

IM 450-01
Intellectual Property Law and New Media
Fall 2022
Oct. 13, 2022
Day 14

Tort Laws for *IP of the Person:*
Basics + Rights of Publicity, Privacy
of the Persona and Defamation.

Intellectual Property “Torts”

(civil infringements that lead to liability)

Rights of Publicity

Rights of Privacy

Defamation

No single law on any of the three areas of interest

- **Amendments to the constitution (1st, 4th, 5th, 14th) are often invoked.**
- **Over half the states have laws, but they sometimes organize the three differently.**

Warren and Brandeis, 1890

- Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis wrote a *Harvard Law Review* article in which they argued that the Constitution, though never stating so directly, offers a “right to be left alone.”
- This and related ideas turned into the “right to privacy,” the “right to retreat from the world”
 - and in those days, the right to escape the excesses of yellow journalism.
 - That may have an analog in today’s ubiquitous data collection practices in new media.

Common Law Claims

(that are then broken out among the three areas)

- **Intrusion upon seclusion (Privacy)**
- **Public disclosure of private facts (Privacy and/or Defamation)**
- **False light in the public eye (Defamation)**
- **Appropriation of name/likeness/etc. (Right of Publicity)**

Intrusion Upon Seclusion (Privacy)

- **Unauthorized intrusion or prying into plaintiff's seclusion;**
 - **Intrusion offensive or objectionable to a reasonable person;**
 - **Matter upon which intrusion occurs must be private;**
 - **Intrusion causes anguish or suffering.**

Intrusion Upon Seclusion (Privacy)

- **The privacy right of the persona responds to protections against unreasonable intrusion, unreasonable public disclosure of private facts, and others representing one's person in false light.**
 - **Considerations about privacy violations often involve matters of consent: Was consent given for the collection, use, and distribution of the information?**
 - **In new media, this often takes us back to examinations of terms of service, privacy policies, and end-user license agreements**
 - **Courts, generally, still treat wrap agreements as law**
 - **Over time, one has to think that this will change/evolve.**

Why the Baby on Nirvana's 'Nevermind' Album Is Suing Now

Spencer Elden, 30, says Nirvana engaged in child pornography when the band used a picture of him naked on the cover of the breakthrough album.

<https://www.nytimes.com/2021/08/25/arts/music/spencer-alden-nirvana-nevermind.html?action=click&module=RelatedLinks&pgtype=Article>

Judge Dismisses Suit Over Naked Baby Image on Nirvana Album Cover

<https://www.nytimes.com/2022/09/04/arts/music/nirvana-nevermind-baby-lawsuit.html>

Constitutional bases and troubles

- Aspects of the First, Fourth, and Fifth Amendments to the Constitution often apply to privacy of the persona.
- Many authors/analysts note that the *Patriot Act* and other post-911 aspects have largely cancelled-out constitutional protections of privacy.
- The nature of our uses for digital media also contribute here too: we post a lot, our mobile phones aren't used "as in private," etc.
 - A lot of constitutional protections are pinned to "expectations of privacy." When we act like we don't expect any, the law doesn't protect us.
- Constitutional protections (generally) only apply to what the government can do. These don't apply (much or at all) to commercial/private data collection.

Public Disclosure of Private Fact (Privacy and/or Defamation)

“A” is liable to “B” for giving publicity to a matter concerning the private life of “B,” if the matter publicized is the kind that:

- **Would be highly offensive to a reasonable person, and**
- **Is not of legitimate concern to the public**

- For example: “[IMDB’s Disclosure of Actress’s Age Will Go To Trial – Hoang v. Amazon](#)”

Hoang v. Amazon.com, Inc. et al. (initially filed as *Doe v. Amazon.com, Inc. et al.*) is a lawsuit brought by actress Junie Hoang in October 2011 against [IMDb.com](#) and its parent company [Amazon.com](#) for revealing her true date of birth, which she said opened her up to [age discrimination](#). In March 2013, all of her claims against Amazon and all but one of her claims against IMDb were dismissed, and in April 2013, a jury found that IMDb was not liable for the remaining claim for breach of contract. She appealed February 2015; the 9th Circuit affirmed for IMDb

False Light in the Public Eye (Defamation)

- **Publication of false fact to the public;**
- **Highly offensive to reasonable person;**
- **Causes damage to plaintiff.**
- **Usually represented in defamation cases**

Alec Baldwin sued by family of fallen Marine for \$25 million for defamation and other allegations

- Actor Alec Baldwin is being sued for defamation and negligence by the family of a fallen Marine after comments he made about one family member's presence outside the US Capitol on January 6, 2021, according to a suit filed Monday in the US District Court for the District of Wyoming.
- The sisters and widow of [Lance Corporal Rylee J. McCollum](#), who died on August 26, 2021, during the suicide bomber attack in Kabul, Afghanistan, are asking for \$25 million plus legal fees after suffering severe distress following Baldwin's comments, according to the court filing.
- After McCollum's death, a GoFundMe account was started for his widow Jiannah McCollum "and her soon-to-be-born daughter," the suit says. Baldwin heard about the GoFundMe account and sent a check of \$5,000 to the Marine's [sister, Roice McCollum](#), for Jiannah and her child as what he called "a tribute to a fallen soldier," according to the suit.
- On January 3, Roice "posted a photo of a crowd of demonstrators at the Washington Monument on her Instagram page in anticipation of the January 6, 2022, one-year anniversary of her attendance at the Washington, DC demonstration," the suit said.
- When Baldwin saw Roice's post ahead of the one-year anniversary, he began to message her on Instagram, according to the lawsuit.
- "When I sent the \$ for your late brother, out of real respect for his service to this country, I didn't know you were a January 6th rioter," Baldwin said, according to the suit.

Right of Publicity Defined

- “[T]he inherent right of *every human being* to control the commercial use of his or her identity.”
 - McCarthy, *Right of Publicity*, 2nd Ed., 2005, Vol. 1, §1:3
- Note that this right adheres regardless of the status of the person. However, since celebrities can usually leverage their personae for value, fussing over this right usually involves famous people.

Right of Publicity Defined

PROTECTED ASPECTS OF PERSONA

- **Name**
- **Likeness**
- **Distinctive Voice**
- **Style**
- **Role – If synonymous with actor**
- **Nicknames**
 - **“Crazy-Legs Hirsch”**
 - **“Here’s Johnny Porta-potties”**

'Real-life Hustler' Samantha Barbash sues over Jennifer Lopez film

The woman who inspired Jennifer Lopez's character in Hustlers is suing the film's makers for \$40m.

In the lawsuit, Samantha Barbash accuses film companies including STX Films and Lopez's Nuyorican Productions of using her likeness and defaming her.

In response, STX said it would "defend our right to tell factually based stories based on the public record".

Hustlers is the fictionalized story of Barbash and other women who drugged and swindled rich men at strip clubs.

Barbash was the alleged mastermind of the ring and was sentenced to five years' probation for conspiracy, assault and grand larceny after it came to light.

The movie was based on [a 2015 New York Magazine article about the gang](#), but Barbash has said she declined to sell her rights to the movie's producers, saying they offered her "peanuts".

Real people who have been portrayed on screen do not have a good track record of success when suing movie and TV companies. (5 instances listed)

<https://www.bbc.com/news/entertainment-arts-51032332>

NCAA and Right of Publicity

- The NCAA Board of Governors announced that beginning 2021, Student Athletes will be able to make money for endorsement deals involving use of their Image and Likeness.
- The announcement resulted from years of litigation and legislative hearings involving the NCAA's profiteering off of student-athletes. The announcement appears to be a compromise by the NCAA over the ability of student athletes making money [from] their likeness.
- With the policy change, the NCAA appears to be supporting changes to allow student athletes to earn compensation for endorsements, social media and other businesses and personal appearances. The student athletes will be able to identify themselves by their school and sport, but will not be able to use the logo of the teams.
- [April 29, 2020, https://theipcenter.com/2020/04/student-athletes-earning-money-from-rights-of-publicity/](https://theipcenter.com/2020/04/student-athletes-earning-money-from-rights-of-publicity/)

(mis) Appropriation of Name or Likeness

- **Name or likeness of plaintiff;**
- **Appropriated by defendant;**
- **For some advantage, usually commercial.**



By Samuel Maull, Associated Press

NEW YORK — 50 Cent has sued Taco Bell, claiming the fast-food restaurant chain is using his name without permission in advertising that asks him to call himself 99 Cent. The rapper says in a federal lawsuit filed Wednesday that the Mexican-themed chain features him in a print ad asking him to change his name to 79 Cent, 89 Cent or 99 Cent. His real name is Curtis Jackson.

The rapper's court papers say the ad is part of Taco Bell's "Why Pay More?" campaign, which promotes items for under a dollar, including Cinnamon Twists for 79 cents, Crunchy Tacos for 89 cents and Bean Burritos for 99 cents. The papers say the Irvine, Calif.-based company sent a bogus letter requesting the name change to the news media but not to the rapper.

The rapper's lawyer, Peter D. Raymond, said his client didn't learn about the letter or that he was featured in the ad campaign until he saw a news report about it.

Raymond said his client is seeking \$4 million in damages.

Taco Bell Corp. spokesman Rob Poetsch issued a statement saying: "We made a good faith, charitable offer to 50 Cent to change his name to either 79, 89 or 99 Cent for one day by rapping his order at a Taco Bell, and we would have been very pleased to make the \$10,000 donation to the charity of his choice."

Maybe a right of publicity claim? Parody?



Exceptions

- News, commentary, satire, critique, and some other forms of speech are protected when the information can be interpreted to be within the public's right to know. News and information of public interest, even when about public figures with a lot at risk, is generally treated as outside the realm of protection under rights of publicity.
- Images of public buildings
- Images of people at news events
- Sometimes (and in some jurisdictions) “parodies” and/or “artistic renderings” of otherwise protected personae.

Illinois Right of Publicity Act

- **765 ILCS 1075/1**
- **Effective as of 1-1-1999**
- **Protects the right to control and to chose whether and how to use one's individual identity for commercial purposes**
- **Requires written consent to use an individual's identity for commercial purposes**
- **Continues for 50 years after death**

Illinois Right of Publicity Act

- **EXCEPTIONS:**

- **Portray, describe or impersonate individual in live performance or other literary or artistic manner;**
 - **Note that this one allows impersonations that are protected in other jurisdictions.**
- **Non-commercial use (news, public affairs, sports broadcast, political campaign);**
- **Identifying individual truthfully as author of work or program or performer;**
- **Promotional materials for the above-referenced;**
- **Professional photographers who display work at their shops (unless otherwise notified of objection).**

- **Note that when you get a pix done by a photographer, they control the copyright and can display the work virtually anywhere, without additional permission. You are, in effect, their model with the equivalent of a signed release, unless you constrain them with paperwork. Paying them does not make their work a work for hire and thereby give you the copyright. If you want to limit publication/re-use, you must constrain them by specific contractual language/agreements.**

- **Note that when you get a pix done by a photographer, they control the copyright and can display the work virtually anywhere, without additional permission. You are, in effect, their model with the equivalent of a signed release, unless you constrain them with paperwork. Paying them does not make their work a work for hire and thereby give you the copyright. If you want to limit publication/re-use, you must constrain them by specific contractual language/agreements.**