Right of Publicity

Trademark & Unfair Competition
Eric E. Johnson
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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"

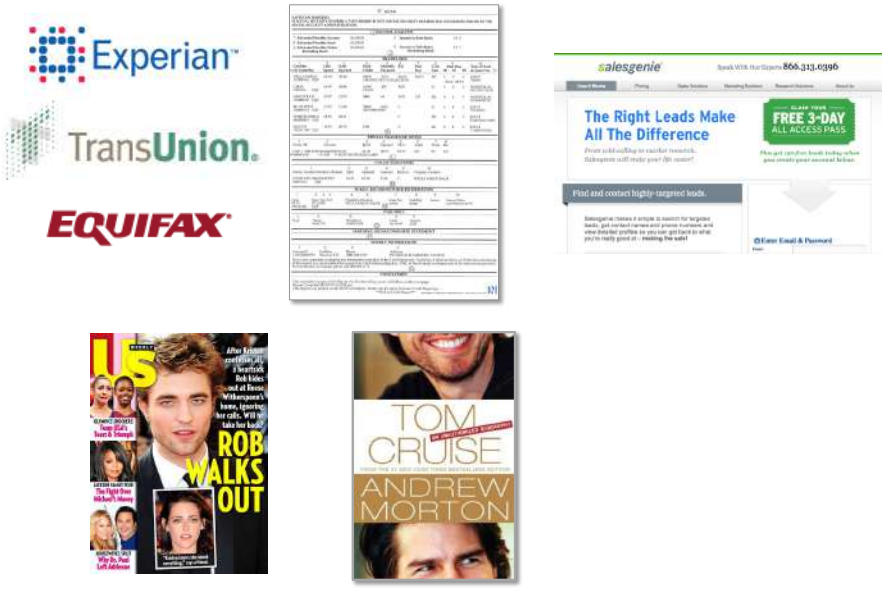
Three circumstances where rights of publicity actions are commonly recognized:

- Endorsement/advertising
- Merchandising
- "Virtual impressment"

Its elements are: "(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."

White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1397 (9th Cir. 1992)

Right of Publicity



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Right of Publicity

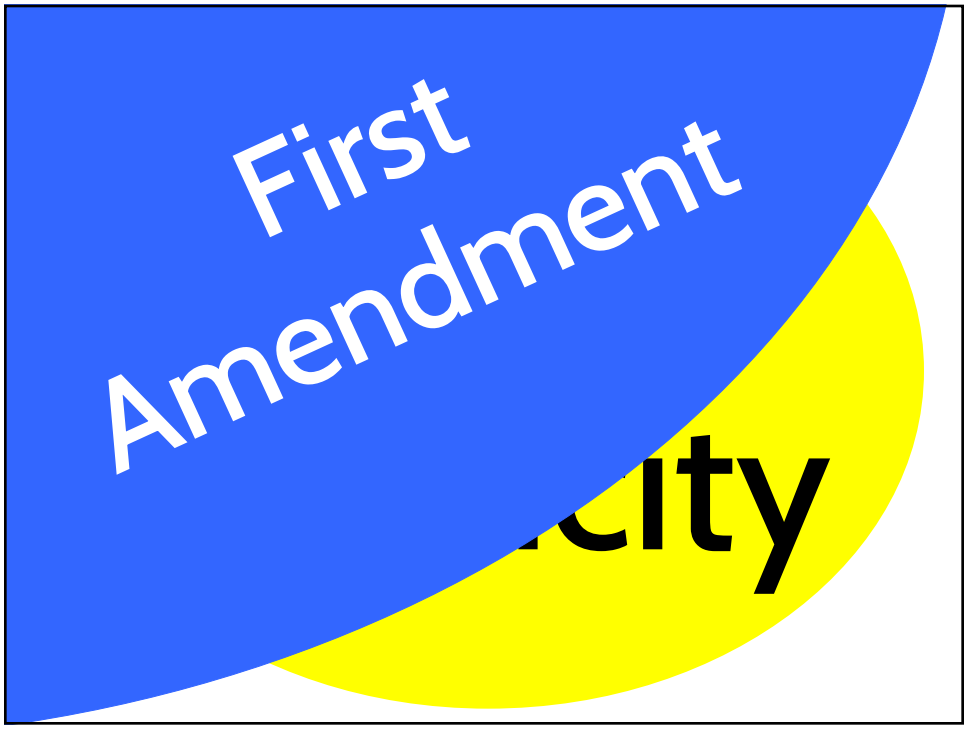
Reality check: The blackletter scope is much broader than the real scope.

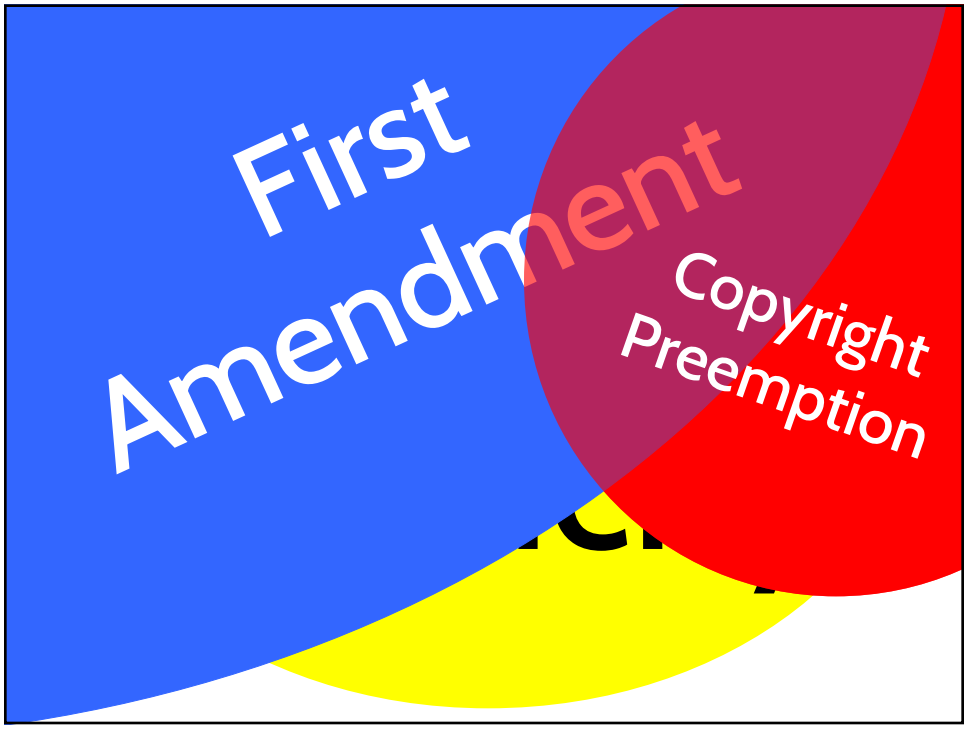
Right of publicity applies

Observation:

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


Right of
Publicity


First
Amendment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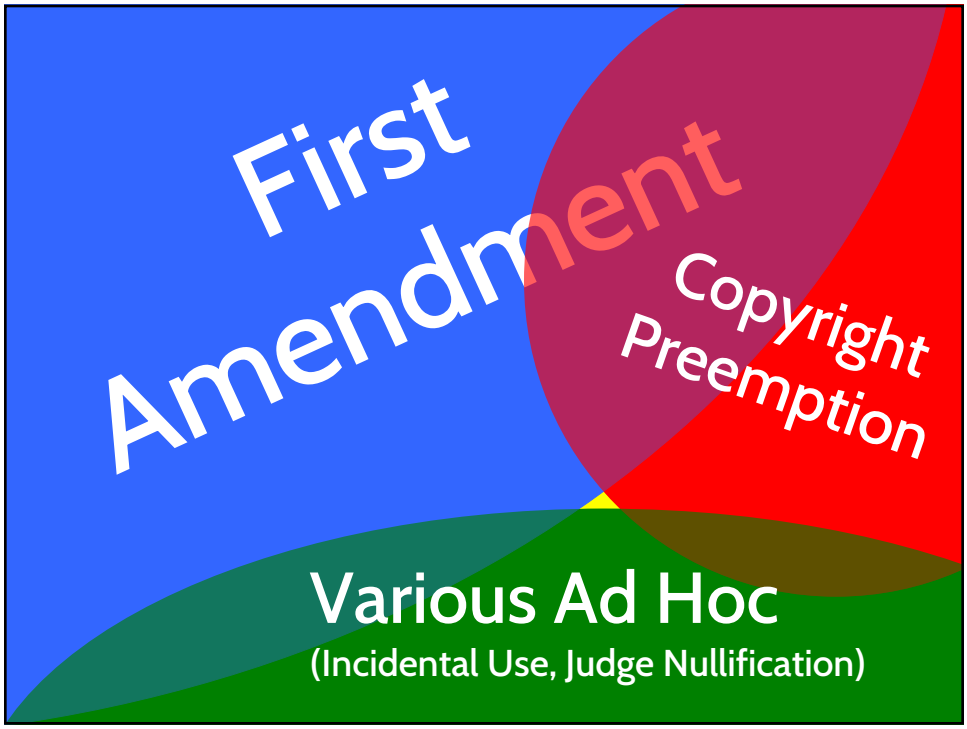
Copyright Preemption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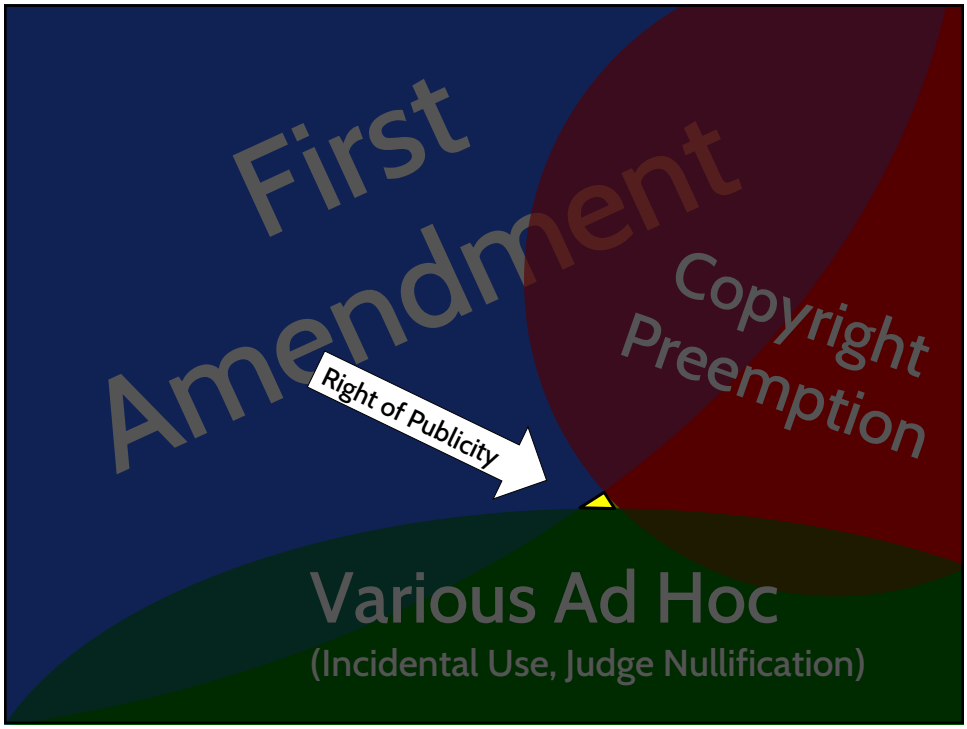
(Incidental Use, Judge Nullification)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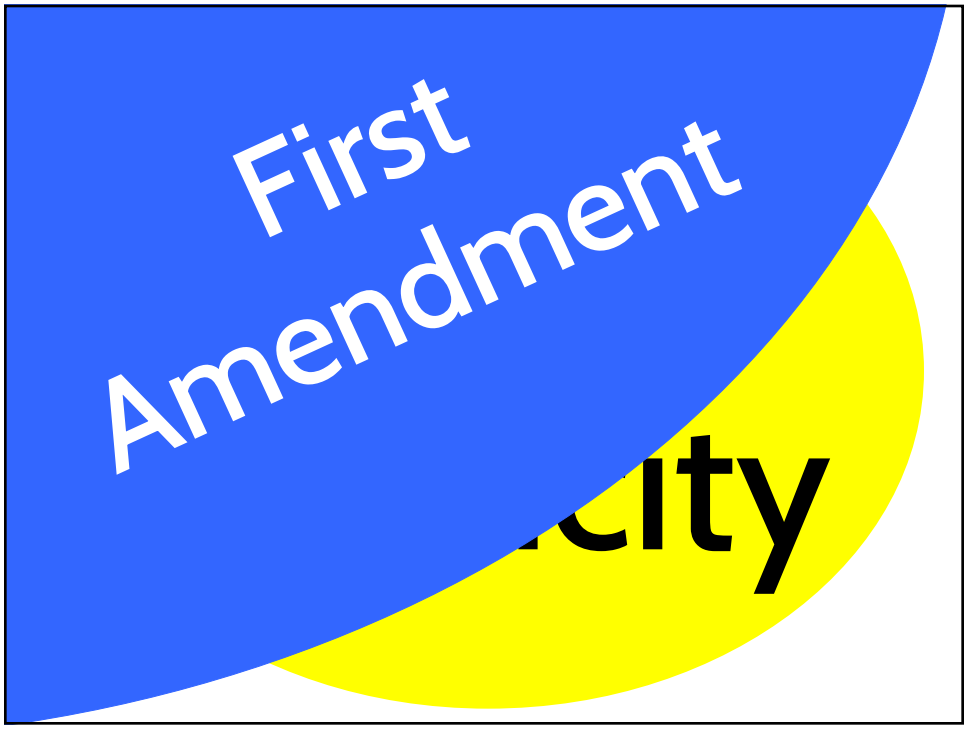
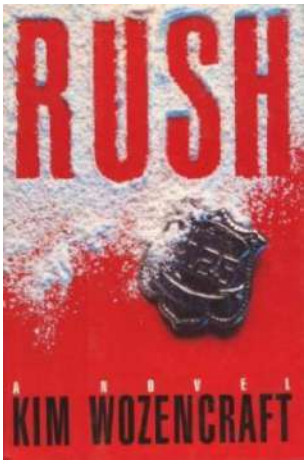

First Amendment

Cardtoons, L.C. v. MLB Players Ass'n
95 F.3d 959 (10th Cir. 1996)

Parody baseball cards presented no actionable violation of players' rights of publicity because of a First Amendment fair use defense for commercial parody speech.

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.

Matthews v. Wozencraft,

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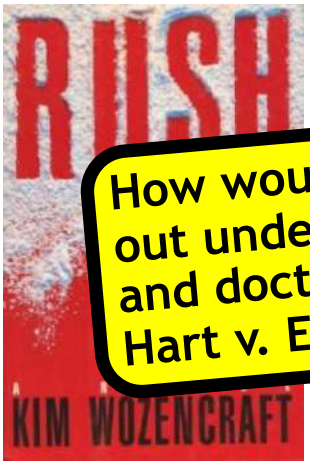

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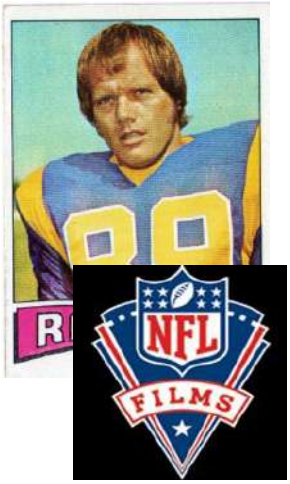
Dryer v. NFL,

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 by the "newsworthiness exception" – notwithstanding the passage of three or four decades.

Dryer v. NFL,

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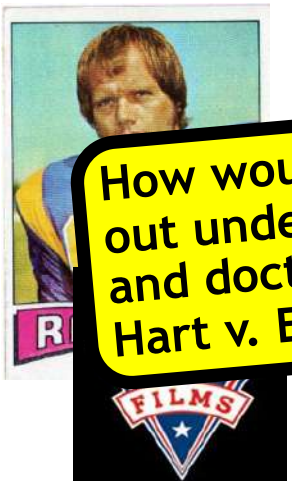

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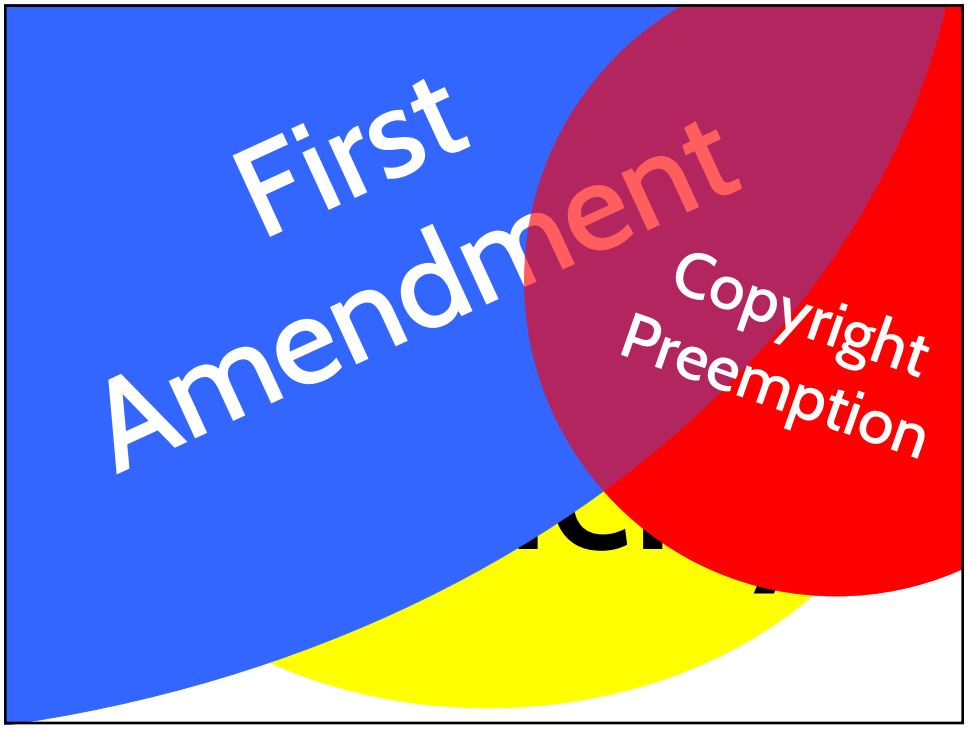
Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)

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.



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, to which Sony obtained a license from the copyright's owner.

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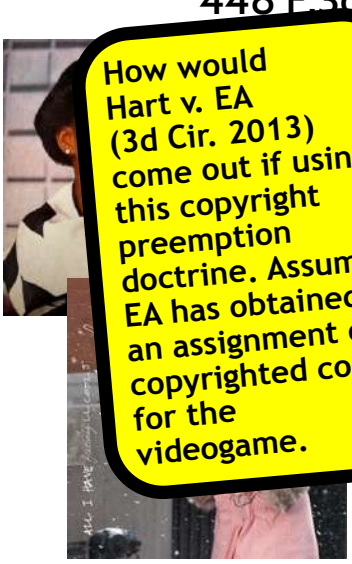

How would Hart v. EA (3d Cir. 2013) come out if using this copyright preemption doctrine. Assume EA has obtained an assignment of copyrighted code for the videogame.

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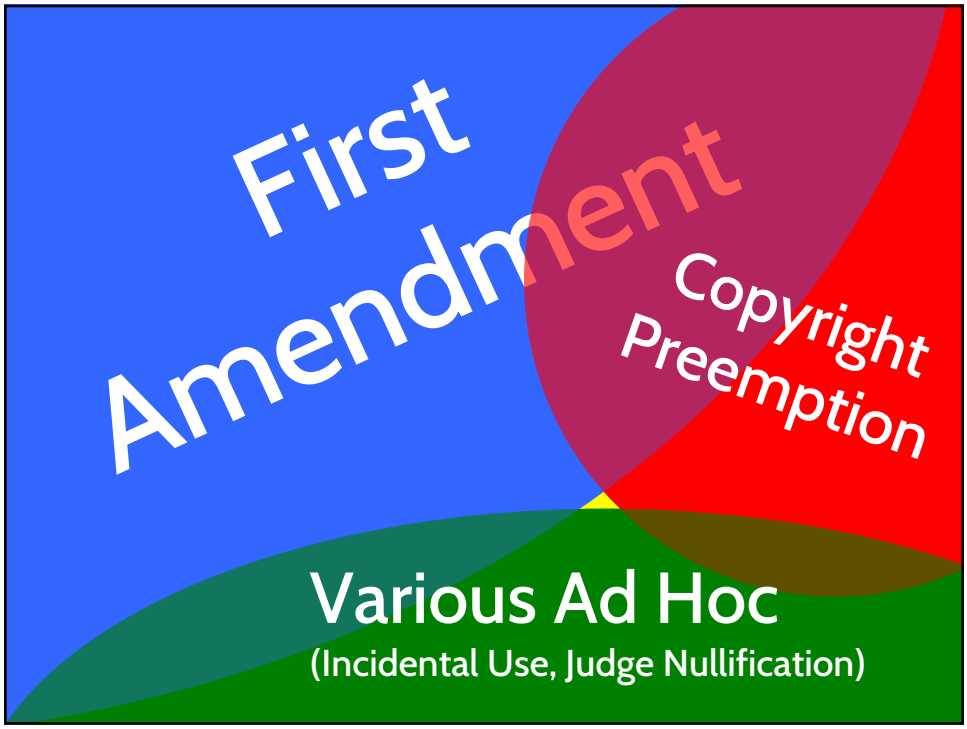
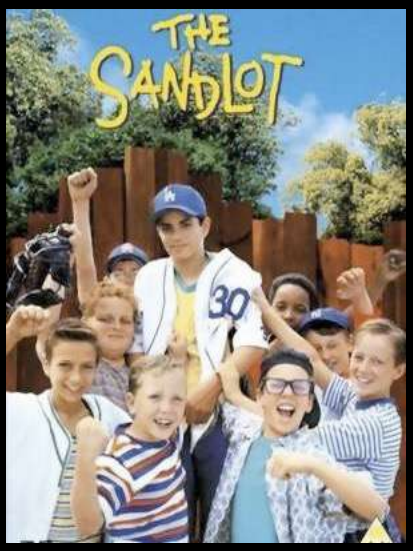
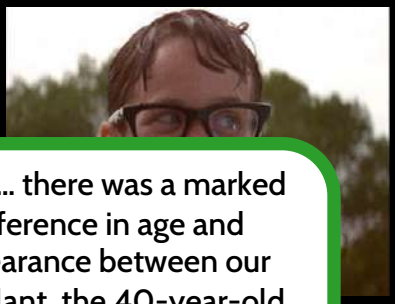
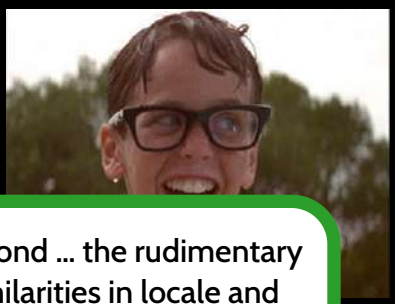






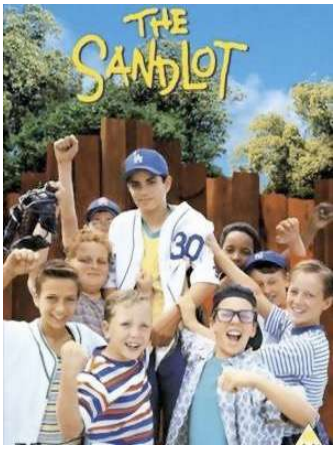
"First ... there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous."



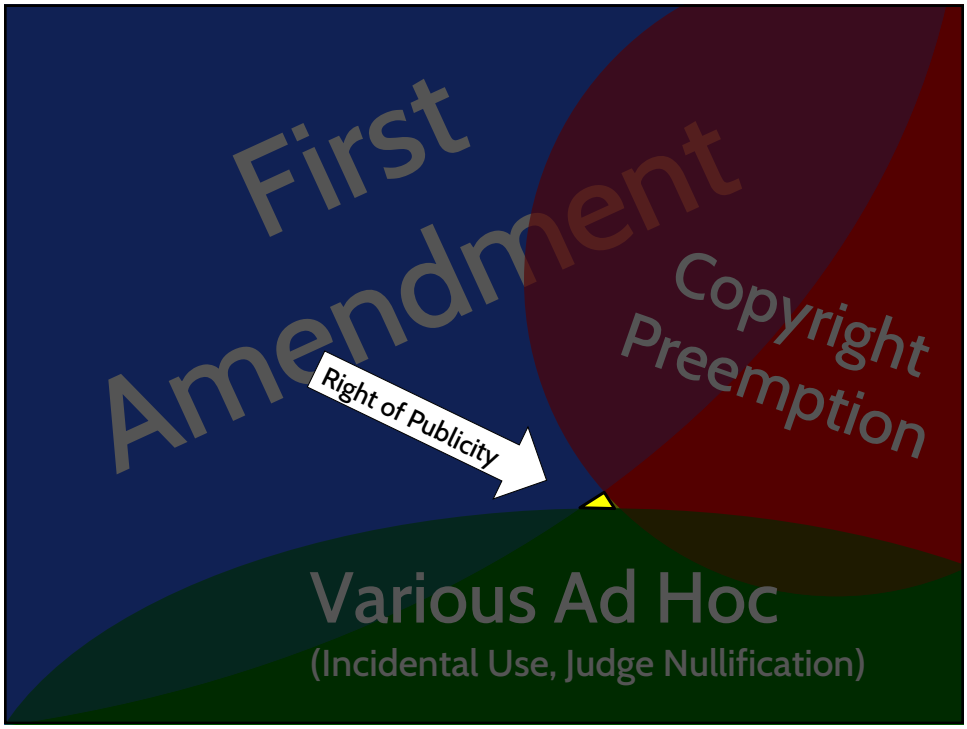
"Second ... the rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about appellant's life."

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.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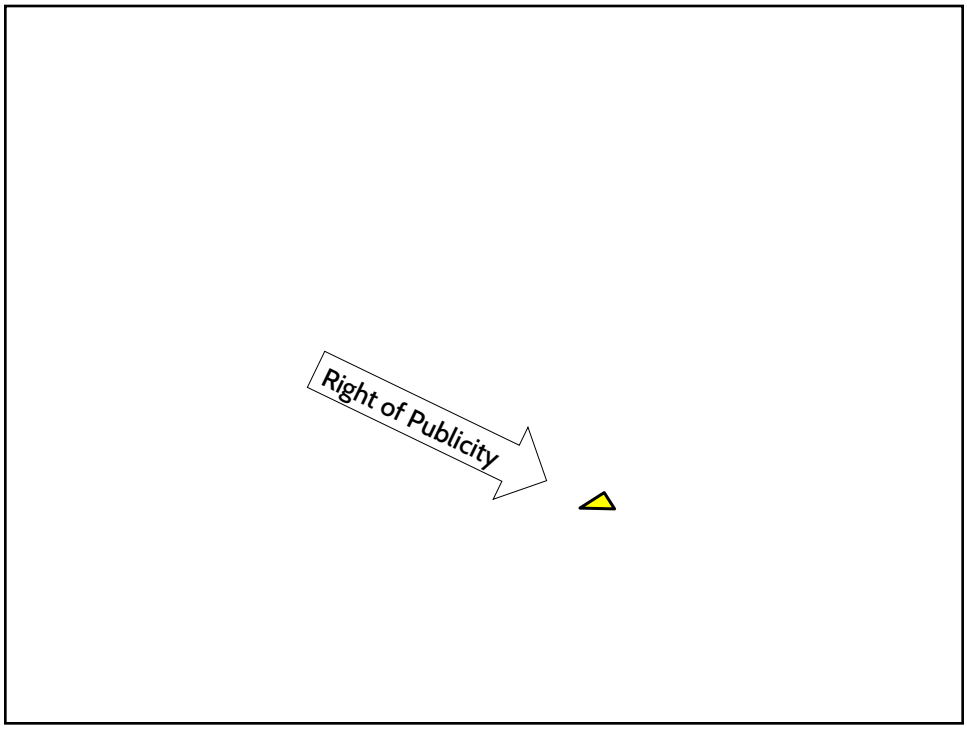
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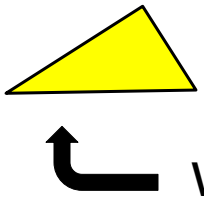
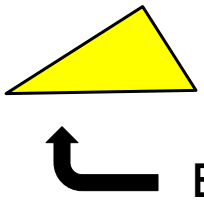


We know what this is not:

- 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"

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.

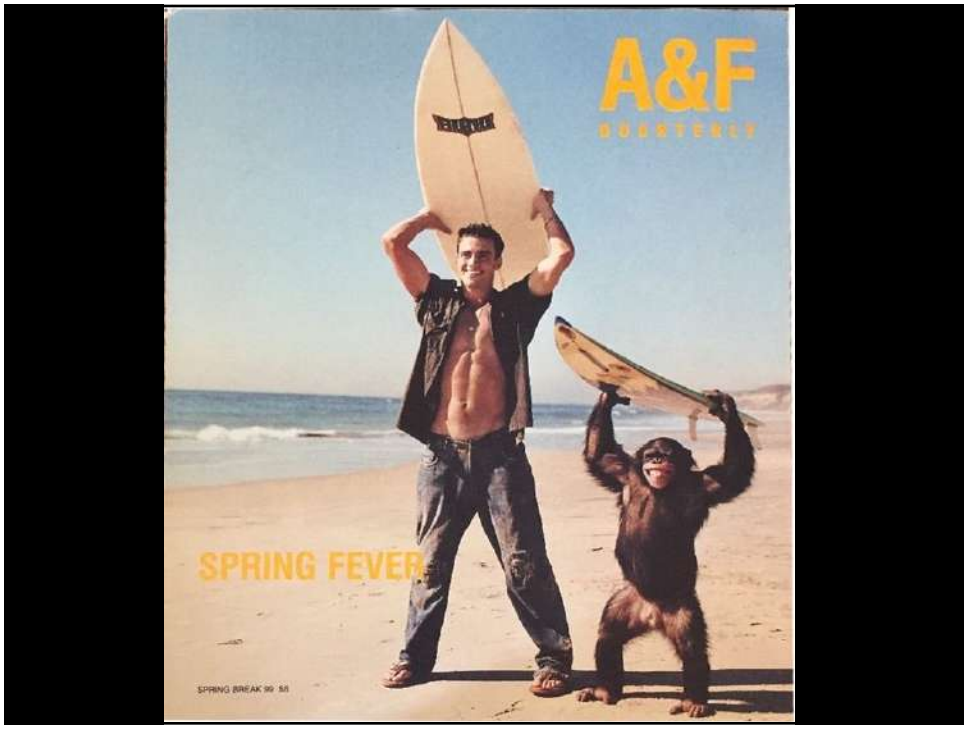
The sale of t-shirts or coffee mugs with the person's name or likeness violates.

claims for virtual impressment

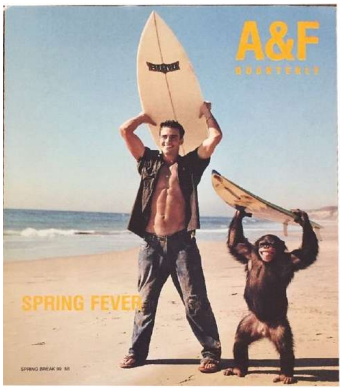
Many (but not all) courts recognize claims against defendants who exploits a plaintiff's name, likeness, or voice in such a way that the plaintiff has been unwittingly employed to produce a performance that might otherwise require voluntarily supplied labor.

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].”

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

Bar Exam Tip:
If you see a right of publicity issue, consider whether there are additional indignancy-type tort issues.

The Indignancy Matrix

The Indignancy Matrix

	Communicated to how many?	Communicated statement is true or false?	Must it be highly offensive?	State-of-mind requirement?	Cause of action 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	**one person**	**false**	**no** (Instead, must be reputation harming)	*[it's complicated!*]*	**no**
IIED	*N/A*	*N/A*	**yes+** (extreme & outrageous)	**intent** or recklessness	*N/A*
Right of publicity	the usual requirement is just that it be **commercial**	**either**	**no**	**none**	**often**

**See the Defamation Flowchart.*