

CELEBRITY LICENSING AND THE RIGHT OF PUBLICITY

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Defining the Right of Publicity

Right of Publicity = the right to control the commercial exploitation of a person's identity and prevent misappropriation for commercial purposes.

- “Identity”: may be name, voice, likeness (photograph, film, artistic rendering), signature, catch-phrase
- “Person”: individuals only; no right of publicity in, e.g., a company name
- Governed by state statute and/or common law; no federal law (though false endorsement claims are often brought under Section 43(a) of the Lanham Act for the same or similar fact patterns)



Defining the Right of Publicity – cont'd

- Derived from invasion of privacy and tort of appropriation laws (e.g., NY right of publicity is part of its right of privacy statute)
- The right of publicity is a property right that can be freely assigned
- Many states recognize a post-mortem right of publicity, often for a period of 70 years after the death of the individual in question.
- Applicable law is determined based on where the person was domiciled at the time of death.

CA Right of Publicity Statute

Civil Code § 3344:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.



Live Content Slide

When playing as a slideshow, this slide will display live content

Poll: 1. Is the estate of Mohammed Ali entitled to compensation for this use?

Elements of a Right of Publicity Claim

- 1) Defendant used plaintiff's identity in such a manner that plaintiff is identifiable.
- 2) The use of plaintiff's identity was to defendant's commercial advantage.
- 3) The use of plaintiff's identity was without authorization.
- 4) Plaintiff was harmed (*including loss of potential income*).

See California Civil Jury Instructions 1803 and 1804A

Element #1: Is Plaintiff Identifiable?

NAME / VOICE:

a) *Faulkner v. Hasbro*
(N.J. Dist. Ct. 2015)



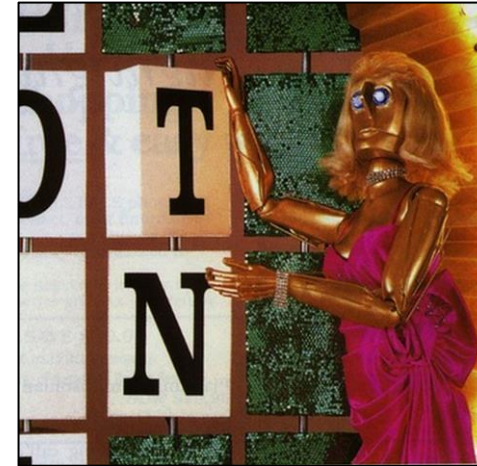
b) *Midler v. Ford Motor Co.*
(9th Cir. 1988)



Element #1: Is Plaintiff Identifiable?

STYLE/CONTEXT:

*White v. Samsung
Electronics America, Inc.*
(9th Cir. 1992)



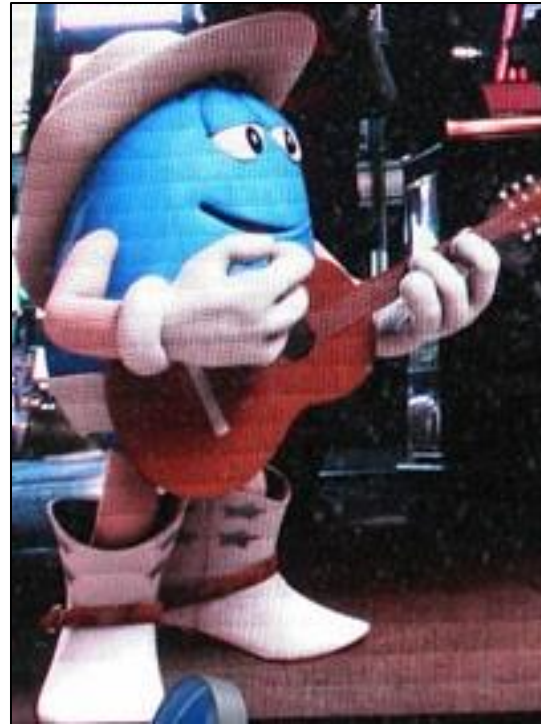
CATCHPHRASE:

*Carson v. Here's Johnny's
Portable Toilets, Inc.*
(6th Cir. 1983)



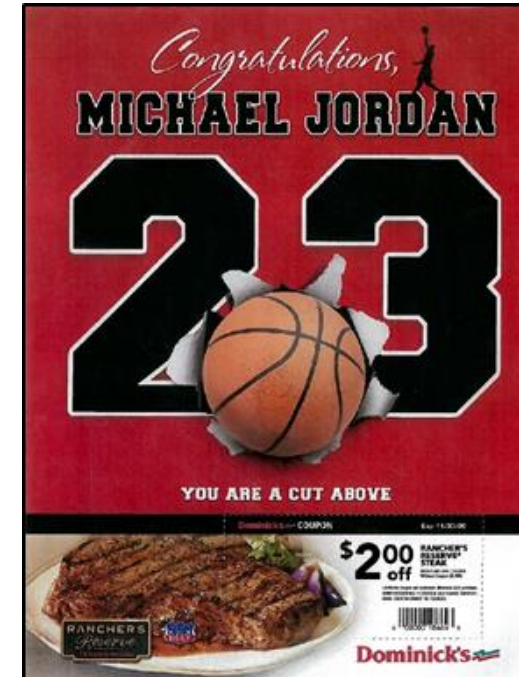
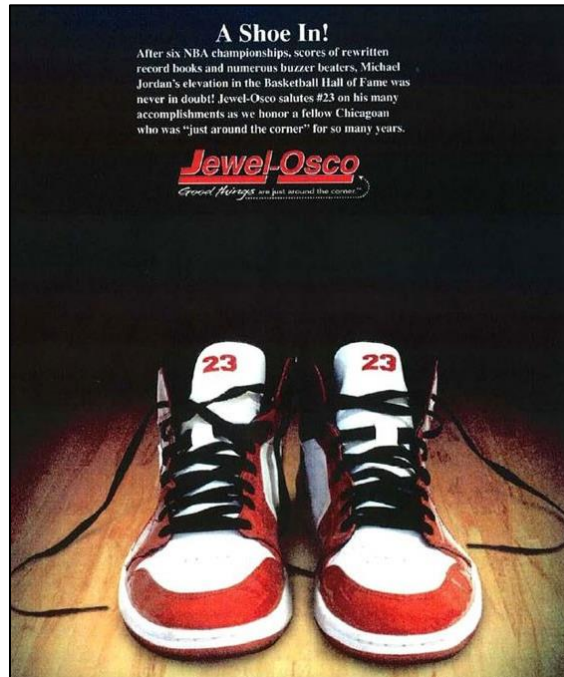
Element #1: Is Plaintiff Identifiable?

Burck v. Mars, Inc. (S.D. N.Y. 2008)



Element #2: Did Defendant Gain a Commercial Advantage?

- *Michael Jordan v. Jewel Foods Stores, Inc.* (7th Cir. 2014)
- *Jordan v. Dominick's Finer Foods LLC* (N.D. Ill. 2015)



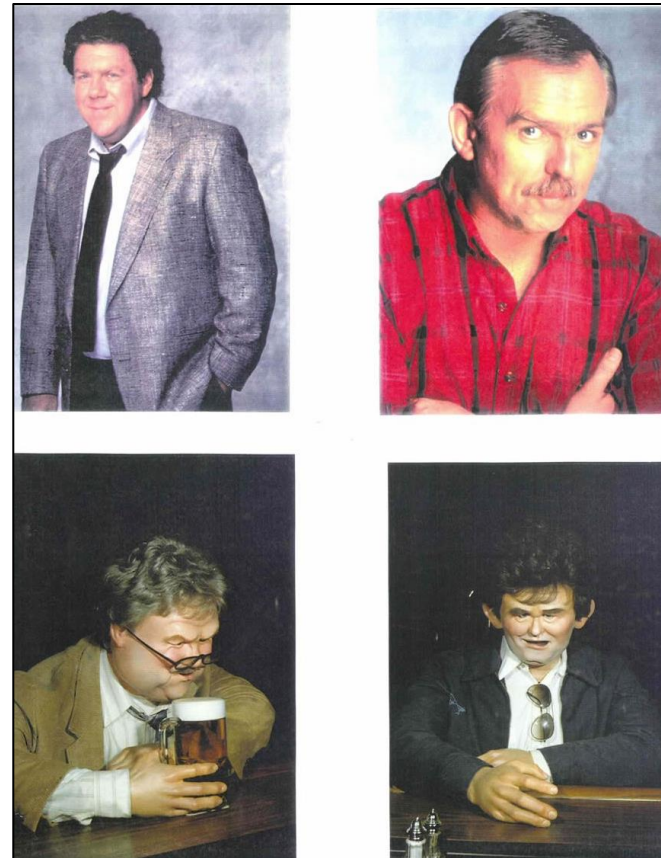
Element #2: Did Defendant Gain a Commercial Advantage?

- *Hoffman v. Capital Cities/ABC Inc.* (9th Cir. 2001)



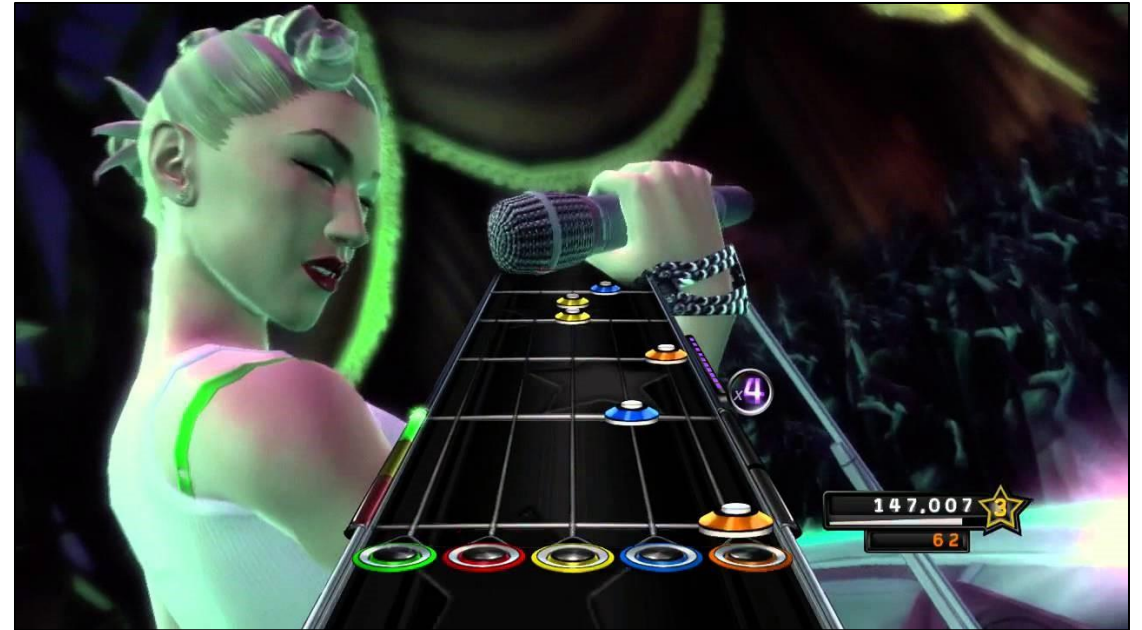
Element #3: Was Use Without Authorization?

- *Wendt v. Host Int'l Inc.*
(9th Cir. 1997)



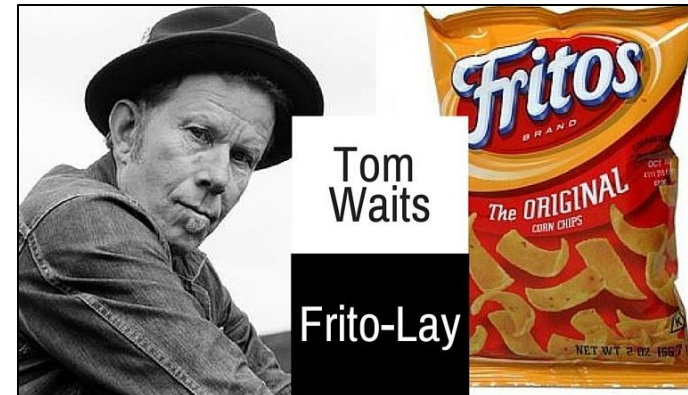
Element #3: Was Use Without Authorization?

- *No Doubt v. Activision Publishing, Inc.*
(Cal. App. 2011)



Element #4: Was Plaintiff Harmed?

- *Jordan Cases*
- *Waits v. Frito-Lay, Inc.*
(9th Cir. 1992)



Student Athletes – The New Frontier

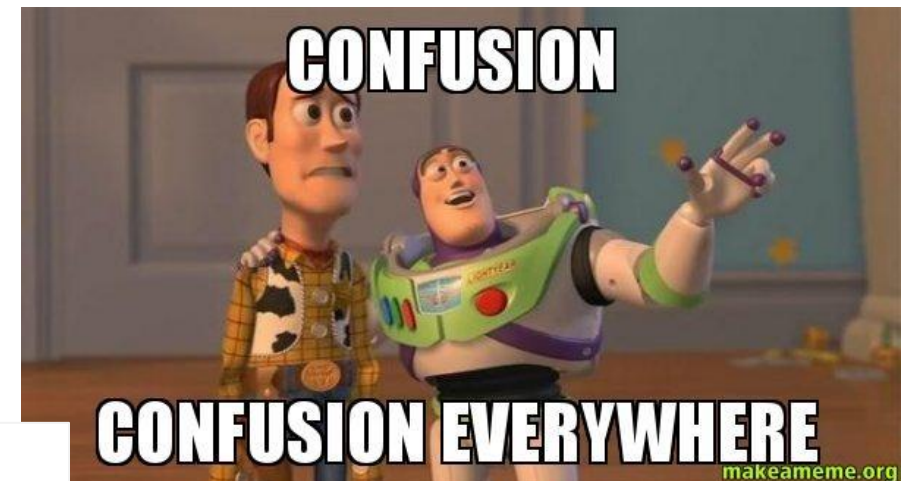
- *NCAA v Alston* (2021)
- Collegiate Athletes can monetize their NIL
- No guidelines/regulations/best practices established by SCOTUS



Navigating this New Frontier

Different Sources of NIL Rules for Student Athletes

- NCAA Interim Policy (discretion given to schools and states)
- State Laws (If applicable)
- University Policies
- Conference Regulations
- General Right of Publicity and Contracting Statutes
- Other Applicable Governing Bodies
- Potential Federal Legislation



Terms of Collegiate NIL Deals

- Deals vary – we don't yet have generally accepted standards
- Popular to set an exhaustion period on the deal
 - Some states/schools have duration limitations
- Popular contractual clauses in NIL deals
 - Usage Rights Clause
 - Exclusivity Clause
 - Force Majeure Clause
 - Morals Clause
 - Transfer contingency plan

College Athletes With High NIL Valuations

1. Bronny James – \$6.1M Valuation



Nike, Beats by Dre and PSD Underwear

2. Shedeur Sanders – \$4.1M Valuation



Nike, Mercedes Benz, Oikos Super Bowl ad, BRADY, etc.

3. Livvy Dunne – \$3.2M Valuation



Too Faced Cosmetics, Motorola, SI Swimsuit, Forever 21, etc.

4. Arch Manning – \$2.9M Valuation



Panini America

The Nurture Originals, Foster Art, and Keep Entertainment Safe - (NO FAKES) Act

The proposed NO FAKES Act would address the use of non-consensual digital replications in audiovisual works or sound recordings.

- The act makes it unlawful to produce digital replicas of an individual without their consent.
- Plaintiffs do not have to prove that their NIL has commercial value or that they suffered damages; the act includes statutory damages and the possibility of punitive damages.
- Networks and platforms that distribute digital replicas may be liable if such network or platform had knowledge that the replica was unauthorized.
- The act leaves open the possibility of suing AI firms as well.

Sound Recordings: Drake and The Weeknd

- The song “Heart on My Sleeve” was created with AI-generated replicas of the voices of pop stars Drake and The Weeknd.
- It quickly accumulated hundreds of thousands of streams on YouTube, Spotify, and other sites before it was identified as a fake and removed.



Audiovisual: Tom Hanks



- AI-generated version of Tom Hanks was used in ads for a dental plan.
- The use was without his authorization or participation.

Exemptions and Defenses

- Statutory/Common Law Exemptions
- First Amendment
- Incidental Use
- Copyright Act Preemption
- Anti-SLAPP
- Consent
- Statute of Limitations



California Statutory Exemptions

- News, public affairs, sports broadcasts or accounts, political campaigns

CA Civ. Code §§ 3344(d) and 3344.1(j)

- Post-mortem entertainment (fictional, non-fictional) and dramatic, literary or musical works

- Plays, books, magazines, newspapers, musical compositions, audiovisual works, radio programs, television programs, single and original works of art, works of political or newsworthy value, ads for the foregoing

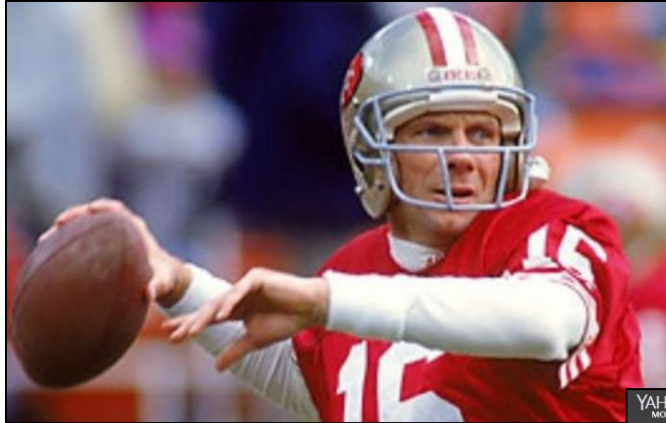
CA Civ. Code § 3344.1(a)(2)

Exemptions

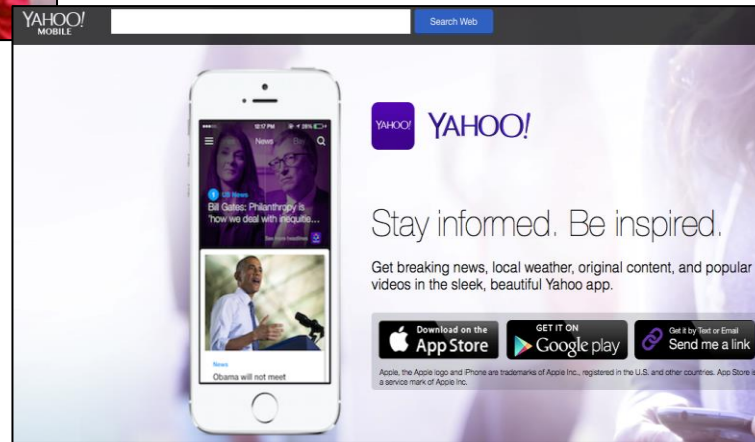


- PUBLIC INTEREST:
Dora v. Frontline Videos, Inc.
(Cal. Ct. App. 1993)

Exemptions



- MEDIA ADVERTISING:
Montana v. San Jose Mercury News
(Cal. Ct. App. 1995)



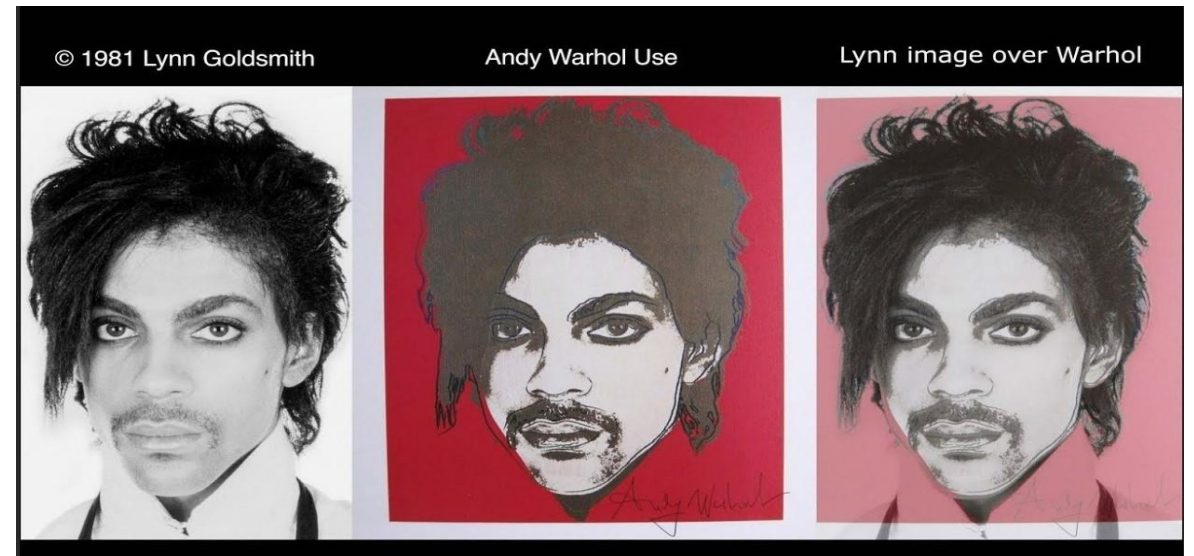
First Amendment Defenses

- Transformative Use
- Expressive Works
- Parody

First Amendment Defenses

TRANSFORMATIVE?

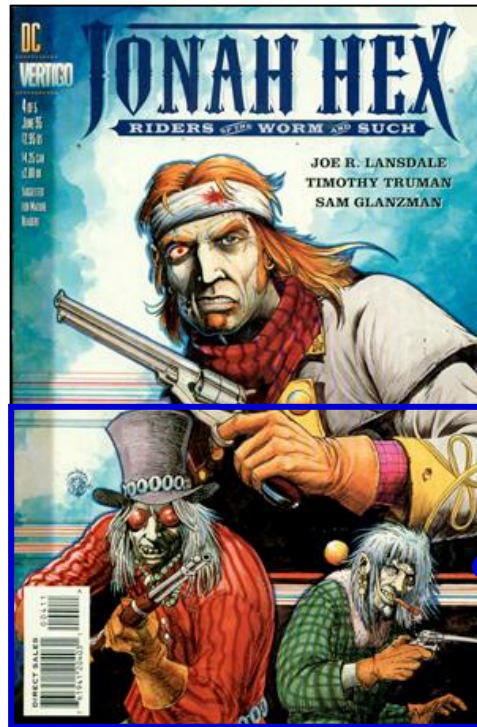
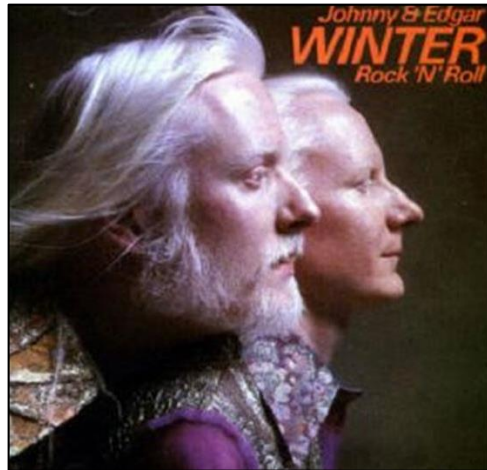
- *Comedy III Prods., Inc. v. Saderup Inc.* (Cal. 2001)
- *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*



First Amendment Defenses

TRANSFORMATIVE?

- *Winter v. DC Comics* (Cal. 2003)



First Amendment Defenses

TRANSFORMATIVE?



December 2023

First Amendment Defenses

TRANSFORMATIVE?

Siviero v Fox (Cal. Ct. App. 2018)



December 2023

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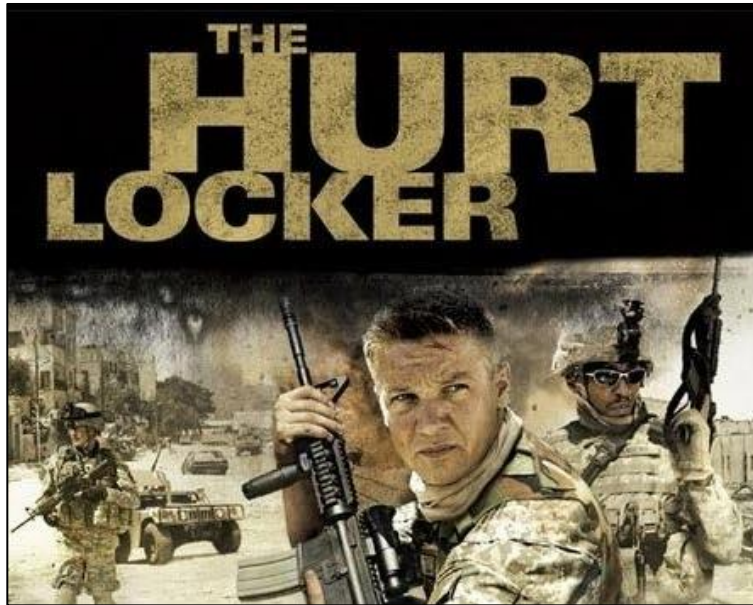
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Poll: 2. Should the actor get paid?

First Amendment Defenses

EXPRESSIVE WORKS?

- *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016)



First Amendment Defenses

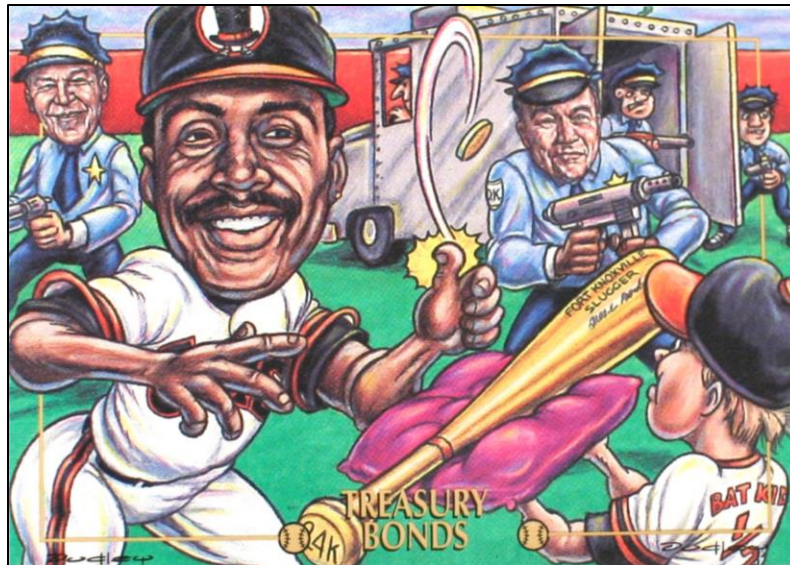
Expressive Works



First Amendment Defenses

PARODY?

- *Cardtoons, L.C. v. Major League Baseball Players Association* (10th Cir. 1996)
- *World Wrestling Fed. Entertainment Inc. v. Big Dog Holdings, Inc.* (W.D.Pa. 2003)



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 payoff pitch.

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

Cardtoons™ Cardtoons baseball is a parody and is NOT licensed by Major League Baseball Properties or Major League Baseball Players Association.
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Remedies



- Injunctive relief
- Compensatory damages (CA Civ. Code)
 - Courts consider the fair market value of the use
- Award of profits (CA Civ. Code)
 - In addition to compensatory damages
 - Burden of proof:
 - gross profits —————> plaintiff
 - deductible costs —————> defendant

Remedies

- Statutory minimum damages
 - CA – \$750 per use
 - NO FAKES proposal - \$5000 per violation
- Punitive damages
 - CA Civ. Code – oppression, fraud or malice
 - Common law – a conscious disregard for plaintiff's rights
- Attorneys' fees
 - Under CA Civ. Code, prevailing party recovers attorneys' fees

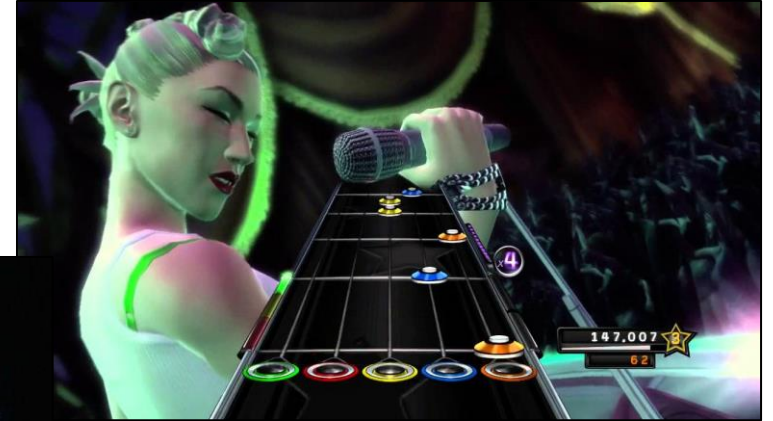
Licensing

The Right of Publicity Spectrum

Type of Use	Deal Considerations
Editorial (newsworthy)	Only need copyright (e.g., in photo, video, article), no right of publicity
Non-news/interview / reality content	Consider obtaining likeness rights via contract/release (can secure broader rights than under ROP law)
Marketing and publicity for underlying content / platform	<p>Include rights in agreement with individual for underlying content</p> <p>Obtain rights separately for unrelated marketing (e.g., model release)</p> <p>*Consider First Amendment news media exception</p>
Branded entertainment (“sponsored by”; product interaction)	Higher fees for product/service association
Endorsements	Commands highest fees for product/service endorsement
Products/Merchandise	Often a royalty or other revenue-based fee

Licensing Considerations (1 of 4)

- Scope of the Use
 - Endorsement
 - Branded Entertainment
 - Marketing and Publicity
 - Non-news/Interview Content
 - Editorial (newsworthy)
 - Products/Merchandise
 - Digital Recreations
 - Post-Mortem



Licensing Considerations (2 of 4)

- Term of Use
 - Run of campaign
 - In perpetuity
 - Options
- Media
 - Television, film, Internet, radio, print...
 - “Now known or hereafter devised”
- Territory
 - U.S. (territories and possessions?)
 - English-speaking North America
 - Worldwide
 - Throughout the universe



Christoff v. Nestle USA Inc



Licensing Considerations (3 of 4)

- Restrictions
 - e.g., feminine products, tobacco, firearms, and alcohol
- Approvals
 - Photographs
 - Film cuts
 - Promotional materials
 - Press releases

Licensing Considerations (4 of 4)

- Termination Rights
 - Morals clause
 - *Tiger Woods, Ryan Lochte, Lance Armstrong*
- Non-performance
- Death or disability
 - insurance
- Non-competition
 - *Ronaldinho – Coca-Cola or Pepsi?*



Thank You



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