



Right of Publicity

Torts
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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.

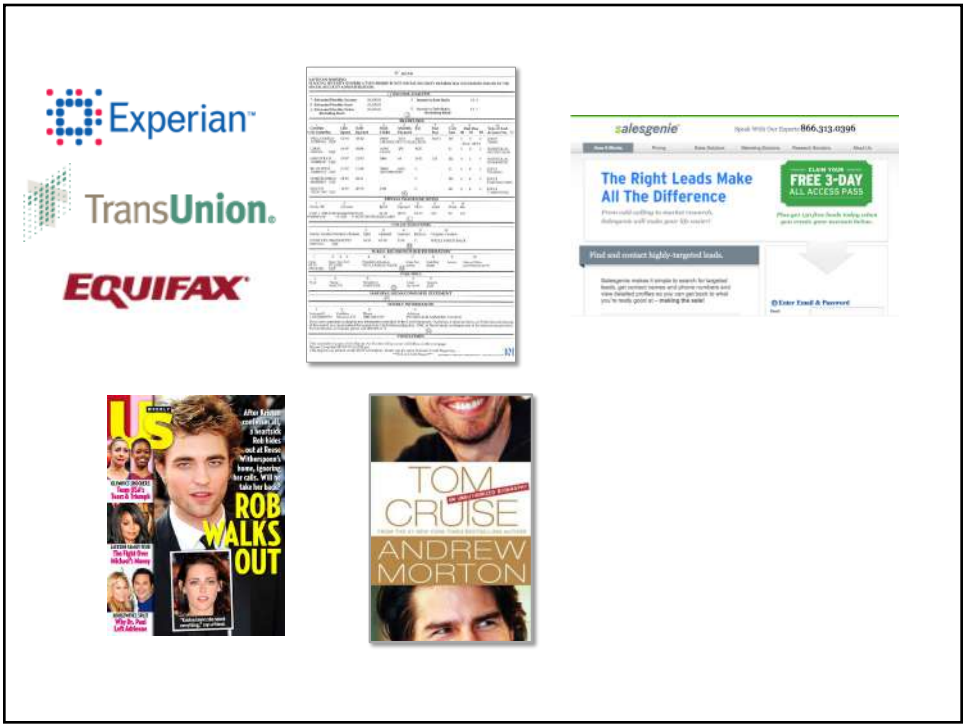
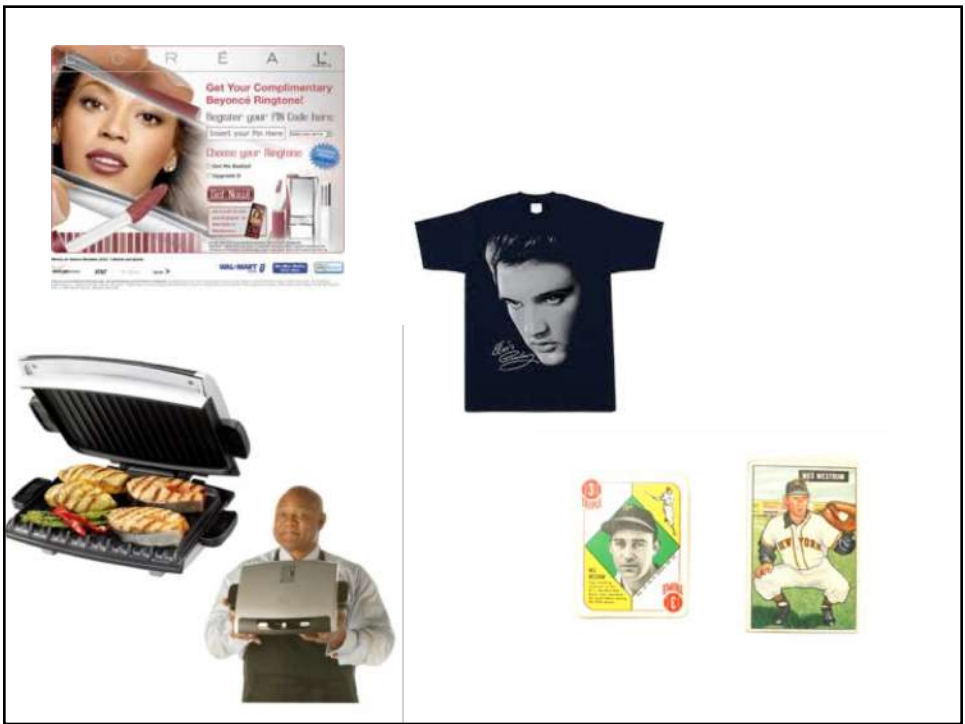
The scope of the doctrine is greatly limited by:

- 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)**





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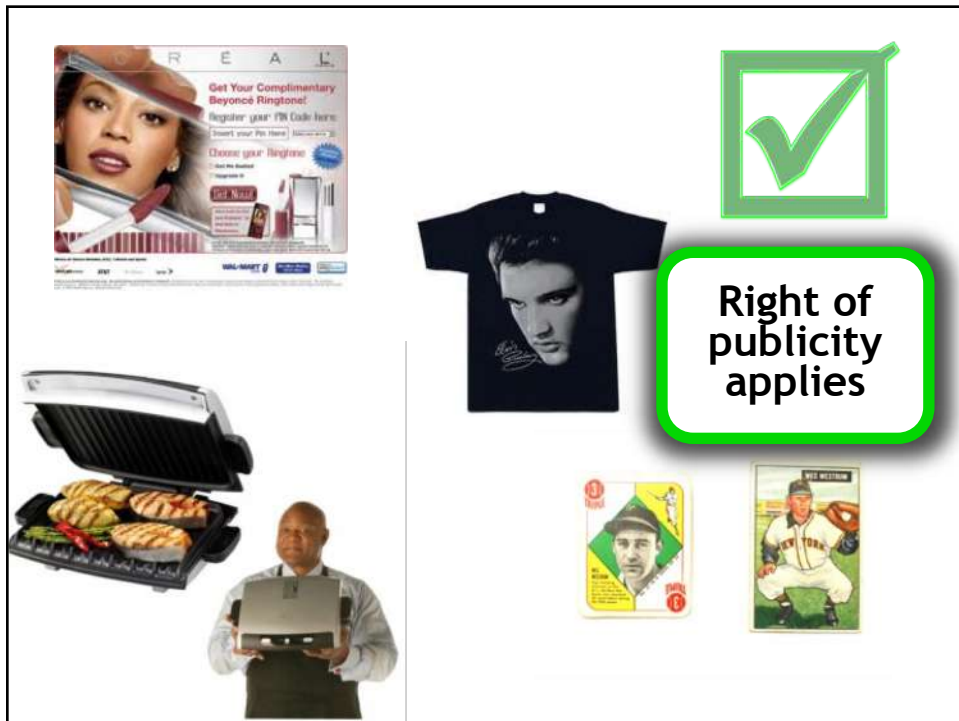
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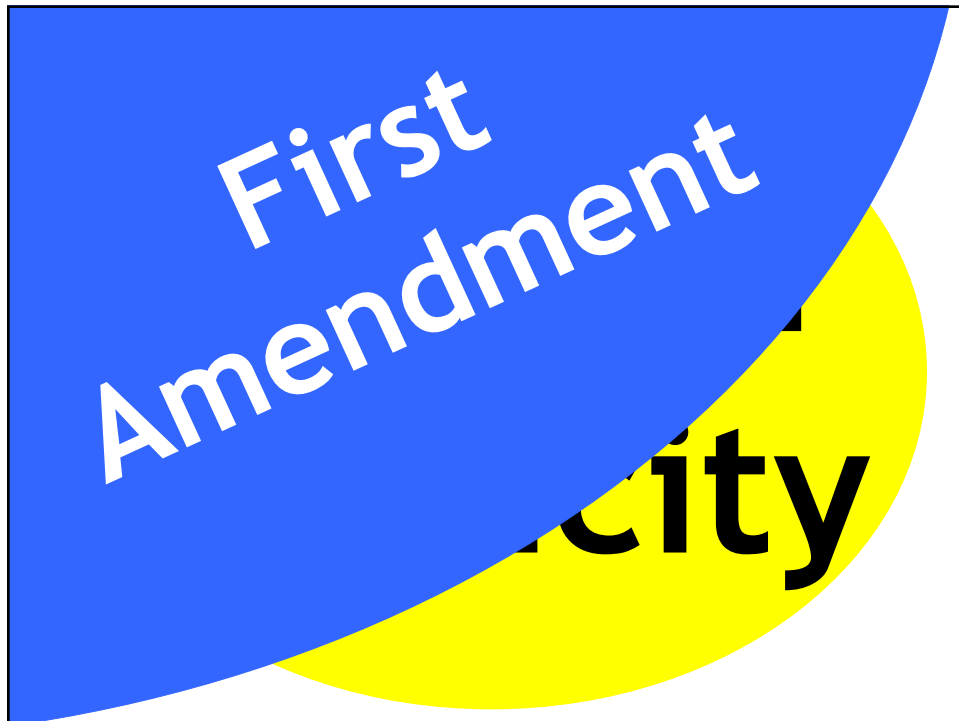
Reality check:
The blackletter
scope is much
broader than the
real scope.



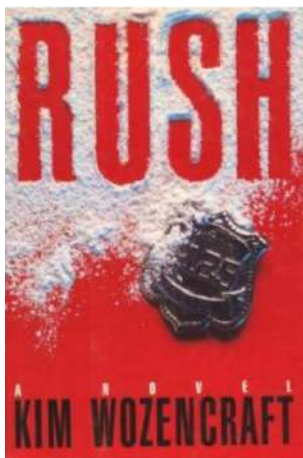
Observation:

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

**Right of
Publicity**



**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.

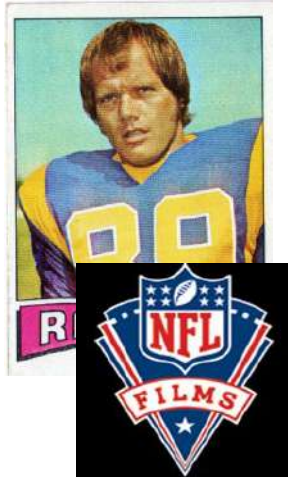


**Stephano v. News Group Publications,
474 N.E.2d 580 (N.Y. 1984)**

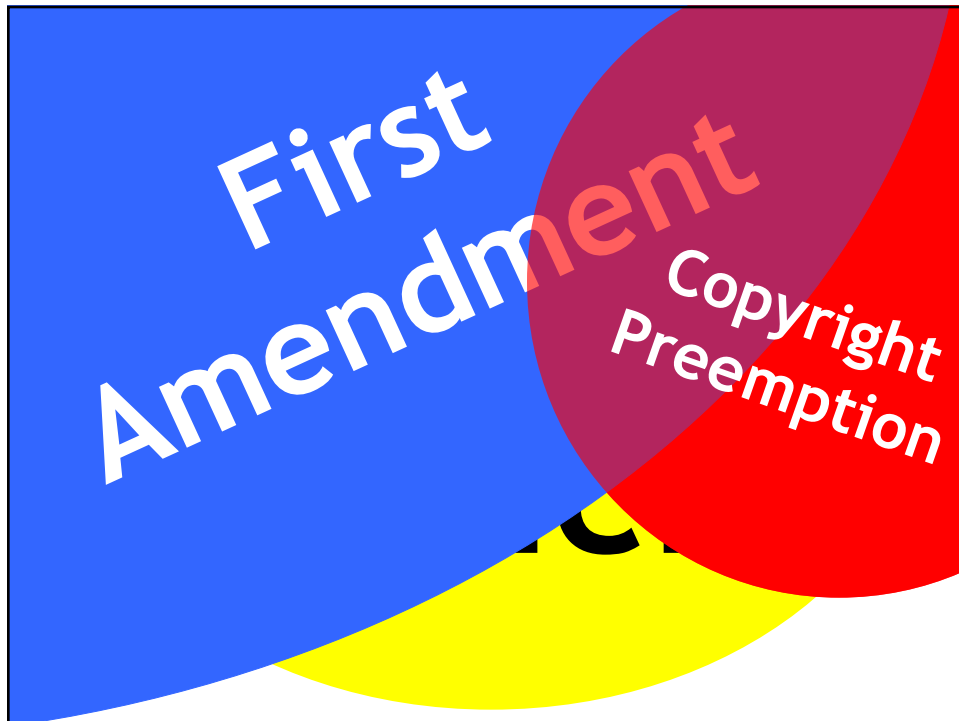


A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

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



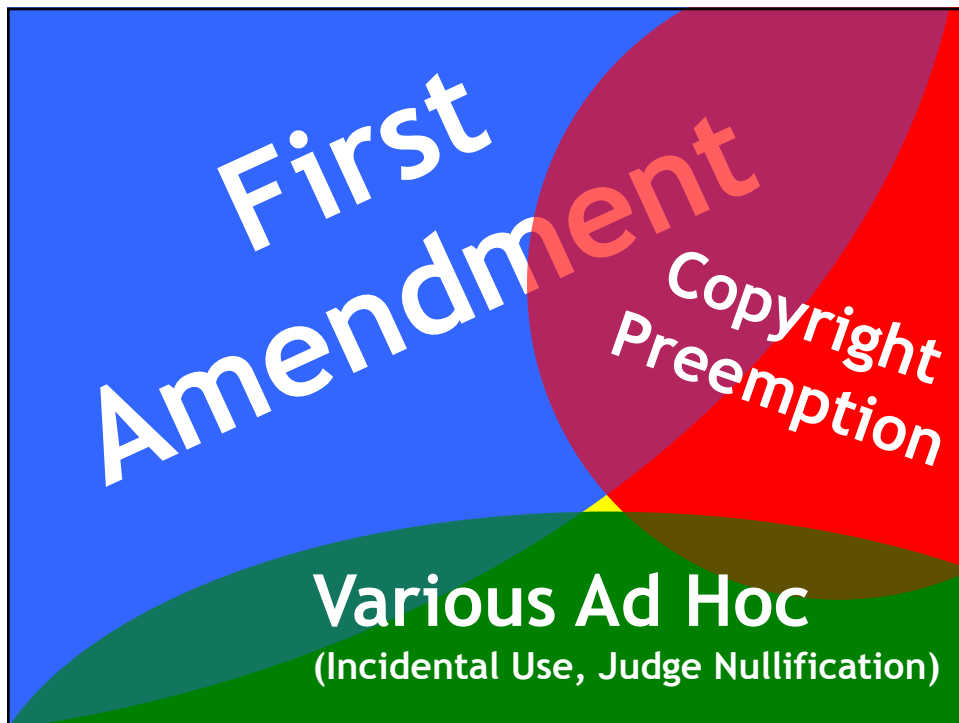
Right of publicity claim for use of old film footage of athlete in new documentary-style television production was barred on by the “newsworthiness exception” - notwithstanding that the passage of three or four decades.

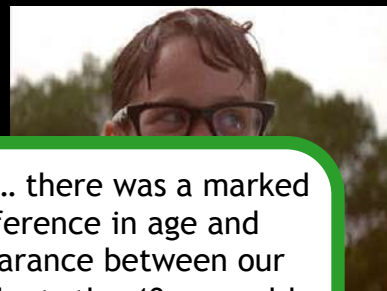
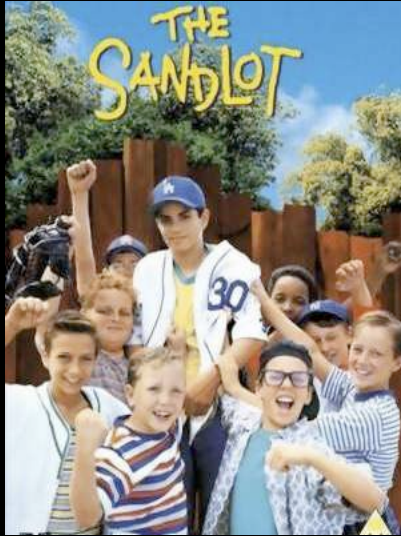


Laws v. Sony Music, 448 F.3d 1134 (9th Cir. 2006)

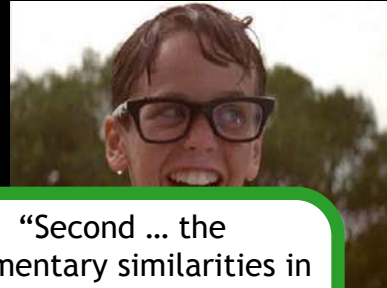


Right-of-publicity claim for unauthorized use of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have" held preempted because of copyright preemption on the basis that Laws' voice was lifted from a copyrighted recording.



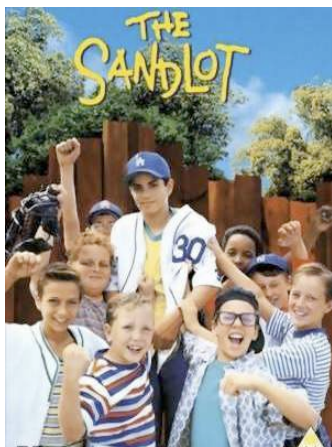


“First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”

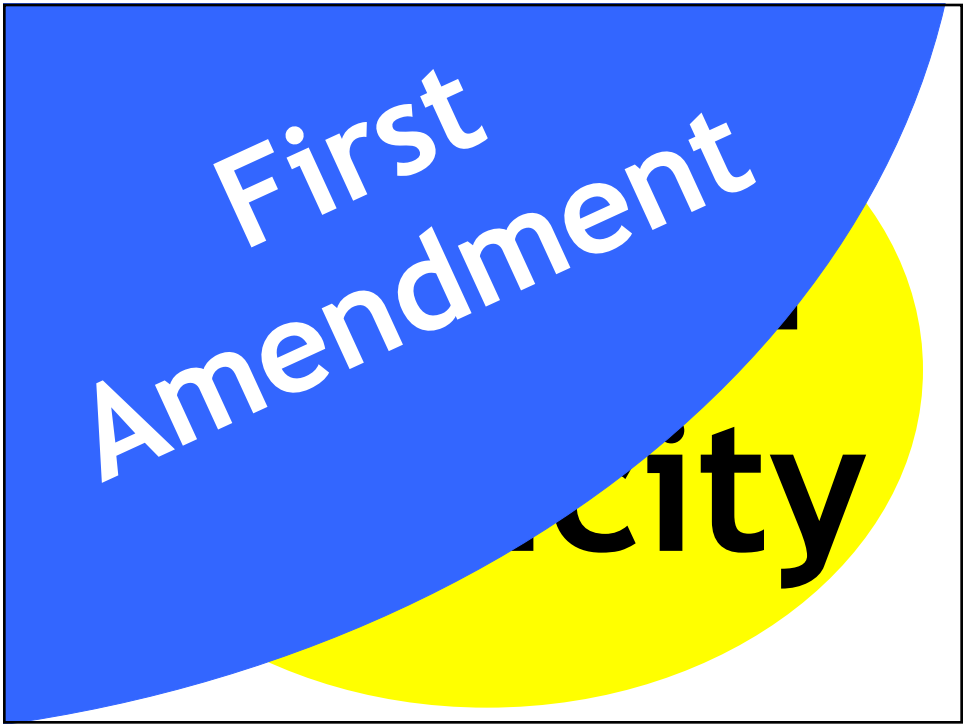


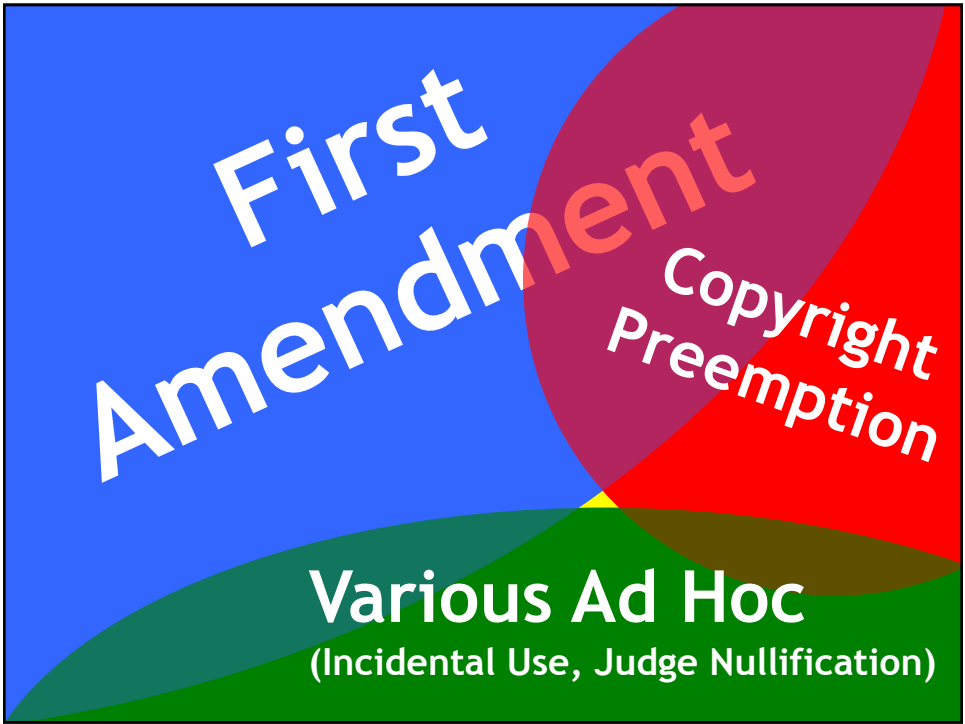
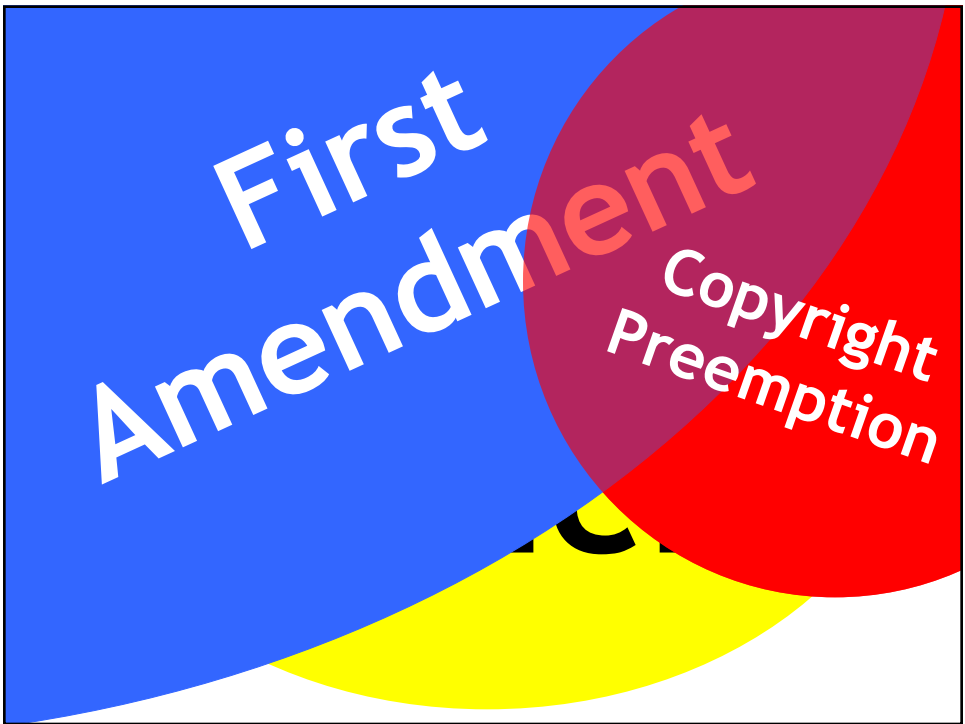
“Second ... the rudimentary similarities in locale and boyhood activities do not make *The Sandlot* a film about appellant’s life.”

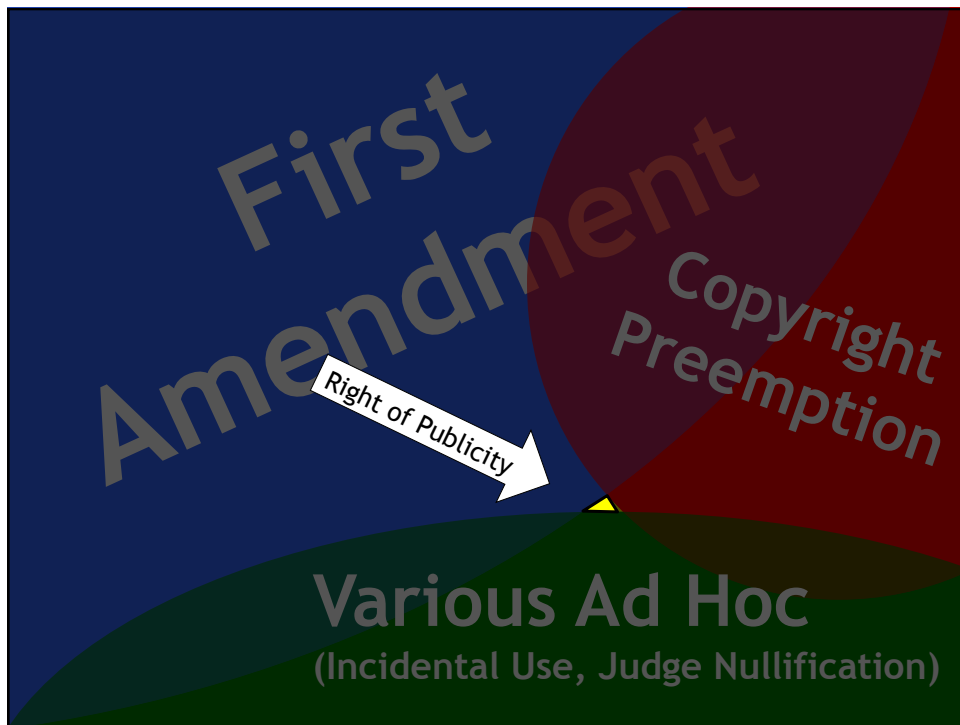
Polydoros v. 20th Century Fox, 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997)

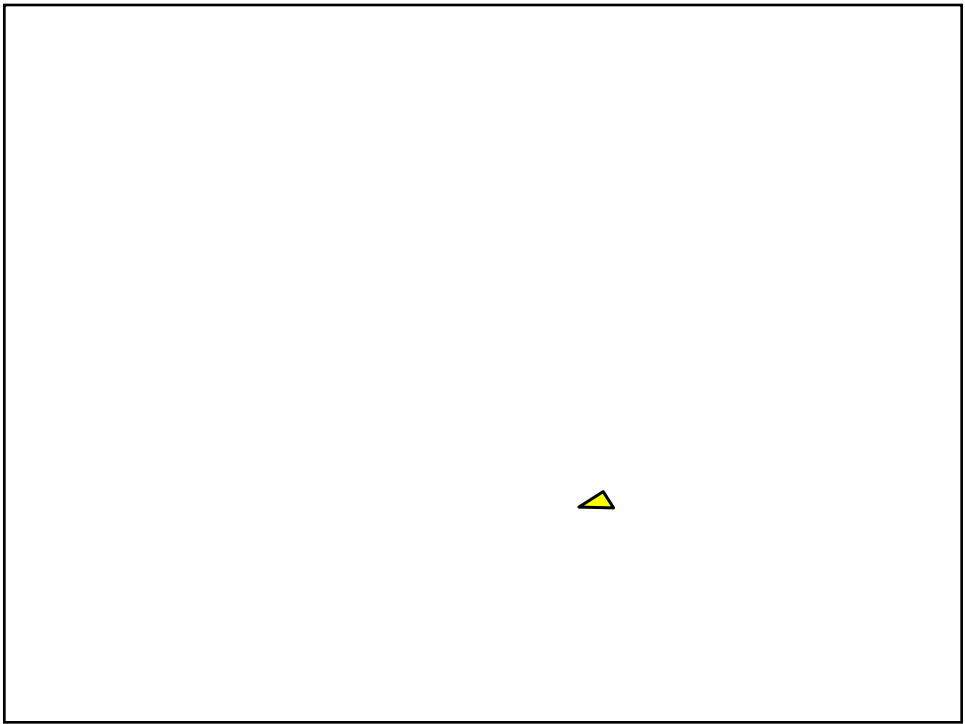
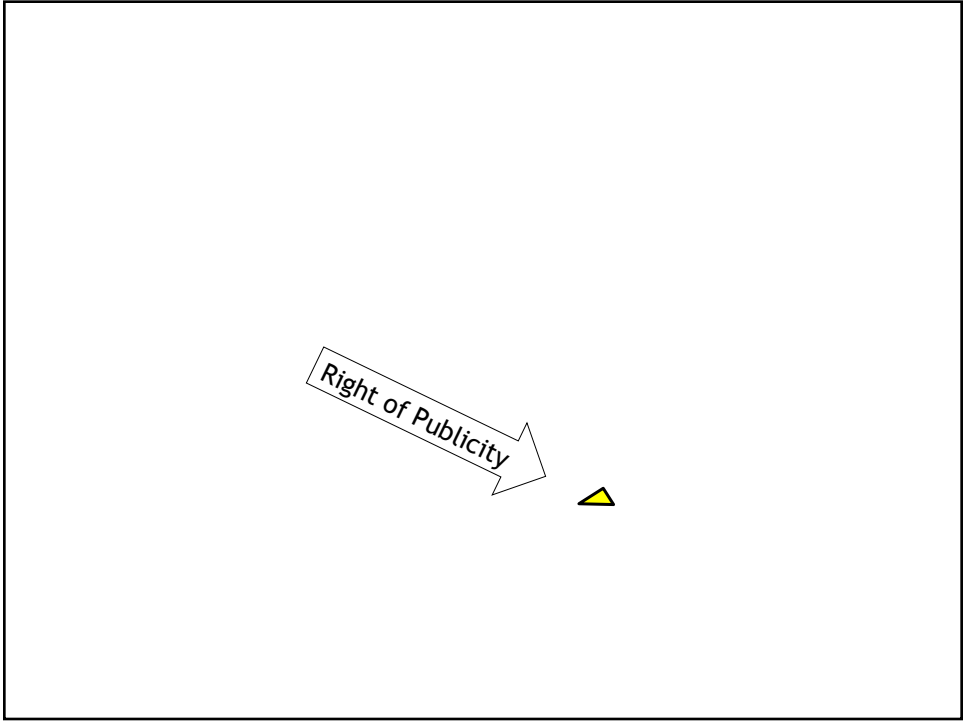


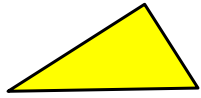
Where writer used a whole constellation of the plaintiff’s indicia of identity, including name and likeness, and where people recognized the plaintiff as being portrayed in the film, the court rejected the right-of-publicity claim on summary judgment because of “a marked difference in age and other awkward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





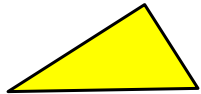




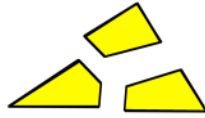


We know what this is not:

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

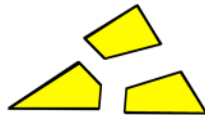


But what is it?



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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