



# Rights of Publicity

Law 115 | Week 7 | Lecture 15  
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# Agenda

1. Right of Publicity Overview
2. Origins of the Right of Publicity
3. A Creature of State Law
4. Washington's Right of Publicity
5. First Amendment Defense
6. ROP Cases
7. Example

# Right of Publicity Overview

Rights of publicity, also called personality rights, are **state law rights** of an individual to control the use of his or her:

- name
- image
- likeness
- voice, and
- other identifiable aspects of his or her identity



# Right of Publicity Overview

Examples of the right of publicity being exploited...



baby  
einstein.®

The logo for Baby Einstein, featuring a stylized, smiling face with spiky hair and glasses.

Brad Pitt: <http://youtu.be/mGs4CjeJiJQ>

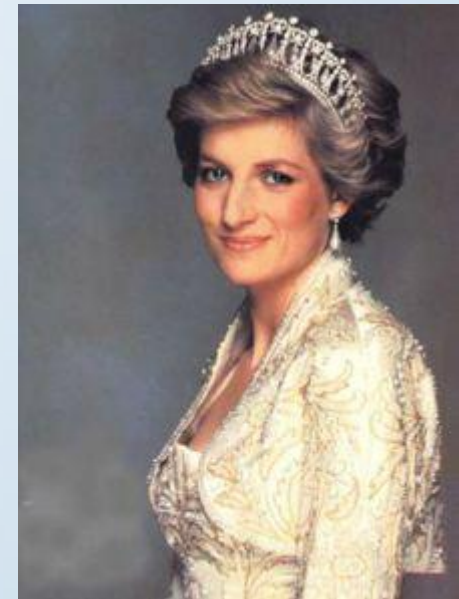
# Origins of the Right of Publicity

- Right of publicity developed from a notion about privacy, that we all have the “right to enjoy life – the right to be let alone” (from the Samuel Warren & Louis Brandeis *Harvard Law Review* article published in 1890)
- Various writings of William Prosser that expanded on the concept of right to privacy into four categories:
  1. Protection against intrusion into one’s private affairs
  2. Avoidance of disclosure of one’s embarrassing private facts
  3. Protection against publicity placing one in a false light in the public eye
  4. Remedies for appropriation, usually for commercial advantage, of one’s name or likeness



# A Creature of State Law

- Right of publicity is a state-specific property right
- Some states only recognize common law (judge made/case law) right of publicity; others have passed laws (statutory) to govern right of publicity
- In some states, the right of publicity expires at death and in other states, it continues after death and is passed on to the person's descendants
- Which law to apply depends on person's residence or place of death



# A Creature of State Law

California

Illinois

Kentucky

Nebraska

New York

Pennsylvania

Rhode Island

Texas

Virginia

Wisconsin

Florida

Indiana

Massachusetts

Nevada

Ohio

Oklahoma

Tennessee

Utah

Washington

# Washington's Right of Publicity

## RCW 63.60 – Washington Personality Rights Act

- Washington State recognizes that “every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness”
- Freely transferable
- Exists during the person's lifetime and 75 years after her death

## Exceptions

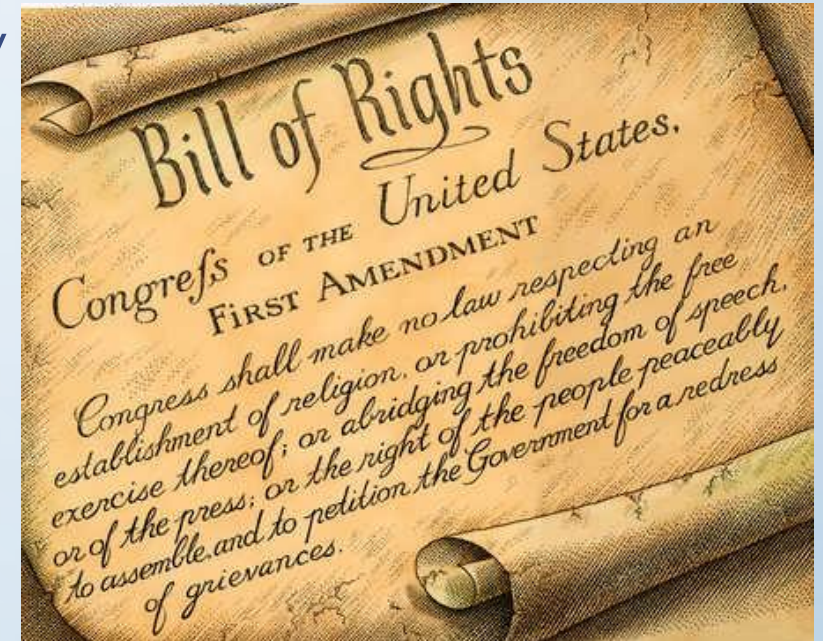
- Single and original works of fine art that are not published in more than five copies;
- Specific uses that do not inaccurately claim or state an endorsement by the individual or personality



# First Amendment Defense

Right of publicity does not operate in a vacuum – it is constrained in its exercise by how it affects the freedom of speech as guaranteed by the First Amendment to the U.S. Constitution

- **Predominative use test:** Art as opposed to an ad (expressive or newsworthy use vs. commercial use)
- **Saderup transformative test:** Was the work “transformed” into more than a mere likeness or imitation?



# No Doubt vs. Activision



The Court sided with No Doubt, but the case eventually settled.

- No Doubt licensed the likeness of its members for use in Band Hero, but argued that Activision used them in objectionable ways outside the scope of the license
- The court used a balancing test between the First Amendment and the right of publicity based on the question of whether the work in question added significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation

# *ETW v. Jireh Publishing*

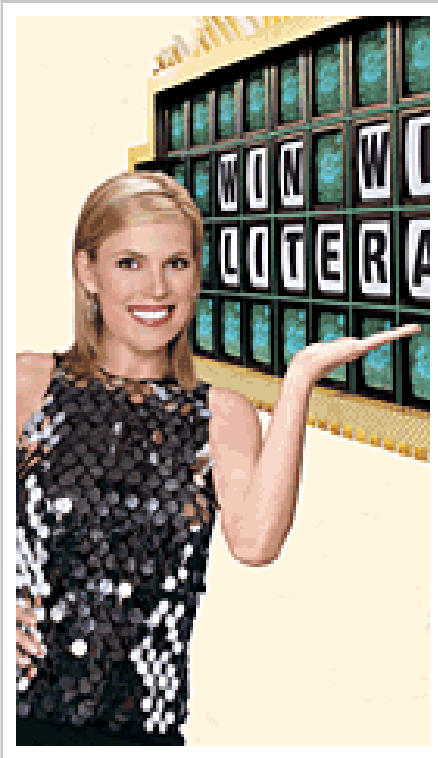


*The Masters of Augusta*

- **Use of image:** did not violate right of publicity because work was transformative and celebrated an event, not just an athlete
- **Use of name in title and caption:** did not violate right of publicity because it was a descriptive use

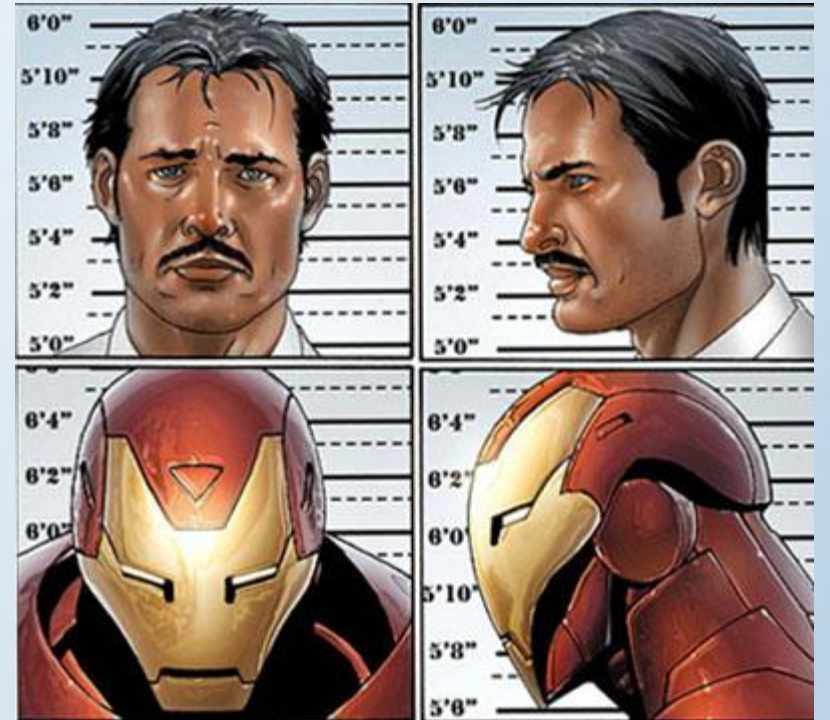


# White v. Samsung



- Common law privacy claim prevented Samsung from using robot that “called Vana White to mind”
- Court was concerned with identifying information about what she did for a living

# Example



<http://youtu.be/K-H8gdxSK34>



# Example

- Does this piece of fanart infringe the copyright associated with the Tony Stark character or Robert Downey Jr.'s right of publicity?
- Do you think the artist has a defense?

