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## Privacy, Property, and Publicity

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# PRIVACY, PROPERTY, AND PUBLICITY<sup>†</sup>

Mark A. Lemley\*

THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD. By *Jennifer E. Rothman*. Cambridge and London: Harvard University Press. 2018. P. 185. \$39.95.

## INTRODUCTION

In Jennifer Rothman's<sup>1</sup> new book *The Right of Publicity: Privacy Reimagined for a Public World*, she argues that we have wrongly reconceived the right of publicity as an intellectual property (IP) right rather than as a privacy-like right of "self-ownership,"<sup>2</sup> and that in doing so we have let it grow unchecked in ways that serve no good purpose.<sup>3</sup> She endorses returning to the historical core of the right of publicity as a privacy right that primarily protects human dignity (p. 181), and she argues that doing so will enable us to limit the growth of the doctrine and apply the First Amendment to effectively protect speech threatened by the current, mutant right of publicity (p. 182).

Rothman's book is a compelling read, and her explication of the history of the right of publicity and how we got here is fascinating and largely persuasive. And I agree with her both about the problems with the current broad form of the right of publicity and about many of the specific doctrinal changes we should make to cut it back to a manageable size. But I think there is a disconnect between the history she has uncovered and the theoretical and legal framework she proposes. The history of the right of publicity as a privacy rather than an IP right is not encouraging for those who would limit the scope of the right or apply robust First Amendment principles to counterbalance it. The right of privacy that grew into the right of publicity was, as Rothman herself shows, a property right (p. 48). And it was, from the start,

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1. Professor of Law and Joseph Scott Fellow, Loyola Law School, Los Angeles.
2. P. 48. As Rothman acknowledges, this privacy-like right of "self-ownership" nonetheless had property characteristics. P. 48.
3. P. 87 ("Once . . . officially placed . . . in the pantheon of IP, [the right of publicity] began to expand—and did so far beyond what its underlying justifications merited.").

capacious, unruly, poorly cabined, and intolerant of free speech.<sup>4</sup> While dropping the idea of the right of publicity as IP might solve particular problems such as its transferability, it is unlikely to give us the limits she wants on the substantive scope of the right itself. To get there, we would need to challenge the nature of the use of one's identity as a privacy harm in and of itself. Ironically, understanding the right of publicity as a specific form of IP right—a trademark-like right against deception—may point the way toward a more reasonable doctrine.

### I. THE PRIVACY WE DESERVE

*“Every nation has the government it deserves.”*

— Joseph de Maistre<sup>5</sup>

Rothman tells a compelling story of the history of the right of publicity. The conventional narrative identifies early forms of the right of publicity as part of the tort of privacy identified by Samuel Warren and later-to-be-Justice Louis Brandeis.<sup>6</sup> In this conventional story, the right of publicity was recast in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>7</sup> as a property right rather than a privacy right because privacy law couldn't protect the interests of celebrities who wanted to endorse products and the companies with whom they did business.<sup>8</sup> Thinking of the right of publicity

4. Cf. pp. 34–35. As Rothman describes,

As photographs and their dissemination became more common, it also became less shocking and debilitating to see one's image in public. Rather than being mortified when their image was used, both public and private figures simply wanted to choose when and how their images appeared. This shift predated the turn toward an independent right of publicity and was already well on its way when the right of privacy emerged.

Pp. 34–35. *But cf.* p. 49 (describing how prior commentators missed how at least one court prior to the shift toward an IP-based right of publicity had sought to cabin a privacy-based right and protect speech).

5. Letter from Joseph de Maistre (Aug. 27, 1811), excerpted in EDWARD LATHAM, FAMOUS SAYINGS AND THEIR AUTHORS 181 (2d ed. 1906) (quoting the original French, “Toute nation a le gouvernement qu'il mérite,” and translating).

6. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198, 214 (1890) (analogizing to copyright's “power to fix the limits of the publicity which shall be given [an individual's creative works]” and reasoning that the “design of the [right of privacy] must be to protect” individuals from “undesired publicity”).

7. 202 F.2d 866, 868 (2d Cir. 1953) (“We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture . . .”). The defendant chewing-gum company had distributed baseball cards showing an image of a player without that player's consent and while knowing he was under an agreement to exclusively allow the plaintiff chewing-gum company to use his image. *Haelan*, 202 F.2d at 867.

8. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 167–78 (1993) (recounting the history of the celebrity-driven shift from a privacy- to a property-based right of publicity); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005); see also Samantha Barbas, *The Laws of Image*, 47 NEW ENG. L. REV. 23, 63–66 (2012) (recounting same history in

not as a privacy interest but as a property interest led to its expansion from a tort originally aimed at false endorsement to one that encompasses a wide variety of ways someone might use or invoke a person's name or likeness.<sup>9</sup>

Rothman challenges this narrative by illuminating the early history of the right of publicity.<sup>10</sup> She does not question the growth of the property version of the right of publicity, but she does question the necessity for a new IP right. Contrary to the traditional account, she argues that the privacy-based right of publicity adequately protected the identity interests of celebrities, and that only the additional desire to alienate those interests drove courts to reenvision the right of publicity as being property-based (pp. 4–5). The myth that privacy didn't provide effective protection, she argues, led us to create an IP right that has grown ever more powerful with time.<sup>11</sup> The result is a “misunderstood, misshapen, bloated monster that has turned against even its initial masters and proponents” (p. 7).

This move to IP and alienability, Rothman argues, was unnecessary to preserving identity interests.<sup>12</sup> It was driven by myths and misunderstandings about the nature of the original privacy right. The most important of these was the myth that privacy protection was ineffective before the property turn starting in the 1950s.<sup>13</sup> Rothman amply documents the ways in which that myth is false. She discusses several cases granting quite powerful rights under the rubric of privacy.<sup>14</sup> She argues persuasively that those cases protected a liberty and dignity interest, one she thinks we all have, “to stop others from using our identities” (p. 1).

Those cases show, she argues, that

[w]hat is often thought of as the driving force behind the turn to the right of publicity was not in fact the impetus for its adoption. The problem was not that public figures lacked privacy rights, but instead that companies wanted stronger tools to prevent public personalities from giving permission to more than one company to use their names and likenesses. (p. 46)

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context of other legal developments affecting the treatment of images); Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 309–11 (2011). Rothman recounts this history as well, though she challenges it. Pp. 45–46.

9. Madow, *supra* note 8, at 177 & nn.254–55 (surveying “a steady stream of judicial decisions and statutes recognizing a property-like right of publicity and expanding its scope” (footnotes omitted)).

10. *E.g.*, pp. 4–5, 30.

11. P. 7 (“The right of publicity got off track when it transformed from a personal right, rooted in the individual person . . . into a powerful intellectual property right, external to the person, that can be sold to or taken by a non-identity-holding ‘publicity-holder.’”).

12. *See, e.g.*, pp. 45–46, 63–64, 67, 199 n.1.

13. *See, e.g.*, p. 11.

14. Pp. 12–46 (discussing cases leading from *Pollard v. Photographic Co.* (1888) 40 Ch D 345 (Eng.), to *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), which she argues can be read as a privacy case but which has come to be considered the turning point toward the right of publicity).

Rothman bolsters this claim by citing cases at the inflection point in the move from privacy right to IP right, especially *Haelan*.<sup>15</sup> She finds that, despite its mythology, *Haelan* did not reject prior case law, and indeed didn't directly address the right of publicity at all (pp. 62–64). Rather, it was a contract case, and its primary conclusion was that a person held a right of publicity in his photograph that he could freely assign (and that, having done so, he couldn't sell it again in derogation of that contract).<sup>16</sup> While the court used the phrase “right of publicity,” it did so only in dicta (p. 59). Indeed, Rothman points out that to this day New York, where *Haelan* was litigated, does not recognize a common law right of publicity.<sup>17</sup>

Transferability, Rothman argues, was the crux of what she calls the “inflationary period” of the right of publicity (p. 67). Melville Nimmer, then an attorney at Paramount Pictures and later an influential treatise writer, endorsed the newly renamed right of publicity and its transferability.<sup>18</sup> Courts and states expanded that right, now reimagined as a valuable economic right, to anything the celebrity (or his transferee) could sell. They expanded it beyond his death, just as other valuable and tradeable IP rights can be transferred and can survive their owners (pp. 81–86). And the Supreme Court took a significant further step on the IP road in its only right of publicity case, *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>19</sup> which held that the “State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act” to “encourag[e] the production of ‘entertainment’ in a way ‘analogous to the goals of patent and copyright law.’”<sup>20</sup> Rothman views *Zacchini*, not *Haelan*, as the case that cemented the right of publicity as an IP right.

Once entrenched as an IP right that was fundamentally economic, the right of publicity has expanded continually over the last several decades, covering ever more things under the banner of name and likeness (including voice, job description, and the color of one’s car),<sup>21</sup> and assigning to the right

15. Chapter 3; *Haelan*, 202 F.2d 866 (holding chewing-gum company having exclusive agreement with baseball players to publish cards featuring them had actionable claim against another company later making agreements with the same players to publish cards).

16. Pp. 58–60 (describing lower court’s interpretation that these agreements were mere waivers by the players not to sue either company, *Haelan*’s appeal reasserting that Topps tortiously interfered with its exclusive contracts, and the court’s opinion agreeing with *Haelan* but seeming to recognize, in dicta, an exclusive, assignable right standing behind the contract).

17. P. 64. Efforts to pass such a statute in New York in 2018 had failed as of this writing.

18. Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 222–23 (1954) (citing *Haelan*, 202 F.2d 866) (favorably reporting *Haelan* as having taken “a major step in the inexorable process of reconciling law and contemporary problems” by holding that “the right of publicity, unlike the right of privacy, is a property right which may be validly assigned”); pp. 68–69 (discussing Nimmer’s article).

19. 433 U.S. 562 (1977).

20. P. 80 (quoting *Zacchini*, 433 U.S. at 572–77).

21. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (singer’s voice imitated in commercial); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (race-car driver’s red car imitated in commercial); *Staruski v. Cont’l Tel. Co. of Vt.*, 581

of publicity owner (whether or not the identity holder) the right to control virtually any commercial use of the name and likeness (whether or not any consumer believed the celebrity was endorsing the product).<sup>22</sup> Rothman is on more familiar ground here, and her complaints about the growth of the right of publicity echo those made elsewhere.<sup>23</sup>

Rothman is also on familiar ground in considering and mostly rejecting the proffered theoretical justifications for this new IP right (pp. 98–112). She correctly observes that the IP-as-incentive story falls flat: “If the right of publicity incentivizes anything, it is not clear that it is incentivizing anything we might wish to encourage.”<sup>24</sup> Nor is it clear that publicity rights efficiently maximize the allocation of resources.<sup>25</sup> And the unjust-enrichment or labor-reward theories, which Rothman has more sympathy for than I do,<sup>26</sup> none-

A.2d 266 (Vt. 1990) (employee’s picture with fabricated quotation explaining her job description and giving testimonial in print ad).

22. Pp. 88–98 (reviewing key cases and summarizing law across states, including emergence of “liability . . . [absent] actual likeness[]”).

23. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) (lamenting that “[i]nstead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of ‘appropriation of identity,’ claims often made by people with a wholly exaggerated sense of their own fame and significance”); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1191–97 (2006) (discussing the right of publicity’s expansive scope and arguing for its limitation to cases of consumer confusion, among other limits suggested); Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 488–98 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 913–25 (2003); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. 35 (1998).

24. P. 101. I have previously made the same argument. See Dogan & Lemley, *supra* note 23, at 1187, 1188 (“Even if celebrities [could be incentivized to invest in personae], it is not at all clear that society should want to encourage fame for fame’s sake.”); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004) [hereinafter Lemley, *Ex Ante*]; cf. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1694 (1999) [hereinafter Lemley, *Modern Lanham Act*] (“We don’t protect trademarks to encourage the creation of more trademarks, and so the incentive rationale for intellectual property will not work here.”).

25. Pp. 103–05 (explaining theories and concluding that “it is not clear how we could determine the optimal allocation of a right of publicity,” nor whether transaction costs would prevent its reassignment to its highest value user); see also Lemley, *Ex Ante*, *supra* note 24, at 146–47 (making the same argument).

26. See Dogan & Lemley, *supra* note 23, at 1181; Lemley, *Ex Ante*, *supra* note 24 at 129–30; Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 169–70, 184–86 (2010) [hereinafter Lemley & McKenna, *Owning Mark(et)s*] (arguing, in the context of trademark law generally, that a defendant’s enrichment is only unjust if we believe the plaintiff has a valid claim to the gains, and that policy reasons suggest the plaintiff does not have a right to positive spillovers from a mark that is used by another but without, for instance, generating consumer confusion or other clear harms). “Unjust enrichment” in this sense seems a tautology—it is unjust because it is enrichment, rather than because anything makes this particular enrichment unjust. Cf. Mark A. Lemley & Mark P. McKenna, *Unfair Disruption* (Sept. 28, 2018) (unpublished manuscript) (on file with author) [hereinafter Lemley & McKenna, *Unfair*].

theless cannot in her view justify the current expansive scope of the right of publicity, including its transferability and its postmortem persistence (pp. 105–10).

Nonetheless, Rothman is a believer in the right of publicity. She justifies it on grounds of liberty and dignity:

In the absence of control over our own identities, we are all like puppets that can be used to speak others' words and messages. Our speech will be compelled, our liberty lost. . . . No one should be able to fully control all constructions of her personality, but one should have some control over how others use one's name, image, and voice, particularly when injury is likely.<sup>27</sup>

She doesn't exclude economic rights, but she gives them short shrift, arguing in a single page that "[u]nauthorized uses of a person's identity can interfere with the ability to earn money from advertisers" (p. 110). But she doesn't follow through on this right as an independent basis for the right of publicity—and, indeed, doing so would undercut the main thrust of her book.<sup>28</sup> Rather, her primary point seems to be that intrusions on liberty and dignity can have economic as well as reputational and emotional consequences, and plaintiffs who have suffered those harms should be able to recover both economic and noneconomic damages (p. 110).

Armed with this somewhat thin description of the right of publicity as a noneconomic, dignitary tort, Rothman sets out in the last part of the book to reconstruct a right of publicity that better fits that conception.<sup>29</sup> The right of publicity, she argues, should not be transferrable, except to "certain living heirs."<sup>30</sup> And it should be cabined by the First Amendment to a much great-

Disruption] (attempting to define when a defendant's enrichment in IP affects a genuine legal interest and when the complaint is simply about free riding).

27. Pp. 111–12. Rothman's argument echoes the work of others who have located the right of publicity in the need for autonomous self-definition. *E.g.*, Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 158–59 (arguing for a right of publicity that promotes the "integrity" of "constructed personas"); McKenna, *supra* note 8.

28. If "I lost the revenue I would have made licensing the right to use my name" counts as a sufficient injury, all Rothman's objections to the current broad form of the right of publicity evaporate, because any control we give people over how their name or likeness is used can easily be turned into an economic injury: the loss of the revenue they would have received in exchange for agreeing not to sue.

29. Pp. 111–12, 115–79, 181–85 (analyzing deficiencies with current right of publicity and its theoretical justifications and endorsing a more limited right "rooted in [the legitimate justification of] personal liberty and dignity").

30. Chapter 6; p. 136 ("Alienating the right of publicity . . . burdens fundamental rights, works at cross-purposes with the right of publicity's purported objectives, sometimes forcibly commodifies a person, and is inefficient."); p. 137 ("Legislatures must step in . . . to limit transferability . . ."); see also Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling Your Soul*, 83 TEMP. L. REV. 1 (2010) (arguing for limitations on alienability of personal names). In a similar vein, courts have proven reluctant to find a person to have aban-

er extent than it currently is (Chapter Seven). But the “legitimate” justifications for the right of publicity are, in her view, “those focused on protecting a person’s identity . . . when the uses are likely to cause dignitary, emotional, or economic harms” (p. 155).

While the limits on alienability seem to flow from her individual-liberty theory of the right of publicity, the recommendation to impose First Amendment limits on the right do not follow so clearly. Rothman claims that “[r]ecalibrating the right of publicity and realigning it with its privacy-based origins can help refocus our First Amendment inquiries in a way that is more speech protective while still providing adequate safeguards for individuals whose identities are used without permission” (p. 139). But while she offers a number of specific ways in which the First Amendment should limit the right of publicity, she does not tie those limits directly to her theory of the right of publicity. And indeed, it does not seem First Amendment limits can do much work to promote speech under her theory. The very claims Rothman’s tort-based right of publicity would promote—the claims that another’s use of one’s name or likeness caused emotional or dignitary harm—are likely to be the most worrisome from a First Amendment perspective because they aim to alter the content of someone else’s message. Rather, it seems to be the very fact of getting away from the rhetoric of IP that is doing her First Amendment work. She argues that “[a]lthough the Supreme Court has never explicitly said so, it has repeatedly indicated that First Amendment defenses have less traction against IP claims” than against other laws.<sup>31</sup> So not calling the right of publicity an IP right might get the courts to pay more attention to the First Amendment rather than giving it a free pass, but Rothman’s theory of the right of publicity is still one that exists in substantial tension with the First Amendment, as I discuss below.<sup>32</sup>

In the end, Rothman envisions a right of publicity that is appropriately calibrated to protect what she views as legitimate interests in liberty and dignity, and that loses much of its economic character (pp. 181–85).

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done his birth name even where he doesn’t use it. *See, e.g., Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

31. P. 143. While that is surely true of copyright, it may not be true of trademark, which takes the First Amendment more seriously than copyright does. And while Rothman argues that “trademark claims[, like copyright], also are evaluated without using the strict scrutiny analysis,” p. 145, that may no longer be true after the decision in *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017) (plurality opinion) (holding that the Lanham Act’s disparagement clause, which required the Patent and Trademark Office to deny the registration of disparaging marks, ran contrary to the First Amendment because the clause was not “narrowly drawn” to bar only commercially disruptive commercial marks, and arguing further that even commercial and commercially disruptive speech may deserve First Amendment protection).

32. *See infra* Section II.C.



## II. LIBERTY, DIGNITY, AND PRIVACY

A. *Right Result, Wrong Reason*

I find myself in a somewhat awkward position for a book review writer: I think much of Rothman's book is right on. Her history is illuminating and seems persuasive, at least as far as I can tell without being a historian myself. At a minimum, it caused me to rethink what I have always assumed about the history of the right of publicity. I also think her challenges to the incentive/labor stories often told to justify the right of publicity are compelling.<sup>33</sup> I think her concerns with the expansion of the right of publicity are on point.<sup>34</sup> And I think her policy prescriptions are right, at least in broad brush: we should make it harder to sell your publicity rights or to transfer them to heirs, we should reduce the ability of an individual to control things said about her, and we should take the First Amendment more seriously than we do as a counterweight to the right of publicity.

Where I part ways with Rothman is in *why* we should do these things. For Rothman, the right of publicity is a personal dignitary interest. It is the right not to be "puppets that can be used to speak others' words and messages" (p. 111). This is a privacy interest, or perhaps a property interest, or perhaps both—she goes back and forth a bit on this question.<sup>35</sup> It is not, however, a privacy interest in the strict sense of the right to be let alone; Rothman is comfortable extending the right to people who do want publicity but want some control over its terms. Rather, Rothman wants us all (celebrities and mortals alike) to have some, but not complete, control over how others use our names, voices, or likenesses.

How much control? Well, she's a bit vague here. The key, she says, is that we should have control when injury is likely (p. 112). What exactly qualifies as injury is unclear; more on that in a moment. But the injury she has in mind is personal—an interference with dignity or autonomy, not simply the loss of an endorsement contract (p. 112). The right of publicity is, for Rothman, fundamentally a personal dignity interest, not an economic interest like a traditional IP right.

Rothman's move away from an economic rationale toward a personal dignitary interest has two significant advantages over the existing right of

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33. That's not surprising; I've made similar arguments myself in the past. Dogan & Lemley, *supra* note 23, at 1181, 1187–88.

34. Again, that's not surprising; I and many others have criticized the expansion of the right in the past. *E.g.*, *id.* at 1162; Lee, *supra* note 23, at 488; Volokh, *supra* note 23, at 929–30. See sources cited *supra* note 24.

35. The book is subtitled "Privacy Reimagined for a Public World," and she speaks on the first page of the right of publicity as a way that "privacy lives on." P. 1. But elsewhere she seems to accept the label of property, though not IP, even while arguing for limitations on the transferability of that property. See pp. 124–25 (drawing analogies from the right of publicity to types of property for which we restrict alienability, such as "[b]lood, babies, [and] historic buildings," to suggest it should have similarly restricted alienability).

publicity. First, a personal privacy-based interest should not be alienable. Indeed, selling your dignity, while common in DC in the last two years, seems anathema to Rothman's dignitary-injury theory. The whole point of dignity is that it is a personal right, not a trading chit. Rothman seems particularly concerned about involuntary transfers. She notes that many celebrities have declared bankruptcy and might lose the right to their own identities to creditors (pp. 117–19, 122). Others might sell the right to a business partner who then sells it to a third party with whom the celebrity might never have willingly dealt, as happened when a parent transferred the rights over nude images of her minor children to a publisher and those rights ended up in the hands of a pornographer.<sup>36</sup> Second, and for similar reasons, a personal interest in controlling the conversation about oneself should arguably end at death.

Rothman endorses the limits on alienability, and it is fair to say this is the primary way her reframing of the right of publicity would help cabin that right. She's a bit cagier on postmortem rights, raising various problems with them at different points (pp. 123–24, 136) but leaving open the possibility of the transfer of the otherwise personal right to "certain living heirs" in unspecified circumstances (p. 137).

Rothman envisions her justification for the right of publicity, I think, as a return to the more reasonable days of a privacy-based publicity right—not the narrow right of some histories, but one that attached to the person and couldn't be transferred like an IP right. I think that's the right result. But it's not clear that reconceiving the right of publicity as about dignity and autonomy rather than about monetization will get us there.

To begin, it's hard to see what would stop a celebrity with a dignity-based right of publicity from trading on that right. True, tort claims, unlike IP rights, are not usually tradeable. But it's not clear that Rothman would in fact go this far. At times she mixes in "economic harm" with the sorts of things she wants the right of publicity to protect (pp. 155–56). But at other times, even on the same page, she urges a "[f]ocus[] on likely harms rather than lost revenue" (p. 156). But what is the economic harm from the use of one's identity if not the loss of the ability to endorse products or otherwise license that use? The issue in *Haelan*, for example, wasn't whether baseball players could license the use of their names and photographs for use on baseball cards.<sup>37</sup> It was, as Rothman documents in detail, whether they could license the same right to more than one person (pp. 45–46, 50–64). Treating the right of publicity as an IP right allowed celebrities to assign or exclusively license it, preventing companies that paid for endorsements from having their own endorsers compete with them (p. 60).

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36. *Faloona ex rel. Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1002–03, 1007 (5th Cir. 1986); see also pp. 119–22 (discussing the problems even with voluntary transfers). Rothman points out that Prince changed his stage name to a symbol because Warner Brothers owned the right to the name Prince and refused to let him make the music he wanted. P. 120.

37. See *supra* text accompanying notes 15–17.

Rothman is right that allowing someone to sell her identity outright is probably a bad idea. Losing control over your own name seems like an affront to rather than a protection of your dignity.<sup>38</sup> But if it is autonomy rather than dignity we want to protect, celebrities might well want to sign an exclusive endorsement deal, which presumably will pay more than a nonexclusive endorsement would. Will we void contracts that purport to grant exclusivity? Some statutes do so,<sup>39</sup> but it's rare, and contract law generally defers to the intent of the contracting parties.<sup>40</sup> Short of a law that makes paid endorsement itself unlawful or misleading,<sup>41</sup> celebrities will often want to trade their dignity and autonomy for money, and it seems a bit paternalistic to tell them they can't—ironically in the name of preserving their autonomy.<sup>42</sup>

The postmortem right of publicity is an even better example of the difficulty of cabining the right simply by changing its rationale. True, many heirs are just out to make a quick buck, cashing in on the fame of the dear departed. But that's not the only reason heirs might want a postmortem right of publicity. Sometimes heirs want to control a celebrity's legacy to *prevent* others from cashing in on the fame of the deceased, or to control the story being told about him. If the interest is in the dignity of the person named, a postmortem right would sometimes (though not always) serve that purpose.<sup>43</sup> So perhaps we should distinguish between monetizing and nonmonetizing uses

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38. Cf. Tiffany Hsu, *Kate Spade and Fashion's Identity Crisis: When a Name Makes a Brand*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/business/kate-spade-fashion-brand.html> (on file with the *Michigan Law Review*) (describing the post-sale struggles of founders of namesake companies, such as Kate Spade, who committed suicide, and Bobbi Brown, who is "regularly stopped by Bobbi Brown Cosmetics shoppers asking her to change or add products over which she no longer has any say").

39. E.g., 17 U.S.C. § 304(c)–(d) (2012) (allowing unilateral termination of transfers and licenses to copyrights notwithstanding contrary agreements under certain conditions); *id.* § 106A(e) (barring transfer of moral rights).

40. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (setting out cases when, against the presumption of enforceability, public policy may justify voiding a contract).

41. See Uri Y. Hacoen, *Unjust Endorsement: Endorser Responsibility in the Social Media Age*, U.C. BERKELEY SCH. L., <https://www.law.berkeley.edu/wp-content/uploads/2018/07/Uri-Hacoen.pdf> (on file with the *Michigan Law Review*).

42. Further, as Rothman herself points out, there are limits to the autonomy a celebrity can give up in such a contract. While Prince might not have been able to perform as Prince, *see* p. 120, individuals who assign the rights in their names to others as part of endorsement deals are still individuals, and their behavior can affect the value of those rights even though owned by others. Just ask the many companies who did deals with Tiger Woods before his fall from grace. Cf. p. 127 (giving the example of Olympic athlete Ryan Lochte, many of whose sponsors deserted him after his criminal behavior at the 2016 Olympics).

43. The classic legal maxim is that you can't libel the dead because they have no continuing dignitary interest. *See, e.g., Nev. Press Ass'n v. Del Papa*, No. CV-S-98-00991-JBR (LRL) (D. Nev. 1998); cf. DON HERZOG, *DEFAMING THE DEAD* (2017) (arguing that that should change). But some (though by no means all) heirs asserting right of publicity claims are interested in protecting the reputation of the deceased, not simply in profiting from that reputation.

of the right of publicity, giving the heirs to the Three Stooges control over artists making T-shirts depicting the stooges if but only if the heirs' interest is to prevent commercialization rather than to have the exclusive right to it.<sup>44</sup> Rothman tries to navigate a middle ground, suggesting a zombie right of publicity (a right that extends past death) that is "narrow in scope and duration, focused on protecting the noneconomic interests of heirs for no more than one generation," and not transferrable to companies (p. 184). But even this core case presents challenges that require us to think carefully about what counts as an injury to autonomy and dignity.

### B. *What Is a Dignitary Injury?*

The biggest shortcoming in Rothman's book, in my view, is that she doesn't offer us much if any detail on what sorts of injury will satisfy this new, dignitary right of publicity. She emphasizes that a cognizable claim should involve actual injury to the autonomy or dignity of the plaintiff, as opposed to just a lost licensing opportunity. But what should qualify? There are easy cases like false endorsement; I discuss those in Part III. But we don't need a dignitary injury tort to prevent false endorsement; avoiding confusion will do just fine as a rationale.

Unwanted publicity that affects private citizens might seem to be a second easy case. The private citizen who finds himself on the side of a coffee can as the face of instant coffee, for instance, may have lost control over his destiny in some meaningful way that the law should probably care about.<sup>45</sup> So too has the young woman who shows up on the cover of a *Girls Gone Wild* video.<sup>46</sup> But it is less clear that that young woman has a claim under the right of publicity as Rothman conceives it. The young woman does, after all, feature in the video, and under *Rogers v. Grimaldi* (a test Rothman endorses) a defendant can put a person's name or likeness on the cover of an expressive work if the expressive work is in fact about that person.<sup>47</sup> And what

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44. Cf. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001) ("What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity." (quoting CAL. CIV. CODE § 990 (West 2000) (current version at CAL. CIV. CODE § 3344.1 (West 2012))))). That will be hard to establish, particularly if the heirs have an interest in manipulating the answer. One way to achieve it would be to allow injunctive relief but not damages, though courts would then also have to police settlements in which heirs traded away their right to an injunction for monetary payments.

45. See *Christoff v. Nestlé USA, Inc.*, 213 P.3d 132, 134 (Cal. 2009). Perhaps we shouldn't care, if the citizen was an aspiring model who had signed a release. But we might feel differently if it was a picture taken of a private citizen in a public place.

46. See, e.g., *Gritzke v. M.R.A. Holding, LLC*, No. 4:01CV495–RH, 2002 WL 32107540, at \*1 (N.D. Fla. Mar. 15, 2002).

47. See p. 158; *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989); see also *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) ("Applying *Rogers* to our case, we

about people who feature in online videos that go viral, like the Star Wars Kid<sup>48</sup> or the baby dancing to Prince's "Let's Go Crazy"?<sup>49</sup> It can be cool to suddenly be the focus of so much attention, but it can also suck, especially if you are mocked for it<sup>50</sup> and especially if you are a woman who can expect to receive rape and death threats for no other reason than the fact that you are now a famous woman and the world is full of jerks.<sup>51</sup> We might want to give these accidental celebrities the power to put the genie of fame back in the bottle. They have suffered a loss of autonomy and also of dignity. But doing so comes at a cost. We lose the ability to share and enjoy things we like—things that were, after all, voluntarily made available in the first place.

Further, as Rothman explains, the right of publicity has never really differentiated between private and public figures.<sup>52</sup> And there are plenty of celebrities who would like more control over how they are portrayed in the world, not just more money. They may sue simply because their name was used to draw attention to something unrelated to them and they don't like it.<sup>53</sup> Sometimes they're fine with having their name used but want control

conclude that MCA's use of Barbie [here specifically in the title of a song, "Barbie Girl,"] is not an infringement of Mattel's trademark.").

48. Jimi Love, *Star Wars Kid*, YOUTUBE (Jan. 15, 2006), <https://www.youtube.com/watch?v=HPPj6viIBmU>.

49. *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016); Stephanie Lenz, "Let's Go Crazy" #1, YOUTUBE (Feb. 7, 2007), <https://www.youtube.com/watch?v=N1KfjHFWlhQ>.

50. *Star Wars Kid Files Lawsuit*, WIRED (July 24, 2003, 12:33 PM), <https://www.wired.com/2003/07/star-wars-kid-files-lawsuit/> [<https://perma.cc/9T9J-B565>] ("Now his parents are claiming damages of \$160,000 from the families of the four classmates who digitized and published the video," contending "their son was so humiliated, he is undergoing psychiatric care and may be marked for life by the experience.").

51. See e.g., Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (Jan. 6, 2014), <https://psmag.com/social-justice/women-arent-welcome-internet-72170> [<https://perma.cc/AU94-KLAY>] (describing threats against women on the internet, including against well-known journalists, and potential legal, policy, and societal responses); Corinne Lestch, *Aspiring Actress in "Catcall" Video Receiving Rape Threats*, N.Y. DAILY NEWS (Oct. 29, 2014, 11:16 AM), <http://www.nydailynews.com/new-york/aspiring-actress-catcall-video-receiving-rape-threats-exec-article-1.1991391> [<https://perma.cc/X2XZ-X9JX>] (describing rape threats against star of a public service announcement about sexual harassment); Brianna Wu, *Rape and Death Threats Are Terrorizing Female Gamers. Why Haven't Men in Tech Spoken Out?*, WASH. POST: POSTEVERYTHING (Oct. 20, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/10/20/rape-and-death-threats-are-terrorizing-female-gamers-why-havent-men-in-tech-spoken-out/> [<https://perma.cc/9GSZ-Z5DS>] (describing "GamerGate" and the violent threats against female gamers, female journalists reporting on video games, and feminist critics of video games).

52. P. 45. She thinks it shouldn't, p. 183, and I agree.

53. See e.g., *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) ("[W]e believe that [Rosa] Parks' right of publicity claim presents a genuine issue of material fact regarding the question of whether the title to the [OutKast] song[, "Rosa Parks,"] is or is not 'wholly unrelated' to the content of the song." (quoting, with respect to the legal standard, *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989))); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 618 (Ct. App. 2006) (holding that retro-funk-dance singer Kirby had no right of publicity claim against maker of video-game character Ulala given Ulala's appearance and dance moves

over it so they can charge money.<sup>54</sup> But often they object to the way they are portrayed in expressive works. Olivia de Havilland wants to change the way she appears in a new biopic about her, and she persuaded a trial court to let her.<sup>55</sup> The soldier on whom *The Hurt Locker's* leading role was based doesn't like the way he was portrayed.<sup>56</sup> And celebrities sue (and sometimes win) when companies make fun of them or depict them in unflattering ways, even when it's clear to everyone involved that they haven't endorsed the joke.<sup>57</sup>

All these people arguably have suffered harms to their dignity or autonomy. The problem is that often we want those harms to occur. We need room for journalists, documentary filmmakers, and even the makers of trashy biopics to depict celebrities. And there are certainly circumstances in which we want to make public the names and likenesses of private figures, too, like outing the neo-Nazis who march in Charlottesville or posting videos of cops who murder African Americans. We need some way to distinguish between legitimate control over one's appearance and impermissible efforts to stifle or direct public conversation on a topic that the world should, or at least does, care about.

I think Rothman and I probably agree on how most of these cases should come out. Maybe the First Amendment compels the result, as the California Court of Appeal held in *de Havilland*,<sup>58</sup> though the Supreme

were sufficiently distinct and, in any case, the digital character was a transformative First Amendment use).

54. This seems to have motivated plaintiffs in *Davis v. Electronic Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015) (retired football players against video game maker using likenesses); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (college football players against video game maker); and *No Doubt v. Activision Publishing, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (band against maker of *Band Hero* video game).

55. The court was (correctly) reversed on appeal. *De Havilland v. FX Networks*, No. BC667011, 2017 WL 4682951, at \*1 (Cal. Super. Ct. Sept. 29, 2017), *rev'd sub nom.* *de Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Ct. App. 2018), *cert. denied*, No. 18-453, 2019 WL 113121 (2019).

56. *Sarver v. Chartier*, 813 F.3d 891, 907 (9th Cir. 2016) (dismissing claims).

57. *McFarland v. Miller*, 14 F.3d 912, 916 n.8 (3d Cir. 1994) ("At [defendant's] restaurant [based on character of 'Spanky' from *Little Rascals*], one can choose among 'Spanky's Steak Sandwich,' 'Rascal's Choice,' 'Buckweat's Basket,' and 'Alfalpa's Sprout Burger.'"); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) ("The gag here, I take it, was that Samsung would still be around when [Vanna] White had been replaced by a robot [on the Wheel of Fortune]."); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting) ("[T]he phrase containing Johnny Carson's first stage name was certainly selected for its value as a double entendre" when applied to a portable toilet where "john" [means] a toilet or bathroom." (citations omitted)); *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003) (holding no actionable claim for musician brothers Johnny and Edgar Winter against comic books featuring brothers "Johnny and Edgar Autumn," including the comic volume "Autumns of Our Discontent"); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 456, 462 (Cal. 1979) (Bird, J., concurring) (dismissing claim against film presenting fictionalized, trashy biopic of actor Rudolph Valentino's life).

58. "The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination

Court's treatment of the First Amendment and the right of publicity in *Zacchini* is not encouraging.<sup>59</sup> But my sense is that Rothman wants the limits to come not from constitutional constraints but from a narrower conception of the right of publicity itself. Without a clear definition of what harms count under her dignity theory, a lot of work in her account is being done by reverting the rhetoric from IP to privacy and the way things were before.<sup>60</sup>

### C. *The Way We Were*

Now don't get me wrong: I'm a great believer in common law development. I think courts can get to the right rules when given accurate information and good lawyers. That might even be true if our goal is to build a doctrine based on the way we approached the law sixty years ago.

But there's a bigger problem with going back to the way things were before, one Rothman herself details: the way things were before sucked. The pre-1954 history of the right of publicity, Rothman shows, was not a narrow right that protected only legitimate dignitary concerns and balanced them against speech interests. Rather, from the outset, the right of publicity—explicitly imagined as a privacy right—was an outrageous infringement on speech on matters of public concern.

California passed what Rothman calls “the first right of publicity statute in the United States” in 1899 (p. 19). It made it a crime—not a tort but a *crime*—to publish “in any newspaper . . . book or serial publication . . . the portrait of any living person . . . other than that of a person holding a public office . . . without the written consent of such person.”<sup>61</sup> Putting a photograph or a drawing of a convicted criminal, a candidate for president, the CEO of a company, or a sports or movie star in a newspaper or in a book was a criminal offense, regardless of why it was done or how newsworthy it was. And even public officeholders could bring charges against their depiction in an editorial cartoon if it “reflect[ed] upon the honor, integrity, manhood, virtue, reputation, or business or political motives of the person so carica-

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of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection.” *De Havilland*, 230 Cal. Rptr. 3d at 630.

59. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (“There is no doubt that entertainment . . . enjoys First Amendment protection,” but “neither the public nor respondent will be deprived” of this entertainment if petitioner is “paid for it.”); *see also* pp. 79–80 (discussing *Zacchini*, which Rothman characterizes as “h[olding] that the First Amendment did *not* categorically protect news”). That case was decided in 1977, only a year after the Court first protected commercial speech at all in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976). So it may be a sport the Court would not follow in today's more robust First Amendment climate. I hope so. But it's always a bit worrisome to place one's hopes for rational legal policy on the possibility that the Court will disavow the only case it has decided on an issue.

60. *See* p. 181 (“The way forward for the right of publicity is by reclaiming its past.”).

61. CAL. PENAL CODE § 258 (1899) (repealed 1915), *reprinted in* CHARLES H. FAIRALL, CRIMINAL LAW AND PROCEDURE OF CALIFORNIA 658 (2d ed. 1906); *see also* p. 19 (discussing statute).

tured, or [if it] tend[ed] to expose the individual so caricatured to public hatred, ridicule, or contempt.”<sup>62</sup> New York considered but did not pass a similar bill (pp. 18–19).

While California apparently did not send journalists and editorial cartoonists to jail and repealed the law in 1915 (p. 19), the early cases defining the right of publicity in civil court were no less outrageous. Actors and actresses won injunctions against photographs depicting them on stage in public performance<sup>63</sup> and against newspapers using their names and likenesses in stories comparing their popularity.<sup>64</sup> These cases explicitly drew on the claims of dignity and control over how one is publicly depicted—the very basis Rothman draws on for her reimagined right of publicity.<sup>65</sup> The subject of a factual film that accurately identified that the plaintiff had been a prostitute was entitled to stop the showing of the film.<sup>66</sup> Other plaintiffs claimed without success the right to prevent the publication of a photograph of a deceased public figure in a biographic sketch about him.<sup>67</sup>

While the story Rothman tells—the story everyone tells about the right of publicity—is a story about expansion over time, a look at these early cases suggests a different arc. It’s hard to imagine any of these cases or statutes surviving First Amendment scrutiny today. But they are rooted in the very dignitary-injury concerns that Rothman would put at the center of the right of publicity. So Rothman’s nostalgia for the past sits uneasily with her support for First Amendment limitations on the right of publicity. Either we would “go back” to the original conception of the right of publicity but then use the now-stronger First Amendment to change the results in many of

62. CAL. PENAL CODE § 258 (1899) (repealed 1915), reprinted in CHARLES H. FAIRALL, CRIMINAL LAW AND PROCEDURE OF CALIFORNIA 658 (2d ed. 1906).

63. See Warren & Brandeis, *supra* note 6, at 195 n.7 (discussing *Manola v. Stevens* case heard in New York Supreme Court in 1890); pp. 20–21 (discussing case).

64. See *Marks v. Jaffa*, 26 N.Y.S. 908, 908–09 (Sup. Ct. 1893); pp. 21–22 (discussing case).

65. *Marks*, 26 N.Y.S. at 909 (“An individual is entitled to protection in person as well as property, and now the right to life has come to mean the privilege to enjoy life, without the publicity or annoyance of a lottery contest . . .”); *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (“One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. . . . Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty.”). To be sure, *Pavesich* was a false endorsement case brought by a private citizen, see p. 26 (reprinting advertisement)—the strongest sort of case in my view. But the rationale for control over if and how one is depicted in public was not limited to such a case.

66. *Melvin v. Reid*, 297 P. 91, 93–94 (Cal. Dist. Ct. App. 1931) (“Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our [California] Constitution [to the pursuit of happiness] that must not be ruthlessly and needlessly invaded by others.”); see also p. 27.

67. *Corliss v. E.W. Walker Co.*, 64 F. 280, 282–83 (D. Mass. 1894) (finding that the plaintiff’s deceased husband had been “a public man” for having “sought public recognition as [an inventor],” and holding that defendant’s use of his picture in the biographical sketch therefore did not violate an individual right “in the representation of his portrait”); pp. 35–36.



those original cases<sup>68</sup> or we would let dignitary injury claims prevail even when they restrict speech on matters of public concern, as they did a century ago. That doesn't inspire much confidence that a return to dignity-based theories will provide the sorts of limits Rothman and I both want to see imposed on the right of publicity.

I don't intend to suggest that theories of dignitary injury can't coexist with the First Amendment. We have dignitary tort doctrines like defamation and false-light invasion of privacy that come both with their own internal limits and with constraints placed on them by the First Amendment.<sup>69</sup> But the problem with the right of publicity as it currently exists (and, as Rothman shows, as it has always existed) is that it doesn't come with any such limits. It is the use of a name or likeness itself that the law treats as an injury. Rothman's argument for a return to treating the right as a dignitary-injury tort would be more persuasive if she could give us principles that would bound the definition of dignitary harm. Perhaps the First Amendment alone will provide such limits. But then it's not clear how reframing the right of publicity helps get us where we want to go.

### III. CONFUSION ABOUT PRIVACY

#### A. *Do We Need a Theory at All?*

If Rothman and I are in basic agreement on what the right of publicity should and shouldn't cover, why does it matter that we disagree over what the doctrine is trying to do? Perhaps we can do without a theory at all. We seem to have muddled along so far without a unifying or persuasive theory

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68. This is clearly Rothman's preference. P. 139. But if that's right, it is the newly broadened First Amendment, not anything about the substantive nature of the right of publicity, that is doing the work. That newly broadened right should operate just as well against an IP-based right of publicity, particularly one grounded in trademark law. See *supra* notes 4–7 and accompanying text.

69. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). False-light invasion of privacy may be the appropriate remedy for some celebrity depictions that don't suggest endorsement but do misrepresent the celebrity in some other way, altering her appearance or making her appear to be participating in sexual acts. See Jessica L. Williams-Vickery, Note, *A (Thigh) Gap in the Law: Addressing Egregious Digital Manipulation of Celebrity Images*, 34 GA. ST. U. L. REV. 795 (2018); cf. Thomas E. Kadri, *Drawing Trump Naked: Curbing the Right of Publicity to Protect Portrayals of Real People*, MD. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3247273](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247273) [<https://perma.cc/P2Q5-JD9B>]. For a discussion of the rise of such manipulation in videos via "deep-fakes," see, e.g., Sarah Scoles, *These New Tricks Can Outsmart Deepfake Videos—For Now*, WIRED (Oct. 17, 2018, 7:00 AM), <https://www.wired.com/story/these-new-tricks-can-outsmart-deepfake-videos-for-now/> [<https://perma.cc/57GM-5RWF>].

Some courts have extended those First Amendment standards to right of publicity claims. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (reversing finding of publicity violation by a magazine that photoshopped Dustin Hoffman's head onto a woman's body for an article about women's fashion). *Hoffman* held that the actual malice standard applied because Hoffman was a public figure. *Id.*

of the right of publicity. But I don't think going without a theory is a good idea. First, "muddled" is the right word. As Rothman persuasively demonstrates, the absence of a theory has meant the absence of any effective limiting principle, and that is one of the things that has driven the continual expansion of the doctrine over time. Indeed, the situation is so bad that the actual elements of the right of publicity cause of action in California are (1) use of something that reminds someone of a person (2) for economic advantage.<sup>70</sup> I think Rothman's effort to define the harm caused by infringement on the right of publicity ultimately fails, but the baseline against which she is writing is worse. Without a clear definition of what counts as harm, courts will gravitate back toward the anti-free riding impulse. I've explained elsewhere why that is a problem in IP cases.<sup>71</sup> But that impulse doesn't come from thinking of the right of publicity as an IP right. Rather, it is a more general instinct, and in fact it may be easier in tort than it is in IP to fall back on the assumption that any "free riding" is legally problematic. If so, Rothman's reframing of the right of publicity could worsen the problem of treating any use of a name or likeness as unlawful free riding. Courts and juries seem primed to treat all competition as unfair competition and all enrichment as unjust enrichment.<sup>72</sup>

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70. Lack of consent and harm are two others, but those elements are necessarily present in any tort case. See *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 265 (Ct. App. 2017) ("[A common law right of publicity] claim has four elements: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."); see also *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799–800 (Cal. 2001) (discussing common law and statutory claims). A few states have more limited rights. Utah's statute is limited to false endorsement, and Florida's is limited to use in advertising, for instance.

As Eric Johnson observes, the result is that we effectively define the scope of the right of publicity through judicially-created defenses and limitations, "saying what the right of publicity is not" rather than what it is. Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891 (2017). On the problems with that approach, see Kadri, *supra* note 69.

71. See Lemley & McKenna, *Owning Mark(et)s*, *supra* note 26, at 140–41, 146–47, 189 (arguing courts tend to find infringement when a defendant's use of a mark appears to reap value the plaintiff sowed); McKenna, *supra* note 8, at 247–250 (making similar argument); cf. David J. Franklyn, *Debunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free-Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117, 117, 140–42 (2004) (arguing that "while American dilution law purports to be about preventing dilutive harm, it really is about preventing free-riding on famous marks," and that "[t]he attempt to make a profit off of some one [sic] else's fame" helps animate the judicial imagination); Jerre B. Swann & Theodore H. Davis, Jr., *Dilution, an Idea Whose Time Has Gone; Brand Equity as Protectable Property, the New/Old Paradigm*, 1 J. INTEL. PROP. L. 219, 220 (1994) (seeming to promote this tendency by advocating that "[t]he likelihood of 'free ride' or 'negative' associations with a mark should equal the likelihood of confusion as a basis for judicial scrutiny").

72. See Lemley & McKenna, *Unfair Disruption*, *supra* note 26 (reasoning that many plaintiffs' trademark complaints should not be legally cognizable, as some antitrust complaints are not, because the harms they posit are actually consistent with benefits the law furthers); cf. Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 907 (2010) (making similar argument and proposing an "IP injury" doctrine as a threshold requirement); CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT (2012) (same).

Because the current elements of the right of publicity cause of action don't impose real limits on the doctrine, essentially all the work in defining the scope of the right of publicity has been done by defenses.<sup>73</sup> Some states have created protections for news reporting and some creative works, but those are often quite limited.<sup>74</sup> Other courts have created common law defenses like *Saderup*'s transformative use test, often drawing from other areas of IP law.<sup>75</sup> And ultimately we fall back on the First Amendment. But none of that has been enough to stop the spread of the right of publicity. So I agree with Rothman that we need a justification for the right of publicity in order to cabin its scope; I just don't think hers fits the bill.

### B. *False Endorsement and the Right of Publicity*

There is a legitimate justification for the right of publicity, and it comes from IP law. But it is trademark, not copyright,<sup>76</sup> that is the relevant analogue. As I have argued elsewhere, individuals should have the right to prevent their names or likenesses from being attached to products if people are

73. See DAVID TAN, *THE COMMERCIAL APPROPRIATION OF FAME* 265 (2017) (noting that proof of identity has presumptively meant a finding of appropriation, leaving courts to rely on the First Amendment to craft the contours of the doctrine).

74. See, e.g., CAL. CIV. CODE § 3344 (d) (West 2016) (“[A] use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required . . .”); *Saderup*, 21 P.3d at 807 (describing parallel common law and statutory rights to publicity and news and public affairs exception); *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 552 (N.Y. 2000) (describing New York case law creating a “broadly construed” newsworthiness exception to New York’s statutory right of publicity).

75. *Saderup*, 21 P.3d at 809, 810 (asking “whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness,” and emphasizing the subsidiary question whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted”). Tan endorses such a test. TAN, *supra* note 73, at 267–68. But the very example he uses—arguing that no artist should be allowed to paint a picture of Tiger Woods unless done to communicate a different message—suggests why that test is insufficiently protective of art involving celebrities. *Id.* at 187–90.

Some courts have avoided this problem by defining a broad exception for “newsworthy” depictions of people. The Indiana Supreme Court did so in *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018), treating statistics about athletes as newsworthy when used in fantasy sports leagues. I think that is the right result, but it’s hard to see why the depiction of Zacchini’s flying-cannonball act wasn’t at least as newsworthy. It was, after all, on the evening news.

76. The Supreme Court drew an analogy to copyright in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (equating the policy underlying the right of publicity to that underlying copyright and patent law in case involving televised broadcast of a human cannonball’s entire performance). But that case looked more like a common law copyright claim than a traditional right of publicity claim, since Zacchini’s complaint was not that the defendants took his image but that they copied his entire performance.

likely to think they sell, endorse, or have some connection with those products.<sup>77</sup>

Logically, the right of publicity has more in common with trademark law than with copyright. The right of publicity protects a celebrity's interest in her name and likeness, much as trademark law protects a business's name and other trademarks. Both areas of law give rights holders some measure of control over the meaning of their identities by permitting them to control the use of associated symbols.<sup>78</sup> The Lanham Act has traditionally accomplished this end by preventing commercial uses of trademarks that are likely to confuse consumers regarding either the source of goods or the affiliation, endorsement, or sponsorship of those goods by the trademark owner.<sup>79</sup> The right of publicity has aimed to do the same thing for celebrities by preventing the use of a celebrity's name or likeness in advertising or promotion to falsely suggest she has endorsed the product. Both forms of legal protection promote not only the rights holder's interests but also the public's. Trademark holders and celebrities can prevent the deceptive appropriation of the meaning associated with their goodwill and identity, while consumers can buy products with confidence in the truth of assertions about who makes, sponsors, endorses, and stands behind those goods.<sup>80</sup>

While its focus on confusion is worth emulation, trademark law itself isn't a perfect model. Trademark law has sometimes offered protection even absent likely consumer confusion.<sup>81</sup> Trademark law protects certain famous

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77. Dogan & Lemley, *supra* note 23, at 1165–66 (setting out benefits of founding a right of publicity on the same grounds as trademark law).

Rothman devotes only two paragraphs to the trademark justification. In dismissing it, she says simply that the right of publicity doesn't currently require confusion in most states. P. 102. That's true, but it is equally true that the right of publicity doesn't require proof of dignitary harms, as she advocates. If we are "reimagining" the right to try to make the world better, we ought to imagine a right that addresses real harms without chilling speech. See Dogan & Lemley, *supra* note 23, at 1181–82 (explaining downsides of a dignity-based right of publicity).

Rothman also notes that some endorsements actually made by celebrities themselves may be misleading. P. 102. That might be true, though I am less persuaded than she appears to be, p. 102, that people believe celebrity endorsers actually use the products they endorse and so are misled. But if they are misled, that seems a problem trademark law can and should address. *Cf.* Hacohen, *supra* note 41 (discussing the related problem of unacknowledged paid endorsements).

78. See McKenna, *supra* note 8, at 289–90.

79. See 15 U.S.C. §§ 1114(1), 1125(a) (2012).

80. Arguably no one should care whether Catherine Zeta-Jones endorses one particular brand of cell phone. But apparently we do: celebrity product endorsement is big business. In a market economy, the right of publicity quite reasonably takes this consumer preference as a given and tries to make sure that even if consumers are irrational in preferring celebrity-endorsed products, they are at least not deceived as to the endorsement of those products.

81. *E.g.*, *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 483–85 (5th Cir. 2008) (holding actionable the mere possibility of post-sale confusion as to sponsorship, even in the absence of point-of-sale confusion as to source); *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1010, 1012 (5th Cir. 1975) (holding that confusion requirement is met where consumers recognize that the trademark on defendant's product belongs to plaintiff and the plaintiff has not authorized its use,

marks against dilution by nonconfusing uses.<sup>82</sup> And some courts give protection to those who make products or T-shirts that feature logos. Those courts often try to come up with a way in which people might be confused by, say, a \$20 counterfeit Rolex watch, but those theories aren't very persuasive.<sup>83</sup> Courts in the merchandising cases are effectively giving trademark owners a right over the logo or product design itself. But they have generally done so only in limited contexts, particularly university and sports-team apparel or luxury goods.<sup>84</sup> And as I have pointed out elsewhere, these expansions are problematic as a matter of trademark law and hardly deserve emulation in the right of publicity context.<sup>85</sup>

Reconceiving the right of publicity as a trademark-like right offers significant benefits in defining the right's scope and limitations. First, it provides a helpful way to think about the different sorts of claims made under the rubric of publicity. We have considerable experience with both confusion-based and merchandising claims in trademark law. Applying that knowledge to right of publicity cases can help us understand why we might (or might not) want to prohibit particular uses. Most importantly, looking at the right of publicity through the lens of trademark law offers logical ways to limit the right. Trademarks are not property rights in the traditional sense, though a few courts and commentators have suggested that trademark owners should have property-like rights over their marks.<sup>86</sup> Trademark cases tend instead to be decided based on likelihood of confusion grounds, grounds that bear a clear relationship to the goal of protecting trademarks as informational symbols in the marketplace. Importantly, trademark law is more likely than the right of publicity law to reject ownership of the mark or likeness as a value in and of itself.<sup>87</sup>

Confusion provides a useful rubric for incorporating autonomy interests while limiting them to legitimate concerns. Both private and public figures should be entitled to decide whether and when to endorse products. Deceiving the public about whether someone has done so hurts both that person and the public. That deception can occur without an explicit claim of endorsement, for example if a car company imitates a singer's voice to make

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without enquiring into actual consumer perceptions). For a discussion of these cases and their problems, see Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461 (2005).

82. 15 U.S.C. § 1125(c).

83. Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769 (2012) (discussing and critiquing those theories).

84. Lemley, *Modern Lanham Act*, *supra* note 24.

85. Dogan & Lemley, *supra* note 81, at 464–65; Dogan & Lemley, *supra* note 23.

86. See, e.g., Franklyn, *supra* note 71; Swann & Davis, *supra* note 71.

87. See Dogan & Lemley, *supra* note 81 (discussing and criticizing the merchandising theory and noting its limits in the courts); Dogan & Lemley, *supra* note 23, at 1206–08.

people think she endorsed their cars<sup>88</sup> or if a company depicts a race car driver's car in an ad to make people think he is working with them.<sup>89</sup>

But trademark infringement also incorporates significant limiting principles designed to balance the interests of other parties against the interests of trademark owners, and to accommodate First Amendment concerns.<sup>90</sup> I have a right not to be falsely depicted as endorsing a product. But I don't have a right not to be accurately depicted, even if I don't like the light in which I am cast. Nor should I have a right to control expressive works such as books, movies, or video games that accurately depict me or the things I have done simply because the creator will make money from those works. And companies too can profit from the use of their competitors' marks as long as they don't do so in a way that misleads consumers. Trademark law allows comparative advertising, criticism, and parody of brands so long as the use doesn't confuse consumers.<sup>91</sup> The failure to incorporate these limitations into the right of publicity has resulted in a mutant version of trademark policy, promoting some of the law's objectives but viewing them in isolation, with neither contours nor counterweight. That problem will likely only get worse as we continue to blur the definition of what is commercial and as states like California eliminate any requirement of commerciality.<sup>92</sup>

A confusion-based theory of the right of publicity might also do a better job of preventing zombie rights of publicity. As noted above, Rothman has a hard time explaining why heirs don't have a dignitary interest in controlling how the deceased is perceived.<sup>93</sup> By contrast, it is hard to argue with a straight face that a dead person is endorsing a product, so properly understood there is no need for a postmortem right of publicity to prevent false endorsements.<sup>94</sup>

A confusion-based theory is consistent with an economic rather than a dignitary basis for the right of publicity, and Rothman might object to it on that ground. But as also noted above, Rothman's theory can't avoid paid celebrity endorsements. A confusion-based theory would still prevent assign-

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88. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

89. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

90. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001) (requiring that the plaintiff prove that the magazine that altered Dustin Hoffman's appearance "intended to create the false impression in the minds of its readers that when they saw the altered 'Tootsie' photograph they were seeing Hoffman's body").

91. See 15 U.S.C. § 1125(c)(3) (2012); see also *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 306–08 (9th Cir. 1992) (summarizing development of doctrine from "[c]ases . . . best understood as involving a non-trademark use of a mark").

92. For an argument that corporate social media accounts blur the line between what is advertising and what is more traditional speech, see Ashley Messenger, *Rethinking the Right of Publicity in the Context of Social Media*, 24 WIDENER L. REV. 259 (2018).

93. See *supra* notes 43–44 and accompanying text.

94. Courts do sometimes get this wrong, however. See *Mercado-Salinas v. Bart Enters. Int'l, Ltd.*, 671 F.3d 12 (1st Cir. 2011) (holding that a celebrity can irrevocably assign the trademark in his name).

ment of the right of publicity because only the celebrity, not an assignee, could be perceived as and confused for an endorser.<sup>95</sup> A celebrity should still be able to agree to endorse only one product, but the remedy for breach of that agreement should lie in contract law, as it did before *Haelan* (and indeed as it did in *Haelan* itself, as Rothman shows<sup>96</sup>).

If a properly conceived right of publicity promotes the same core goals as trademark law, then a proper understanding of the right of publicity would draw more completely on trademark principles in defining the scope and the limitations of the publicity right. The overlap is not perfect, but the trademark framework should suit the vast majority of right of publicity cases.<sup>97</sup> And if a publicity claim raises no concern with false endorsement or confusion, applying the trademark framework gives courts a reason beyond the First Amendment to reject it. That is no small advantage.

Further, while Rothman worries that treating the right of publicity as an IP right gives rights holders a free pass when it comes to the First Amendment,<sup>98</sup> it is copyright, not trademark, that has effectively ignored the First Amendment. Trademark cases regularly take the First Amendment seriously. As the Ninth Circuit said in *Mattel, Inc. v. MCA Records, Inc.*:

The First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark, but “[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.” *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir.1987). Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment. See *Yankee Publ’g, Inc. v. News Am. Publ’g, Inc.*, 809 F.Supp. 267, 276 (S.D.N.Y.1992) (“[W]hen unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.”). Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function. See *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 301 (9th Cir.1979) (“It is the source-denoting function which trademark laws protect, and nothing more.”).<sup>99</sup>

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95. *But see* Liebesman, *supra* note 30 (noting that some courts are too willing to enforce sales of personal name trademarks).

96. *See supra* note 16 and accompanying text.

97. Because there is no one unifying theory of the right of publicity on which everyone can agree, it may be that each application of the right of publicity, rather than the right as a whole, will have to survive First Amendment scrutiny by pointing to a substantial or compelling interest and appropriate tailoring. Thus, even if the false endorsement prong of the right of publicity is constitutional it doesn’t follow that other applications of the right will be.

98. *See, e.g.*, p. 154 (“The First Amendment will not block all right of publicity claims, but it must block some.”).

99. 296 F.3d 894, 900–01 (9th Cir. 2002).

Indeed, the *Rogers v. Grimaldi* test—the most speech-protective test that has been applied in the right of publicity context—originated in trademark law.<sup>100</sup>

Trademark law is likely to become even more solicitous of the First Amendment after the Supreme Court's decision last year in *Matal v. Tam*.<sup>101</sup> In only its second First Amendment case involving trademarks, the Court struck down a provision of the Lanham Act that permitted the government to make viewpoint-based judgments about the legitimacy of trademarks.<sup>102</sup> By making clear that trademark laws were content-based (if not always viewpoint-based) restrictions of speech, "*Tam* opens the door to wide-ranging free speech challenges to trademark laws in the United States."<sup>103</sup> The right of publicity is likely to follow suit. As in trademark law before *Tam*, the Supreme Court has only once before confronted the interaction between the First Amendment and the right of publicity. As in trademark law, that decision is decades old. And as in trademark law, the Court's first encounter gave serious speech concerns the back of its hand.<sup>104</sup> But the First Amendment has evolved in the intervening decades, and the Court would likely follow the regional circuits in expanding First Amendment protection for the right of publicity, just as it has done with trademark law.

The contrast between a trademark-based and a dignitary tort-based theory of the right of publicity can most easily be seen in the football video game cases.<sup>105</sup> Electronic Arts (EA) sold video games that allowed players to build and control teams of college and professional athletes, both current

100. 875 F.2d 994 (2d Cir. 1989).

101. 137 S. Ct. 1744 (2017) (plurality opinion in part).

102. *Tam*, 137 S. Ct. at 1764–65 (plurality opinion) (suggesting that laws regulating even commercial and commercially confusing speech may going forward be reviewed with heightened scrutiny).

103. Lisa P. Ramsey, Essay, *Free Speech Challenges to Trademark Law after Matal v. Tam*, 56 HOUS. L. REV. 401, 401 (2018).

104. Compare *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (first Supreme Court case hearing First Amendment challenge to right of publicity), and Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1188–89 (1978) (“[T]he *Zacchini* Court . . . did not accurately perceive its role in the conflict between rights of performance and the first amendment [sic] . . .”), with *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525–28, 530 (1987) (first Supreme Court case hearing First Amendment challenge to trademark, holding “Congress intended to provide the [U.S. Olympic Committee] with exclusive control of the use of the word ‘Olympic’ without regard to whether an unauthorized use of the word tends to cause confusion” and upholding injunction against use of word “Olympic” in “Gay Olympic Games”), and Lois Nitti, Note, *The Gay Olympics: San Francisco Arts & Athletics v. United States Olympic Committee*, 8 PACE L. REV. 373 (1988) (calling Court's holdings “unfortunate”).

105. Compare *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013) (First Amendment defense accepted against trademark claims by football players whose likenesses appeared in video game), with *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (First Amendment defense denied against right of publicity claims on similar facts).



and former. Particular avatars in the game had the characteristics—background, playing abilities, etc.—of particular, real-life athletes, but not the athletes' names.<sup>106</sup> Groups of both professional and college athletes sued, effectively to stop the use of their profiles in creating avatars. But without those profiles, EA couldn't create realistic football video games.

In a pair of decisions on the same day by the same judges, the Ninth Circuit came to radically different results in the NFL and NCAA cases.<sup>107</sup> The difference was simple: in the NFL case, Brown brought a trademark claim. The court affirmed dismissal of the claim, following *Rogers v. Grimaldi* and holding that an expressive work like a video game did not expressly mislead as to source or sponsorship because, even though Brown's likeness appeared in photos on the cover, Brown was in the game, so mentioning and depicting him was "artistically relevant" to the contents of the work.<sup>108</sup> No one would assume Brown endorsed or was sponsoring the work merely because it was "about" him (and thousands of other past and present football players).<sup>109</sup>

In the NCAA case, by contrast, the plaintiffs brought exactly the same claim but couched it in terms of the right of publicity rather than trademark law. And they prevailed. The *In re NCAA* court's reasoning in rejecting its conclusion the same day in *Brown* is instructive:

As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim. The right of publicity, on the other hand, does not primarily seek to prevent consumer confusion. Rather, it primarily "protects a form of intellectual property [in one's person] that society deems to have some social utility." . . .

The right of publicity protects the *celebrity*, not the *consumer*. Keller's publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products. Indeed, he would be hard-pressed to support such an allegation absent evidence that EA explicitly misled consumers into holding such a belief. Instead, Keller's claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field. The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly misled consumers—is simply not responsive to Keller's asserted interests here.<sup>110</sup>

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106. *Brown*, 724 F.3d at 1240; *In re NCAA*, 724 F.3d at 1271–72.

107. Compare *Brown*, 724 F.3d at 1248 (holding that because "Brown's likeness is artistically relevant to the games" his claims are "subject to the *Rogers* test," and here "the public interest in free expression outweighs the public interest in avoiding consumer confusion" in trademark), with *In re NCAA*, 724 F.3d. at 1284 ("We reject EA's suggestion to import the *Rogers* test into the right-of-publicity arena," and so "EA's use of [Keller's and other players'] likenesses" is not "protected by the First Amendment").

108. *Brown*, 724 F.3d at 1248.

109. See *id.*

110. *In re NCAA*, 724 F.3d at 1280–81 (citations omitted) (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001)); accord *Hart v. Elec. Arts, Inc.*, 717

The result was that thousands of athletes each had rights to control the depiction of their behavior on the football field. That was unworkable, and EA stopped making its college football games at all.<sup>111</sup> Everyone lost out—athletes, fans, gamers, and EA.

Rothman and I agree that *In re NCAA* is wrong.<sup>112</sup> She thinks that a right of publicity motivated by autonomy interests, by moving away from lost licensing revenue as a harm, would avoid results like *In re NCAA*.<sup>113</sup> I'm not so sure. While Keller seemed to want money, it is just as easy to imagine some of the thousands of athletes depicted in the games wanting no part of the game at all. And if your theory of the right of publicity is broadly "rooted in personal liberty and dignity, and the prevention of economic, reputational, and emotional harms to individuals" (p. 181), it's hard to say for sure they shouldn't have that kind of control. By contrast, we know for a fact that a theory based on false endorsement wouldn't have shut down EA's video games; it didn't shut down the NFL games in *Brown*,<sup>114</sup> and indeed the *In re NCAA* court said as much.<sup>115</sup>

Understanding the right of publicity as a particular type of IP right—a right to prevent false and misleading representations of endorsement—provides a way to stop the uses of a person's identity that seem problematic while leaving ample breathing room for truthful speech. It provides a clearer path to the results both Rothman and I endorse than does a search for an unspecified dignitary injury.

#### CONCLUSION

Rothman's important book is an excellent contribution to the field, one that will hopefully provoke courts and legislatures to rethink their headlong expansion of the right of publicity. It should be required reading for anyone dealing with the right of publicity. But once Rothman has persuaded them

F.3d 141, 158 n.23, 170 & n.47 (3d Cir. 2013) (applying reasoning developed under California law to reach the same outcome under New Jersey law in a nearly identical right of publicity challenge).

111. Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), [http://www.espn.com/college-football/story/\\_/id/9728042/ea-sports-stop-producing-college-football-game](http://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game) [https://perma.cc/SM7D-YV96].

112. To be clear, *In re NCAA* was wrong even on its own terms. It purported to apply the five-factor transformative use test from *Saderup* but misunderstood every one of those factors. See *In re NCAA*, 724 F.3d at 1285–89 (Thomas, J., dissenting) (setting out the five factors, performing a holistic balancing, and concluding that each of those factors favored EA rather than Keller). But see *id.* at 1276–79 (majority opinion) (attempting to respond to Judge Thomas).

113. Pp. 155–56 ("Given that no harm befell the players, this was an instance in which the free speech interests of EA should have weighed more heavily.").

114. *Brown*, 724 F.3d at 1248.

115. *In re NCAA*, 724 F.3d at 1280–81.

Indeed, if we are stuck with a right of publicity as broad as the Ninth Circuit conceives it, we may be better off rooting it in economic rather than dignitary injury precisely *because* those rights could be transferred, potentially allowing at least some productive uses like EA's.

that the current version of that right is unsustainable, they will need guidance for how to make it better. Rothman offers some concrete suggestions for improvement, but she falls short of offering a persuasive theory of why the right of publicity should be limited in the ways she and I both think it should. While Rothman thinks much of the problematic expansion resulted from treating the right of publicity as an IP right, I think picking the *right* IP analogy is the key to fixing a doctrine that is currently out of control.