



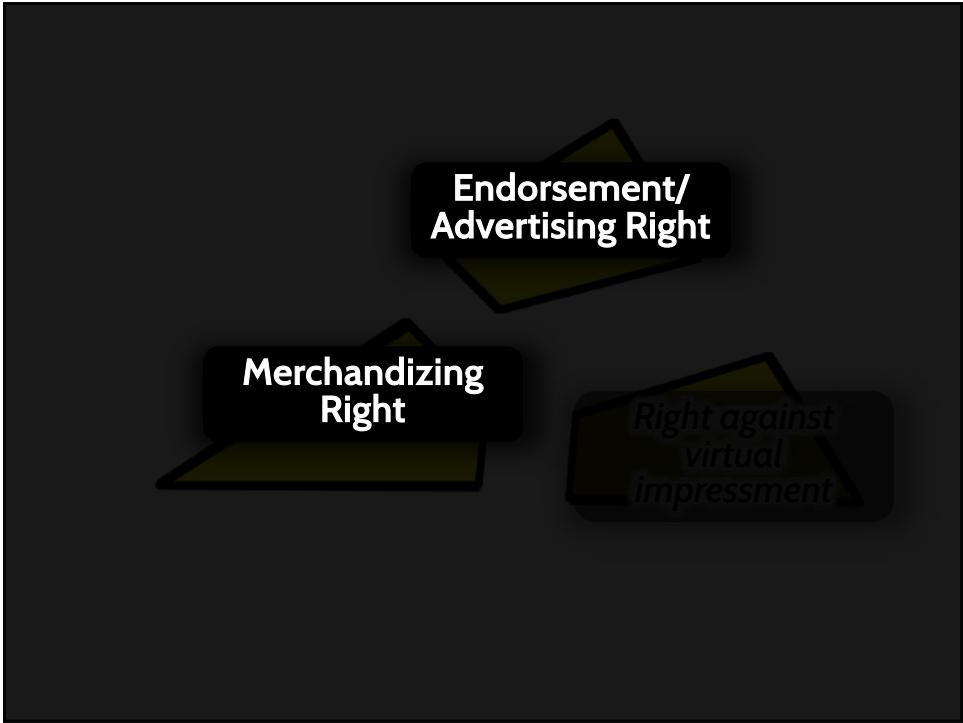
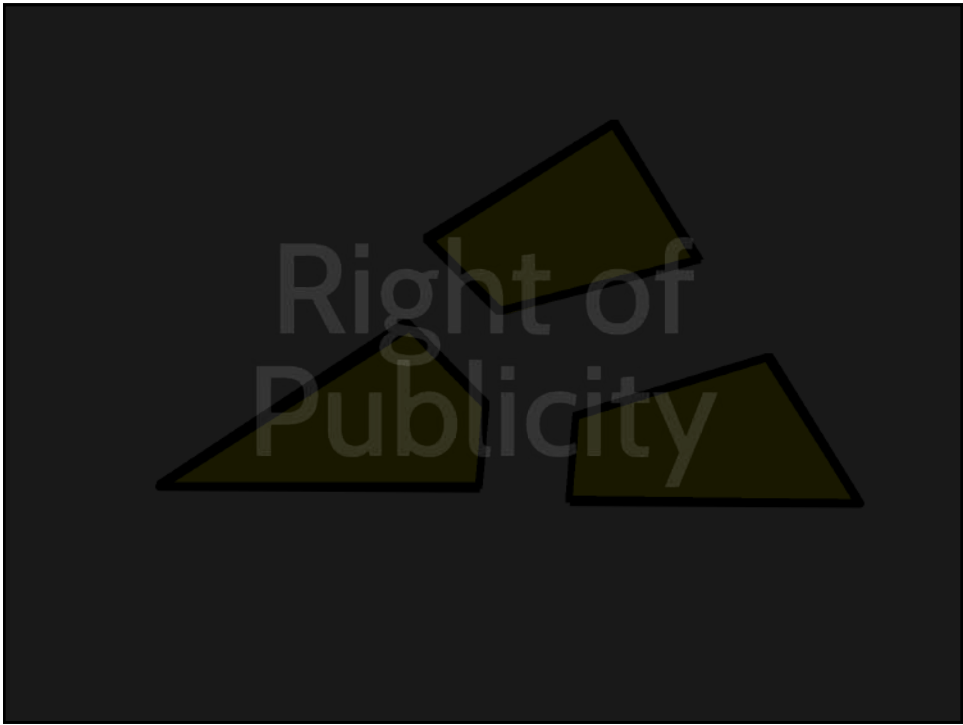
Right of Publicity

Trademark & Unfair Competition
Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable





“[A]n individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”

Violation if there's “appropriation of one’s name or likeness,” without consent, “of a benefit to someone other than the claimant.”

Fleet v. CBS (Cal. App. 1996)
R.I. Gen. Laws § 9-1-28.1

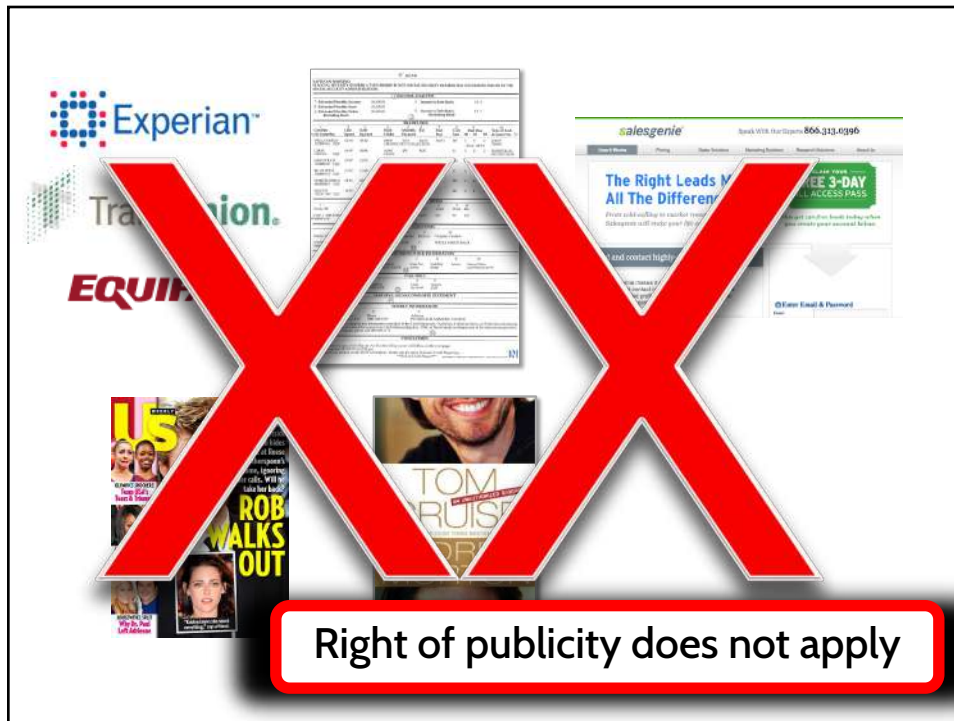
Right of
Publicity

The collage contains the following elements:

- Logos for credit reporting agencies: **Experian**, **TransUnion**, and **EQUIFAX**.
- A snippet of a credit report showing various data points.
- A screenshot of a **salesgenie** advertisement with the headline "The Right Leads Make All The Difference" and a "FREE 3-DAY ALL ACCESS PASS" offer.
- A cover of **Us** magazine featuring **ROB WALKS OUT** with a picture of Robert Pattinson.
- A book cover for **TOM CRUISE ANDREW MORTON**.

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





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Right of Publicity

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Right of Publicity

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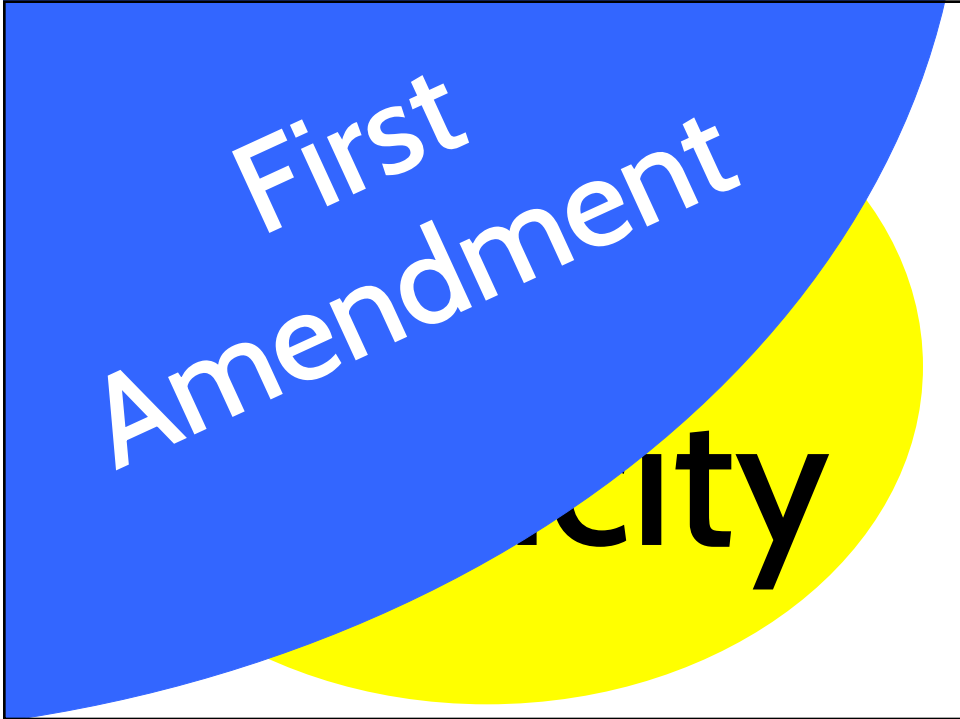
R.I. Gen. Laws § 9-1-28.1

Observation:

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



**Right of
Publicity**



**First
Amendment**

city



Right of
publicity
applies



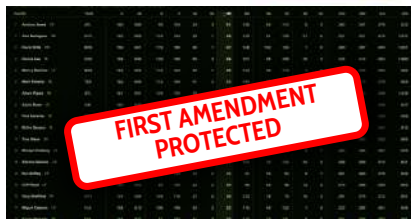
*Haelan Laboratories, Inc. v. Topps
Chewing Gum (2d Cir 1953)*



Right of
publicity
applies



*Haelan Laboratories, Inc. v. Topps
Chewing Gum (2d Cir 1953)*



Right of
publicity
REJECTED



*C.B.C. Distribution and Marketing v. MLB
Advanced Media (8th Cir 2007)*

C.B.C.'s fantasy baseball sufficient for a prima facie case

But First Amendment bars claim b/c of the “public value of information about the game of baseball and its players,” and “substantial public interest” in the “recitation and discussion of factual data concerning the athletic performance of” MLB players

Cartoons trading cards each lampooned a famous baseball player.

The Tenth Circuit rejected players' claims. The court focused on the paramount importance of the defendant's free speech interests.



Right of
publicity
REJECTED



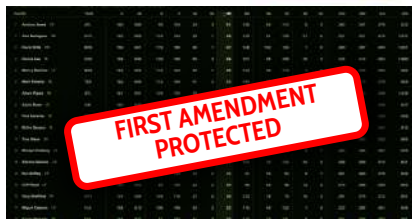
Cartoons v. MLB Players Ass'n
(10th Cir. 1996)



Right of
publicity
applies



Haelan Laboratories, Inc. v. Topps
Chewing Gum (2d Cir 1953)



Right of
publicity
REJECTED



C.B.C. Distribution and Marketing v. MLB
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Right of
publicity
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Cartoons v. MLB Players Ass'n
(10th Cir. 1996)

Comedy III Productions, Inc. v. Gary Saderup, Inc. (Cal. 2001)

Right of
publicity
applies



“We formulate ... a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation. Applying this test to the present case, we conclude that there are no such creative elements here and that the right of publicity prevails.”

ETW v Jireh (6th Cir. 2003)

So, I bought
this because I
am a Three
Stooges fan?

Comedy III Productions, Inc. v. Gary Saderup, Inc. (Cal. 2001)

Right of
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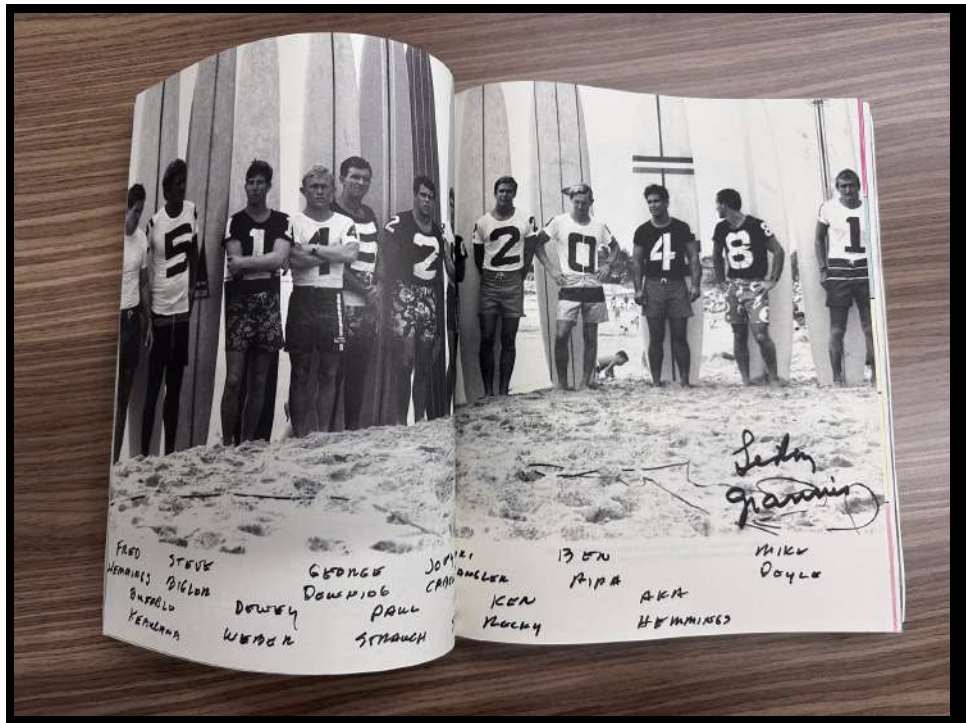
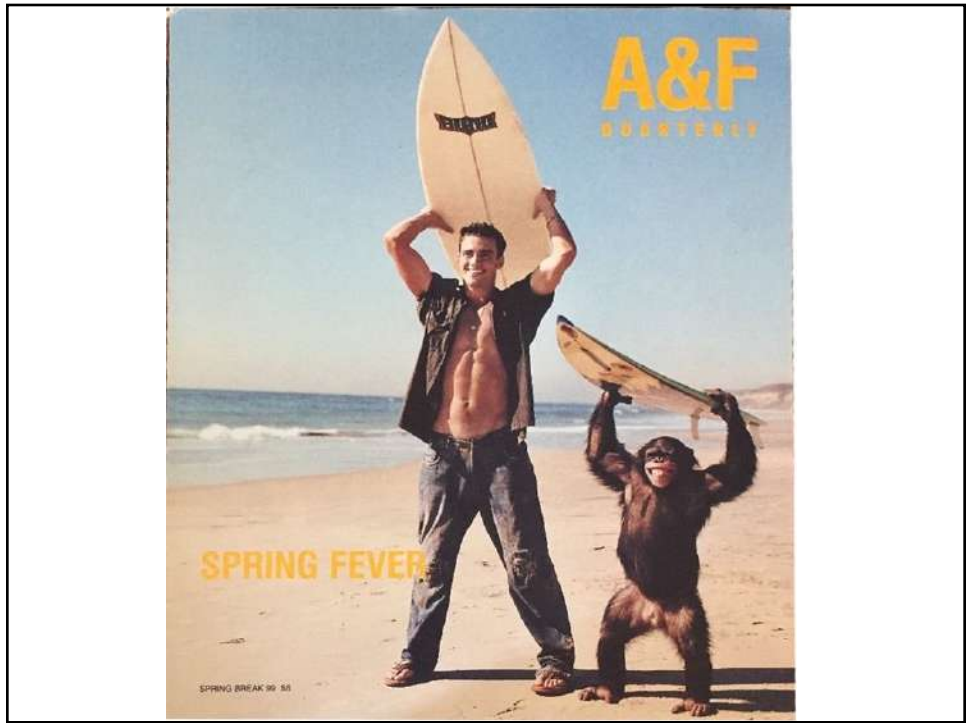
ETW v Jireh (6th Cir. 2003)

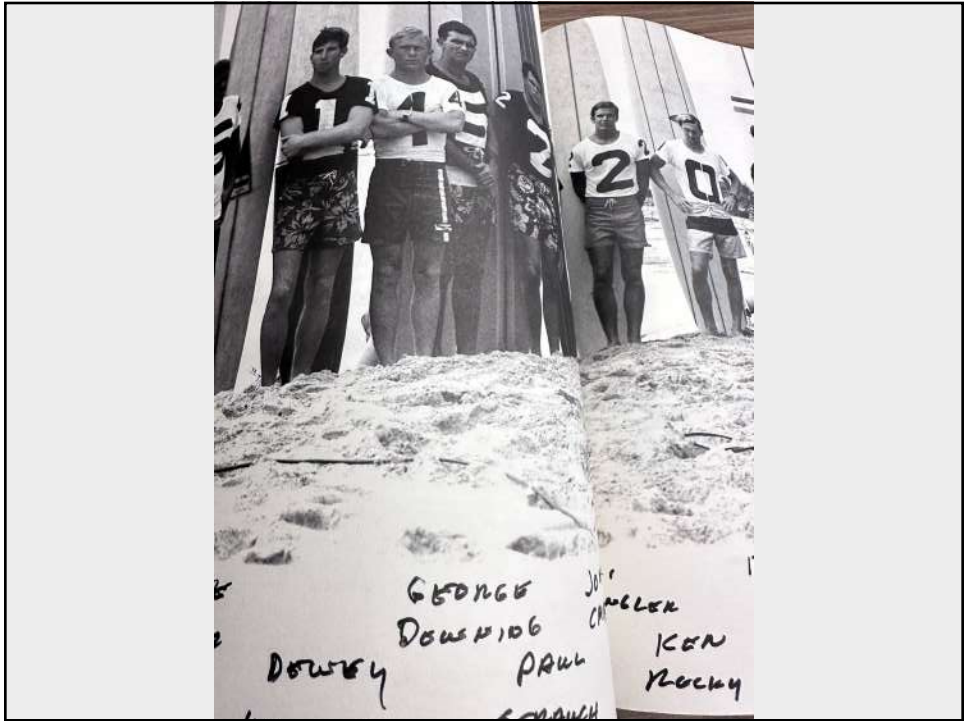
Right of
publicity
REJECTED

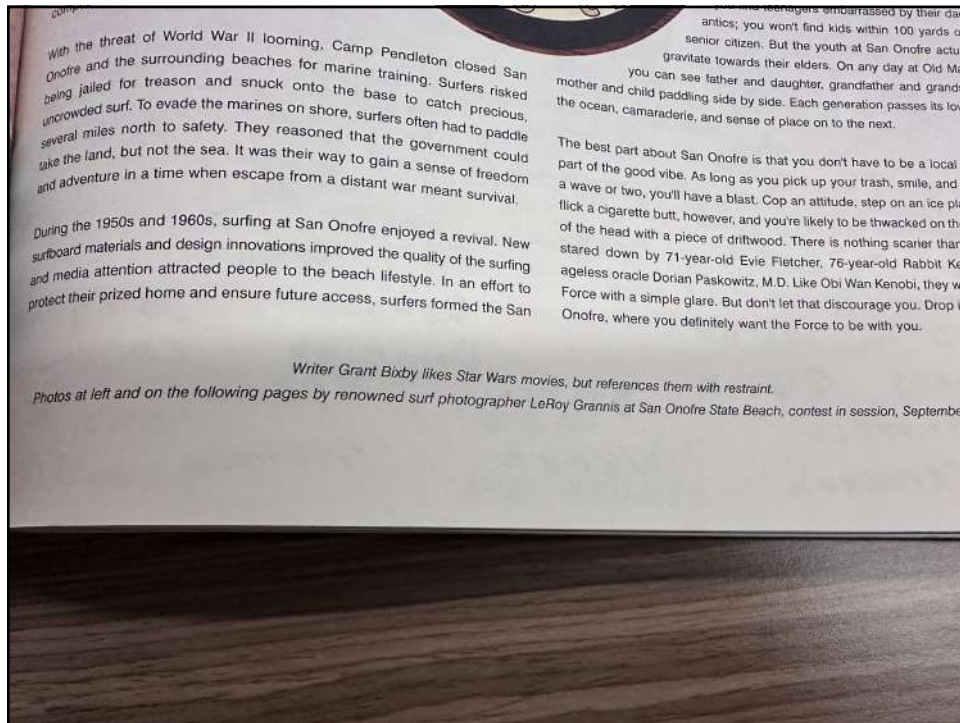


“The evidence in the record reveals that Rush’s work consists of much more than a mere literal likeness of Woods. It is a panorama of Woods’s victory at the 1997 Masters Tournament, with all of the trappings of that tournament in full view, including the Augusta clubhouse, the leader board, images of Woods’s caddy, and his final round partner’s caddy. These elements in themselves are sufficient to bring Rush’s work within the protection of the First Amendment.”







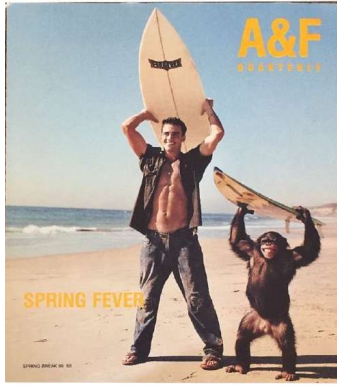


Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984)

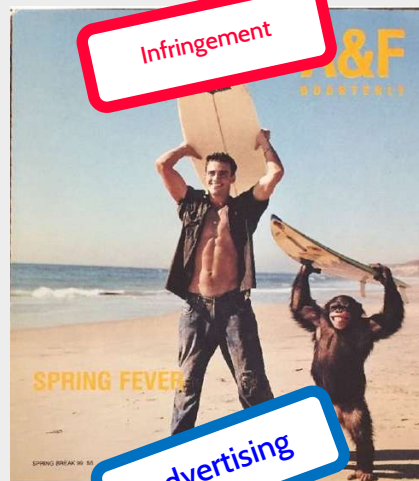
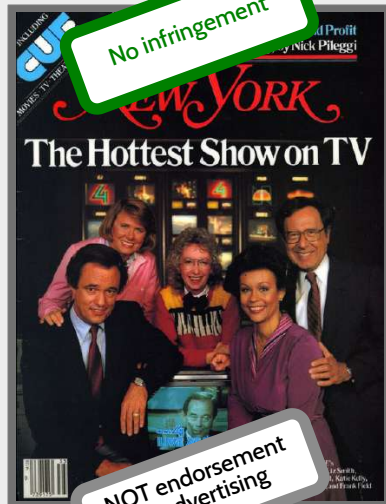


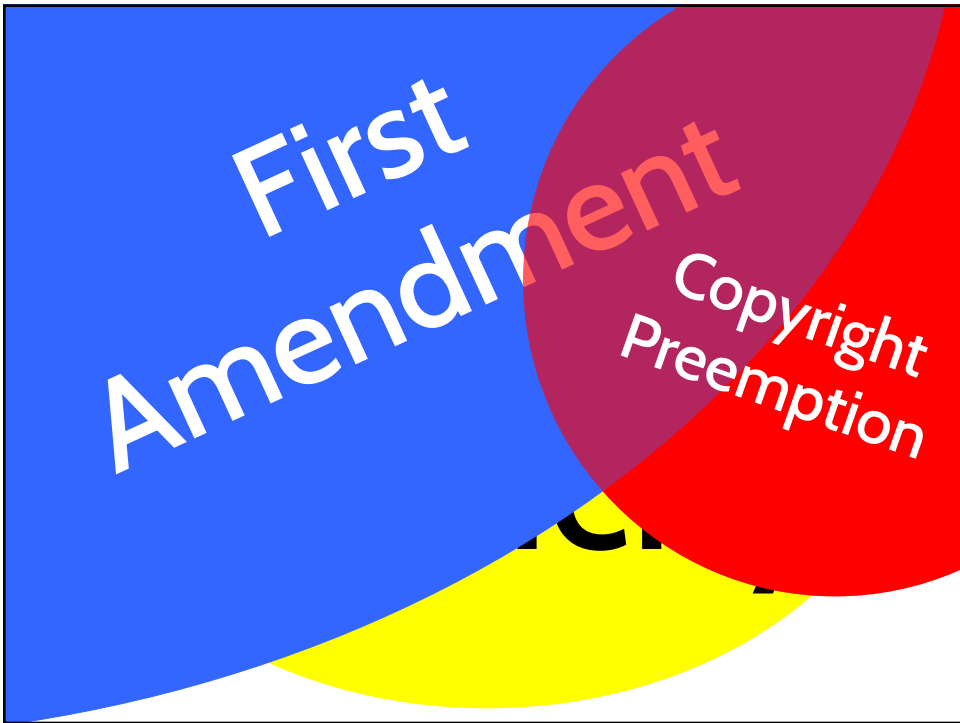
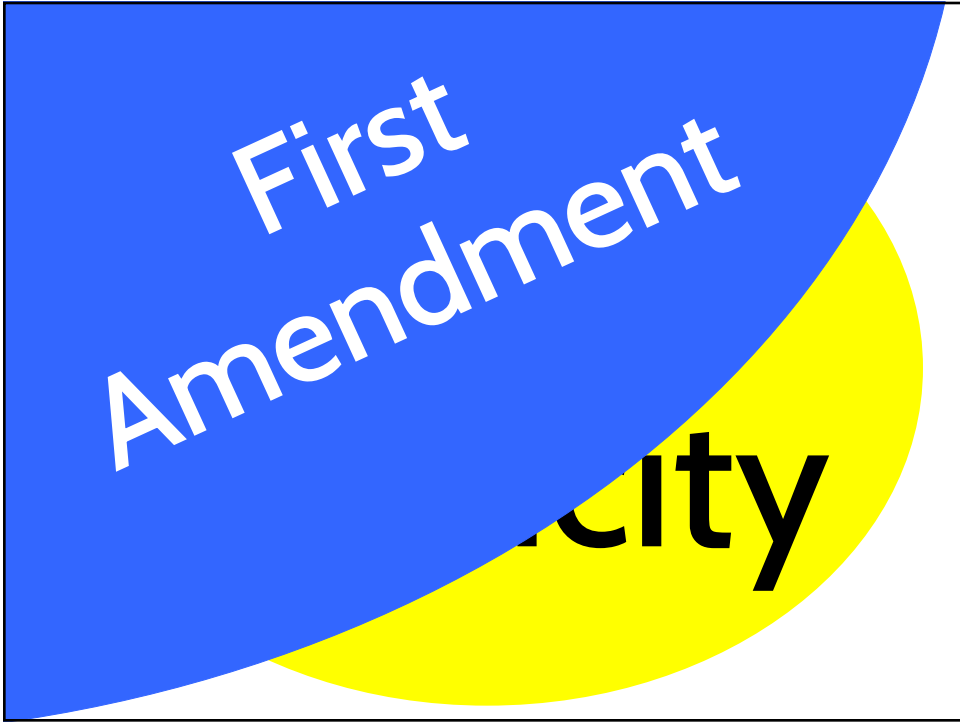
A “newsworthiness exception” defeated a model's right-of-publicity claim where the photos he posed for were used for more than the one article he'd authorized.

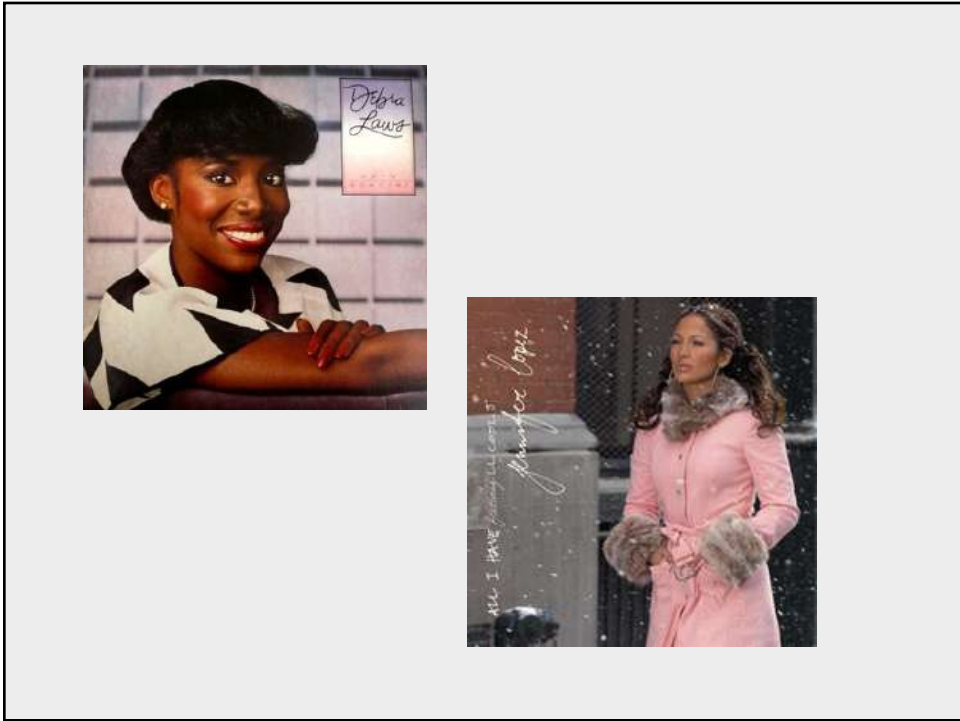
Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001)



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].”







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



Uses of Debra Laws' voice
from 1981 "Very Special" in
2002 Jennifer Lopez song
"All I Have."

© license from record label
no license from Laws

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



Uses of Debra Laws' voice from 1981 "Very Special" in 2002 Jennifer Lopez song "All I Have."

© license from record label
no license from Laws



Copyright preempted

Right of publicity REJECTED

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

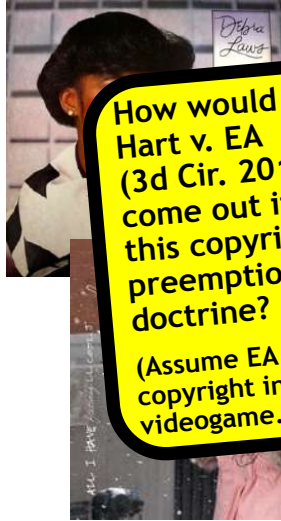


Right-of-publicity claim for unauthorized use of Debra Laws' voice from "Very Special" in Jennifer Lopez's song "All I Have" held preempted by copyright on the basis that Laws' voice was lifted from a copyrighted recording, to which Sony obtained a license from the copyright's owner.



Laws v. Sony Music,

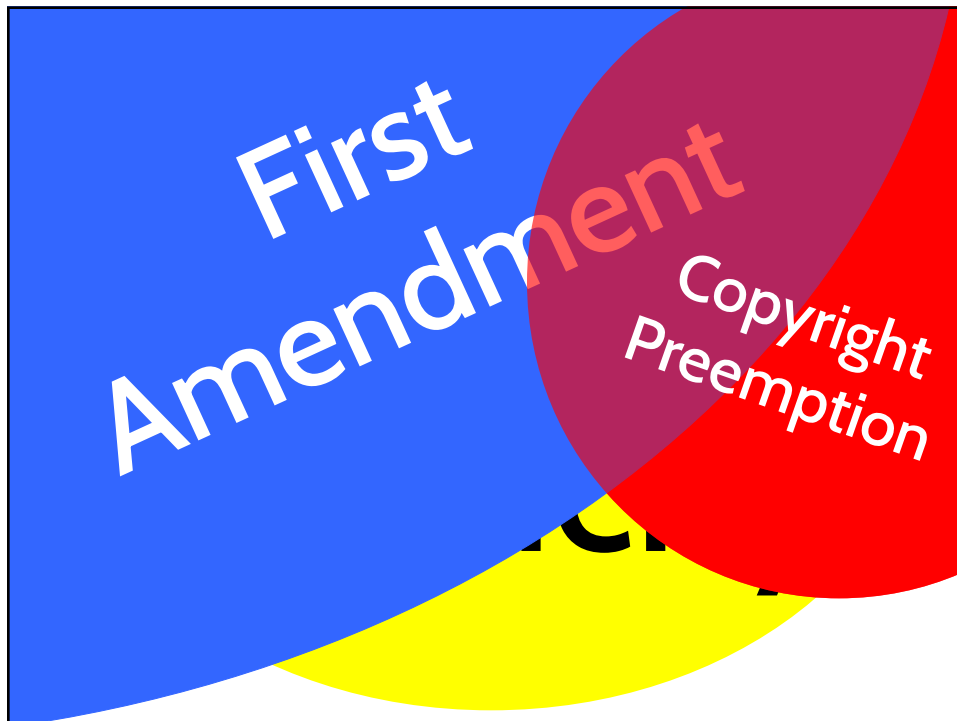
448 F.3d 1134 (9th Cir. 2006)

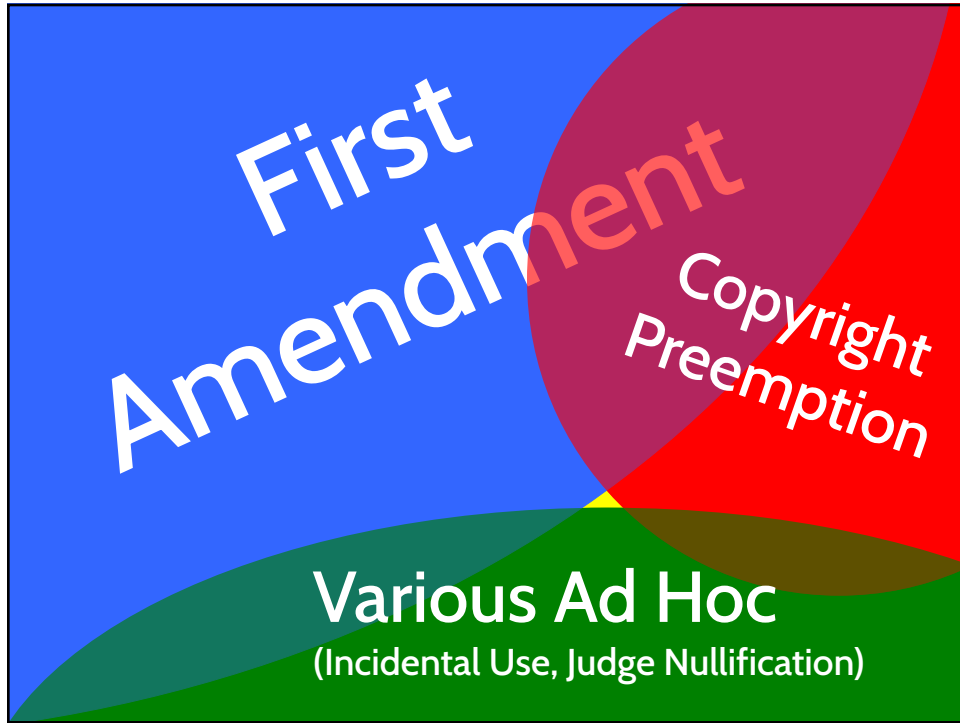


How would
Hart v. EA
(3d Cir. 2013)
come out if using
this copyright
preemption
doctrine?

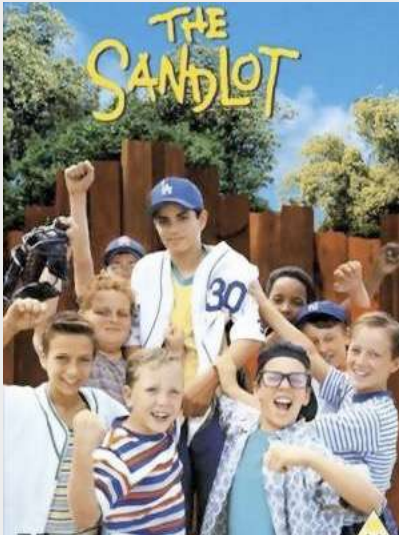
(Assume EA owns a
copyright in the
videogame.)

Right-of-publicity claim for unauthorized use of Debra Laws' voice from "Very Special" in Jennifer Lopez's song "All I Have" held preempted by copyright on the basis that Laws' voice was lifted from a copyrighted recording, to which Sony obtained a license from the copyright's owner.

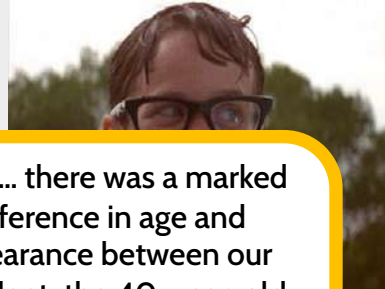




Polydoros v. 20th Century Fox,
(Cal. App. 1997)

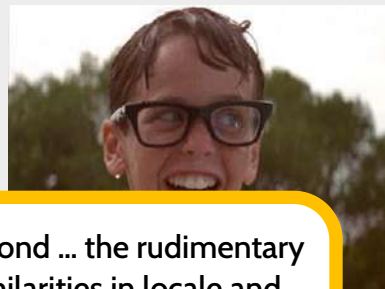
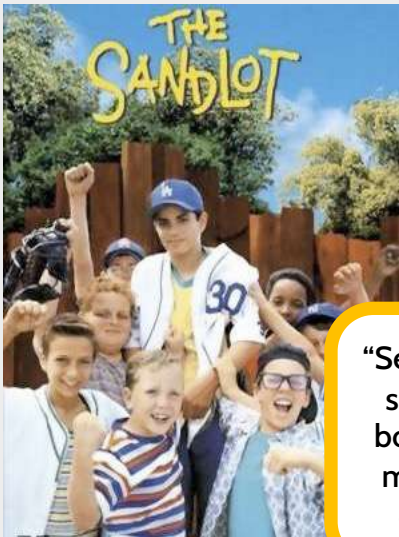


Polydoros v. 20th Century Fox,
(Cal. App. 1997)



“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.”

Polydoros v. 20th Century Fox,
(Cal. App. 1997)



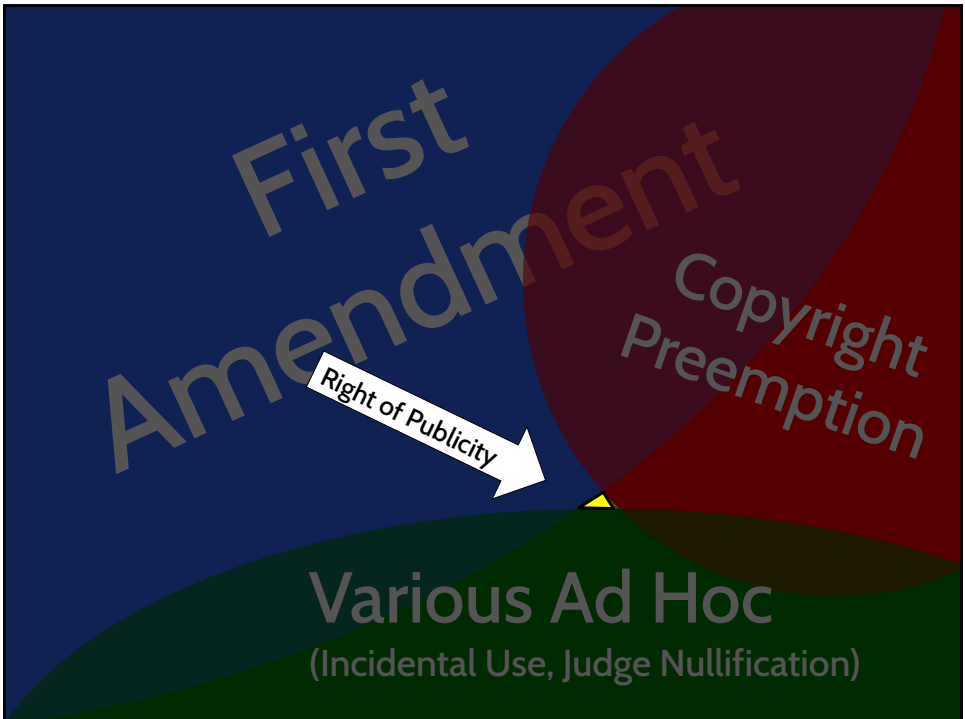
“Second ... the rudimentary similarities in locale and boyhood activities do not make The Sandlot a film about appellant’s life.”

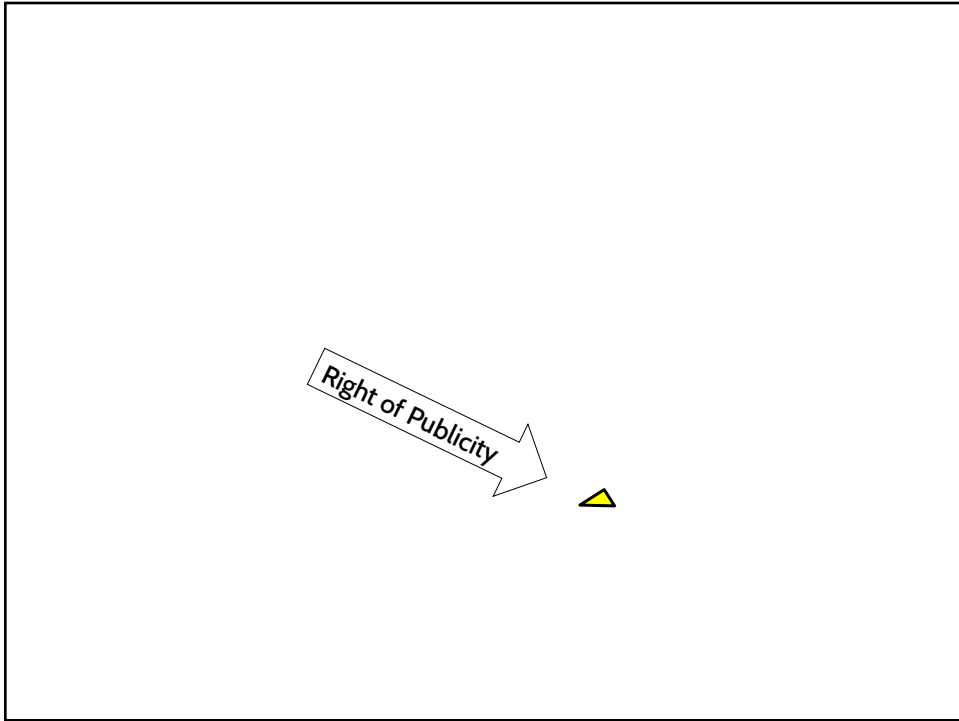
Polydoros v. 20th Century Fox,
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“a marked difference in age” and other awkward characterizations of the facts and assertions irrelevant to the law

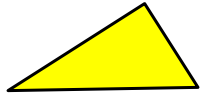
Right of publicity
REJECTED





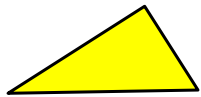
We know what this is not:

- 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”

