

THE BUSINESS OF SPORT

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Privacy, Publicity, and the American Athlete

The right to free speech and a free press were guaranteed in 1791 with the adoption of the First Amendment to the United States Constitution. The words "privacy" and "publicity" do not appear at all in that August document. Samuel Warren and Louis Brandeis first discussed the idea of a right to privacy in an 1890 Harvard Law Review article, when the two called for tort protection of individuals from the intrusion of the press into private aspects of life. In the article the two legal scholars essentially created an American right of privacy, describing it as an extension of the right to life, that included the right to enjoy life and the "right to be let alone," and as an extension of the right to property as a means to secure intangible possessions such as reputation. The tension between the concepts of a free press and personal privacy has tantalized American scholars and infuriated American celebrities ever since.

The concept of the right of publicity grew from Warren and Brandeis' privacy theory. Because the scholars derived the right to be let alone in part from the right to property, the idea evolved into protecting one's own image so that no one else could use it commercially. As a result, two legal ideas protect a person's likeness: the right of publicity and a branch of privacy known as appropriation of image. Both ideas can be used to keep someone else from profiting from another's representation without that person's permission.

This paper will introduce the idea of the rights of privacy and publicity and examine the early legal battles of athletes to control the commodification of their images-to control their right of publicity. It will describe the court decisions and contextualize the cases in historical documents of the era and consider how these cases laid the groundwork for American athletes to profit from and to control their image, moving them closer to the present day where professional athletes often make more money from their image than they do from their athletic skills. Understanding the early court decisions helps to explain why Tiger Woods, for

example, has his own business (ETW Corporation) to monitor for unauthorized use of his image. So far ETW Corporation has already filed six lawsuits for what they claim to be violations of Woods' rights of privacy and publicity. The results of those early legal cases and the rise of the right to publicity is a multimillion-dollar industry.
