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# Right of Publicity Protection in the United States

Michael Atkins  
University of Washington School of Law  
Atkins Intellectual Property, PLLC  
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# State law controls

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- California statute is the model
  - Any person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner, for purposes of advertising or selling, without person's prior consent shall be liable
    - Cal. Civ. Code § 3344

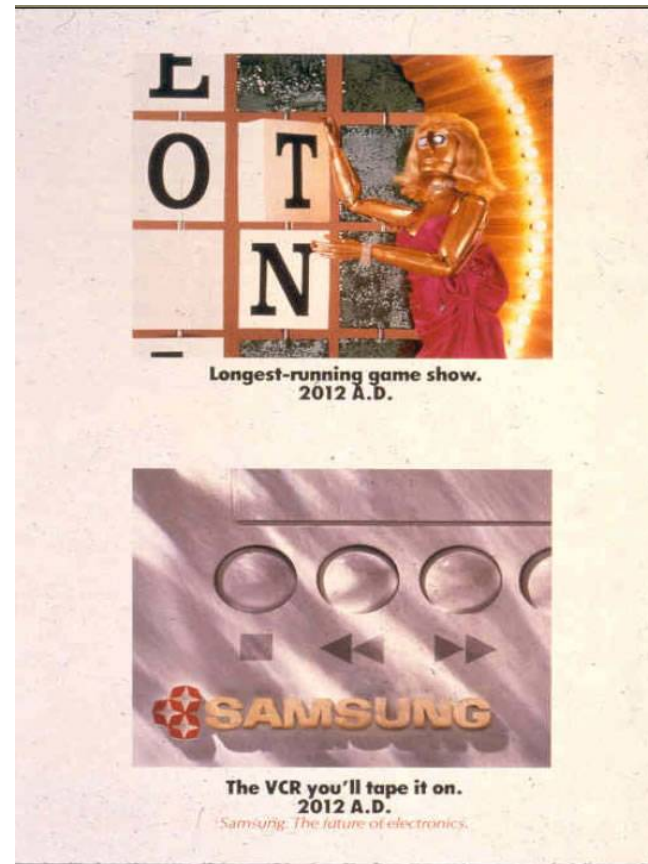
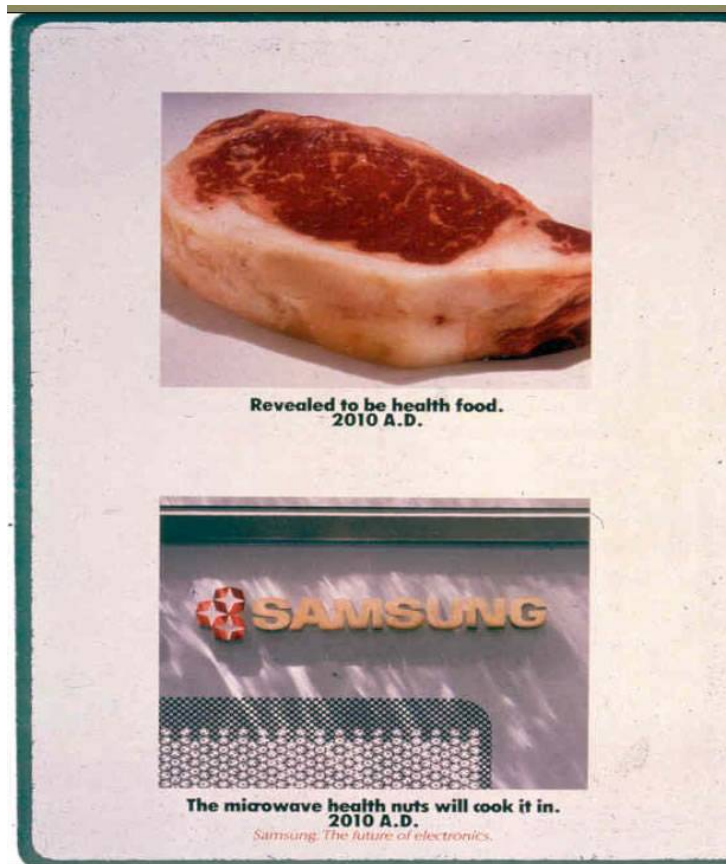
# State law controls

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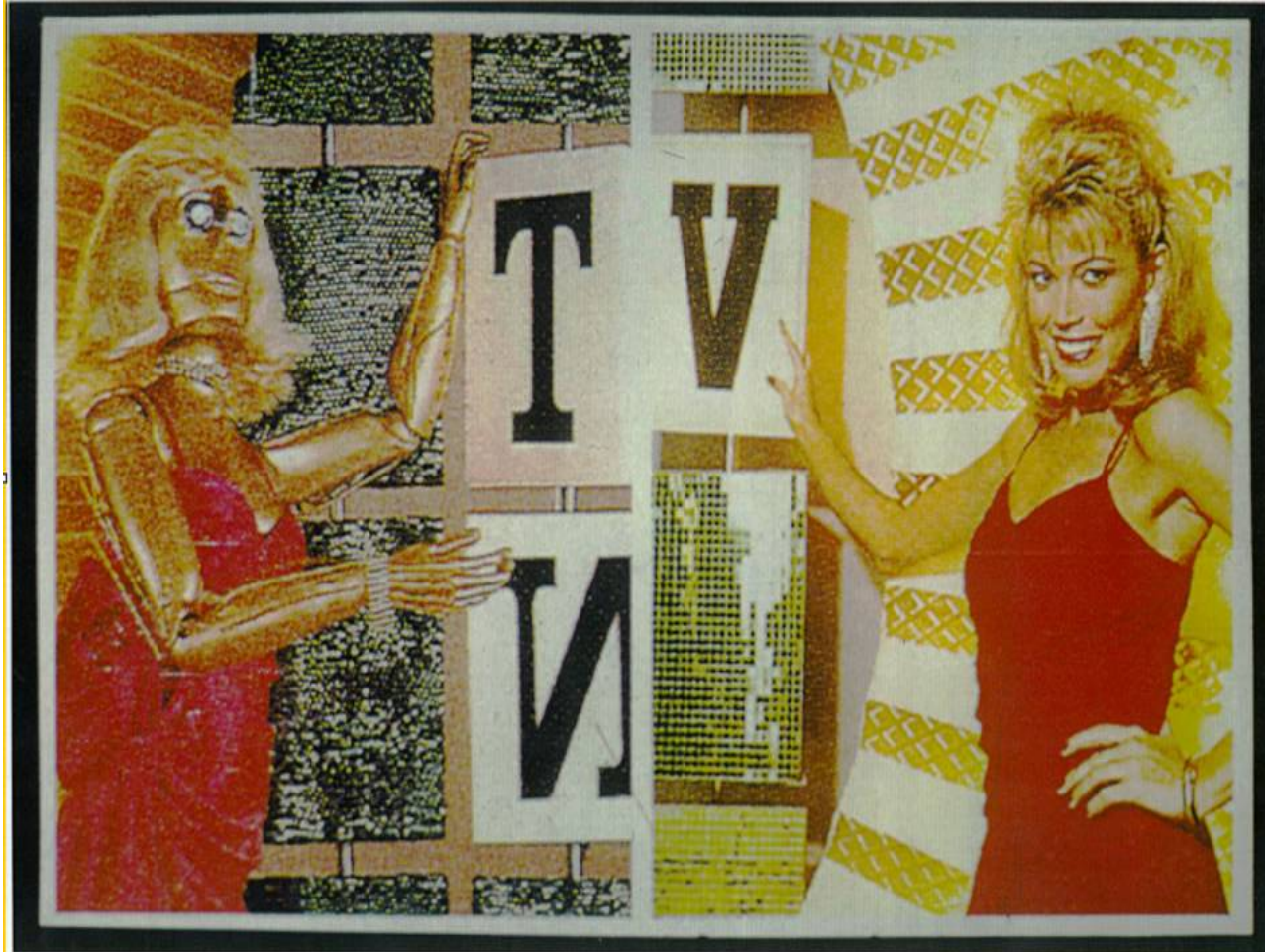
- Creature of state (not federal) law
- 20 States with statutory protection
  - Including California and New York
- Others provide common law protection
  - Some states provide both
- But claim is often paired with federal claims for false designation of origin/false endorsement

# White v. Samsung Electronics

971 F.2d 1395 (9<sup>th</sup> Cir. 1992)



# *White v. Samsung Electronics*



# *White v. Samsung Electronics*

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- Statutory right of publicity claim
  - Any person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner, for purposes of advertising or selling, without person's prior consent shall be liable
    - Held: Samsung not liable to White under statute b/c robot was not of her "likeness"

# *White v. Samsung Electronics*

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- Common law right of publicity claim
  - Protects commercial interest of celebrities in their identities. Since a celebrity's identity can be valuable in the promotion of products, the celebrity has an interest in protecting against the unauthorized commercial exploitation of that identity
    - Has celebrity's identity been appropriated?

# *White v. Samsung Electronics*

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- *E.g.*, Ford Motor Co. found liable under common law for commercial with Bette Midler “sound-alike”
- Held: White only person who stands on Wheel of Fortune set and turns letters; consequently, Samsung’s robot ad appropriated her identity



# *White v. Samsung Electronics*

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- Dissent: Holding wrongly expands common law right of publicity to include anything that reminds the viewer of the celebrity
  - Majority would find violation in monkey on a Wheel of Fortune set with a wig and gown. This gives White an exclusive right not in what she looks like or who she is, but in what she does for a living
  - With no exceptions for fair use or right to parody, expansion of right impoverishes the public domain

# How do paparazzi exist?



# They're excepted (fair use)



# *Comedy III v. Saderup*

21 P.3d 797 (Calif. 2001)



# *Comedy III v. Saderup*

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# *Comedy III v. Saderup*

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- First Amendment (freedom of speech) defense
  - Furthers two First Amendment purposes
    1. Preserving an uninhibited marketplace of ideas
    2. Furthering the individual right of self expression
  - Applies to t-shirts as well as paintings

# *Comedy III v. Saderup*

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- First Amendment (freedom of speech) defense
  - But, defense is limited:
    - First Amendment does not protect false and misleading commercial speech
    - Even nonmisleading commercial speech is subject to lesser First Amendment protection, so right of publicity may often trump the right of advertisers to use celebrity figures

# *Comedy III v. Saderup*

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- Balancing test:
  - When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, state law interest in protecting fruits of artistic labor outweighs the expressive interests of the imitative artist, *i.e.*, celebrity wins
  - But, when a work contains significant transformative elements, it is protected by First Amendment and is less likely to interfere with celebrity's right of publicity, *i.e.*, artist wins
    - Celebrity still can enforce monopoly rights over production of fungible images



# *Comedy III v. Saderup*

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- Transformative elements
  - Not limited to parody
  - Includes factual reporting, fictionalized portrayal, and subtle social criticism
- Is the celebrity likeness one of the “raw materials” from which an original work is synthesized, or is the depiction the sum and substance of the work
- Does the marketability of the work derive primarily from the fame of the celebrity, or from creativity, skill, and reputation of artist?

# *Comedy III v. Saderup*

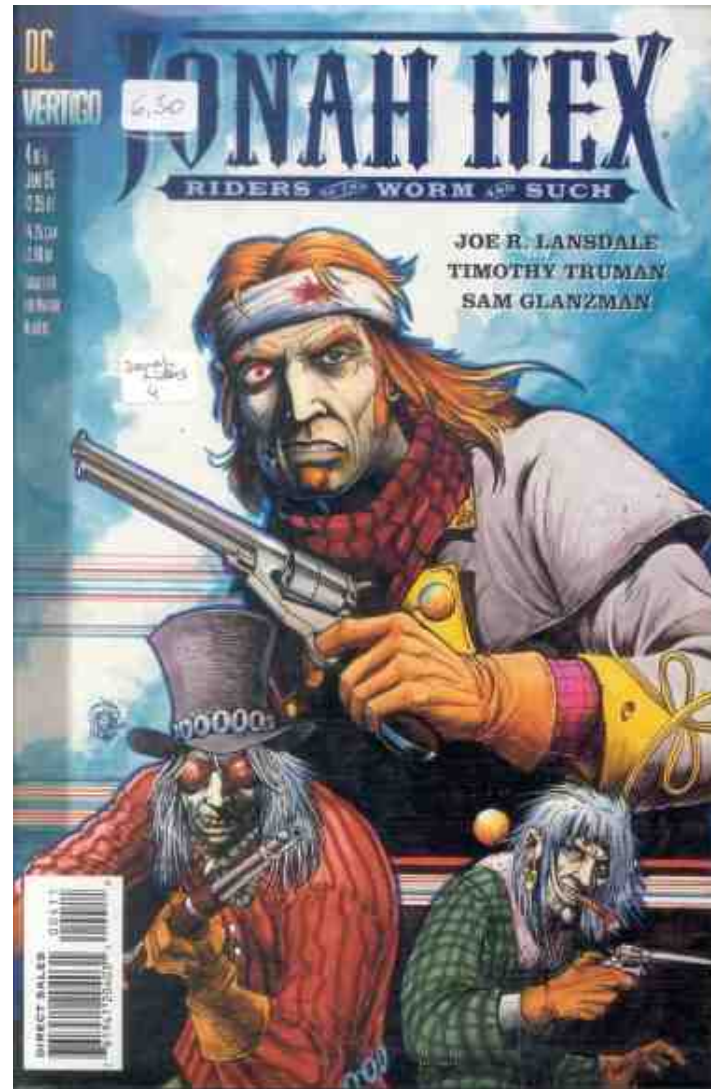
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- Held: Though skillful, the sketches are literal (thus not transformative) depictions of The Three Stooges, which exploits their fame
  - Therefore, the works violate California's right of publicity statute

# *Winter v. DC Comics*



Johnny and Edgar Winter (top);  
Johnny and Edgar Autumn (right)



# *Winter v. DC Comics*

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69 P.3d 473 (Cal. 2003)

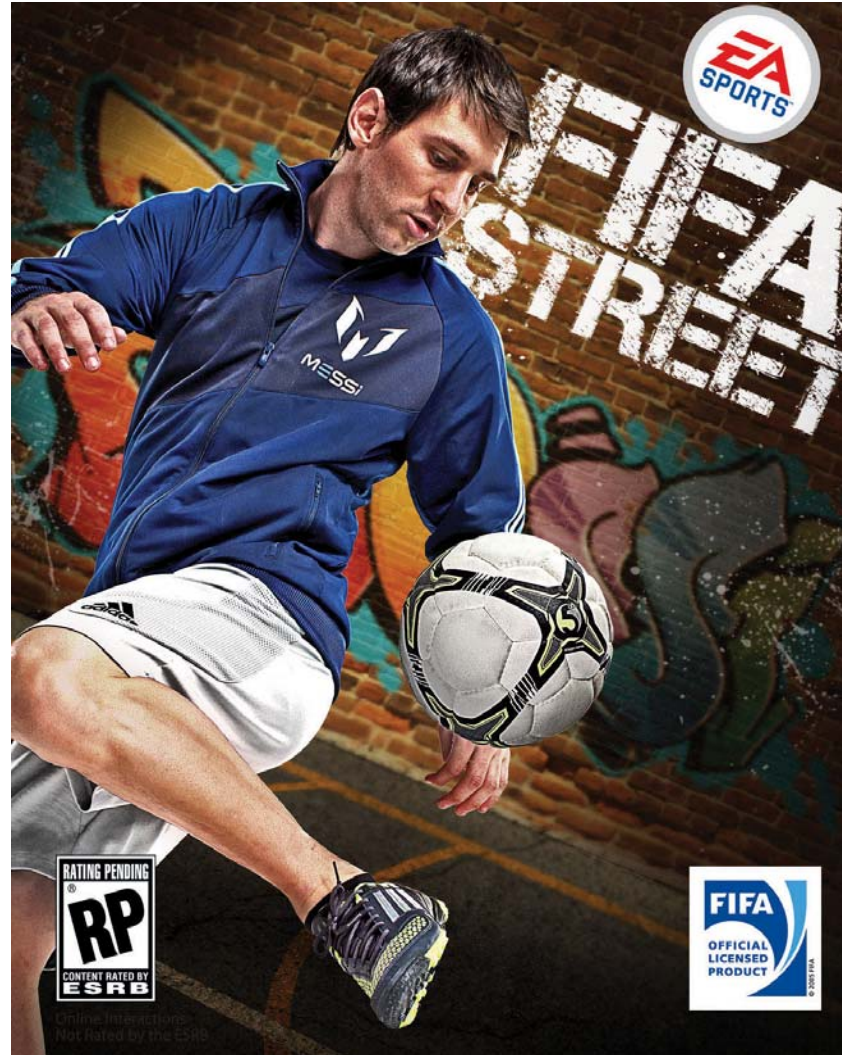
- Applies *Comedy III* test to comic books
  - Comic books do not depict plaintiffs literally
  - Plaintiffs were the “raw materials” from which the comic books were synthesized
  - Distinction between parody and non-parody irrelevant to the transformative test
  - What matters is whether the work is transformative, not whether it is parody

## *Winter v. DC Comics*

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- Held: Defendants published comic books depicting fanciful, creative characters, not pictures of the Winter brothers
  - First Amendment protects such use
  - Irrelevant if put celebrity in bad light

# Messi v. EA Sports: Who wins?



# Questions?

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Thank you!

Michael Atkins  
*mike@atkinsip.com*