



# Communication Law & Ethics

**RU COMS 400 Unit 6**

## **Privacy**

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Class web site:

[revolutionsincommunication.com/law](http://revolutionsincommunication.com/law)

# On Track: Unit 6

- Read the rest of Section 5-6 on web site
- Assignment 6 – privacy hypothetical
- Take quiz 6

This section:

- Four privacy torts, Intentional infliction
- Digital privacy
- Privacy hypotheticals

# Privacy law vs libel law

	Public Figure	Private Person
<b>LIBEL:</b> Defamatory falsehood	<b><u>Difficult to win.</u></b> Plaintiff must prove <b>actual malice</b> (as in NYT v. Sullivan) – Knowingly publish a falsehood or be in reckless disregard for the truth	<b><u>Easier for plaintiff,</u></b> who must only prove <b>negligence</b> under state laws guided by federal court decisions.
<b>PRIVACY:</b> Defamatory truth	<b><u>Difficult to win:</u></b> Plaintiff must prove <b>“highly offensive” disclosure</b> (eg, Bollea v Gawker). Defenses: Public interest, official record, consent.	<b><u>Still difficult for plaintiff to win</u></b> Even private people have a high barrier in public interest cases (eg, Sipple, Smith, Cox, Howard)

# Privacy torts (Wm Prosser)

1. False light (similar to libel)  
*Personal right to reputation*
2. Publication of Private Facts (true, outrageous, and not newsworthy)  
*Personal right to avoid publicity*
3. Intrusion (like trespassing)  
*Personal right to physical privacy*
4. Misappropriation (like copyright – use of personal image without permission)  
*Property right to name, image, likeness*

Also: Intentional infliction of emotional distress  
(some states - eg: *Flynt v Falwell*)

# Defenses in privacy lawsuits

- **Newsworthiness**, or public interest (for editorial content, mostly in misappropriation and false light cases)
- **Public record**, a Constitutional defense similar to privilege (especially in regard to revealing names of private people in court cases)
- **Consent** of private individual involved (eg, signed release of a model to appear in an advertisement)

# Ethical issues re privacy & media

- Learn professional ethical standards
  - Society of Professional Journalists code
  - or American Advertising Federation code
- Victims, minors and witnesses to crime are not usually ID'd in news articles.
- Informed consent is important dealing with minors and private people
- Seek the truth and report it, Minimize harm, Act independently, be transparent

# I. False light



In 2010 Shirley Sherrod spoke to a regional NAACP chapter about her experiences working for the USDA in rural development.

A [video clip](#) of the speech became the subject of a national controversy because it seemed to show racism by African Americans against European Americans. In the video, Sherrod talked about a moment when she was tempted to exclude a few white farmers from USDA benefits. That is the only part of the video clip that was distributed by Andrew Brietbart.

**Breitbart apologized and settled in October, 2015 for an undisclosed amount.**

# False light

Similar to Defamation but ...

- Often involves photos & captions
- Not false but still misleading
- Highly offensive
- Not recognized in some states
- Violation of a Constitutional right of privacy, so there may be no statute of limitations



# Braun v Flynt, 1984, false light



## Braun (cont)

Jeanne Braun, an entertainer, had an act with a swimming pig. Through deception, a company associated with Hustler Magazine bought her picture with the pig and placed it within the lewd magazine. She sued for defamation and false light, and won both. Courts however said she could only win one, and that the personal humiliation, pain and suffering was a better fit with false light than defamation.

## 2 Publication of private facts



• **Publication of Private Facts** or unreasonable revelation of private facts that may be true but nevertheless embarrassing to private people.

*Bolea v Gawker, 2017* When Gawker magazine posted sex videos of Hulk Hogan (Bollea) with a friend's wife, Bollea filed suit in a Florida state court for invasion of privacy (intrusion, publication of private facts and misappropriation) along with intentional infliction of emotional distress. To win, Bollea had to show that this was truthful information, that a reasonable person would find it highly offensive, and that it did not involve a legitimate public concern.

# Going 'too far' – PPF

- Public disclosure of private and embarrassing facts
- Details about sexual conduct, physical or mental condition, educational records
- Private, intimate, highly offensive to a reasonable person
- Truth is not a defense; newsworthiness and consent are main defenses

# Elements of PPF suits

**1. Public Disclosure:** Published, broadcast, or disseminated in some way.

**2. Private Fact:** The facts disclosed must be private and not generally known. It usually can't involve facts that have already been made public.

**3. Offensive to a Reasonable Person:** The facts must be offensive to a reasonable person of ordinary sensibilities. A photo of a person slipping on a banana peel might be a little embarrassing, but it is not offensive.

**4. Not Newsworthy:** “As relating to any matter of political, social, or other concern to the community.”

- Crimes, accidents, deaths, fires, police activity, entertainment events, and activities of public officials are typically considered newsworthy.

# What is newsworthy?

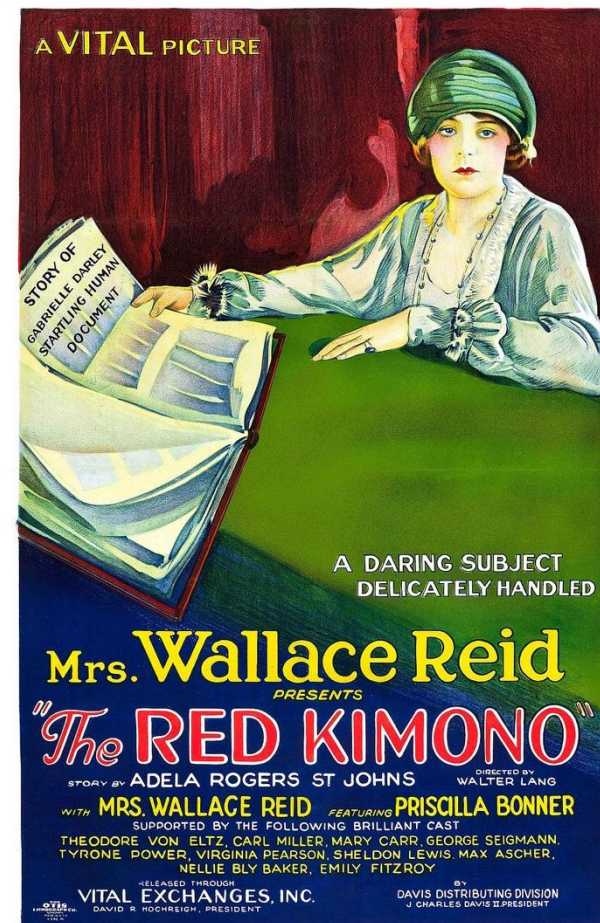
- A topic is newsworthy when it can be “fairly considered as relating to any matter of political, social, or other concern to the community” or when it “is a subject of general interest and of value and concern to the public.” (*Snyder v Phelps*)
- In a video of a victim at an accident scene and inside an emergency helicopter, the California Supreme Court considered three main factors in ultimately concluding the broadcast was newsworthy: the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety. (*Shulman v. Group W*)

# Publication of private facts

- Melvin v Reid, 1931 (“Red Kimono” case)
  - Prostitute reformed, won state lawsuit
- Cox v Cohn, 1975
  - Sexual assault victim ID’d on cable news
- Smith v. Daily Mail, 1979
  - Minor ID’d in W.Va. newspaper
- Howard v Des Moines Register, 1979
  - Sterilized woman ID’d in newspaper
- Sipple v. Chronicle Publishing, 1984
  - Gay hero ID’d in newspaper

# Red Kimono case

- 1925 Silent film about prostitution
- Melvin real name and story used; she sued in California
- The state court sided with Melvin
- *Melvin v Reid* has been cited recently in the emerging "right to be forgotten" cases around the world as an early example of a private right to rehabilitation.
- Not a US Supreme Court precedent.
- Most cases have protected the media, not the private individual





# Cox v Cohn, 1975

- Cox Broadcasting sued by Melvin Cohn (father of dead sexual assault victim)
- Georgia state supreme court rules that identifying victim violates common law privacy
- US Supreme Court reverses. "Freedom of the press [is] of critical importance to our type of government in which the citizenry is the final judge of the **proper conduct** of public business. In preserving that form of government, the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."
- *Proper conduct / professional ethics: Crime victims should not be identified without their own approval.*



# Smith v Daily Mail, Howard v Des Moines Register

- Two 1979 cases reinforced Cox v Cohn
- In Smith, the name of a minor charged with murder was printed in a newspaper, contrary to a state law
- In Howard, the name of a woman sterilized involuntarily was printed in the Des Moines Register.
- Since the identities were obtained legally in both cases, there was no violation of privacy.
- Both cases raise ethical questions

# Sipple v Chronicle, 1984

- On September 23, 1975, Oliver Sipple happened to be in the right place at the right time and stopped an assassination attempt on President Gerald Ford (not in the photo).
- The next day, the Los Angeles Times reported: “A husky ex-marine who was a hero in the attempted assassination of President Ford emerged Wednesday as a prominent figure in the gay community.
- Sipple sued the San Francisco Chronicle, the LA Times and other newspapers for revealing his secret life, but lost because he had become a public figure, and questions about his character were deemed newsworthy.



# “Right to be forgotten”

- European laws allow search engine links for some criminal charges to be removed from public view in order to encourage rehabilitation.
- US laws do not require removal on demand
- About half of states forbid charging money for removal of arrest photos on internet / web sites

# 3 Intrusion

- **Intrusion** on a person's right to seclusion and personal privacy; Media cases usually involve physical intrusion by news media, often with cameras or recording devices, into the lives of celebrities and private people.
- **Galella v. Onassis**, 1973 — Jackie Kennedy Onassis obtained a court injunction against New York photographer Ron Galella, forcing him to stay 25 feet away from her and even further away from the children

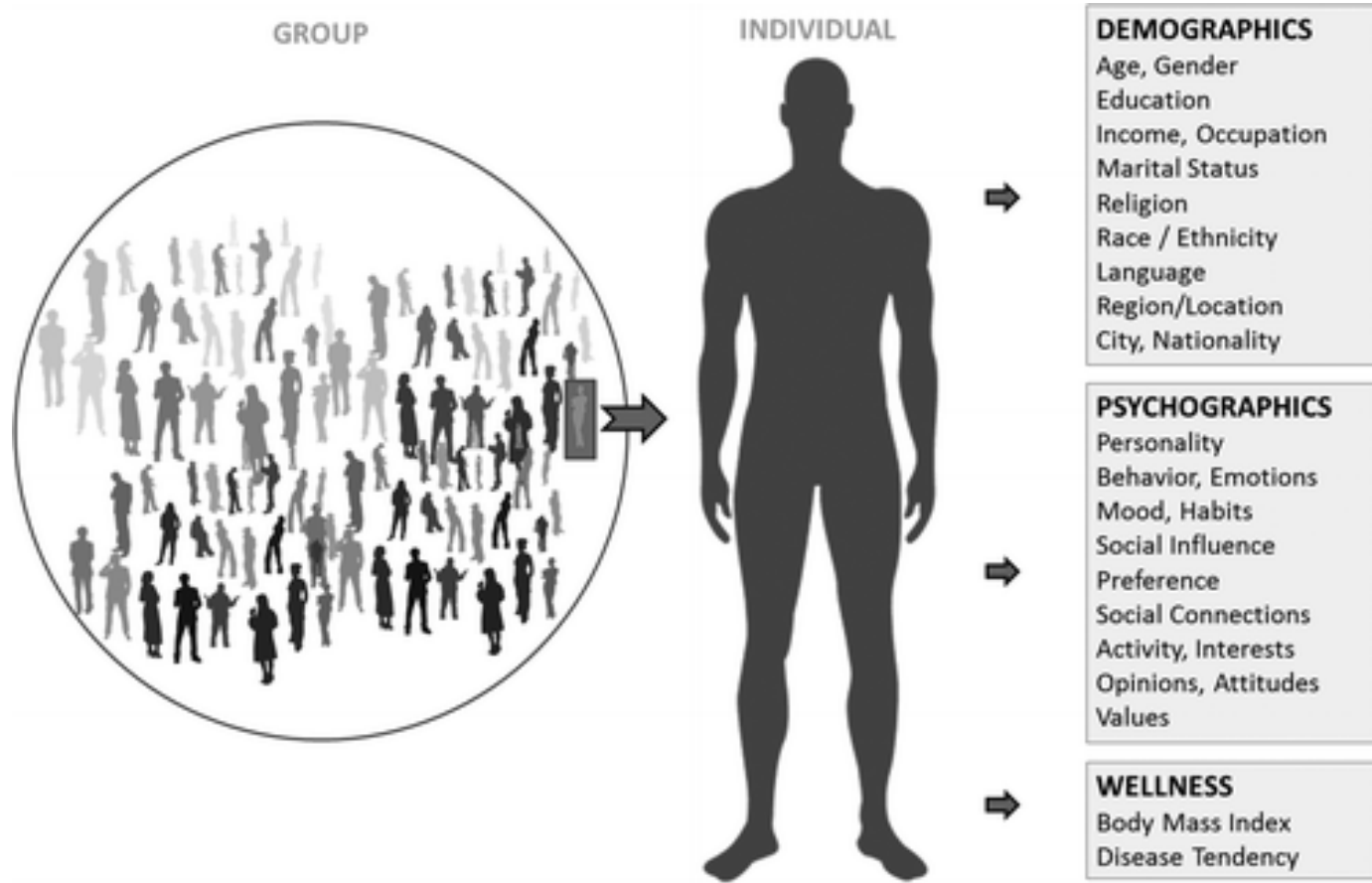
# Intrusion

- Wilson v Layne, 1999 – Case that banned ride-alongs and videos of home searches
- Dietman v Time, 1971 – “Quackery” case
  - *“The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office,*
- *News International hacking scandal, 2011*
  - *News of the World (UK) hacked royal family phones. Results in closure of News, but Rupert Murdoch lives on ...*

# Intrusion

- Especially newsgathering, even if not published or broadcast
- **Trespass** – entering private property without consent or getting too close with cameras
- **Secret surveillance** – bugging, hidden cameras, hacking
- **Misrepresentation** and undercover reporting – ABC v Food Lion, 1997  
Reporters got jobs from Food Lion & reported on meat department

# Digital privacy







# Digital privacy

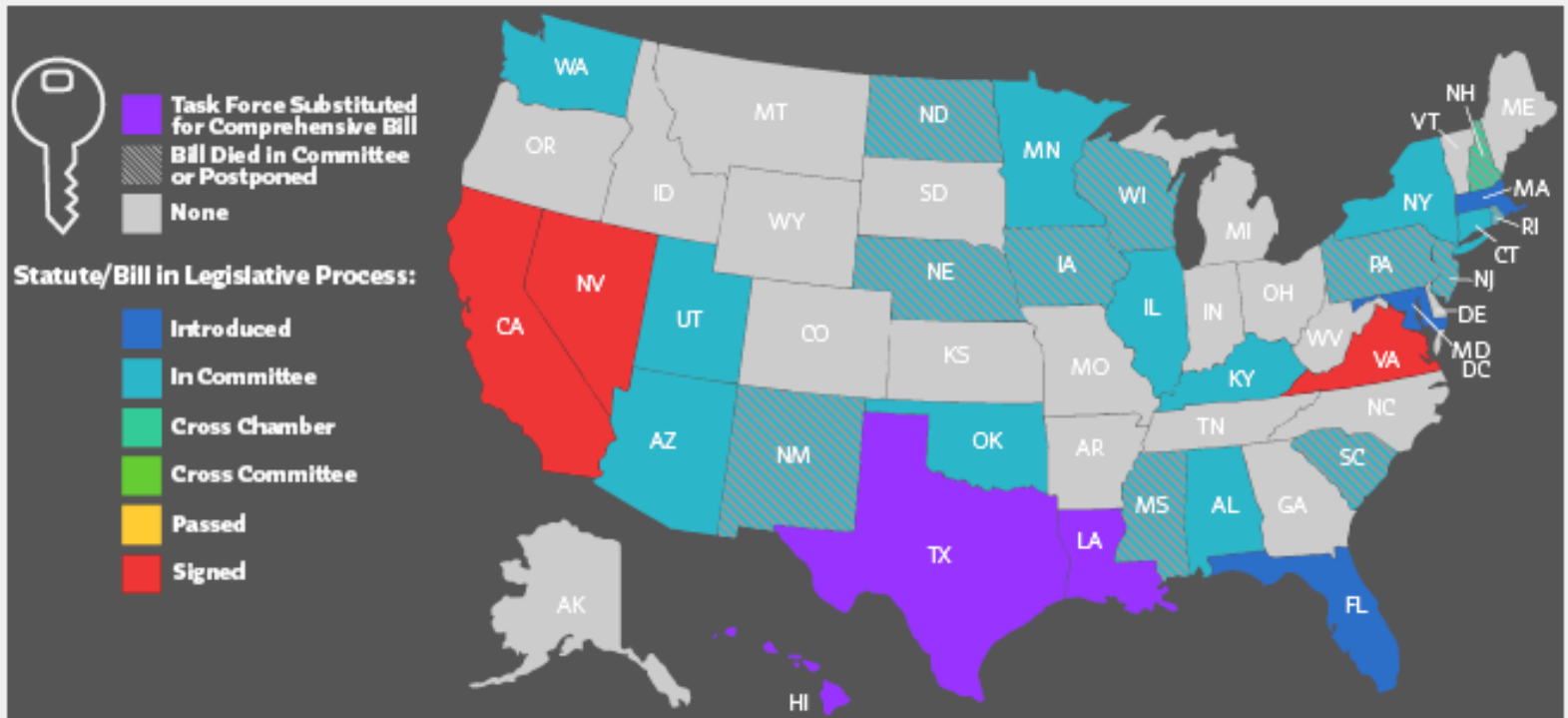
- Do people have a privacy right to control personal information gathered by social media?
- Yes, according to new laws in California, Virginia and Colorado that allow:
  - Access to data held by large social media profiling companies
  - Ability to review and edit
  - Option to withdraw from profiling

# VCDPA passed in 2021

- Virginia Consumer Data Protection Act:
- Takes effect in 2023
- Any consumer can access, correct and delete personal data.
- The Virginia law is enforced through the AG office. It does not provide for a private right of action following a data breach; California's 2018 law does.

# Patchwork of digital privacy law

## State comprehensive privacy law comparison



As of March 3, 2021.

Source: International Association of Privacy Professionals

## 4 Misappropriation & right of publicity

- Name, Image, Likeness (NIL) laws
- Right of publicity to NIL is a property right, akin to copyright or trademark
- It is not a personal or “inalienable” right.
- You can inherit NIL property
- It is mostly based on state laws, but there is an increasing use of federal standards, especially in NCAA related publicity

# Right of publicity

- The key to “misappropriation” is unapproved commercial use.
- Casual appearances of NIL in news footage or non-commercial discussions is not misappropriation.
- Anything remotely in the public interest that can be seen or heard from a public place can be used for non-commercial news.

# Misappropriation / Virginia law

- § 8.01-40. Unauthorized use of name or picture of any person; punitive damages; statute of limitations.
- A. Any person whose name, portrait, or picture is **used without having first obtained the written consent** of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, **for advertising purposes or for the purposes of trade**, such persons may maintain a **suit in equity** against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have **knowingly used** such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the **jury, in its discretion, may award punitive damages**.
- B. No action shall be commenced under this section more than 20 years after the death of such person.

# Misappropriation

Publicity rights law starts with a 1902 case, *Roberson v. Rochester Folding Box Co.* Printing photographs had only recently become possible with the new halftone process, and the box company used a picture of Abigail Roberson on a box of baking flour without her permission.



In a lawsuit the family claimed the incident caused Ms. Roberson severe embarrassment and humiliation, but according to the N.Y. Court of Appeals, there was no law against the use of her likeness in advertising. Outrage over the case led to the passage of new privacy laws in many states,

# Charlie Chaplin v Amador 1923



- Silent film star Charlie Chaplin successfully sued a lookalike named Charlie Aplin in a 1923 case.
- The problem was the attempt at deception, said the court.



# More Lookalike cases

- Kim Kardashian sued Old Navy for putting a Kardashian lookalike in a television commercial in 2011
- In 2019, Ariana Grande sued Forever 21 and Riley Rose for using a look-alike in their advertising campaign.
- In 2008, a federal judge in California ruled that Marilyn Monroe's right of publicity were not protectable in California. While Monroe died in California, she was legally domiciled in New York, and under New York state law, the right of publicity ends at death.

# Misappropriation / Right of publicity

Michael Polydoros v  
20<sup>th</sup> Century Fox –  
“Squints” character in  
The Sandlot was  
originally a friend of  
book author David  
Evans.

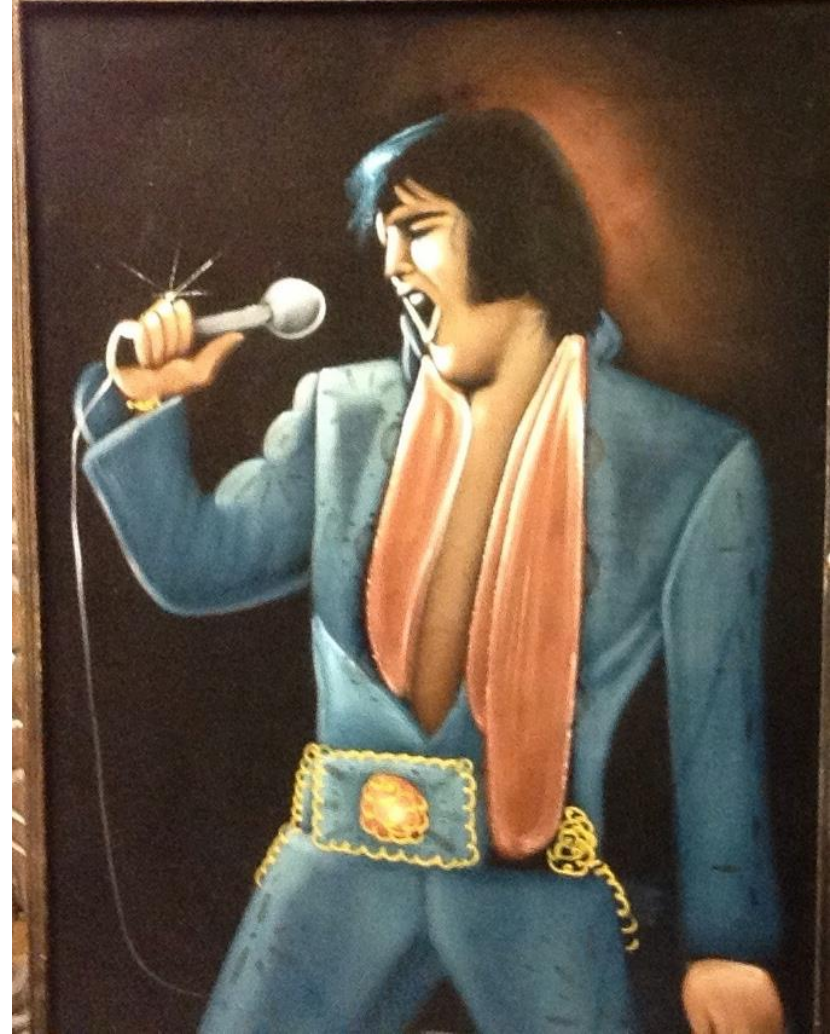


YouTube.com

“It is generally understood that novels are written out of the background and experiences of the novelist. The characters portrayed are fictional, but very often they grow out of real persons the author has met or observed ...”

# Velvet Elvis

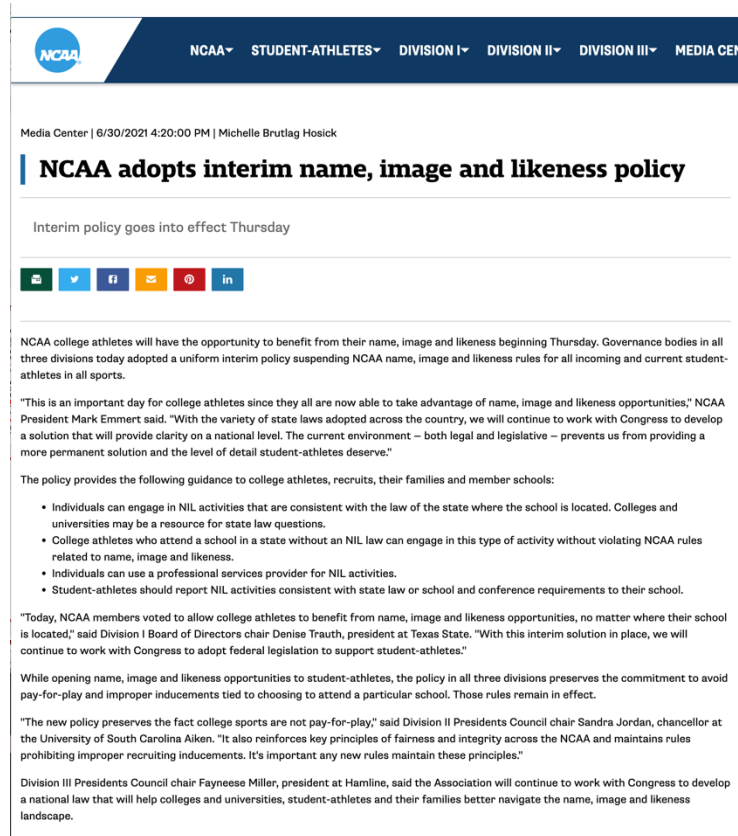
- Elvis Presley Enterprises sued owners of the Velvet Elvis bar in Houston in 1996. The bar owners said it was parody, but Presley Enterprises won in the end. The parody was not of Elvis himself, the court said.



# Name, Image, Likeness And the NCAA

- 2021, the NCAA changed its rules to allow student-athletes to profit from their NIL.
- 2024, the NCAA agreed to further changes and to pay damages to athletes who lost out financially due to its previous rules.
- New rules took effect August 1, 2024, allowing athletes to pursue NIL opportunities without limitations.

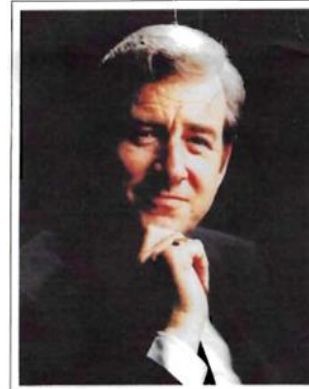
Radford and Virginia Tech now work with the Student Athlete NIL “Collective” -- A rights management organization. RU calls it Tartan Town.



The screenshot shows the top of the NCAA website with the logo and navigation menu. The article title is "NCAA adopts interim name, image and likeness policy". Below the title is a sub-headline "Interim policy goes into effect Thursday" and a row of social media sharing icons. The main text begins with "NCAA college athletes will have the opportunity to benefit from their name, image and likeness beginning Thursday. Governance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports." It includes quotes from NCAA President Mark Emmert and Division I Board of Directors chair Denise Trauth. A bulleted list provides guidance for athletes, including that individuals can engage in NIL activities consistent with state law, college athletes in states without NIL laws can participate, and student-athletes should report NIL activities to their schools. Further quotes from Division II and III presidents are also present.

# 5 Intentional Infliction of Emotional Distress

## Jerry Falwell talks about his first time.\*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

\$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

© 1983—Imported by Campari U.S.A., New York, NY 48° Proof Spirit Agent (Louisville)



**CAMPARI** You'll never forget your first time.

\*AD PARODY—NOT TO BE TAKEN SERIOUSLY

# Intentional Infliction of Emotional Distress

- In some states, such as Virginia “intentional infliction of emotional distress,” is used in place of false light, intrusion and publication of private facts. (Virginia still has a misappropriate statute) As the courts noted in [Flynt v Falwell](#), IIED is not a substitute for defamation.

# Hypothetical privacy analysis

- Are any of the four types of invasion of privacy present? Intrusion; Misappropriation; False Light; and Publication of Private Facts. Or, in Virginia Intentional Infliction of Emotional Distress?
- Can any of the main privacy defenses be applied? (Newsworthiness, Public Record; Consent)
- If the allegation is Publication of Private Facts, are the facts so intimate and embarrassing that they would be offensive to the average person?
- Case law — What similar cases are there that can help guide your decision making process?
- Professional codes & ethics — What do your professional ethical codes tell you? (AdFed, PRSA, SPJ, RTNDA).
- Mitigation — If you have made a mistake, what can you do to mitigate damages?
- Dismiss — If you are in a strong position, should you ask the court to dismiss the case before it goes to trial?

# Hypothetical privacy I

- Someone in your university's public affairs department takes pictures of students and puts up a billboard to advertise the school. However, they did not get permission, much less a signed "model release," from the students. Can the students sue and recover damages? Under which privacy tort?
- You're writing a story about a sexual assault, and you have the victim's name from a police report. Do you print the name? Why or why not?
- Let's say you do print a sexual assault victim's name accurately from a police report, and he feels like his rights to privacy were violated and he sues you for invasion of privacy. Does he have a case?



# Hypothetical privacy 2

- You're working on an ad campaign for a new gated community development, and learn that a famous rock star has already bought a lakefront lot. The star does not want to endorse the development, but you know that sales will skyrocket if you somehow work him into the ad. Should you do it?
- A student running for SGA president has AIDs. You know this for a fact, and you check with the student, and she confirms it but does NOT want that information out there. What do you do?
- You obtain a video of a married celebrity film star having a romantic moment with someone who is not her spouse. The video seems to show passion and even has some nudity. This is really going to get your show known. Should you use it?



**Thank you**