

A cigarette maker created and published a magazine advertisement that featured a person dressed as a race-car driver with a helmet on standing in front of a distinctive race car. In fact, the car looked almost exactly like the very unusually marked car driven by a famous and popular driver. The driver in the ad was not identified, and his face was not shown. The cigarette maker published the advertisement without obtaining the famous driver's permission.

The famous race-car driver sued the cigarette maker for economic loss only, based on common law misappropriation of the right of publicity. The cigarette maker moved to dismiss the complaint.

Will the cigarette maker's motion to dismiss the complaint be granted?

- A. No, because there are sufficient indicia of the famous driver's identity to support a verdict of liability.
- B. Yes, because the driver is a public figure.
- C. Yes, because the famous driver did not claim any emotional or dignitary loss.
- D. Yes, because there was no mention of the famous driver's name in the ad.

### Explanation:

A defendant's **motion to dismiss** will be granted if the plaintiff's complaint fails to allege facts sufficient to support his/her claim. For a **misappropriation of the right to publicity** (ie, appropriation of name or likeness) claim, the plaintiff must allege that the defendant: used the plaintiff's **identity** (ie, name, likeness, or **item closely associated with the plaintiff**) without authorization

to receive a **benefit** (typically for a commercial purpose—eg, using the plaintiff's picture to advertise a product).

Here, though the cigarette maker did not use the famous driver's name or picture, it did feature a distinctive race car that was *almost identical* to his unusually marked car (item closely associated with the driver) in its advertisement (commercial purpose). Therefore, that advertisement contained sufficient indicia of the driver's identity to support his complaint and the court will likely deny the cigarette maker's motion to dismiss.

**(Choice B)** Public figures (persons who achieve pervasive fame/notoriety or who voluntarily involve themselves in a public controversy) have the same right to control the use of their identity as everyone else. Therefore, the driver's status as a public figure will not prevent him from recovering for misappropriation of his right to publicity.

**(Choice C)** Misappropriation of the right to publicity allows the plaintiff to recover for emotional distress or personal humiliation, but neither is required. Therefore, the driver's complaint did not need to allege any emotional or dignitary loss.

**(Choice D)** Although the cigarette maker's ad did not mention the famous driver by name, its use of his unusually marked race car was sufficient to depict or identify him.

### Educational objective:

Misappropriation of the right to publicity is the unauthorized use of the plaintiff's identity—ie, name, likeness, or item closely associated with the plaintiff—for the defendant's benefit (typically for a commercial purpose).

### References

Restatement (Second) of Torts § 652C (Am. Law Inst. 1977) (appropriation of name or likeness).

Fed. R. Civ. P. 12(b)(6) (motion to dismiss).

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## Defendant's motion to dismiss

For **misappropriation of right to publicity**,  
plaintiff's complaint must allege that:



defendant not authorized to use plaintiff's identity

- name
- likeness
- item associated with plaintiff

No

**Grant  
motion**

Yes



identity used for defendant's personal benefit  
(eg, a commercial purpose)

No

**Grant  
motion**

Yes



**Deny motion**