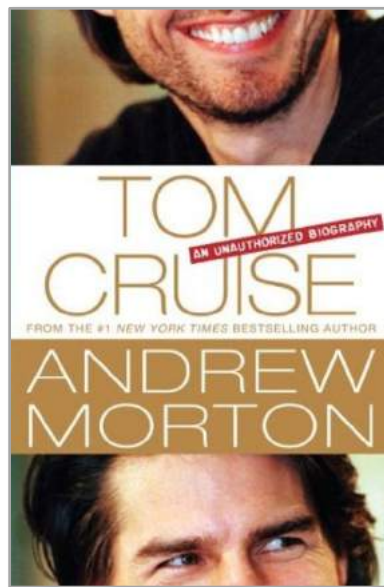
**Kirby v. Sega of Am., Inc.,  
144 Cal.App. 4th 47 (2006)**

Right of  
Publicity









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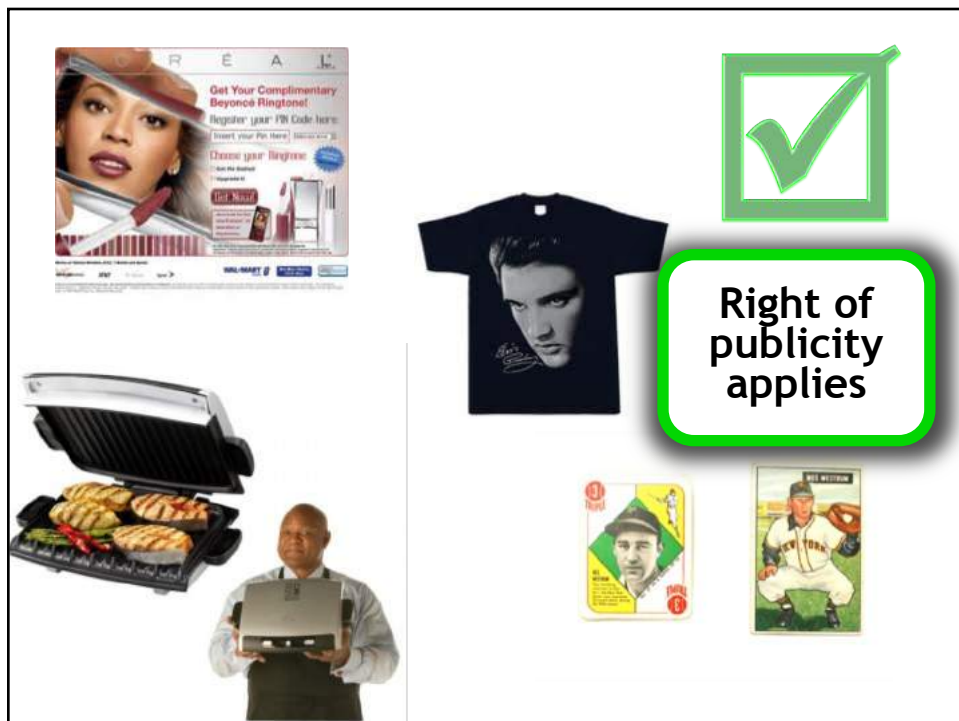
- “The elements of a common law action are the unauthorized use of the plaintiff's identity to the defendant's advantage by appropriating the plaintiff's name, voice, likeness, etc., commercially or otherwise, and resulting injury.”
- # Right of Publicity

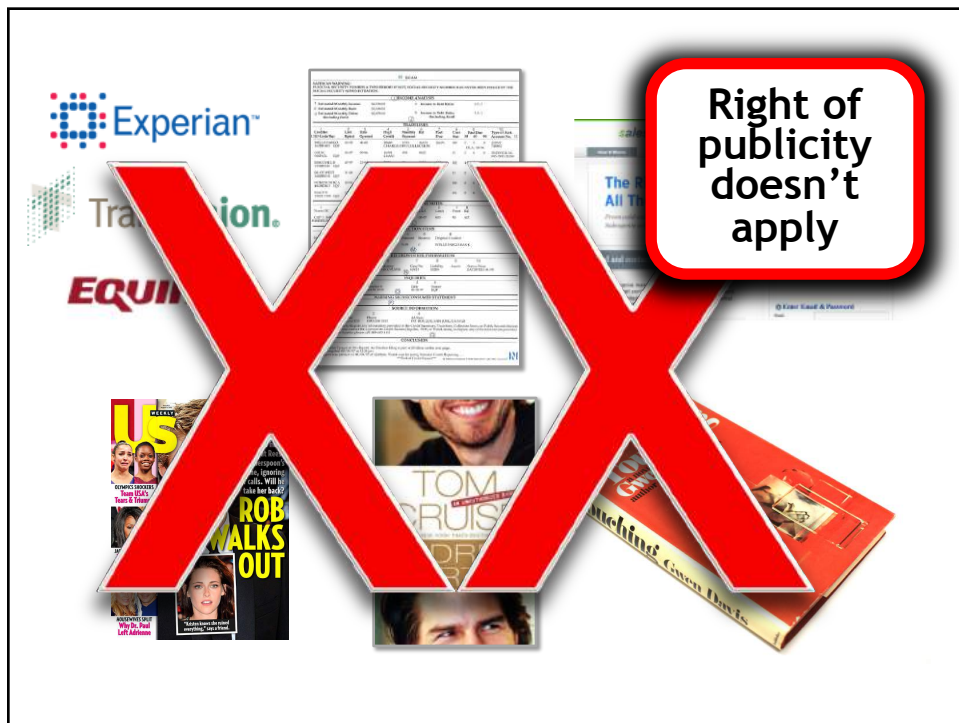
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# Right of Publicity



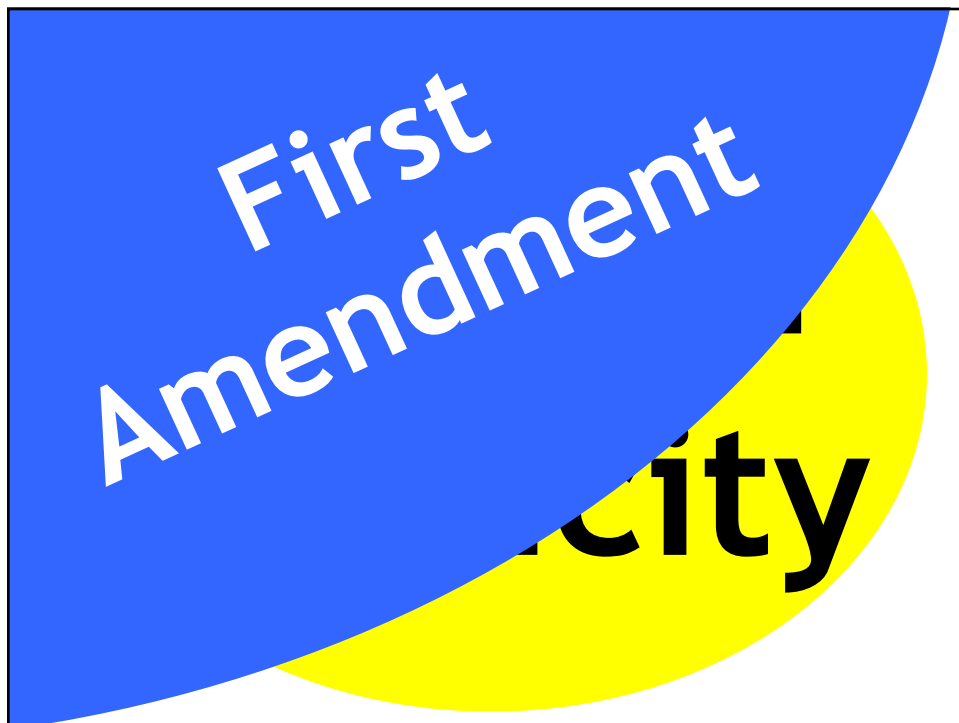
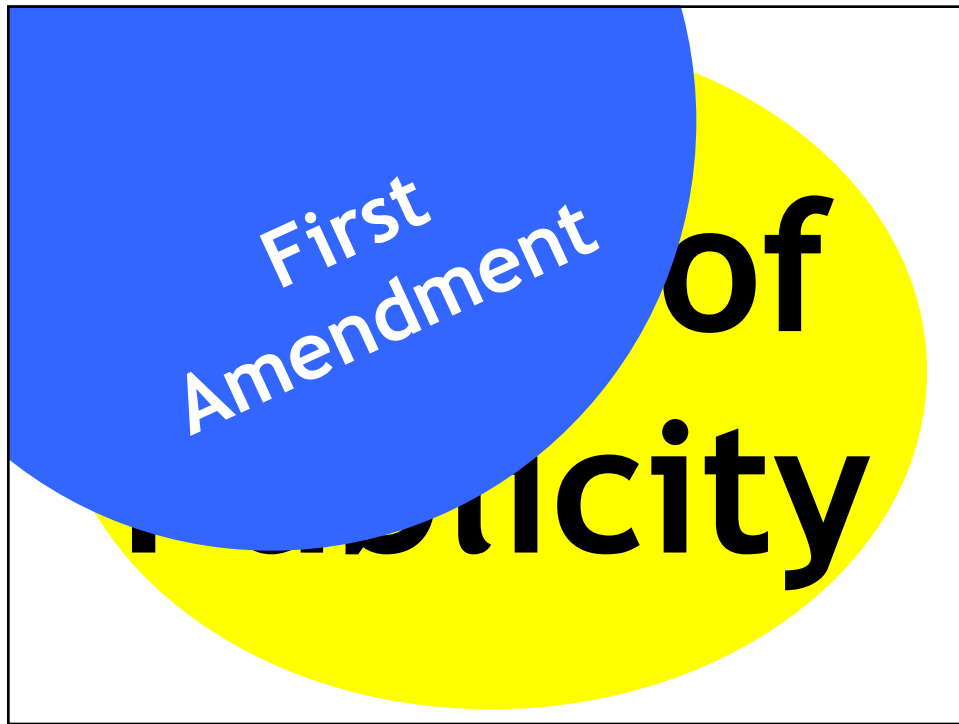
Reality check:  
The blackletter  
scope is much  
broader than the  
real scope.

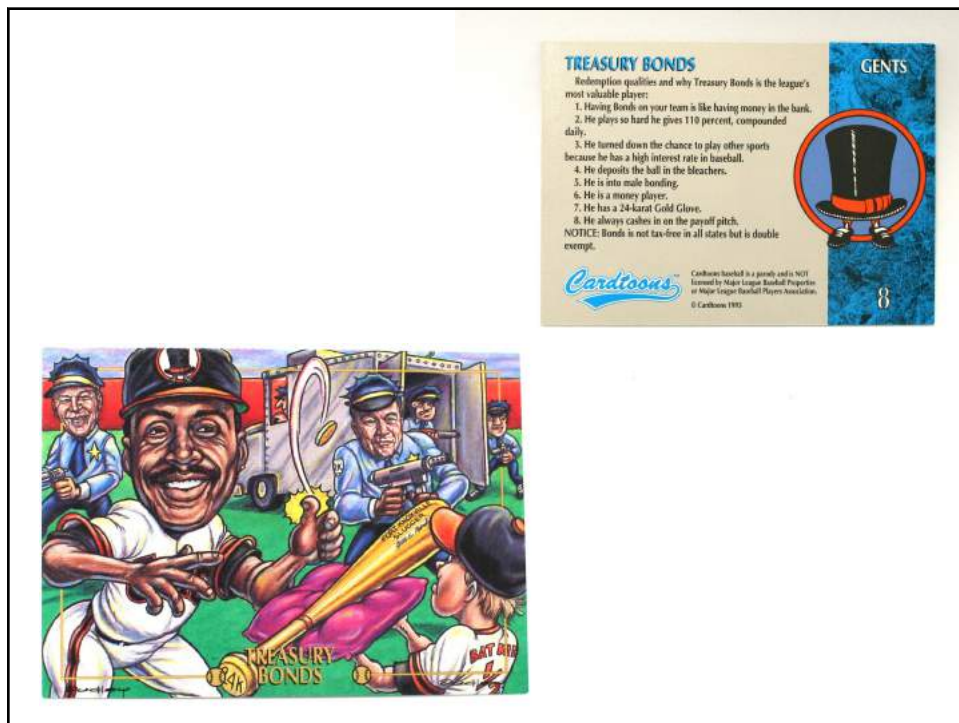




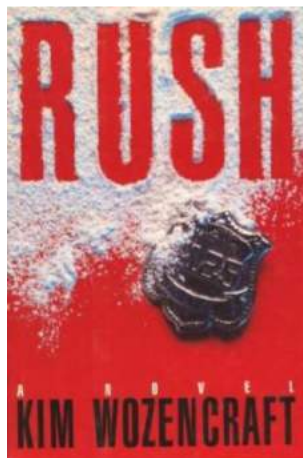
## Observation:

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

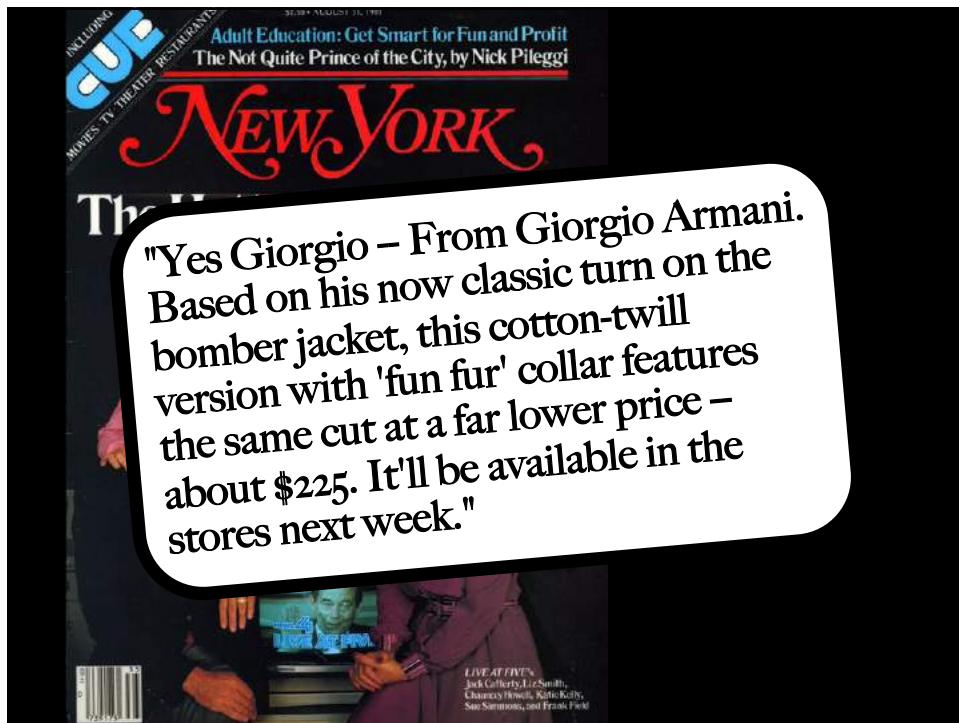




## Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994)



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

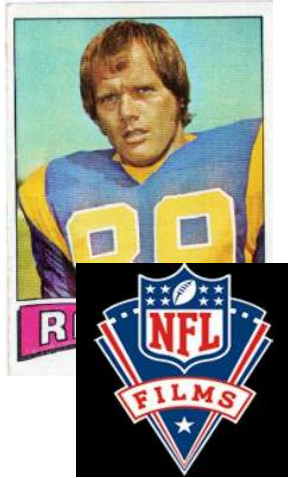


## Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)

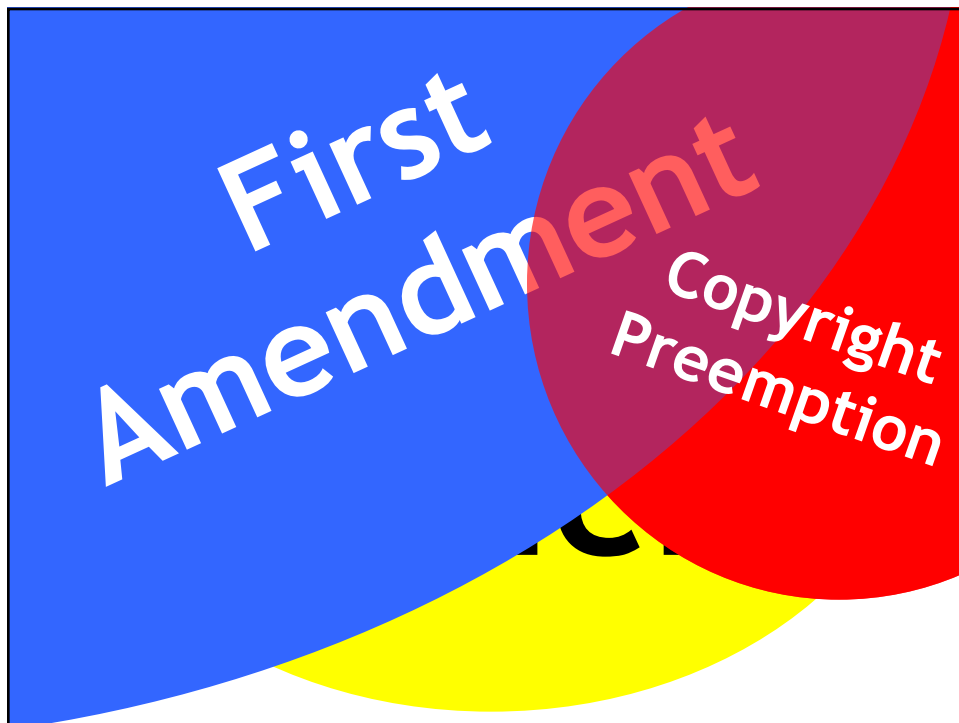


A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

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



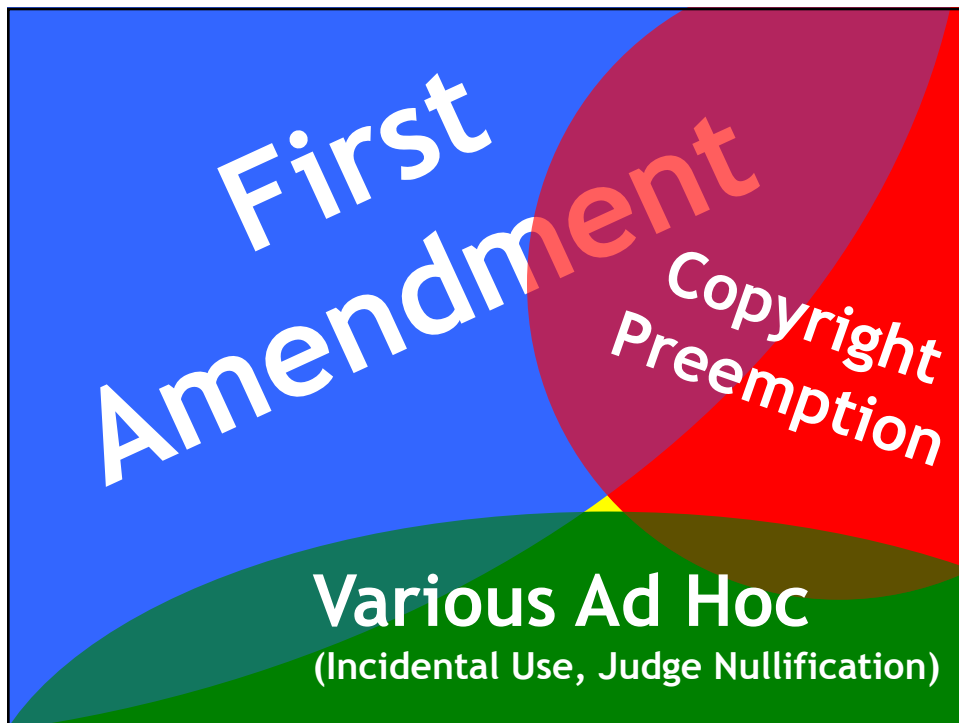
Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred on by the “newsworthiness exception” - notwithstanding that the passage of three or four decades.



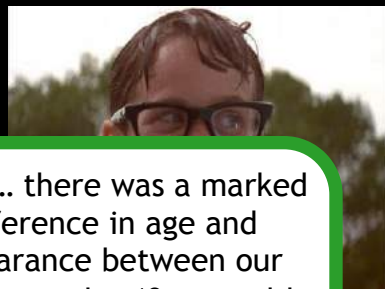
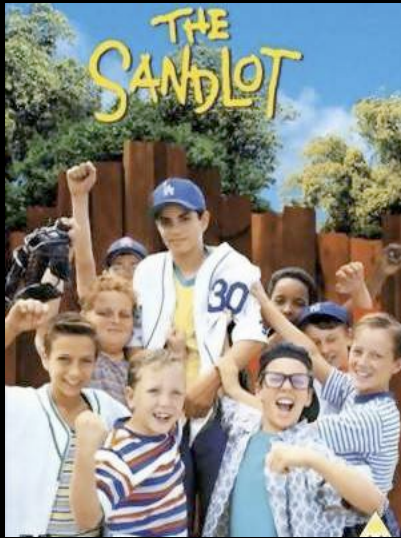
## Laws v. Sony Music, 448 F.3d 1134 (9th Cir. 2006)



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.

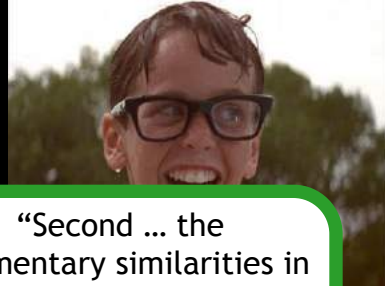






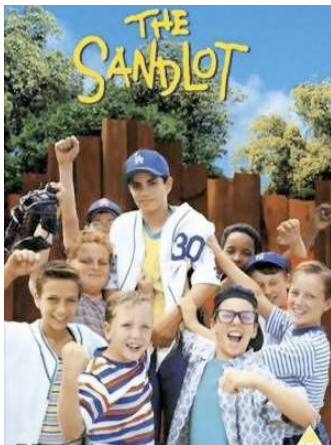
“First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”



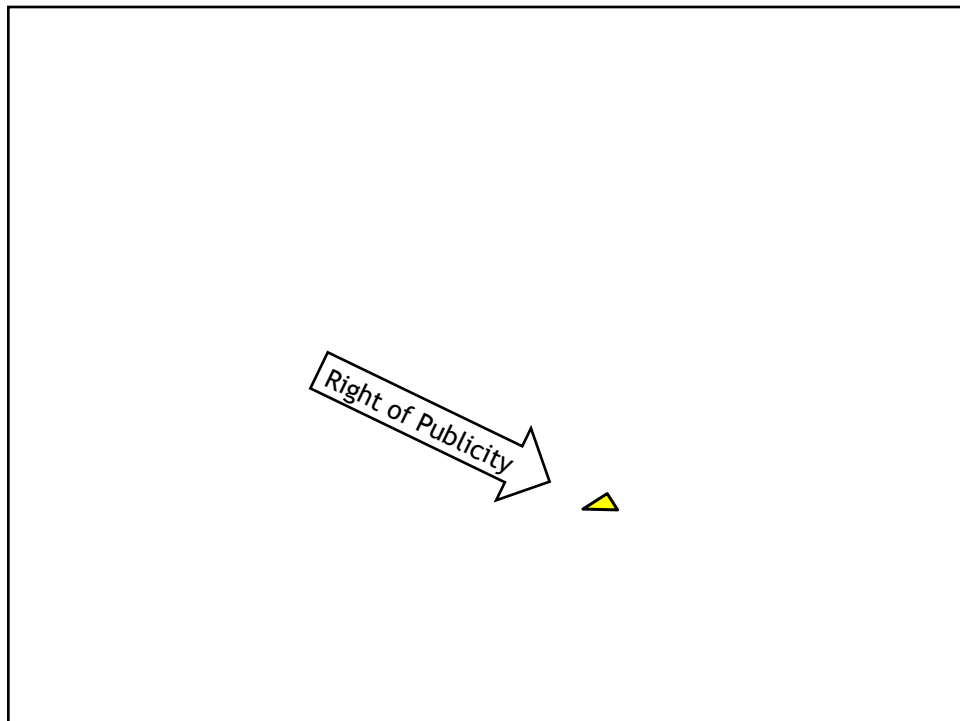
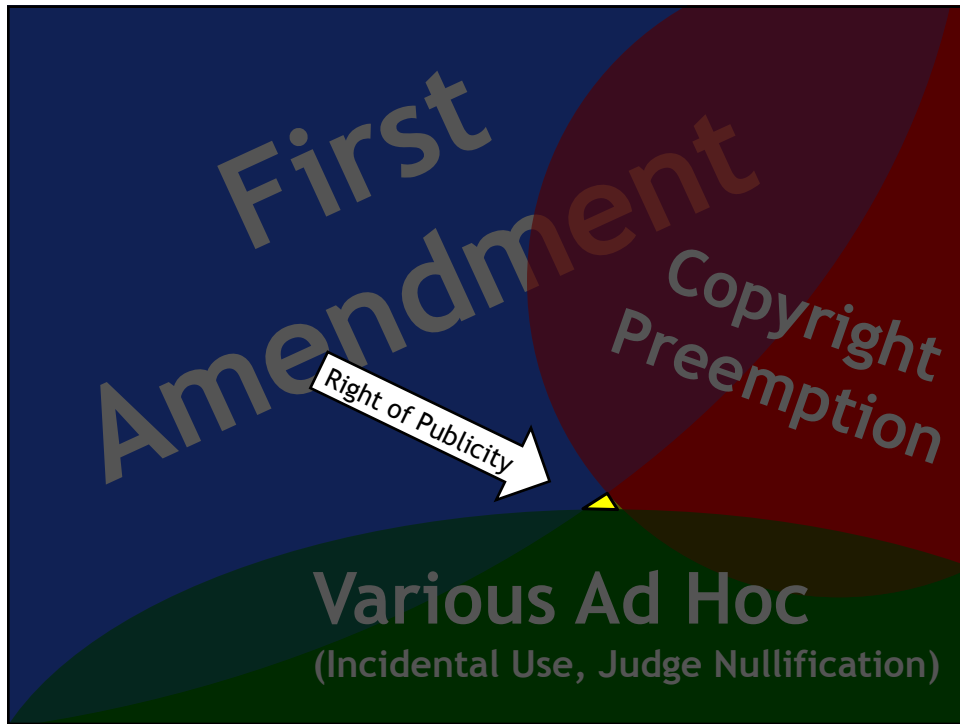


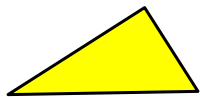
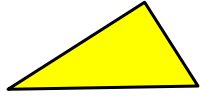
“Second ... the rudimentary similarities in locale and boyhood activities do not make *The Sandlot* a film about appellant’s life.”

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



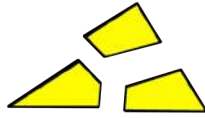
Where writer used a whole constellation of the plaintiff’s indicia of identity, including name and likeness, and where people recognized the plaintiff as being portrayed in the film, the court rejected the right-of-publicity claim on summary judgment because of “a marked difference in age and other awkward characterizations of the facts and assertions irrelevant to the law.





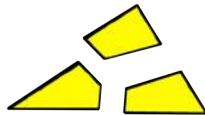
We know what this is not:

- 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

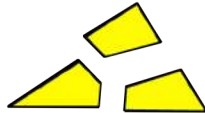
Courts seem to recognize that persons have the exclusive privilege to exploit their name and likeness in merchandising.

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.



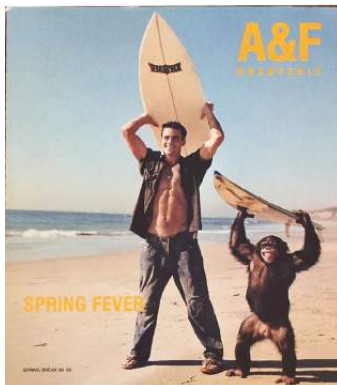
## How this might make sense of the cases ...

## 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)

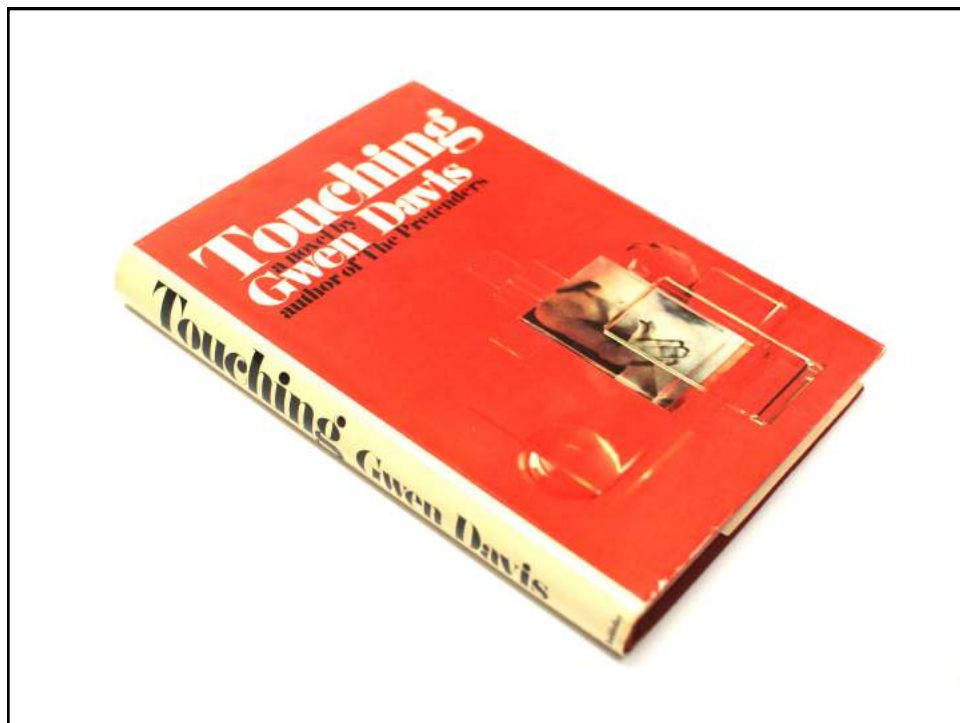


Rejected First Amendment defense and upheld right of publicity violation for a 700-word story, “Your Beach Should Be This Cool,” describing the history of surfing at a California beach. The court noted “The following page exhibits the photograph of Appellants. The two pages immediately thereafter feature [clothing for sale].”



Right of Publicity  
Realothenicals





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

