

# Developing Trends in the Right of Publicity

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- You can ask questions throughout the presentation by using the chat feature that is on the lower left hand corner of your screen. We'll also have Q&A at the end of the presentation.



# A Hypothetical...



- Voice-over on television advertisement for premium ice cream company “Ken & Terry’s”:
  - YOU WILL ABSOLUTELY LOVE OUR NEW PREMIUM ICE CREAM: CREAMY, DELICIOUS AND MADE FOR REAL AMERICANS WHO LOVE THEIR TREATS . . . SORRY, NONE FOR YOU, POSH AND PARIS!



# The Law

- “Right of publicity” law derives from a variety of state statutes and common law decisions.
- Presently, 19 states recognize the right of publicity or the related right of privacy via statute.
- A total of 28 states expressly recognize the rights as a result of statute and/or common law.

# The Law

- New York Right of Publicity  
(N.Y. Civ. Rights Law § § 50, 51 (2009))
  - (i) usage of plaintiff’s name, portrait, picture, or voice
  - (ii) within the state of New York
  - (iii) for purposes of advertising or trade
  - (iv) without plaintiff’s written consent
  
- Damages Pursuant to N.Y. Civ. Rights Law § 51
  - Injunctive relief
  - Compensatory
    - Fair market value of what the defendant appropriated
    - Defendant’s profits
    - Mental Distress
  - Exemplary damages for “knowing” use

# The Law

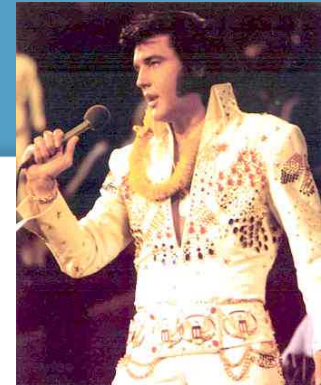
- California Right of Publicity (Cal. Civ. Code § 3344 (2009))
  - (i) knowing use of plaintiff’s name, voice, signature, photograph, or likeness
  - (ii) in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services
  - (iii) without plaintiff’s prior consent
  
- Damages pursuant to Cal. Civ. Code § 3344
  - Injunctive relief
  - Actual Damages
    - Injury to peace, happiness and feelings
    - Injury to goodwill and future publicity value
  - Disgorgement
  - Attorneys’ fees
  - Punitive damages with showing of malice



# The Law

- Lanham Act (15 U.S.C.A. § 1125 (2009))
  - No person may use
    - (i) in connection with any goods
    - (ii) any word, term, name, symbol or device
    - (iii) likely to cause confusion or to cause mistake or to deceive
    - (iv) as to the affiliation, connection, or association of such person with another person –
      - or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person
  
- Damages pursuant to 15 U.S.C.A. § 1125
  - Injunctive relief
  - Disgorgement
  - Actual damages
  - Costs of the action
  - Attorneys' fees upon showing of defendant's willfulness or bad faith

# Post-Mortem Publicity Rights?



- Statutes protecting post-mortem right of publicity
  - California (Cal. Civ. Code § 3344.1 (2009))
    - Prohibits usage of deceased personality'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 prior consent from the person or persons with right of consent.
  - Wash. Rev. Code § 63.60.010 (2009)
  - Ind. Code § 32-36-1-1 to -20 (2009)
  - Tenn. Code Ann. § 47-25-1103 (2009)
  
- Not recognized in New York



# What Law Applies?

- Plaintiff's domicile
- Place of infringement
- Limited opportunity for forum shopping
- Nationwide distribution = nationwide exposure?



# Varying Approaches to Balancing The Right of Publicity Against Free Speech



# Single Publication Rule



Nussenzweig v. diCorcia, 9 N.Y.3d 184, 848 N.Y.S.2d 7 (N.Y. 2007)



Christoff v. Nestle USA, Inc., 47 Cal.4th 468, 213 P.3d 132 (2009)

# Actionable Infringement?



*ETW Corporation v. Jireh Publishing Inc.*,  
332 F.3d 915 (6th Cir. 2003)

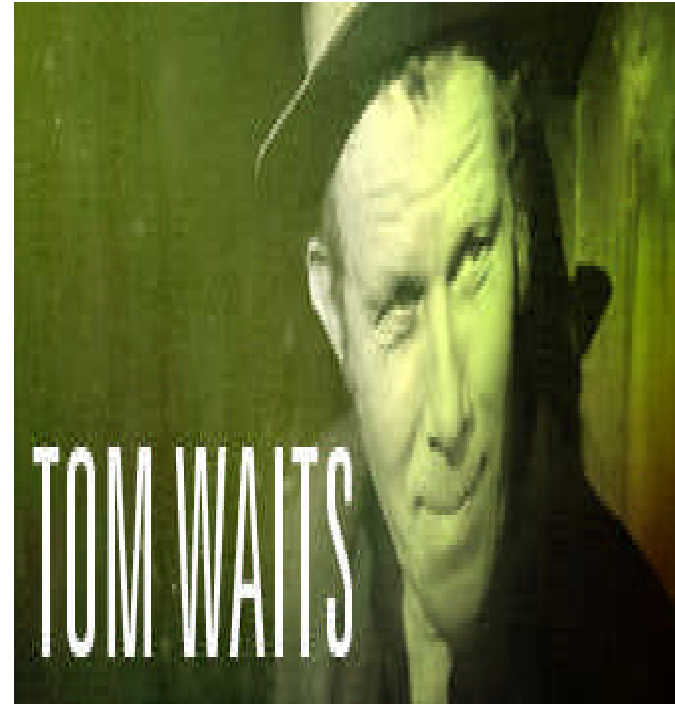


*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (Cal. 2001)

# Sound-alikes

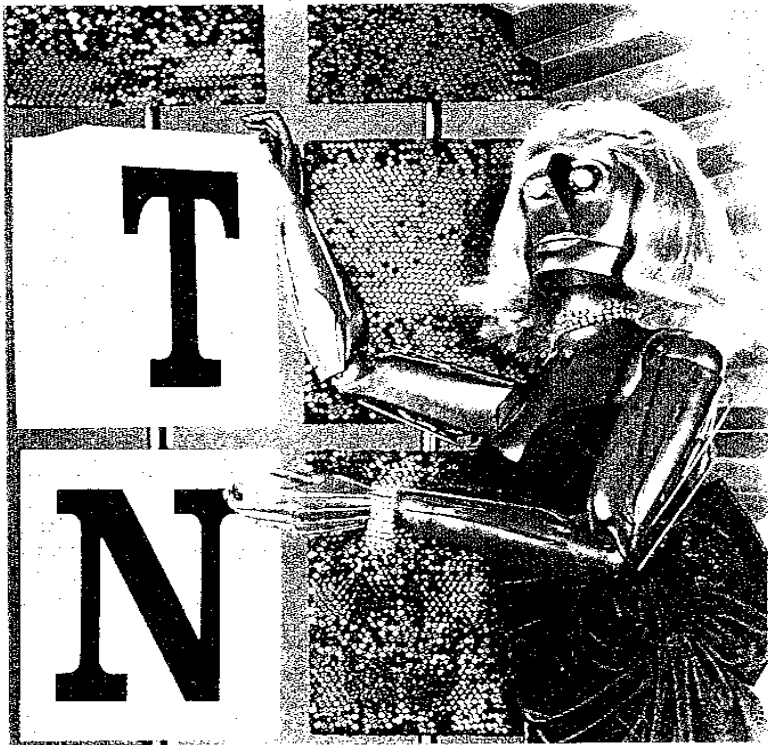


*Midler v. Ford Motor Co.*, 849 F.2d 460  
(9th Cir. 1988)



*Waits v. Frito-Lay, Inc.*, 978 F.2d 1502  
(9th Cir. 1992)

# Robots!

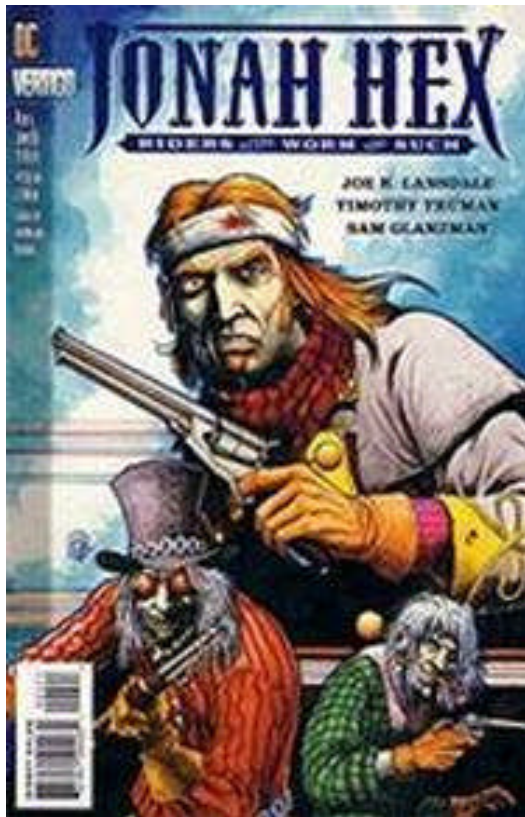


*White v. Samsung*, 989 F.2d 1512  
(9th Cir. 1993)



*Wendt v. Host Intern., Inc.*,  
197 F.3d 1284 (9th Cir. 1999)

# Comic Books

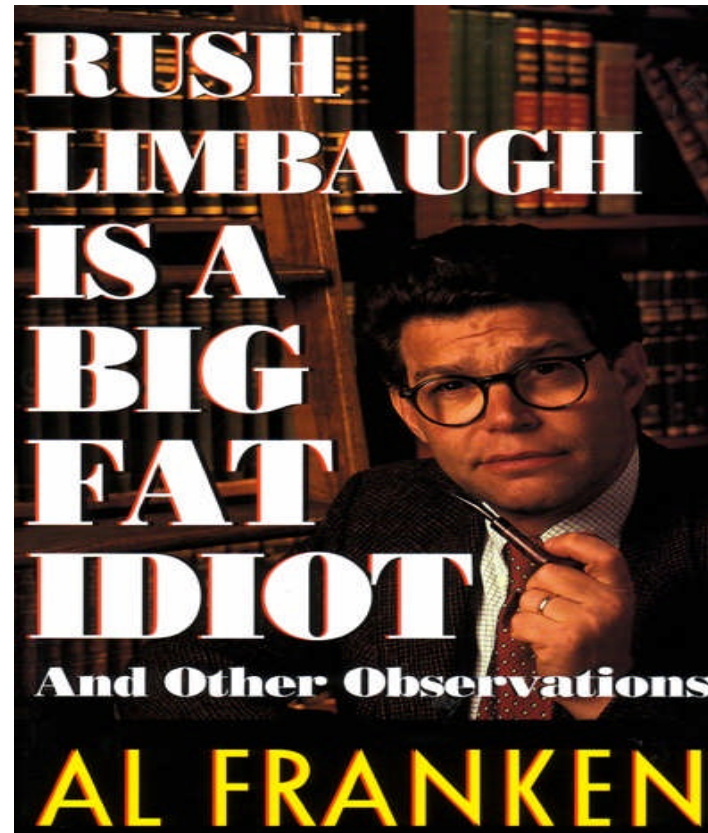


*Winter v. DC Comics*, 30 Cal. 4th 881 (Cal. 2003)



*Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003)

# Unintended Implications of Spawn Decision?





# Lindsay Lohan and E\*Trade

- In March 2010, Lindsay Lohan filed suit in New York state court against E\*Trade for a commercial that aired during the 2010 Super Bowl and Winter Olympics in which a little boy is in the middle of a video chat with his girlfriend and refers to another little girl as “that milkaholic Lindsay.” Lohan claims the commercial violated her right of publicity under New York law.



# Woody Allen v. American Apparel, Inc.



- Without ever seeking, much less obtaining, Allen's permission or consent, American Apparel disseminated billboard and Internet advertisements containing Mr. Allen's image and prominently displayed said images on billboards in the Cities of New York and Los Angeles, California, as well as on American Apparel's Internet website.
- Allen sued American Apparel in the Southern District of New York for violation of his right of publicity under New York's Civil Rights Law §51 and §43(a) of 15 U.S.C. §1125(a), the Lanham Act.
- Allen alleged that American Apparel by its President and Chief Executive Officer, Dov Charney, knowingly used the image, likeness of Plaintiff Woody Allen for trade and advertising purposes without Mr. Allen's consent.
- Case settled on the eve of trial for \$5 Million, which is the highest amount ever recorded for a right of publicity action.

# The “Epiphany”



**New York Billboard,  
Houston and Allen Streets**



**Los Angeles Billboard**



**New York Billboard,  
Houston and Allen Streets**



**American Apparel Retail  
Store in Los Angeles**



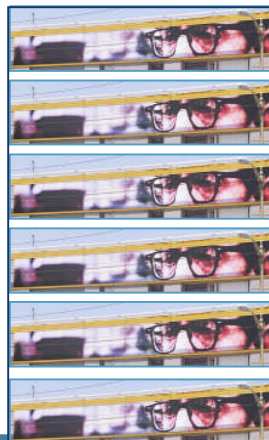
**Los Angeles Billboard**



**New York Billboard,  
Houston and Allen Streets**



**Banner Ads  
Displayed at AAI  
Headquarters**



**American Apparel Retail  
Store in Los Angeles**



**Los Angeles Billboard**



**American Apparel Inc. Headquarters**



**American Apparel Retail Store in Los Angeles**



**New York Billboard, Houston and Allen Streets**



**Banner Ads Displayed at AAI Headquarters**



**Los Angeles Billboard**



## Americanapparel.net Slideshow (April - May 2007)



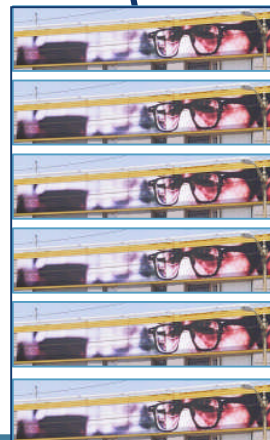
### American Apparel Retail Store in Los Angeles



### New York Billboard, Houston and Allen Streets



### Banner Ads Displayed at AAI Headquarters



### Los Angeles Billboard

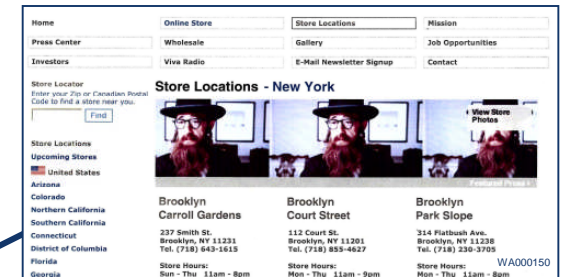




## Americanapparel.net Slideshow (April - May 2007)



## Store Locator



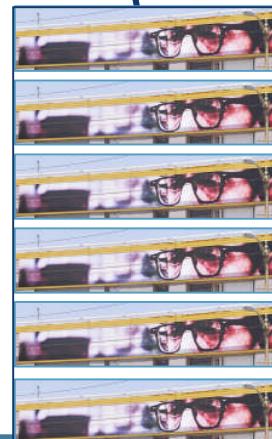
## American Apparel Retail Store in Los Angeles



## New York Billboard, Houston and Allen Streets



## Banner Ads Displayed at AAI Headquarters



## Los Angeles Billboard



# “Woody Allen Is Our Spiritual Leader”

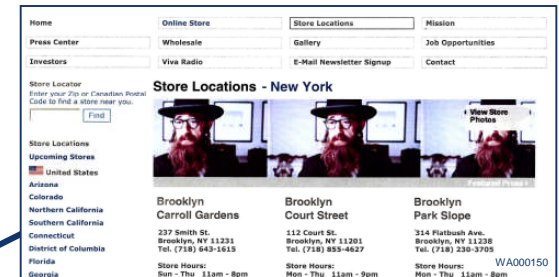
AA001202

5/9/07 E-mail from AAI Employee Alexandra Spunt (Content Director)

## Americanapparel.net Slideshow (April - May 2007)



## Store Locator



## American Apparel Retail Store in Los Angeles



## New York Billboard, Houston and Allen Streets



## Banner Ads Displayed at AAI Headquarters



## Los Angeles Billboard



WA000183

# “Woody Allen Is Our Spiritual Leader”

AA001202

5/9/07 E-mail from AAI Employee Alexandra Spunt (Content Director)

Americanapparel.net Slideshow  
(April - May 2007)

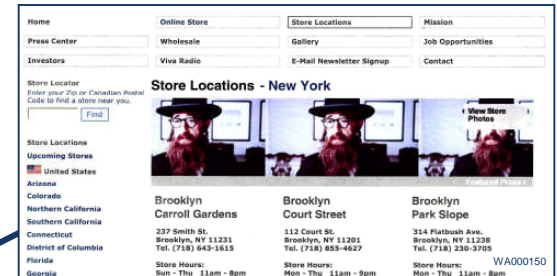


E-mail Inquiry from *Time Out New York*

> From: Dan Derouchie <dderouchie@timeoutny.com>  
> readers and tell them a little bit about the concept behind it and how Woody  
> Allen ended up coming on board. It's for a column we do bi-weekly called

AA001198

Store Locator



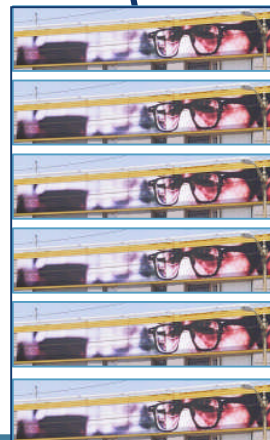
American Apparel Retail  
Store in Los Angeles



New York Billboard,  
Houston and Allen Streets



Banner Ads  
Displayed at AAI  
Headquarters



Los Angeles Billboard



WA000183

# “Woody Allen Is Our Spiritual Leader”

AA001202

5/9/07 E-mail from AAI Employee Alexandra Spunt (Content Director)

Americanapparel.net Slideshow  
(April - May 2007)



5/25/07 E-mail from Dov Charney  
AAI CEO/Founder

From: Dov Charney <dov@americanapparel.net>  
Date: May 25, 2007 9:31:59 PM PDT

investors loved it.

AA2350

New York Billboard,  
Houston and Allen Streets



E-mail Inquiry from Time Out New York

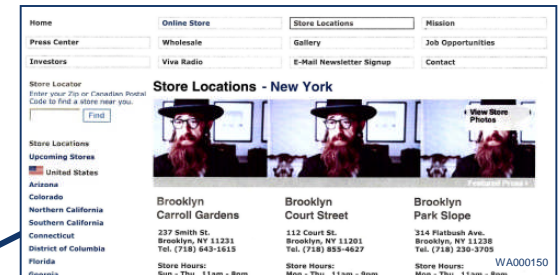
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American Apparel Inc. Headquarters



Store Locator



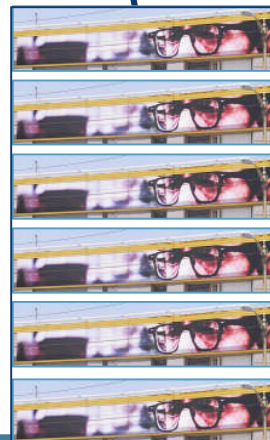
American Apparel Retail  
Store in Los Angeles



Los Angeles Billboard



Banner Ads  
Displayed at AAI  
Headquarters



WA000183

**OK, But How Much Is It Worth?**



# The Match Game



*\$24.5 Million*



*\$15 Million*



*\$2.375 Million*



*\$1.5 Million*



*\$35,000*

# The Match Game



*\$1.5 Million*



*\$24.5 Million*



*\$35,000*



*\$2.375 Million*



*\$15 Million*

## Components of Damages

- Injury to feelings/invasion of privacy
- Commercial Losses
- Disgorgement of Profits
- Punitive damages

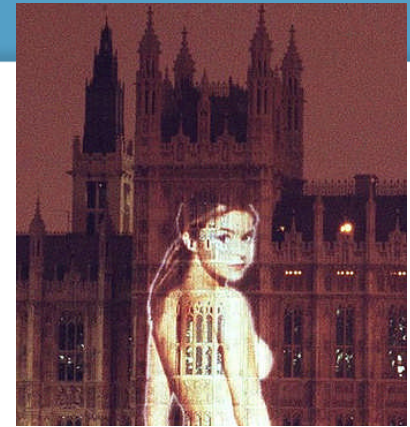
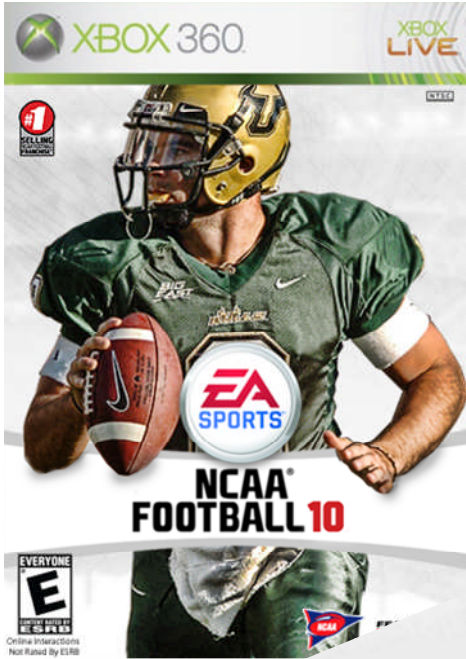
## Unique Aspects of Celebrity Valuation

- Need for Expert Testimony
- The marketplace for celebrity advertising
- Extent of dissemination
- Scarcity of past endorsements
- Premium for unfavorable association with advertiser
- Handling the Question of Duration: “The Price of Admission”

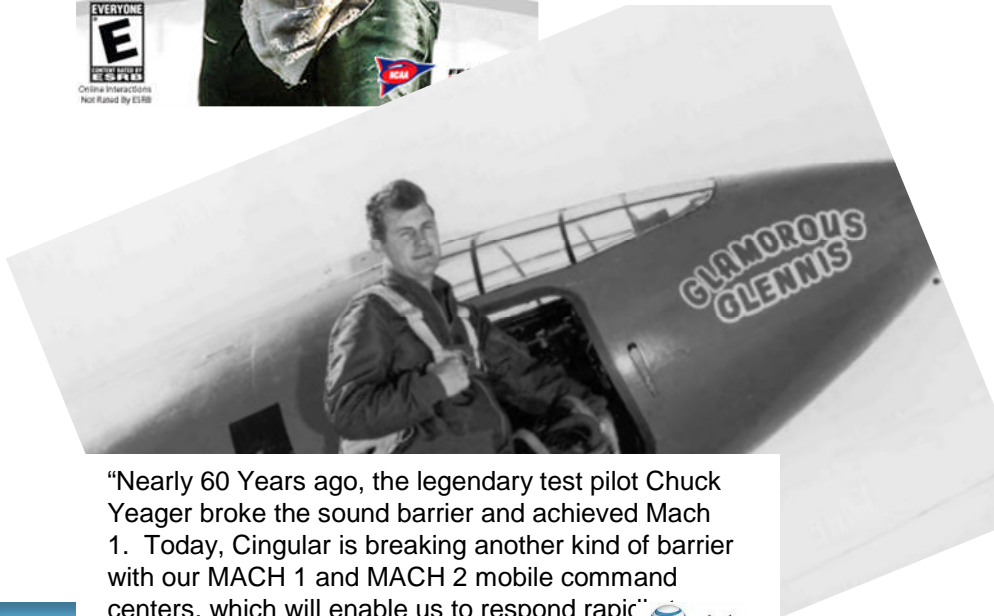




# New Frontiers



twitter



“Nearly 60 Years ago, the legendary test pilot Chuck Yeager broke the sound barrier and achieved Mach 1. Today, Cingular is breaking another kind of barrier with our MACH 1 and MACH 2 mobile command centers, which will enable us to respond rapidly to hurricanes and minimize their impact on our customers.”



STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 ANTHONY LA RUSSA,  
 Plaintiff,  
 vs.  
 TWITTER, INC., a Delaware corporation, and  
 DOES 1-25, inclusive,  
 Defendants.  
 No.: CGC-09-488  
 COMPLAINT FOR  
 INFRINGEMENT, FALS  
 DESIGNATION OF ORIG  
 TRADEMARK DILUTIO  
 CYBERSQUATTING,  
 MISAPPROPRIATION OF  
 AND MISAPPROPRIATIO  
 LIKENESS



# Fantasy Sports



- Use of “names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player” in an interactive form in connection with fantasy products is entitled to First Amendment protection. See *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007); *CBS Interactive Inc. v. National Football League Players Ass'n, Inc.*, 259 F.R.D. 398 (D. Minn. 2009).
  - Some legal commentators believe that *C.B.C. Distribution* was wrongly decided.
  - Appeal to Eight Circuit in *CBS Interactive* was filed on May 28, 2009.
- Extent of player information used will give rise to questions about how far the First Amendment protection reaches.
- Court will examine whether the manner in which the information appears could give the false impression of endorsement. See *CBS Interactive Inc. v. National Football League Players Ass'n, Inc.*, 259 F.R.D. 398 (D. Minn. 2009).



# Video games



# *Keller v. Electronic Arts*

2010 U.S. Dist. LEXIS 10719, 38 Media L. Rep. 1353 (N.D. Cal. Feb. 8, 2010)

- Plaintiff is a former starting quarterback for Arizona State University and the University of Nebraska. Plaintiff alleged that Electronic Arts (EA) designed the virtual football players in its “NCAA Football” series of video games to resemble real-life college football athletes, including himself, by using the same jersey numbers, physical characteristics (e.g., height and weight) and home states.
- EA moved to dismiss, asserting a First Amendment defense.
- Court denied EA’s motion, holding that EA’s depiction of plaintiff is not sufficiently transformative to bar plaintiff’s right of publicity claims:
  - “EA does not depict plaintiff in a different form; he is represented as what he was: the starting quarterback for Arizona State University” and “the game’s setting is identical to where the public found plaintiff during his collegiate career: on the football field.”
- Court granted the NCAA’s motion to dismiss plaintiff’s right of publicity claim under Indiana law, in which plaintiff alleged that the NCAA “knowingly approved” EA’s use of plaintiff’s likeness. The court held that the Indiana statute does not encompass liability for enabling right of publicity violations.



# *O'Bannon, et al. v. NCAA, et al.*

2010 U.S. Dist. LEXIS 19170 (N.D. Cal. Feb. 8, 2010)



- Former UCLA basketball player Edward O'Bannon filed an antitrust class action suit against the NCAA, claiming that NCAA requires college athletes to “relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations.”
- O'Bannon also alleged that the NCAA enters into licensing agreements for the use of college athletes' likenesses while the athletes themselves are excluded from entering into such agreements.
- Court denied, in part, NCAA's motion to dismiss, holding that O'Bannon succeeded in pleading that the NCAA's conduct constitutes an unreasonable restraint of trade.

# Advertisements in disguise:

## Advertising In Guise Of Communicating Factual Information



“Nearly 60 Years ago, the legendary test pilot Chuck Yeager broke the sound barrier and achieved Mach 1. Today, Cingular is breaking another kind of barrier with our MACH 1 and MACH 2 mobile command centers, which will enable us to respond rapidly to hurricanes and minimize their impact on our customers.”



# What Does It All Mean?

- The First Amendment is much less powerful and protective when some commercial purpose is present.
- Celebrity-obsessed culture has created increased opportunities for celebrities to exploit and profit from their success through commercial endorsements which potentially increases value of a celebrity's "right of publicity," but not every "celebrity mention" is a violation.
- Global reach of internet and advancement in technology has created environment where a short, one-time use can reach millions -- creating potential for greatly increased damages due to increased exposure.
- Issues as to blogs, Facebook and Twitter still evolving, but analysis the same.

**Any questions?**



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