

Introduction [NEW]

Arizona first recognized a cause of action for invasion of privacy in 1945. *See Reed v. Real Detective Publishing Co., Inc.*, 63 Ariz. 294 (1945). In 1989 the Arizona Supreme Court explained the history of the Right of Privacy. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335 (1989). The court in *Godbehere* discussed the development of the Right of Privacy from the exposition of the contours of the right in Justice Brandeis' law review article (Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)) to the development of four separate torts outlined by Dean Prosser (Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960)). *Id.* at p.338. The court also noted that the American Law Institute adopted Prosser's four-part classification of privacy torts. *See Godbehere, supra.* citing Restatement (2d) of Torts §§ 652A-I (1977).

Arizona has adopted each of the four types of privacy torts identified in the Restatement. *See Reed, supra.* (adopting cause of action for misappropriation of name or likeness); *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272 (App. 1997) (intrusion into private affairs); *Reed, supra.* (public disclosure of private facts); *Godbehere, supra.*, (placing plaintiff in a false light). Additionally, Arizona has recognized a remedy for the commercial exploitation of a person's name or likeness. *See In re Reynolds*, 235 Ariz. 80 (App. 2014) (adopting Restatement (3d) of Unfair Competition §46 (1995)). The cause of action for the commercial exploitation of a person's name or likeness is often referred to as the Right to Publicity. *Id.*

Privacy Instructions 1-3 are intended for use in claims alleging intrusion into the plaintiff's private affairs. Privacy Instructions 4-8 are intended for use in claims alleging public disclosure of private facts about the plaintiff. Privacy Instructions 9-11 are intended for use in claims alleging publications which place the plaintiff in a false light. Privacy Instruction 12 is intended for use in claims alleging a misappropriation of the plaintiff's name or likeness. All privacy claims would also include the instructions regarding causation and damages (instructions 13, 14, and 14A) and any applicable affirmative defenses (instructions 15 and 16).

NEW
Invasion of Privacy No. 12
(Invasion of Privacy by Appropriation of Name or Likeness)

[Name of plaintiff] claims [name of defendant] used his/her [name][photo][likeness] without his/her consent. On this claim, [name of plaintiff] must prove:

1. [Name of defendant] used [name of plaintiff]'s [name][photo][likeness];
2. [Name of plaintiff] did not consent to [name of defendant]'s use of [name of plaintiff]'s [name][photo][likeness];
3. [Name of defendant]'s use of [name of plaintiff]'s [name][photo][likeness] was a cause of [injury][damage] to [name of plaintiff]; and
4. [Name of plaintiff]'s [injuries][damages][losses].

If you find that any of these four requirements has not been proven, then your verdict must be for [Name of Defendant]. If you find that all four of these requirements have been proven, then your verdict must be for [Name of Plaintiff].

Source: *Reed v Real Detective Publ'g Co., Inc.*, 63 Ariz. 294 (1945); *In re Estate of Reynolds*, 235 Ariz. 80 (App. 2014); *Canas v Bay Entertainment, LLC*, 252 Ariz. 117 (App. 2021).

Use Note: Invasion of Privacy No. 12 should be used with Privacy instructions 13 and 14A.

Comment: Arizona recognizes a cause of action for personal harms caused by a misappropriation of a person's name or likeness. *See Reed, supra*. Arizona also recognizes a cause of action for the commercial appropriation of a person's name or likeness. *See Reynold, supra*. The elements of these two causes of action are the same. However, there are distinct measures of damages for the two types of misappropriation claims. The recoverable damages are explained in Privacy Instruction 14A.

NEW**Invasion of Privacy No. 14A.**

If you find that [Name of Defendant] used [Name of Plaintiff]'s name/likeness/identity without [Name of Plaintiff]'s consent, you must then decide the full amount of damages that will reasonably and fairly compensate [Name of Plaintiff] for each of the following elements of damages proved by the evidence to have been caused by [Name of Defendant]'s conduct:

1. the greater of:
 - a. any economic loss suffered by [Name of Plaintiff] as a result of [Name of Defendant]'s use of [Name of Plaintiff]'s name/likeness/identity; or
 - b. any unjust economic gain obtained by [Name of Defendant] from the use of [Name of Plaintiff]'s name/likeness/identity;
2. any reduction in the commercial value of [Name of Plaintiff]'s name/likeness/identity as a result of [Name of Defendant]'s use of [Name of Plaintiff]'s name/likeness/identity;
3. The cost of corrective measures taken by [Name of Plaintiff] to restore his/her reputation or good will;
4. any emotional distress, humiliation, inconvenience, and anxiety already experienced by [Name of Plaintiff]; and
5. any emotional distress, humiliation, inconvenience, and anxiety reasonably probable to be experienced by [Name of Plaintiff] in the future.

Source: *Reed v Real Detective Publ'g Co., Inc.*, 63 Ariz. 294 (1945); *Estate of Reynolds*, 235 Ariz. 80 (App. 2014); *Canas v. Bay Entertainment, LLC*, 252 Ariz. 117 (App. 2021).

Use Note 1: Arizona recognizes causes of action for both personal harms and commercial harms caused by an appropriation of a person's name or likeness. *See Reed, supra.* 63 Ariz. at p.305-306 (recognizing a cause of action for emotional damages caused by the appropriation of a person's name or likeness) and *Reynolds, supra.*, 235 Ariz. at p.82-83 (recognizing a cause of action for commercial exploitation of a person's name or likeness). The RAJI Committee has included both types of remedies in Privacy Instruction 14A. Categories 1a and 1b set forth the measure of direct damages for commercial appropriation claims. Categories 2 and 3 set forth the indirect or consequential damages for commercial appropriation claims. Categories 4 and 5 set forth the measure of damages for personal harms. The court should instruct only on the categories of damages which are supported by the evidence in the case.

Use Note 2 (Categories 1a and 1b): The court in *Reynolds* adopted §46 of the Restatement (3d) of Unfair Competition (1995). Section 46 indicates that the damages recoverable in commercial misappropriation claims are set forth in §49 which states:

One who is liable for an appropriation of the commercial value of another's identity under the rule stated in §46 is liable for the pecuniary loss to the other caused by the appropriation or for the actor's own pecuniary gain resulting from the appropriation, whichever is greater.

Comment d to §49 of the Restatement (3d) of Unfair Competition states:

Monetary relief [in appropriation cases] may be awarded for the pecuniary loss to the plaintiff or the pecuniary gain to the defendant resulting from the unauthorized use of the plaintiff's identity. As in other areas of unfair competition, the plaintiff is permitted to establish either or both measures of relief, but may recover only the greater of the two amounts.

Categories 1a and 1b are intended to capture the measure of damages described in §49. While the court in *Reynolds* adopted §46, the court did not determine the scope of damages recoverable in commercial misappropriation cases. Because there is no Arizona case which has addressed the measure of damages in commercial misappropriation cases, it will be for the court to determine whether a plaintiff may present evidence of both the losses suffered by the plaintiff and the gains achieved by the defendant or whether the plaintiff must elect the remedy prior to trial.

Comment: Consequential Damages (Categories 2 and 3). While the *Reynolds* case indicates that damages for commercial harms are recoverable in appropriation cases, there is no Arizona case which discusses the types of damages recoverable for such commercial harms. Section 49 of the Restatement (3d) of Unfair Competition sets forth the commercial damages recoverable in appropriation claims. In addition to the direct damages set forth in categories 1a and 1b, comment *d* to §49 indicates that other consequential damages may be recovered including: the reduction in the commercial value of the plaintiff's name/likeness/identity as a result of the defendant's use of the plaintiff's name/likeness/identity, and the cost of corrective measures taken by the plaintiff to restore his/her reputation or good will. *See* Restatement (3d) of Unfair Competition §49 cmt. d. The indirect damages identified in comment *d* are included in categories 2 and 3 of the instruction. Because there is no Arizona case which has addressed what elements of damages are recoverable commercial misappropriation cases, it will be for the court to determine which of the elements of damages are recoverable.