

A well-known movie star was drinking a vineyard's wine at a nightclub. A bottle of the vineyard's wine, with its label plainly showing, was on the table in front of the movie star. An amateur photographer asked the movie star if he could take his picture and the movie star said, "Yes." Subsequently, the photographer sold the photo to the vineyard. The vineyard, without the movie star's consent, used the photo in a wine advertisement in a nationally circulated magazine. The caption below the photo stated, "A movie star enjoys the vineyard's wine."

If the movie star sues the vineyard to recover damages as a result of the vineyard's use of the photograph, will the movie star prevail?

- A. No, because the movie star consented to being photographed.
- B. No, because the movie star is a public figure.
- C. Yes, because the vineyard made commercial use of the photograph.
- D. Yes, unless the movie star did, in fact, enjoy the vineyard's wine.

### Explanation:

To recover damages for an **invasion of privacy** claim based on **appropriation of name or likeness** (ie, misappropriation of the right to publicity), the plaintiff must prove that the defendant:

**used the plaintiff's picture**, name, or likeness **without authorization** *and* **obtained a benefit** (typically a commercial advantage—eg, advertising) from that use.

Here, the vineyard used the movie star's photo in an advertisement in a nationally circulated magazine. Although the movie star consented to being photographed, he did not authorize the vineyard to use his photo **(Choice A)**. And since the vineyard made commercial use of that photo (wine advertisement) without authorization, the movie star will recover damages from the vineyard.

**(Choice B)** Public figures have the same right to control the use of their identities as anyone else, so the fact that the movie star is a public figure does not preclude his recovery. Instead, this fact strengthens his claim by establishing the commercial value (ie, benefit) of using his identity.

**(Choice D)** Truth is a defense to an **invasion of privacy** claim based on *publicity in false light*, which requires proof that the defendant published false information about the plaintiff. But truth is no defense here since falsity is not an element of *appropriation of name or likeness*. Therefore, the movie star will recover even if the photo caption truthfully claimed that he enjoyed the vineyard's wine.

### Educational objective:

Invasion of privacy based on appropriation of name or likeness requires proof that the defendant (1) used the plaintiff's name, picture, or likeness without his/her authorization and (2) obtained a benefit—typically a commercial advantage.

### References

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

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## Appropriation of name or likeness (benefit requirement)



Name / likeness used for advertisement  
=  
benefit



Name / likeness used for news  
≠  
benefit