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The Right of Publicity's Intellectual Property Turn

Jennifer Rothman

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The Right of Publicity's Intellectual Property Turn

Jennifer E. Rothman*

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* Professor of Law and the Joseph Scott Fellow at Loyola Law School, Loyola Marymount University, Los Angeles, and an affiliated fellow at the Yale Information Society Project. This Article is adapted from the keynote lecture that I delivered at Columbia Law School on October 19, 2018, as part of the Symposium, "Owning Personality: The Expanding Right of Publicity." Some aspects have been expanded upon, and footnotes have been added. The Lecture is based on material originally published in my book, JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (Harvard Univ. Press 2018). Many thanks to Jane Ginsburg, June Besek, and Pippa Loengard who made this phenomenal symposium and journal issue a reality. Thank you also to the Kernochan Center for Law, Media and the Arts, and the Columbia Journal of Law & the Arts for co-sponsoring the event, and to the Journal for editing and publishing our contributions.

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INTRODUCTION

Today's event is attended by many who spend a great deal of time thinking about intellectual property laws, especially their intersection with the entertainment industry and the arts. There therefore may be few in the room who think they do not already know what the right of publicity is, or how its story began. But, much of what you have thought, been taught, or have read turns out to be wrong. This Lecture, along with my recently published book on the subject, *The Right of Publicity: Privacy Reimagined for a Public World*, reveals a different origin story for the right of publicity. The right of publicity did not emerge as something distinct from the right of privacy because of privacy law's failings. Instead, my research reveals that the right of privacy from the very beginning did much of what we consider today to be the work of the right of publicity. Privacy-based claims provided both injunctive and monetary relief for public and private figures alike.

The right of publicity is something we all have—it is a state law that gives a person the right to stop others from using our identities—particularly our names and likenesses without permission—usually for a defendant's advantage. It is recognized in at least thirty states across the United States. In contrast to the right of privacy, which is mostly consistent across the more than forty states that recognize such a right under their tort laws, the right of publicity varies dramatically from state to state in terms of who is covered, what is covered, how the right can be infringed, and what sorts of uses are exempted from liability.¹

The right of publicity is not an absolute right. It has long been limited by countervailing interests, such as those protected and furthered by the First Amendment. The right has exploded in importance over the last few decades, exponentially growing in scope and the frequency with which it is asserted. Although right of publicity claims are often thought of as primarily protecting celebrity plaintiffs from unauthorized uses in advertisements, the right of publicity provides broader coverage in most states. Many states allow anyone to bring claims, not only those who commercialize their identities for a living.² Many states also allow claims in the context of noncommercial speech, including uses in news reporting, political campaigns, comic books, and video games.³

1. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 96–98 (2018). To facilitate the navigation of these disparate state right of publicity laws I created the website *Rothman's Roadmap to the Right of Publicity*. The website provides information about each state's laws, as well as news about right of publicity cases, legislation, and scholarship. It is accessible at www.rightofpublicityroadmap.com.

2. ROTHMAN, *supra* note 1, at 96–98; see also Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1951–52 (2015).

3. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (allowing right of publicity claim in context of news broadcast); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (allowing right of publicity claim in context of video game); *Browne v. McCain*, 611 F. Supp.2d 1073 (C.D. Cal. 2009) (allowing right of publicity claim to proceed in context of political campaign ad); *Porco v. Lifetime Entm't Servs.*, 47 N.Y.S.3d 769 (App. Div. 2017) (allowing right of publicity claim under New York's privacy statute in the context of a television docudrama); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (allowing multimillion-dollar verdict arising out of use of a hockey player's name in a comic book); *Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga.

Despite the right of publicity's increasing prominence, much of the common wisdom and understanding of the right is historically inaccurate. Today, courts and scholars often describe the right of publicity and the right of privacy as opposites, the right of publicity as the "reverse side of the coin of privacy."⁴ But these two rights are far more similar and intertwined than is commonly thought. They began as one and the same—the right of privacy was the original right of publicity, and was expressly recognized as a right to stop "unwarranted publicity" about oneself.⁵ It is said that something new was needed because privacy law failed to protect public figures who sought to commercialize their identities, but this claim turns out to be wrong. Privacy law did protect public figures, including those who commercialized their personalities, and who claimed primarily economic harms for unauthorized uses. There was one thing, however, that the right of privacy did not do—it could not be transferred—it was (and is) an inalienable right. This meant that the right to a person's identity could not be taken away from that person and transferred to a corporation or other third party. As I will discuss, inalienability was an advantage of the privacy-based regime, rather than a liability.⁶

In the context of this discussion, when I refer to the "right of privacy" I mean the first right of privacy recognized in the United States—the one that emerged as part of state tort laws in the late 1800s. The right of privacy today means many different things in American law, from the protection of secrets, to data privacy, to spatial privacy, to decisional privacy (encompassing rights such as those to use contraceptives and to have an abortion). Although privacy is often thought of as a constitutional right, the right of privacy initially developed under state tort laws for the same reasons asserted to justify today's right of publicity—an interest in protecting individuals from having their names and likenesses used without permission. It was this concern that led to the adoption of state privacy laws in the United States, more so than concerns over secrecy or intrusion into secluded locations. Many states today recognize a right of privacy, either instead of an independent right of publicity, or in addition to one. These privacy-based misappropriation claims protect against unauthorized uses of a person's identity for a defendant's advantage.⁷

Sometimes we tell ourselves incorrect stories about the law, and how it got made or how it functions. Sometimes this happens because of one or more mistakes that get repeated over time, or because of an agenda long forgotten. Both are true in the context of the right of publicity. Sometimes our misunderstanding of the past does not matter. But when it comes to the right of publicity, longstanding mistakes about how the right came to be, and what its objectives are, greatly alter how we should think about and apply the law today.

1982) (allowing right of publicity claim in context of mass-produced busts of Martin Luther King Jr.); see also ROTHMAN, *supra* note 1, at 87–88; Rothman, *supra* note 2, at 1953–55.

4. See, e.g., *Hirsch v. S. C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (quoting Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 204 (1954)).

5. ROTHMAN, *supra* note 1, at 27–29; see also discussion *infra* nn.37–82 & accompanying text.

6. ROTHMAN, *supra* note 1, at 11–50.

7. *Id.* at 3–5, 11–29.

Many of the missteps in right of publicity law have been driven by falsehoods repeated to the point of almost universal consensus and unassailability. Part of the problem also has been that *federal* courts have taken a leading role in shaping and misshaping these *state* laws, often without being sufficiently familiar with the state law in the area. This Lecture reveals the truth about the development of the right of publicity, and by so doing, provides a foundation for reforming the right going forward. In particular, I will focus on one theme drawn from my larger book project—the right of publicity’s split from the right of privacy, and its turn toward being treated as a distinct intellectual property or quasi-IP right.

The turn toward understanding the right of publicity as akin to a copyright or patent, as opposed to a right rooted in the individual identity-holder has created many of the challenges with today’s right of publicity laws. The right of publicity—emboldened by its status as a form of IP—has expanded in ways that increasingly clash with free speech, and with the privileges provided by copyright law. At the same time, its new-found IP status undercuts the ability of the First Amendment and copyright preemption to balance out the more expansive publicity laws. The shift to the IP paradigm has also created another danger: that the very individuals the right is supposed to protect could lose control of their own identities forever, thereby undermining the very basis for providing such a right in the first place.⁸

Placing the right of publicity in the intellectual property pantheon has also severed its connections to the right of privacy. This has problematically unmoored the right of publicity, sometimes leaving ordinary people without any remedy for wrongs committed against them. At the same time, the shift has narrowed our understanding of privacy law. Tort-based privacy law has turned into something small and literal, primarily limited to protecting secrets and seclusion. This narrower view of privacy has led courts to sometimes ignore claims of emotional distress by public figures, and injuries arising out of the use of information (including images, videos, and audio

8. As I will discuss, from the beginning the right of privacy was sometimes understood as a property right, but as one inextricably attached to the underlying person. See *infra* notes 83–92 & accompanying text. So the shift to the IP framework was not a shift to being understood as property, but instead a shift to a particular type of property, a form of transferable IP similar to copyrights and patents. The right of publicity has been analogized primarily to copyrights and patents, and not to trademarks. This may be surprising given that trademark and unfair competition laws sometimes protect those with commercially-valuable identities from having their images and names used without permission, just as right of publicity laws can do. Nevertheless, it is the broader and freely alienable patents and copyrights to which the right of publicity has been compared. In contrast, trademarks have more limited alienability. They cannot be transferred in gross; transfers are limited to those that include transfers of the underlying goodwill of the business or of the particular product for which the mark is a source-identifier. Notably, the status of trademark laws in the IP rubric is itself something that has been contested. See S. Rep. No. 79-1333, at 3–4 (1946) as reprinted in 1946 U.S.C.C.A.N. 1274, 1276 (contrasting trademarks with copyrights and patents); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105 *passim* (2005) (discussing the debate about whether trademark laws are better situated as IP rights, or as unfair competition claims); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999) (describing the troubling shift over time in how we understand trademark law).

recordings) that, while technically not secret, was not meant for public use and distribution.

The revisiting of the right of publicity's origin story also provides a useful reminder of the value of questioning long-understood assertions about the law that have been repeated, but never supported. Sometimes such repetition in law review articles and elsewhere has little impact, but, in this case, the mistaken notions of the right of publicity's development have sent the right far off course.

I will first consider the case often wrongly credited with creating the right of publicity—*Haelan Laboratories v. Topps Chewing Gum*—and then reveal the right of publicity's true origins, explaining when the actual turn to becoming an independent IP right took place. I will conclude with some challenges posed by this IP turn, as well as some implications that flow from this resurrected story of the right of publicity's development.

Almost twenty-five years ago, in 1995, Columbia Law School organized another Symposium on the right of publicity.⁹ Many of the concerns raised then and the disagreements voiced at that time remain today. But *none* of the speakers at the time accurately understood the history of the right of publicity's development. As a result, the conversation stood on a shaky foundation—one that has long skewed our understanding of the right of publicity, its objectives, and the controversies that surround it. Let us begin today's Symposium by setting the record straight.

I. A RIGHT IS NOT BORN: *HAELAN LABORATORIES V. TOPPS CHEWING GUM*

If the right of publicity is already familiar to you, you probably have long thought that the right was born in 1953 in the Second Circuit Court of Appeals decision in *Haelan Laboratories v. Topps Chewing Gum*.¹⁰ The case is commonly understood to be about protecting the interests of baseball players—even though no players were ever party to the case. The case instead involved a dispute between two corporations that sold gum and candy with baseball trading cards, and revolved around the companies' alleged interference with each others' contracts. Nevertheless, it is often claimed that the court in *Haelan* coined the term “right of publicity,” and created something new—a claim for public figures to stop (and collect damages for) unauthorized uses of their identities. Peter Felcher and Edward Rubin described *Haelan* as creating a right of publicity “to protect the ability of baseball players to profit from the use of their photographs on bubble gum cards.”¹¹ Sheldon Halpern explained *Haelan* as giving a “celebrity” the right to collect “damages” for

9. Symposium, *Identity Crisis: A Vision for the Right of Publicity in the Year 2020*, 20 COLUM.-VLA J.L. & ARTS 1 (1995); see also J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Person as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129 (1995).

10. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

11. Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life after Death?*, 89 YALE L.J. 1125, 1125 (1980).

unauthorized uses of his identity that had previously not existed.¹² Stacey Dogan and Mark Lemley described *Haelan* as creating a “new cause of action” that “vindicat[ed]” the interests of “[c]elebrities frustrated with the right of privacy.”¹³ Mark Bartholomew similarly presented the view that *Haelan* “called into being a new right” to address the unmet “economic” interests of celebrities, as opposed to their “dignitary concerns,” which he claims were the focus of privacy laws.¹⁴ This well-accepted, almost universal story of *Haelan* as coining and creating a “new” “right of publicity” turns out to be wrong.

These and many other accomplished scholars (and virtually every author and court) writing on the topic since the decision issued have repeated the erroneous claim that because public figures voluntarily entered the limelight, sought out publicity, and suffered no personal injury from uses of their identities, they could not bring a privacy-based claim. Instead, their injury was solely an economic one derived from lost endorsement deals. Accordingly, the story goes, the Second Circuit needed to create a new right in *Haelan* to protect the baseball players from having their names and likenesses used without their permission on trading cards that were included with the gum and candy sold by the litigants in the case. As it turns out, *no* part of this story of either *Haelan* or the law leading up to it is accurate—with the exception of the fact that the baseball trading cards were sold with the gum and candy.

It is not a surprise that this mistaken reading and understanding of *Haelan* has persisted for so long. If you relied only on the Second Circuit opinion, it would be easy to go astray in interpreting the decision, especially if you were not familiar with the relevant state laws at the time. *Haelan* was misunderstood early on, both by law students, and by a prominent sports journalist writing about the decision shortly after it issued.¹⁵ Perhaps the first law school graduate to claim in writing that *Haelan* created something new was Melville Nimmer in his influential 1954 article, *The Right of Publicity*. Of particular note, Nimmer claimed that the decision in *Haelan*

12. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201–02 (1986).

13. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1172–73 (2006).

14. Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 310–11 (2011). See also JESSICA LAKE, *THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY* 155, 179–81 (2016) (describing *Haelan* as “coin[ing]” the term and concept of the right of publicity and as “finally accord[ing] women and men quasi-property rights in their images.” For additional examples, see ROTHMAN, *supra*, note 1, at 199–200 n.1, and *infra* notes 15–17.

15. See, e.g., Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1123–27 (1953); Case Comment, *Right of Privacy—Nature and Extent—Baseball Players’ Rights to Prevent Commercial Use of Photographs Held Transferred to Promisee by Contract for Exclusive Advertising Use*, 66 HARV. L. REV. 1536, 1536–37 (1953) (describing the case as having “for the first time termed” a “right of publicity” that “protects the advertising value of a person’s name or photograph”); John Randolph Ingram, Comment, *Privacy—Unauthorized Use of Photographs—Infringement of Personal and Property Rights*, 32 N.C. L. REV. 125 (1953); Donald A. Macksey, Comment, *Torts—A Person has the Right to the Publicity Value of His Photograph, Independent of His Right of Privacy, Which May be Transferred in Gross*, 41 GEO. L.J. 583 (1953); Red Smith, *The Battle of Bubble Gum*, N.Y. HERALD, Mar. 30, 1953, at 14.

was the first to “expressly recognize[] a ‘right of publicity.’”¹⁶ After this, courts and scholars repeated these erroneous assessments of *Haelan* without further investigation.¹⁷ There were few incentives for them to challenge this accepted view, as it was often of tangential import to a particular decision or a point an article was making. As time went on and the citations amassed, there was even less reason to question the longstanding—although incorrect—assessments of *Haelan*.

When one digs into the record and examines the facts behind *Haelan*, as I have done, it reveals a very different story both about the case, and about the right of publicity's emergence in general. *Haelan* was a contract case, not a privacy or publicity case. To the extent we understand the case as being about the right of publicity, such a reading of the case undermines, rather than supports, the interests of the baseball players who, under the conventional description of the case, were the basis for the alleged creation of this “new” right. The baseball players were not parties to the litigation, nor were their interests represented by either of the litigants. The creation of some new, transferable right of publicity would have served the plaintiff *Haelan*'s interests, but would have done so at the *expense* of the ballplayers who had given permission to both *Haelan* and the defendant *Topps* to use their identities on the trading cards.¹⁸

Haelan involved a dispute between these two corporations that both sold gum and candy with baseball trading cards. The cards were included to encourage sales of the primary products. The dispute centered on thousands of contracts that gave both companies permission to use particular baseball players' names, likenesses, and biographies on the trading cards. The companies were locked in a competitive market and by the time of the litigation were the two major operators left in the baseball card business. The plaintiff (initially *Bowman Gum*, later bought by

16. Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 204, 218–23 (1954). For more about this article and its motivations, see *infra* notes 93–103 & accompanying text.

17. See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 929 (6th Cir. 2003) (pointing to *Haelan* as having “coined the phrase ‘right of publicity,’” and having invented a new “cause of action”); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 148 (3d Cir. 1982) (describing *Haelan* as “establish[ing] a new ‘right of publicity’”); JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 187–89 (1991) (describing *Haelan* as creating a “brand-new right”); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U.L. REV. 891, 892 (2017) (claiming that the “right of publicity first sprang up some sixty years ago” in the *Haelan* decision); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity ‘Wheel Spun out of Control*, 45 KAN. L. REV. 329, 334 (1997) (crediting *Haelan* with both “coin[ing]” the term and creating the “first formal recognition of a right of publicity cause of action”); see also *supra* notes 11–16. One of the few exceptions is Stuart Banner, who in his book about the history of American property law notes that celebrities' rights to their names and likenesses had been protected long before *Haelan*. He still incorrectly concluded that the term “right of publicity” was coined by the court in *Haelan*, but comes closer than others in acknowledging the breadth of misappropriation claims that predated that decision. STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 154 (2011). The leading treatise author on the right of publicity also expresses conflicting views on the subject of *Haelan*—at first noting that the court “invent[ed] a new legal label,” created the concept, and coined the term, while also noting in a footnote that the term was not novel at the time of the decision. J. THOMAS MCCARTHY, 1 *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 1:26, 52–55 n.1 (2016).

18. ROTHMAN, *supra* note 1, at 50–64.

Haelan) wanted to beat Topps in the market by getting players to sign exclusive contracts with it.¹⁹

The conventional account of *Haelan* derives in part from a retrospective and false narrative about the failings of the right of privacy. In contrast to this widely-accepted view, the right of privacy had long recognized the rights of public figures—like the well-known baseball players in *Haelan*—to control uses of their identities. There was no question either before or after *Haelan* that the companies needed the baseball players' permission to use their identities on things like trading cards. Under applicable New York privacy law, both companies needed to get the players' written permission to do so, and it was expected that they would pay for the privilege, which both companies in the case did.²⁰

The dispute in *Haelan* was not about whether the players had a right to control uses of their identities in a commercial context, something they already had. Instead, the dispute centered on a very different question: Whether one company, Haelan, could prevent its competitor, Topps, from using the same players on its cards if Haelan had a prior signed contract with those players granting it the exclusive rights to do so. Haelan did not need a new legal entitlement to enforce such exclusive contract rights. There were a number of claims at its disposal. It could have sued the players directly for breach of contract. Existing contract and tort law also provided Haelan the ability to enforce exclusive contracts against competitors like Topps.²¹

Surprisingly, given *Haelan's* status in right of publicity folklore, neither the original nor amended complaints filed in the case included a privacy-based claim, a right of publicity claim, or anything remotely similar to one. The primary claim—and the only claim appealed to the Second Circuit—was an interference with contract claim. Bowman (Haelan's predecessor) claimed that Topps had knowingly induced players to breach the exclusivity provisions of their agreements with Bowman. The amended complaint also included claims for trade dress and

19. *Id.* at 45–46, 50–64, & 201–02 nn.8–9; *see also* Testimony of Jack Griffith Rensel, Transcript of Record at 212–19, *Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866 (No. 22564) [hereinafter *Haelan TR*] (on file with author) (noting awareness that players had some contracts with other companies, and explaining that players were told they “must list in what we called the exception clause any contracts that they might have prior to this time that might be in conflict because . . . you are not supposed to or not allowed to sign with two people for any given product”); Testimony of Joseph J. Donahue, *Haelan TR* at 84–118; DEAN HANLEY BUBBLE GUM CARD WAR: THE GREAT BOWMAN & TOPPS SETS FROM 1948 TO 1955 (2016); DAVE JAMESON, MINT CONDITION: HOW BASEBALL CARDS BECAME AN AMERICAN OBSESSION 16–29, 49–67, 89–113 (2010); J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273, 275–83 (2001); *see also* Affidavit of Joseph J. Donahue, Apr. 25, 1955, at 4, in *Haelan Labs. v. Topps Chewing Gum, Inc.*, No. 04430 (N.Y. Sup. Ct. 1955) (“[D]efendant Topps commenced a campaign to destroy plaintiff’s business by using the names and pictures of players under exclusive contracts to plaintiff.”) (on file with Kings County Clerk, Supreme Court Records). Haelan Labs. became the substituted plaintiff on appeal to the Second Circuit after it purchased Bowman Gum. *Bowman Gum v. Topps Chewing Gum*, 103 F. Supp. 944 (E.D.N.Y. 1952), *rev’d sub nom. Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

20. ROTHMAN, *supra* note 1, at 61–64, 203 n.27; *see also* *Jansen v. Hilo Packing Co., Inc.*, 118 N.Y.S.2d 162 (Sup. Ct. 1952).

21. ROTHMAN, *supra* note 1, at 50–64.

trademark infringement for the use of allegedly similar trade names and packaging designs. These claims were dismissed by the district court, and were not appealed to the Second Circuit.²²

The remaining impairment of contract claim that was the sole focus of the Second Circuit appeal was challenging both because of the sheer number of contracts at issue and because it was not clear that Topps had knowledge of the prior conflicting contracts with Bowman, at least not in every instance. This, however, should not have been a fatal stumbling block, as exclusive contracts could still be enforced against third-parties regardless of their knowledge of their existence, as the district court noted was true in the context of personal services contracts, and as the judge initially thought was true in this instance.²³

Another potential complication in the case stemmed from the possibility that some of the contracts were invalid, formed on the basis of misrepresentations, questionable extensions, and sometimes without payment of the agreed-upon compensation. In part to avoid wading into each individual contract and the circumstances surrounding its signing, Topps's lead counsel, George Middleton, led us down the path toward a right of publicity—although his goals and those of his client were not served by such a concept. Middleton claimed that the contracts constituted waivers of the players' rights of privacy—an agreement to not sue Bowman, rather than a grant of any affirmative right to Bowman. Therefore, according to Topps, the contracts did not convey anything of value to Bowman that could be enforced against a third-party—even if the waiver were designated an exclusive one.²⁴

Middleton cited a line of cases that had rejected the transferability of privacy rights to support his conclusion. He suggested that the only way that Bowman could enforce its rights was if the players granted to it an intellectual property-like right akin to an exclusive license in a copyrighted work or a patented invention. Middleton claimed such transferability would so greatly limit the players' freedom as to be analogous to enslaving them: "Baseball players are not [Bowman's] bond slaves, though it seems to think so."²⁵ Middleton contended that because the players had given permission to both companies to use their identities, both companies should be able to do so.²⁶

Initially, the trial judge rejected Topps's argument, concluding that an impairment of contract claim could stand, and that injunctive relief was appropriate to enforce

22. See *Haelan Labs*, 202 F.2d at 868; *Bowman Gum*, 103 F. Supp. at 947–48; Amended Complaint, *Bowman Gum v. Topps Chewing Gum*, *Haelan* TR at 5–23; Complaint, *Bowman Gum v. Topps Chewing Gum*, 103 F. Supp. 944 (E.D.N.Y. 1952); see also ROTHMAN, *supra* note 1, at 51, 53–54.

23. Trial Transcript, *Haelan* TR at 48–50, 77–80, 194–95.

24. ROTHMAN, *supra* note 1, at 53–54, 57–63, 202 nn.13–17; see also *Haelan Labs*, 202 F.2d at 868; Memorandum by Judge Charles Edward Clark (January 19, 1953) (on file with Yale Univ. Library) 1–2.

25. Brief of Defendant at 64, *Bowman Gum*, 103 F. Supp. 944 (E.D.N.Y. 1952); Reply Brief for Defendant at 6, 11, *Bowman Gum*, 103 F. Supp. 944 (E.D.N.Y. 1952).

26. ROTHMAN, *supra* note 1, at 57–58 & 202 nn. 17–19; see also *id.* at 37–38, 46–50 (challenging Topps's interpretation of line of cases upon which it relied, particularly *Gautier v. Pro-Football*, 107 N.E.2d 485 (N.Y. 1952), *Pakas Co. v. Leslie* (N.Y. Sup. Ct. Mar. 19, 1915), and *Hanna Mfg. v. Hillerich & Bradbsy Co.*, 78 F.2d 763 (5th Cir. 1935)).

superior and exclusive contracts. But Middleton was insistent on his reading of the law, and eventually persuaded the district court judge to reconsider. The judge ultimately issued an opinion agreeing with Topps that Bowman could only sue third parties to enforce its contractual rights if the contract transferred the players' rights to their own names and likenesses to Bowman, or at least transferred *the right to sue* for violations of the players' privacy rights.²⁷

Bowman Gum appealed. During the appeal, Haelan purchased Bowman Gum and became the named plaintiff. Haelan's appellate briefs contended that the players' contracts with Bowman were enforceable without regard to whether the players' rights to their own names and likenesses had been transferred to it. Haelan accurately noted that the players' names and likenesses were "commercially and pecuniarily valuable," and therefore the contracts had value that could be enforced. Haelan did not think transferability was a relevant consideration, but noted that if its success in the lawsuit turned on that question, then the contracts should be interpreted as transferring such rights to it.²⁸

On February 16, 1953, the Second Circuit issued its oft-quoted and frequently misinterpreted majority opinion. The short opinion authored by Judge Jerome Frank, and signed on to by Judge Charles Edward Clark, remanded the case to the district court with instructions to further develop the facts, particularly the specific terms and legitimacy of each contract, as well as what each company knew. The court concluded that if Topps, "knowing of the contract, deliberately induced the ball-player to break that promise, [then] defendant behaved tortiously."²⁹ Judge Thomas Walter Swan, in his concurrence, agreed with this conclusion, and thought the opinion should end there—it was an impairment of contract case.³⁰

Frank's opinion, however, did not stop there, leading to confusion that lasts to this day. He suggested, as had Haelan in its briefs, that *if* Topps's reading of the right of privacy turned out to be correct (and prevented a claim here), *then* "in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph."³¹ Frank dubbed this a "right of publicity" without realizing either that term's longstanding use and history, or the scope of New York's right of privacy statute which *already* covered the publicity value of public figures' photographs—something it had done for decades before Frank considered the issue.³² Frank suggested that this "right to grant the exclusive privilege of publishing" a person's likeness could be assigned "in gross" without any related

27. *Bowman Gum*, 103 F. Supp. at 948–54.

28. Brief of Petitioner-Appellant at 2, 15–32, *Haelan Labs v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953); Reply Brief for Petitioner-Appellant at 3–18, *Haelan Labs v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953). See also ROTHMAN, *supra* note 1, at 58–59.

29. *Haelan Labs*, 202 F.2d at 866, 867–69.

30. *Id.* at 869 (Swan, C. J., concurring in part); see also Memorandum by Judge Thomas Walter Swan (Jan. 16, 1953) (on file with Yale Univ. Library).

31. *Haelan Labs.*, 202 F.2d at 868.

32. *Id.*; *Jansen v. Hilo Packing Co., Inc.*, 118 N.Y.S.2d 162 (Sup. Ct. 1952), *aff'd*, 125 N.Y.S.2d 648 (N.Y. App. Div. 1953) (providing a privacy-based claim to baseball players whose images had been used on popcorn containers and packages of gum without permission); see also ROTHMAN, *supra* note 1, at 61–64, 203 n.27.

transfer of an underlying business, and without any ongoing connection to the individual players (something required in the context of the assignment of a trademark).³³

This conditional discussion in the opinion of a right of publicity was contingent on a possible failure in privacy law, one hypothesized on the basis of an apparent lack of familiarity with New York state law. Judge Frank's and Judge Clark's files in the case, as well as the opinion itself, reveal that both judges were uncertain about whether New York's longstanding privacy law protected the ballplayers' right to collect endorsement fees—despite the reality that players had been collecting such fees for decades, including in the very case before them.³⁴

If the Second Circuit thought it had created a new right—which is not entirely clear—such a right was one it had no power to invent. As a federal court, it had no authority to change state law. Unsurprisingly then, the parties to *Haelan* treated the case as a contract case on remand, rather than as one about privacy or publicity rights. The district court judge interpreted the guidance from the appellate court as about contract law, and upon the case's return instructed a magistrate judge to start wading through all of the contracts. The case ultimately settled without a final judgment when Topps bought out Haelan's successor, Connelly Containers.³⁵

Most importantly, the state courts in New York, that have the final word on such questions of state law, rejected the conventional (yet incorrect) reading of *Haelan* as creating a new right. So, to the extent that the Second Circuit even intended to create

33. *Haelan Labs.*, 202 F.2d at 868.

34. Judge Clark likely misread New York law on this question because of his acceptance of the claims in a book review written by Herman Finkelstein. Clark likely saw Finkelstein's review because it coincidentally followed his own review of a new civil procedure casebook in the Yale Law Journal. Finkelstein reviewed Samuel Spring's book, *RISK AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER* (1952). Spring's book documented the longstanding protection provided by New York's privacy statute of the names and likenesses of public performers and models. Finkelstein disagreed with Spring's assessment of New York law. Judge Clark relied on Finkelstein's assessment of the law, rather than Spring's book or the underlying decisions. Memorandum of Judge Charles Edward Clark to Judge Jerome N. Frank (Feb. 6, 1953) (on file with Yale Univ. Library); Herman Finkelstein, *Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theater*, 62 YALE L.J. 298, 300 (1953) (book review); Charles E. Clark, *Cases and Materials on Modern Procedure and Judicial Administration*, 62 YALE L.J. 292 (1953) (reviewing casebook by Arthur T. Vanderbilt). Interestingly, Judge Frank, who wrote the opinion in *Haelan*, declined to cite to Finkelstein's book review because he thought it suggested that New York law would not countenance the claim they suggested existed. Memorandum of Judge Frank to Judge Clark (Feb. 7, 1953) (on file with Yale Univ. Library); see also ROTHMAN, *supra* note 1, at 60–61, 203 nn. 24–28.

35. Petition for Writ of Certiorari at 18–19, 21–24, *Topps Chewing Gum v. Haelan Labs.*, 346 U.S. 816 (1953) (No. 82286); Respondent's Brief in Opposition to Petition for Writ of Certiorari at 4, 8–15, *Topps Chewing Gum*, 346 U.S. 816 (No. 82286); Transcript of Record, June 13, 1955, *Haelan Labs. v. Topps Chewing Gum*, 131 F. Supp. 262 (E.D.N.Y. 1955) (No. 11852); Memorandum of Judge Galston, *Haelan Labs.*, 131 F. Supp. 262 (E.D.N.Y. 1955) (No. 11852) (Feb. 9, 1955); Supplemental Complaint, *Haelan Labs.*, 112 F. Supp. 904 (E.D.N.Y. 1953) (No. 11852) (May 17, 1954); Answer to Supplemental Complaint, *Haelan Labs.*, 112 F. Supp. 904 (E.D.N.Y. 1953) (No. 11852) (June 22, 1954); Complaint, *Haelan Labs. v. Topps Chewing Gum* (N.Y. Sup. Ct. Apr. 26, 1955) (No. 04430); see also ROTHMAN, *supra* note 1, at 61–63, 203–04 nn.27–28, nn.30–33; JAMIESON, *supra* note 19, at 100–01; Hylton, *supra* note 19, at 291.

a new right under state law, the decision has been expressly overruled.³⁶ Despite this reality, the dominant, but mistaken, reading of *Haelan* has created problems going forward, and shored up a skewed understanding of both today's right of publicity and today's privacy laws.

II. THE ORIGINAL RIGHT OF PUBLICITY

The decision in *Haelan* and subsequent commentary about the decision fomented the common misunderstanding of the right of publicity as the “reverse side of the coin” of privacy law and the simplistic and historically inaccurate view that privacy laws protect seclusion, secrecy, and hurt feelings while publicity laws primarily (sometimes exclusively) protect celebrities and their economic interests.³⁷ This division was not true at the time of the right of privacy's emergence in the United States, nor was it true for many decades after *Haelan* was decided, and it remains untrue even today in many jurisdictions.³⁸

The right of *privacy* was the original “right of publicity.” The terms were used interchangeably starting in the mid to late 1800s. While today the right of privacy means many different types of privacy, including information and data privacy, and constitutional issues of decisional and spatial privacy, at its origin in the mid to late 1800s, privacy was expressly located in tort law, and primarily focused on providing a way to control the use of one's name and likeness. This is the very same interest protected by today's right of publicity laws.³⁹

The initial adoption of a right to privacy was driven by efforts to create a claim that would allow individuals to control “publicity” about themselves—when and how their image and name could be used by others in public. The term right of publicity was used at that time, and the right of privacy was frequently referred to as a right to stop “unwarranted publicity” about oneself.⁴⁰ In 1911, an article in the *Columbia Law Review* defined the right of “privacy” as the “Right to Immunity from Wrongful Publicity.”⁴¹ In 1927, the Kentucky Court of Appeals described the right of privacy as the “right to be free from unwarranted publicity.”⁴² In 1929, George Ragland Jr. wrote in the *Kentucky Law Journal* that the “typical” right of privacy cases were the

36. *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 583–85 (N.Y. 1984) (rejecting the existence of a common law right of publicity independent from the statutory right of privacy provided by N.Y. Civil Rights Law §§ 50 & 51); see also ROTHMAN, *supra* note 1, at 61–64, 203–04 nn.30–34.

37. Nimmer, *supra* note 16, at 204; see also ROTHMAN, *supra* note 1 *passim*; *supra* note 4.

38. ROTHMAN, *supra* note 1, at 11–44.

39. *Id.* at 11–29.

40. See, e.g., *Brents v. Morgan*, 299 S.W. 967, 970 (Ky. 1927); *Marks v. Jaffa*, 26 N.Y.S. 908, 909–10 (Sup. Ct. 1893); “Privacy,” 41 AM. JUR. § 2, at 925 (1942); 21 RULING CASE LAW 1196–98 (William M. McKinney & Burdett A. Rich eds., 1918); E.L. Godkin, *The Rights of the Citizen: To His Own Reputation*, SCRIBNER'S MAG., July 1890, at 58, 65; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890); George B. Corkhill, Editorial, *Portrait Right*, 12 WASH. L. REP. 353 (1884); *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8; see also *infra* notes 41–51.

41. Note, *The Right to Immunity from Wrongful Publicity*, 11 COLUM. L. REV. 566, 566–68 (1911).

42. *Brents*, 299 S.W. at 969–70. At the time *Brents* was decided, the Kentucky Court of Appeals was the highest court in Kentucky. The state now has a Supreme Court, and the Court of Appeals has become the intermediate appellate court in the state.

“picture-ad” cases.⁴³ A few years later, in 1932, Leon Green similarly noted that the more frequent privacy claims were about the “appropriation of [] personality,” including the use of a person’s name or likeness.⁴⁴ The American Law Institute’s first Restatement of Torts, published in 1939, described the privacy tort as providing a claim when a “person unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public.”⁴⁵ In his influential 1941 torts treatise, William Prosser described the right of privacy as providing a right to control “publicity given to [a person’s] name or likeness, . . . and the commercial appropriation of elements of his personality.” He noted that the largest “number of privacy cases . . . involved the appropriation of some element of the plaintiff’s personality for a commercial use. The typical case is that of the unauthorized use of his picture in the defendant’s advertising.”⁴⁶ This “exploitation of another’s personality for commercial purposes” was at the heart of the right of privacy, and courts recognized this right as primarily focused on providing a right to stop “unauthorized and unwarranted publicity.”⁴⁷ This decades-long understanding of the right of privacy as being a right to control “publicity” about oneself—including the right to stop unauthorized uses of one’s name and likeness—was central to the adoption of the right of privacy, and long predated the decision in *Haelan*.

The very first cases to consider whether there was a right of privacy in the United States were ones that involved situations that today would be considered typical right of publicity cases. Many of the first privacy cases involved the use of people’s likenesses on products and in advertisements. It was these early cases, rather than cases about intrusion into secluded spaces or the publication of private facts, that played a dominant role in the creation of a right of privacy.

43. George Ragland, Jr., *The Right of Privacy*, 17 KY. L.J. 85, 115 (1929) (citation omitted).

44. Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 239 (1932).

45. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

46. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 107, at 1050, 1056 (1941).

47. *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Dist. Ct. App. 1955).

Some of you may already be familiar with the early 1900s cases *Roberson v. Rochester Folding Box Co.* and *Pavesich v. New England Life Insurance*. (The infringing images from each case are provided below in Figures 1 and 2.) In *Roberson*, a photograph of a young woman, Abigail Roberson, was used without her permission in an advertisement for flour:



Figure 1. Advertisement for Franklin Mills Flour with photograph of Abigail Roberson, published in *The Right of Privacy*, 12 PROFITABLE ADVERTISING 187 (1902).

Roberson had voluntarily sat for the photograph that was used. She had not, however, authorized the photographer to license its use in any context and certainly not in advertisements for Franklin Mills Flour. Yet, the highest court in New York, the New York Court of Appeals, rejected Roberson's claim, concluding that there was no right of privacy under the state's common law that would provide her with relief. The judges in the majority were sympathetic to her plight, but thought that the legislature was the appropriate body to craft a remedy.⁴⁸ Outrage followed in the wake of the *Roberson* decision, leading to the swift passage in 1903 of one of the nation's first privacy statutes.⁴⁹ The statute made it a civil injury and a misdemeanor

48. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), *superseded by statute*, N.Y. Civ. Rights Law §§ 50 & 51 (McKinney 2019). For further discussion of this case and its aftermath see ROTHMAN, *supra* note 1, at 21–25.

49. See, e.g., *The Right of Privacy*, *supra* note 40, at 8 (newspaper article describing *Roberson* as a decision that caused “amazement among lawyers and jurists,” and that should be abrogated by the legislature); Case Comment, *Right to Privacy: Injunction Denied a Young Woman to Restrain the*

to use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person" without written consent.⁵⁰

The second example of an early privacy case that may be familiar to you is *Pavesich v. New England Life Insurance*. The plaintiff, Paolo Pavesich, sued when his image was used without his permission in an advertisement for life insurance:



Figure 2. Paolo Pavesich appears in the photograph on the left. The advertisement appeared in the ATLANTA CONSTITUTION, Nov. 15, 1903, at 9.

Like Roberson, Pavesich had voluntarily sat for a photograph which was then used without his permission in the advertisement. Pavesich's lawsuit led Georgia to become the first state to have its highest court—here the Supreme Court of Georgia—recognize a right of privacy under the state's common law.⁵¹

Publication of her Portrait on Commercial Packages for the Purpose of Advertising, 36 AM L. REV. 614–20, 634–36 (1902) (describing the decision as one that "shocks and wounds the ordinary sense of justice") (due to an apparent printing error the commentary on *Roberson* is discontinuous); see also ROTHMAN, *supra* note 1, at 24–25; *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78–81 (Ga. 1905) (comparing the decision in *Roberson* to Lord Hale's decision in the 1600s "imposing the death penalty for witchcraft upon ignorant and harmless women").

50. Act of Apr. 6, 1903, ch. 132, 1903 N.Y. Laws 308 (codified as amended at N.Y. Civil Rights Law §§ 50–51, 1909 N.Y. Laws 317). The statute was later expanded in 1995 to include civil liability for uses of a person's voice. Act of Aug. 9, 1995, Ch. 674, 1995 N.Y. Laws 3642 (codified at N.Y. Civ. Rights Law § 51). Shortly after New York passed its first privacy law, Virginia adopted a similar statute. Act of Mar. 7, 1904, ch. 66, 1904 Va. Acts 111 (codified at Va. Code Ann. § 2897a; 10 Va. L. Reg. 824 (Jan. 1905)). In 1919, Virginia added a postmortem provision to the section and renumbered the section as § 5782. Va. Code Ann. § 5782 (1919).

51. The court in *Pavesich* used the term "right of publicity" in its decision, but likely meant something different from what commentators meant at the time by the right to stop "unwarranted publicity," and from what we mean by the term today. The court concluded that:

Many have focused on these cases as being emblematic of claims brought by private figures. But *Roberson* and *Pavesich* were part of a larger conversation at the time about controlling publicity about oneself—a conversation that included and even featured prominent public figures and celebrities. Concerns over the use of one's image and name reached a fever pitch in the mid-to late 1800s because of a number of changes in technology arising from the industrial revolution. These changes led to the development of a national and international culture, a rise in recognized celebrities with endorsement careers, and improved printing technology that led to a proliferation of newspapers and magazines (and the use of photographs in them). The improved printing technology created ruthless competition among newspapers and magazines that gave rise to the era of so-called yellow journalism—which, along with the other shifts, further supported calls for a right to privacy. These changes also led to a shift in the style of advertising from an informative model to a persuasive one. This new advertising mode more frequently relied on using photographs and drawings of real people, as well as their names.⁵²

One of the major technological breakthroughs of this era also drove the move toward a right of privacy. Portable cameras developed that could be used by amateurs on the streets to document people's public activities, and then share them without permission, much like friends and strangers often do on social media platforms today. These cameras were tellingly described as “detective cameras.”⁵³ Ads at the time from Kodak and other manufacturers highlighted the ability to take images of unwitting subjects. The Folmer & Schwing Manufacturing Company advertised its Deceptive Angle Camera with a drawing of a man pointing his camera in front of him, while secretly taking a picture of two women sitting on a rock behind him (wearing what appear to be bathing costumes of the era).⁵⁴

Many of the calls for creating a right of privacy at this time were focused on addressing concerns over the taking of these photographs, and their use in and on products, in advertisements, as well as in films and newspapers. Numerous articles and essays starting in the mid-1800s called for a right to control images of oneself,

The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other are each guaranteed. If personal liberty embraces the *right of publicity*, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (emphasis added). The court used the term “right of publicity” likely to refer to an aspect of the right of liberty, and particularly the right to appear in public. The court then suggested an associated liberty-based right to *not* be forced to appear in public against one's wishes (such as in an advertisement). Regardless of how the *Pavesich* court used the term, courts and scholars of the era called for a right to control “publicity” about oneself in the exact same sense we use the term today and as an aspect of privacy, or simply as a definition of privacy itself. See ROTHMAN, *supra* note 1, at 27–29; see also *supra* notes 40–48, and *infra* notes 56–70, and accompanying text.

52. ROTHMAN, *supra* note 1, at 12–15, 188–89 nn.2–8.

53. *Id.* at 12–15, 188 nn.2–5; *The Right of Privacy*, *supra* note 40, at 8; *Proceedings of Societies*, PHOTOGRAPHIC NEWS, Nov. 9, 1888, at 717, 719.

54. ROTHMAN, *supra* note 1, at 12–15; *Advert. for Folmer & Schwing Deceptive Angle Camera from 1904*, in ROTHMAN, *supra* note 1, at 14.

particularly photographs that were taken either with or without permission.⁵⁵ In 1869, the *America Law Register* published an article advocating for the creation of a cause of action to prevent the selling of a person's photographic image without permission. The author contended that people should be understood to have a "natural copyright" in their "own features" that would give them the right to bar others from using their image without permission.⁵⁶ In 1884, an article in the *Washington Law Reporter* called for a "portrait right" to provide a right to control "publicity" about oneself, and particularly the use of photographs.⁵⁷ *The New York Times* in 1902 called for a right of privacy, even one that would limit the newspaper's own publication of images of the president and prominent business men.⁵⁸ It is hard to imagine today that a newspaper like *The New York Times* would call for such a limit on itself.

Samuel Warren and Louis Brandeis's famous and influential 1890 *Harvard Law Review* article, *The Right to Privacy*, was one of many essays and articles on the topic written in the later part of the 19th Century.⁵⁹ Their article was influential in the courts, but it was also part and parcel of a widespread discussion across society about these issues. A few months before Warren and Brandeis's article was published, Edwin Lawrence Godkin, a well-regarded journalist, wrote an essay that also was cited by courts in decisions of the era.⁶⁰ In *Scribner's Magazine*, Godkin highlighted the importance of privacy, and called for a right to control "publicity" about oneself. Despite being a journalist himself, he criticized newspapers for profiting from exploiting people's private lives. He thought the law should recognize a right to control "how much or how little publicity should surround [our] daily lives."⁶¹

Warren and Brandeis shared Godkin's disdain for using gossip to sell papers and emphasized the growing concern about "unauthorized circulation of portraits of private persons."⁶² They described the "simplest case" for a right to privacy as the "right of one who has remained a private individual[] to prevent his public portraiture."⁶³ Warren and Brandeis called for an extension of Thomas Cooley's concept of a "right to be let alone" to encompass a right to stop unwanted "publicity" about oneself that could cause "mental pain and distress" "far greater than could be inflicted by mere bodily injury."⁶⁴

55. *Id.* at 16–29.

56. John A. Jameson, *The Legal Relations of Photographs*, 17 AM. L. REG. 1, 8 (1869).

57. George B. Corkill, Editorial, *Portrait Right*, 12 WASH. L. REP. 353 (1884).

58. *The Right of Privacy*, *supra* note 40, at 8; *see also* ROTHMAN, *supra* note 1, at 17–18, 190 n.11.

59. Warren & Brandeis, *supra* note 40, at 208–11; *see also* ROTHMAN, *supra* note 1, at 13–20.

60. Godkin, *supra* note 40, at 58. A number of early cases considering privacy claims cited to Godkin's essay. *See, e.g.*, *Schuyler v. Curtis*, 15 N.Y.S. 787 (Sup. Ct. 1891), *aff'd*, 19 N.Y.S. 264 (Sup. Ct. 1892), *rev'd* 42 N.E. 22 (N.Y. 1895).

61. Godkin, *supra* note 40, at 65.

62. Warren & Brandeis, *supra* note 40, at 194–95.

63. *Id.* at 213–14.

64. *Id.* at 195–96. Cooley's influential treatise on tort law added a right of "personal immunity" or a right "to be let alone" in the second edition, published in 1888. This right was added primarily to encompass protection against nonphysical injuries, such as assault (which allows liability on the basis of a perception of an unwanted physical contact, rather than on the completion of that contact, as required for battery). Cooley's addition of these rights was part of a larger move at the time to recognize emotional

Although Warren and Brandeis suggested that private figures should have greater control over their identities than public figures—who might need to be referred to for news reporting purposes—they advocated for a right of privacy that would encompass protection for prominent public figures. Of particular note, they explicitly supported a lawsuit brought at the time by Marion Manola, a stage performer, who sued when the manager of the show she was appearing in took a picture of her without her permission. Not only was she a public personality at the time, but the disputed image was taken during a public performance while she was on stage in front of an audience. Manola claimed that she did not want the image of her wearing her costume (which included tights) circulated—something the manager threatened to do to increase attendance at the show. A New York trial court issued an injunction barring the use of the photograph. Manola's claim was widely covered in newspapers across the country, with public opinion squarely in her favor.⁶⁵

Beginning in the 1880s, public and private figures alike advocated for legislation to address the unwanted use of portraits and photographs. In 1888, legislation was introduced in Congress to “prohibit the use of likenesses, portraits, or representations of females for advertising purposes, without consent in writing.”⁶⁶ The bill proposed protecting both the dead and the living, and penalties that included prison time and a criminal fine that could run as high as \$5,000 (an amount equal to more than \$125,000 in today's dollars). The legislation was driven by concern over the use of the likeness of one of the most famous and public women at the time, the First Lady, Mrs. Frances Folsom Cleveland, whose image often adorned advertisements and merchandise without her permission.⁶⁷ In 1899, a women's club in Illinois sought similar legislation to prevent a woman's face from becoming “an advertiser's fortune.”⁶⁸

Politicians on both coasts in the late 1800s sought to stop the use of their likenesses, particularly in political cartoons, despite their status as prominent public figures. In 1897, New York Senator Timothy E. Ellsworth introduced a bill to “restrain the unauthorized printing, publishing, or circulating of portraits.”⁶⁹ The New York bill failed in the state assembly, but, in 1899, California legislators succeeded in passing a similar bill. The California bill, like the New York one, was

as well as physical injuries. Cooley advocated in the same edition of his treatise for recognition of reputational injuries and for the protection of private letters to prevent injuries to feelings from unauthorized publication of such letters. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29–33, 42–43 (Fred B. Rothman & Co., 2d ed. 1888); see also ROTHMAN, *supra* note 1, at 15–16; G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 4–5, 173–76 (3d ed. 2003).

65. Warren & Brandeis, *supra* note 40, 195–96 n.7; *Will Not Be Photographed in Tights: Miss Manola Will Wear Them, but There She Draws the Line*, CHI. TRIBUNE, June 13, 1890, at 6; *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; see also ROTHMAN, *supra* note 1, at 20–21, 191 n.20.

66. A Bill to Protect Ladies, H.R. 8151, 50th Cong. (1888).

67. *A Chivalrous Congressman*, S.F. CHRON., Mar. 6, 1888, at 1; ROTHMAN, *supra* note 1, at 17–18, 190 nn.12–13.

68. *A New Crusade*, 8 PROFITABLE ADVERT. 561 (Mar. 15, 1899); Polly Larkin, MARIN J., Mar. 9, 1899, at 1; ROTHMAN, *supra* note 1, at 18, 190 n.14.

69. *New York Legislature*, N.Y. TIMES, Mar. 26, 1897, at 4; *Anti-Cartoon Bill Again*, N.Y. TIMES, Dec. 17, 1897, at 1.

dubbed the Anti-Cartoon bill, and prohibited the publication “in any newspaper, handbill, poster, book or serial publication . . . the portrait of any living person a resident of California.” The final version of the bill as passed excluded those holding public office from this provision, but another part of the law gave even public office holders the right to stop caricatures of their likenesses if such uses “reflect upon the honor, integrity, manhood, virtue, reputation, or business or political motives of the person so caricatured, or which tend to expose the individual so caricatured to public hatred, ridicule, or contempt.”⁷⁰

The role privacy laws played in protecting against “unwarranted publicity” and unauthorized uses of one’s name and likeness is often forgotten, as is their applicability to public figures, and the ability to collect money damages for losses, including professional damages. Yet, from the beginning, right of privacy laws did the same work that right of publicity laws do today.

III. THE RIGHT OF PRIVACY DID PUBLICITY’S WORK

The right of privacy protected public and private figures, including individuals with commercially-valuable identities who actively promoted their identities and sought out publicity.⁷¹ Public figures successfully brought privacy-based claims and recovered damages. Lawsuits were brought by actors, athletes, and singers, such as suits filed by Marion Manola, Rudolph Marks, Felicite Skiff Riddle, Nancy Flake, Gladys Loftus, Jack Redmond, and Fred Astaire.⁷² Prominent scientists, doctors, politicians, and university presidents also brought successful claims and recovered damages, including suits brought by Thomas Edison, Sir Morell Mackenzie, J. P. Chinn, and Charles Eliot.⁷³ Across the country, courts were clear that one’s “public character” did not constitute a waiver of the right of privacy or the right to control

70. *Senators Get Even with Newspapers*, S.F. CALL, Feb. 21, 1899, at 3; Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258) (Deering 1915). There is no evidence that the California law was ever enforced, and it was repealed in 1915. Act of May 22, 1915, ch. 459, 1915 Cal. Stat. 761; *Useless Anti-Cartoon Bill May Be Repealed*, S.F. CALL, Jan. 21, 1901, at 4. For further discussion of these legislative efforts in both California and New York, see ROTHMAN, *supra* note 1, at 18–19, 191 nn.16–17.

71. See ROTHMAN, *supra* note 1, at 30–44, 193–98 nn.1–25. The erroneous claim that public figures could not recover, or if they could, that they could not get money damages for professional injuries under privacy laws, was in part driven by Harold R. Gordon’s article, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 *passim* (1960) (incorrectly claiming that recoveries by public figures were minimal or nonexistent).

72. *Redmond v. Columbia Pictures Corp.*, 14 N.E.2d 636 (N.Y. 1938); *Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938); *Loftus v. Greenwich Lithographing Co.*, 182 N.Y.S. 428 (App. Div. 1920); *Marks v. Jaffa*, 26 N.Y.S. 908 (Sup. Ct. 1893); *Astaire v. Esquire Magazine*, N.Y. L.J., Feb. 11, 1936, at 760; *Manola Gets an Injunction*, N.Y. TIMES, June 18, 1890, at 3; see also SAMUEL H. WANDELL, *THE LAW OF THE THEATRE: A TREATISE UPON THE LEGAL RELATIONS OF ACTORS, MANAGERS, AND AUDIENCES* 110–11 (1891).

73. *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909); *Eliot v. Jones*, 120 N.Y.S. 989 (Sup. Ct. 1910); *Edison v. Edison Polyform & Mfg. Co.*, 67 A. 392 (N.J. Ch. 1907); *Mackenzie v. Soden Mineral Springs*, 18 N.Y.S. 240 (Sup. Ct. 1891); see also ROTHMAN, *supra* note 1, at 30–44.

“unwarranted publicity” about oneself.⁷⁴ The New York Times thought the president and prominent businessmen like J.P. Morgan should be able to stop the taking of and circulation of their images.⁷⁵ The 1902 issue of *Current Literature* advocated that everyone, including the president, should have a right of privacy that would bar others from taking unauthorized photographs of them even when they appeared in public.⁷⁶ In 1905, the Supreme Court of Georgia emphasized that the “mere fact that a man aspires to public office or holds public office” does not mean that he gives up the right to control how his picture will appear in public.⁷⁷

The right of privacy—contrary to subsequent revisionist claims—allowed the recovery of professional damages, as well as personal ones. Courts considered lost endorsement fees and other professional harms under privacy-based claims. Celebrity endorsements were already common by the late 1800s and public figures who commercialized their identities were not limited to dignitary or emotional injuries. From the beginning, public figures were able to recover for professional and economic injuries.⁷⁸

While it is not easy to determine many of the final recoveries in early litigation because case files have been lost, there is evidence that many public figures received significant recoveries under privacy claims, including for professional damages. A number of actors who did not claim any mental distress recovered damages, even when the images circulated were ones they had approved of being taken, and sometimes even when the specific images used were ones they themselves had approved to be circulated to the press as publicity stills.⁷⁹ In 1908, the actor Felicite Skiff Riddle recovered \$3,000 (approximately \$75,000 today) when her image was

74. *Bell v. Birmingham Broad. Co.*, 96 So. 2d 263, 265–66 (Ala. 1957); *see also supra* notes 40–47 & accompanying text (discussing right of privacy as synonymous with the right to stop “unwarranted publicity”).

75. *The Right of Privacy*, *supra* note 40, at 8.

76. *The Camera and the Prominent Person*, CURRENT LITERATURE, 390–91 (July 1902).

77. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

78. *See, e.g., Redmond v. Columbia Pictures*, 14 N.E.2d 636 (N.Y. 1938); Judgment, Record on Appeal at 75, *Franklin v. Columbia Pictures*, 2 N.E. 2d 691 (N.Y. 1936); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913); *Franklin v. Columbia Pictures Corp.*, 284 N.Y.S. 96 (App. Div. 1935); *Loftus v. Greenwich Lithographic Co.*, 182 N.Y.S. 428 (App. Div. 1920); *Riddle v. MacFadden*, 115 N.Y.S. 1142 (App. Div. 1909) (affirming jury award); *Riddle v. MacFadden*, 101 N.Y.S. 606 (App. Div. 1906); *see also Gladys Loftus Wins*, N.Y. CLIPPER, June 9, 1920, at 32; *Jack Binns to Get \$12,500*, N.Y. TIMES, Dec. 31, 1913, at 5; ROTHMAN, *supra* note 1, at 32–35, 194–95 nn.6–10.

79. *See, e.g., Redmond v. Columbia Pictures Corp.*, 1 N.Y.S.2d 643 (App. Div. 1937); Complaint, Case on Appeal at 4–9, *Redmond v. Columbia Pictures*, 14 N.E.2d 636 (N.Y. App. Div. 1938) (No. 859), case files available at <https://perma.cc/KH5L-GG4H>; Testimony of Jack Redmond, *Redmond v. Columbia Pictures Corp.*, 1 N.Y.S.2d 643 (App. Div. 1937); *Loftus v. Greenwich Lithographic Co.*, 182 N.Y.S. 428 (App. Div. 1920); Complaint, Case on Appeal at 5–9, *Loftus*, 182 N.Y.S. 428 (on file with the New York State Library); Complaint, Record on Appeal at 6, *Flake v. Greensboro News*, 195 S.E. 55 (N.C. 1938) (No. 744) (on file with author); Affidavit of Harry E. Malcolm in Opposition to Plaintiff’s Motion for an Order Enjoining Defendants, *Astaire v. Esquire* (N.Y. Sup. Ct. 1936) (No. 1083) (July 10, 1935, letter from Kenneth E. Hallam of RKO Radio Pictures) (on file with author). *See also Gladys Loftus Wins*, N.Y. CLIPPER, June 9, 1920, at 32; ROTHMAN, at 32–35, 194–95 nn.6–10.

used in an advertisement without her permission.⁸⁰ One of the most famous people of the early 1900s was Jack Binns, who became internationally known for saving thousands of lives at sea by using then-new telegraph technology after a maritime accident. Binns sued for a violation of his right of privacy when his name and likeness were “used” (in the form of an actor playing him) in a movie based on his real-life actions. At the time of the film, Binns was actively commercializing his identity in a show at Coney Island inspired by his heroic acts. Although Binns claimed some distress at being portrayed in the movie—which he stated he had not watched—there was little doubt that he was comfortable with having his name and image used to publicize and profit from professional endeavors. He too won his case, and in 1911 was awarded \$12,500 (approximately \$300,000 today) for the violation of his right of privacy.⁸¹ In 1936, a professional bullfighter recovered \$5,000 (the equivalent of \$90,000 today) when his public performance was used in a newsreel without his consent.⁸² These examples demonstrate that public personalities, far from being left out of privacy protections, were some of its biggest beneficiaries.

IV. THE ROAD TO TRANSFERABILITY

Despite privacy laws being far more capacious than is usually thought, there was something significant that privacy laws did not do: They were not transferable and therefore could not be owned by third parties or survive a person's death.⁸³ This was true even though the right of privacy, from the beginning, was often described as a property right—albeit one rooted in self-ownership. In 1911, a Missouri appellate court concluded that the right of privacy existed under that state's common law, and that the right conveyed a “property right of value” in the “exclusive right to [one's] picture.”⁸⁴ Numerous other cases that either supported the adoption of a right of privacy or actually adopted such a right rooted it in property.⁸⁵ Warren and Brandeis relied in part on common law copyright to justify the adoption of a right to privacy, and protection against unauthorized uses of a person's name and likeness.⁸⁶ Some

80. *Riddle v. MacFadden*, 115 N.Y.S. 1142 (App. Div. 1909) (affirming jury award); *Riddle v. MacFadden*, 101 N.Y.S. 606 (App. Div. 1906); Extract from Minutes, Case on Appeal at 18, *Riddle*, 115 N.Y.S. 1142, <https://perma.cc/Z96A-6NVT>.

81. *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913); *Jack Binns to Get \$12,500*, N.Y. Times, Dec. 31, 1913, at 5; see also Rothman, *supra* note 1, at 34, 195 n.9.

82. Judgment, Record on Appeal at 75, *Franklin v. Columbia Pictures Corp.*, 2 N.E. 2d 691 (N.Y. 1936); *Franklin v. Columbia Pictures Corp.*, 284 N.Y.S. 96 (App. Div. 1935).

83. See ROTHMAN, *supra* note 1, at 46–50, 200–01 nn.2–8.

84. *Munden v. Harris*, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911).

85. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78–81 (Ga. 1905); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 450–51 (N.Y. 1902) (Gray, J., dissenting); see also ROTHMAN, *supra* note 1, at 200–01 n.4; *supra* notes 56–59 & accompanying text.

86. *Warren & Brandeis*, *supra* note 40, at 193, 200–09; see also *Pollard v. Photographic Co.*, 40 Ch. D. 345 (Eng. 1888); *Prince Albert v. Strange*, 1 McN. & G. 25 (Eng. 1849).

courts also analogized to trademark claims as a basis to control the use of a person's name or likeness in the context of one's professional career or business.⁸⁷

But, even if treated as property for some purposes, the right of privacy was never thought of as being a transferable form of property.⁸⁸ Because of the unique status of one's body, name, and likeness, even when understood as property, it was not alienable. Although transferability is a feature of most forms of property, we limit the transferability of property for a variety of reasons, particularly when it is inseparable from a person or against public policy to allow sales or transfers. For example, we bar or limit transferability in the context of ownership of people, body parts, and endangered animals.⁸⁹

In 1935, in a case that foreshadowed the dispute to come in *Haelan*, the Fifth Circuit Court of Appeals in *Hanna Manufacturing v. Hillerich & Bradsby* held that rights to a person's own name and signature could not be transferred to anyone else.⁹⁰ In *Hanna*, the manufacturer of the Louisville Slugger autograph bats sued a competitor that used players' names on its own line of bats. The Court of Appeals concluded that although the baseball players had a "property" right in their names, this right was not "vendible in gross so as to pass from purchaser to purchaser."⁹¹ Despite the lack of transferability, the court still allowed an injunction against the use of the players' names on the bats to the extent it suggested a false endorsement by the players (who had not agreed to the use).⁹²

Transferability then was not required for the players (or the companies who made licensing deals with them) to protect themselves. Nevertheless, some saw advantages in making the rights transferable. Many who misread *Haelan* as creating a new, transferable right in a person's name and likeness did so accidentally, but some had motivations for reading it that way. Some advocates saw opportunity in the *Haelan* dicta that suggested that a new, alienable right might exist. Such a transferable right could be useful, particularly for Hollywood studios, Broadway producers, and the heirs of famous deceased celebrities.

87. See, e.g., *Brown Chem. Co. v. Meyer*, 139 U.S. 540 (1891); *Edison v. Edison Polyform & Mfg.*, 67 A. 392 (N.J. Ch. 1907); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); *Mackenzie v. Soden Mineral Springs*, 18 N.Y.S. 240 (Sup. Ct. 1891).

88. See, e.g., *Hanna Mfg. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 766–68 (5th Cir. 1935); *Pakas Co. v. Leslie* (N.Y. Sup. Ct. Mar. 19, 1915); *Pekas [sic] Co. v. Leslie*, 52 N.Y. L. J. 1864 (Feb. 13, 1915) (the journal misreported the case as "Pekas"); see also ROTHMAN, *supra* note 1, at 46–50.

89. See ROTHMAN, *supra* note 1, at 124–36; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 204–33 (2012); see also Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); see also *infra* notes 132–148 & accompanying text.

90. *Hanna Mfg.*, 78 F.2d at 766–68.

91. *Id.*

92. *Id.* *Hanna Manufacturing* is often misunderstood as a case about how the lack of transferability limited the rights of the bat company and the players, but it did no such thing. The case was instead focused on the scope of the issued injunction and the right of a competitor to accurately describe a bat as being in a style that a particular player preferred. The court concluded that the uses of the players' names were protected free speech so long as the uses did not confuse consumers as to whether the bats were authorized by the players. ROTHMAN, *supra* note 1, 49–50.

One such advocate was Melville Nimmer, who would go on to become a great copyright scholar. In Nimmer's influential 1954 article, *The Right of Publicity*, he contended that *Haelan* created something new, and filled a gap in the law.⁹³ His description of the failings of privacy law turn out not to have been accurate, and he glossed over many alternative claims the competing gum and candy companies could have brought to enforce their contractual rights against each other (as well as against the players). Nevertheless, his narrative about the differences between privacy law and the right of publicity stuck.⁹⁴

Nimmer had good reasons for wanting to read *Haelan* a certain way. At the time he was writing, he was an attorney for Paramount Pictures. His article focused on promoting the interests of the Hollywood studios in the aftermath of the invalidation of the long-term studio contracts that had held actors hostage to a particular studio. These contracts had been struck down in California courts in the early 1940s, and the studios were looking for other options to control their actors.⁹⁵ A transferable right of publicity would achieve this goal because studios could require actors to transfer the rights to them, leading to the studios owning the actors' names, likenesses, and voices. This would give the studios at least as much control over the actors as they had had during the heyday of the studio star system, and likely far more.⁹⁶

Some clues about the aims of Nimmer's article—other than who his employer at the time was—stem from the examples he provided in the article. He was not concerned about the baseball players involved in the *Haelan* dispute nor about actors, he was advocating for a tool for studios to assert greater control over their actors. Nimmer gave an example of how the right of publicity could help the studios stop an actress from booking bathing suit advertisements without the studio's approval.⁹⁷ From Nimmer's perspective, only the studio should get to decide what advertisements one of its actors could do, and perhaps only it should reap the rewards. If a right of publicity were transferable, then an actor's rights to her own name, likeness, voice, and broader identity could be transferred to the studio, and she would no longer have a say in such matters. Such questions (and many others) would be only for the studio to decide. Another often forgotten aspect of Nimmer's article is that he advocated for animals, like the dog that played Lassie, to have rights of publicity too—so the studios could have transferred to them the animal actors' rights, as well as those of its stable of human actors.⁹⁸

This history makes it ironic that the main union seeking to protect actors—SAG-AFTRA—is today one of the proponents of spreading and expanding right of publicity laws that include provisions that define the right as being “freely alienable”—making it possible for their own members to lose control over their own

93. Nimmer, *supra* note 16, 204 & *passim*.

94. ROTHMAN, *supra* note 1, at 68–72, 204–05 nn.3–8.

95. *De Havilland v. Warner Bros. Pictures*, 153 P.2d 983 (Cal. Dist. Ct. App. 1944); David Denby, *Fallen Idols: Have Stars Lost Their Magic?*, NEW YORKER, Oct. 22, 2007, at 104, 108.

96. ROTHMAN, *supra* note 1, at 68–71; Nimmer, *supra* note 16, at 203–04, 209–10.

97. I have generally adopted the gender-neutral term actor throughout, but use actress when that term was used by the person I am discussing, as is the case with Nimmer.

98. Nimmer, *supra* note 16, at 209–10.

identities, forever.⁹⁹ Recently, the union has expressed some awareness of these concerns, and the latest version of a bill proposed in New York includes at least some protection against the assignment in perpetuity of children's rights.¹⁰⁰ However, as long as the rights are made transferable, SAG's members and everyone else will be at risk of losing ownership of our identities.¹⁰¹

In addition to likely being influenced by his employer's interests, Nimmer wanted to write an ambitious and influential law review article. He was particularly impressed with Warren and Brandeis's article on *The Right of Privacy*, and the impact that the article had had on the direction of the law.¹⁰² Nimmer already knew he wanted a career in academia, and suggesting that a major new right had been created in *Haelan*, and that such a right was both warranted and necessary would make a bigger splash than a more straightforward contract-based interpretation of *Haelan*. It would also be more impressive than suggesting a menu of alternative doctrinal options that companies could exercise under current laws to stop pesky baseball players from double-booking trading card appearances with more than one company. Whether intentionally or not, this likely skewed Nimmer's analysis of both *Haelan* and the law that came before it.¹⁰³

Another highly influential article in the right of publicity's turn to becoming a form of intellectual property was published six years after Nimmer's article, by Harold Gordon, a prominent Chicago lawyer. Gordon's *Right of Property in Name, Likeness, Personality and History* was published in 1960, the same year as William Prosser's now famous *Privacy* article.¹⁰⁴ Prosser, in his effort to make sense of what seemed like a series of irreconcilable decisions under privacy laws, had concluded that the right of privacy was really composed of four different torts: the tort of intrusion upon seclusion, the tort of public disclosure of private facts, the tort of placing a person in a false light, and of particular relevance here, the tort of "appropriation, for the defendant's advantage, of the plaintiff's name or likeness."¹⁰⁵ Prosser concluded that this misappropriation branch of privacy law was one and the same with the right of publicity described in *Haelan*.¹⁰⁶

Where Prosser saw harmony, Gordon, like Nimmer, saw opportunity in the right of publicity and the right of privacy diverging. If the right of publicity provided an IP-like right in a person's personality that was transferable, inheritable, and focused on commercial exploitation, then Gordon's clients would have causes of action in

99. For example, SAG-AFTRA has lobbied in favor of a proposed bill in New York that would make the right freely alienable in that state—currently the right is not transferable in New York. See Jennifer E. Rothman, *New York Legislature Amends Right of Publicity Bill for the Worse* (June 14, 2017, 5:00 PM), <https://perma.cc/ZM49-QVBE>; SAG-AFTRA MAG., cover, 29–31 (Summer 2018).

100. See N.Y. Assemb. B. No. A08155, May 31, 2017; see also Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 590–92 (2018).

101. See Part VIA, *infra*.

102. Nimmer, *supra* note 16, at 203–04.

103. ROTHMAN, *supra* note 1, at 70–71.

104. Gordon, *supra* note 71; William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

105. Prosser, *supra* note 104, at 383, 389, 401–10.

106. *Id.*; see also RESTATEMENT (SECOND) OF TORTS §§ 652C, 652H, 652I (1977); ROTHMAN, *supra* note 1, at 72–73, 206 nn. 13–14.

cases that courts were otherwise rejecting. Gordon represented descendants of the famous gangster Al Capone. Capone's sister, wife, and son wanted to stop, or at least be compensated for, and control the content of biographical movies and television series about their deceased relative, including the hit television show, *The Untouchables*. Gordon also represented Nathan Leopold, who had been convicted of the infamous murder and kidnapping of a 14-year old boy. Leopold objected to the use of his name and life story in the novel, play, and movie *Compulsion*. Neither Capone's heirs nor Leopold had claims under the laws at the time for these uses.¹⁰⁷

Gordon was at the forefront of advocating for postmortem rights, and for shifting to a more IP-like framework. He thought claims should accrue even in the context of uses of a person's identity in fictional works. Just as authors should be paid if their copyrighted work is used, he thought his clients should be paid for uses of their or their dead relatives' identities. He called for a "quasi-contractual right to recover for unjust enrichment against anyone who appropriated the name, likeness, life-story, and personality of another in a work of fiction that was distributed through the usual commercial channels."¹⁰⁸

Gordon's advocacy for something different, whether a "right of publicity" or what he sometimes described as a "right of property in name, likeness, personality and history," was expressly driven by his efforts to avoid the limits on privacy laws. He wanted to escape its short one-year statute of limitations in Illinois, its inability to transfer to heirs, and its speech-related limits on uses in creative works. In the process of advocating on behalf of his clients in the form of his law review article, Gordon erroneously described the right of privacy as only applying to private figures, and as not providing significant recoveries for professional or commercial injuries. Although Gordon's assessment of the privacy cases does not withstand scrutiny, Gordon's view that privacy was about protecting "injury to feelings," while the right of publicity was about protecting the "pecuniary value" of a person's identity began to dominate all other discourse.¹⁰⁹ The U.S. Supreme Court cited to Gordon's article and adopted his view of the differences between privacy and publicity laws to support its ground-shifting decision in *Zacchini v. Scripps-Howard Broadcasting*—the decision in which the right of publicity was truly severed from privacy law, and entered the IP pantheon.¹¹⁰

107. Gordon, *supra* note 71 *passim*; *Maritote v. Desilu Prods. Inc.*, 230 F. Supp. 721 (N.D. Ill. 1964); *Leopold v. Levin*, 259 N.E. 2d 250 (Ill. 1970); ELMER GERTZ, *A HANDFUL OF CLIENTS* 166–92 (1965); *Capone Kin to Sue on Film*, L.A. TIMES, Oct. 25, 1959, at 4; *see also* ROTHMAN, *supra* note 1, at 73–75, 206–07 nn. 15–17.

108. GERTZ, *supra* note 107, at 166.

109. Gordon, *supra* note 71 *passim*. For examples of the influence of Gordon's assessment, *see*, e.g., *Price v. Hal Roach Studios*, 400 F. Supp. 836, 843–844 n.5 (S.D.N.Y. 1975); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280 (D. Minn. 1970); *Lugosi v. Universal Pictures* 603 P.2d 425, 444 (Cal. 1979) (Bird, C.J., dissenting) (describing the conflation of the right of privacy and publicity as "procrustean jurisprudence"); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 66–74 (N.J. Super Ct. Law. Div. 1967); *Canabiss v. Hipsley*, 151 S.E. 2d 496, 504 (Ga. Ct. App. 1966); *see also* ROTHMAN, *supra* note 1, at 73–75, 206–07 nn.17.

110. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 n.9 (1977); *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 465 (Ohio 1976) (Celebrezze, J., dissenting in part).

V. ZACCHINI AND THE IP TURN

In the Supreme Court's 1977 decision in *Zacchini v. Scripps-Howard Broadcasting*, the Court both created and cemented the right of publicity's break from the right of privacy and its placement into the intellectual property framework. It was *Zacchini*, not *Haelan*, that created what we understand today as the right of publicity.

Zacchini remains the only right of publicity case to reach the Supreme Court. *Zacchini* involved a human cannonball act that was filmed at a local fair, and then broadcast on the nightly news. Hugo Zacchini's entire act was shown—albeit it only being fifteen seconds in length.¹¹¹ Scholars and courts usually cite to *Zacchini* because of the Court's rejection of a First Amendment defense to a right of publicity claim. But the decision did more than this—it also established a particular view of the right of publicity, one that had not been widely adopted before that time.

Zacchini is often described as a quasi-copyright case. But dismissing it so quickly—as *not* a right of publicity case—is a mistake. Even though the case was brought under Ohio's common law right of privacy, a majority of the Supreme Court insisted on highlighting in the decision, and in the oral arguments, that the case was a right of publicity case. During the arguments, the Justices repeatedly corrected the litigants that this was a case about *publicity* rights, not privacy rights.¹¹²

It was the Court's misunderstanding of Ohio law, combined with the unusual facts of the case and an effort to distinguish it from the Court's decision in *Time v. Hill*, that generated and entrenched the differences between the right of privacy and the right of publicity that remain today.¹¹³ No amicus briefs were filed with the Court, and this absence combined with the way the case had been litigated and decided by the Ohio courts, led to there being little to no briefing of the underlying state interests supporting the alleged Ohio right of publicity.¹¹⁴ This absence likely exacerbated the Court's misunderstanding of Ohio's right of privacy—a state law issue about

111. There was a dispute about whether his entire performance was in fact shown, but the majority's decision rested on the supposition that it was. See *Zacchini*, 433 U.S. at 579 n.1 (Powell, J., dissenting).

112. ROTHMAN, *supra* note 1, at 75–81, 139–43, 207–08 nn.18–32, 219–20 nn.2–8; *Zacchini*, 433 U.S. at 571–78 & 573 n.10; *Zacchini*, 351 N.E.2d at 455–59, 461; Transcript of Oral Argument at 8, 19, 33–34, *Zacchini*, 433 U.S. 562 (1977).

113. *Time, Inc. v. Hill*, 385 U.S. 374 (1967), involved a suit under New York's privacy statute against *Life* magazine for its publication of an article that falsely described the plaintiff's (and his family's) experiences during a home invasion. The Court in *Hill* held that the First Amendment insulated the publisher from liability against the false light claim in the absence of a showing of actual malice by the publisher. The Court in *Zacchini* distinguished *Hill*, identifying that case as one involving a false light privacy claim rather than a right of publicity claim. ROTHMAN, *supra* note 1, at 78–80, 207–08 nn. 26–28, 30.

114. ROTHMAN, *supra* note 1, at 141–42, 220 n.7. The one amicus brief submitted to the court by the National Association of Broadcasters was submitted after the deadline to file briefs. It was therefore not filed by the Court. The brief is included in the case file, but there is no reference to the brief in any of the justices' publicly-available files. As of the time of publication, papers are not yet available for Justices Warren Burger, William Rehnquist, or John Paul Stevens who were also on the panel. Brief for National Association of Broadcasters as Amicus Curiae Supporting Respondent, *Zacchini*, 433 U.S. 562 (No. 76-577) (on file with author); Orders in Pending Cases: No. 76–577, 1976 SUPREME COURT J. 594 (1977) (denying leave to file amicus brief).

which it had no basis to opine. The Supreme Court of Ohio had held that Zacchini's claim was under Ohio's right of *privacy*, and the misappropriation branch of that right, which it deemed synonymous with the right of publicity under state law. The Ohio court concluded that Zacchini could make out a *prima facie* case for a violation of his right of privacy for the use of his likeness and performance, but concluded that the station's use of the clip was newsworthy and therefore not actionable.¹¹⁵

Zacchini was heard by the Supreme Court despite several law clerks recommending against reviewing the case.¹¹⁶ Justice Lewis Powell likely regretted his fourth, and deciding vote to hear the case—on the basis that it looked “interesting” and “fun to work on”.¹¹⁷

| | MEREITS | | JURISDICTIONAL STATEMENTS | | | | | MEREITS | | AGREED | NOT GRANTED |
|----------------|---------|---|---------------------------|---|---|---|---|---------|---|--------|-------------|
| | Y | N | 1 | 2 | 3 | 4 | 5 | 6 | 7 | | |
| Stevens, J. | | | | | | | | | | | |
| Rehnquist, J. | | | | | | | | | | | |
| Powell, J. | | | | | | | | | | | |
| Blackmun, J. | | | | | | | | | | | |
| Marshall, J. | | | | | | | | | | | |
| White, J. | | | | | | | | | | | |
| Stewart, J. | | | | | | | | | | | |
| Brennan, J. | | | | | | | | | | | |
| Burger, Ch. J. | | | | | | | | | | | |

Figure 3. Lewis F. Powell Jr., Certiorari Petition Conference Notes, Oct. 23, 1976, in Lewis F. Powell Jr. Papers.

115. ROTHMAN, *supra* note 1, at 61–63, 75–81, 139–43; *Zacchini*, 351 N.E.2d at 455–59, 461.

116. ROTHMAN, *supra* note 1, at 140, 219 n.3; Memorandum by Wayne Drinkwater, *Zacchini* (Dec. 7, 1976), Lewis F. Powell Jr. Papers, Supreme Court Case Files, Box 43, Lewis F. Powell Jr. Archives, Wash. & Lee Univ. Sch. of Law, Lexington, VA; Memorandum by Gene Comey, *Zacchini* (Argued Apr. 25, 1977), Box 43, Lewis F. Powell Jr. Papers, Supreme Court Case Files, Lewis F. Powell Jr. Archives, Wash. & Lee Univ. Sch. of Law, Lexington, VA; *see also* Lee Levine & Stephen Wermiel, *The Court and the Cannonball: An Inside Look*, 65 AM. L. REV. 607, 621 (2016).

117. Lewis F. Powell Jr., Cert. Petition Conf. Notes, Oct. 23, 1976, Lewis F. Powell Jr. Papers, *supra* note 116; Notes of Powell on Memo from Clerk, Lewis F. Powell Jr. Papers (underlining and indicating “yes” in response to clerk’s comment that would be “fun-to-work-on”); *see also* ROTHMAN, *supra* note 1, at 140, 219 n.3.

Powell dissented in the five-to-four decision, and was deeply troubled by the majority's reasoning. He thought the holding and standard offered by the majority was vague and would have a chilling effect on newsgatherers.¹¹⁸

The ultimate decision in *Zacchini* rejecting the First Amendment defense in the context of news was driven in large part by one central concern—a concern epitomized by Justice Harry Blackmun's visit to the symphony two nights before the oral arguments in the case. (His program from the event is in Figure 4 below). Blackmun worried that if the news could broadcast performances like *Zacchini*'s without permission, there was nothing to prevent broadcasts of entire symphonies or boxing matches or plays—if those performances were not protected by copyright laws.¹¹⁹

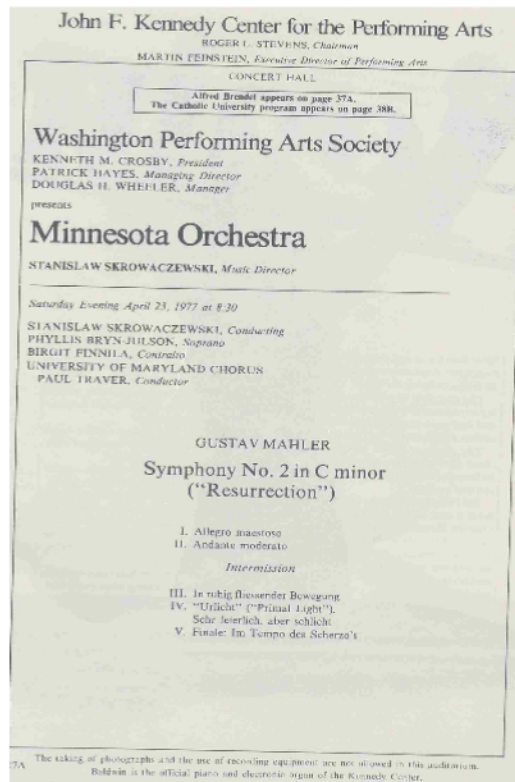


Figure 4. The program states: “The taking of photographs and the use of recording equipment are not allowed.” Image of the Program from Gustav Mahler, *Symphony No. 2 in C Minor*, Minnesota Orchestra, John F. Kennedy Center for the Performing Arts (Apr. 23, 1977), in Harry A. Blackmun Papers.

118. *Zacchini*, 433 U.S. at 579–82 (Powell, J., dissenting).

119. ROTHMAN, *supra* note 1, at 141, 220 n.5; *Zacchini*, 433 U.S. at 756; Transcript of Oral Arguments *passim*, *Zacchini*, 433 U.S. 562 (1977) (No. 76-577); Program from Gustav Mahler, *Symphony No. 2 in C Minor*, Minnesota Orchestra, John F. Kennedy Center for the Performing Arts (Apr. 23, 1977), Supreme Court Case File, Folder 3, Box 254, Harry A. Blackmun Papers, Library of Congress, Wash., D.C.; Lewis F. Powell Jr. Oral Argument Notes, April 25, 1977, Lewis Powell Papers, *supra* note 116.

This framing skewed the Court's understanding of the right of publicity, and led the Court to articulate justifications for the right that largely only apply in the context of performance-based cases. The Court described the "State's interest in permitting a 'right of publicity'" as one based "in protecting the proprietary interest of the individual in his act."¹²⁰ This protection incentivizes the production of works of "entertainment" in ways "analogous to the goals of patent and copyright law."¹²¹ The Court concluded that providing Zacchini (and others) a right of publicity provided an "economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."¹²²

The Court emphasized Zacchini's pecuniary interests over his emotional and reputational ones, contending that his claim had "little to do with protecting feelings or reputation," and instead was about "reap[ing] the reward of his endeavors."¹²³ In addition to worrying about a substitutionary effect on Zacchini's act from the news broadcast, and concluding that the right of publicity provided an incentive effect for performers like Zacchini, the court also suggested that labor-reward and unjust enrichment rationales justified the right. Quoting from an essay by Harry Kalven Jr., the Court noted that Zacchini was "ordinarily" paid for his performances. For the justices in the majority, "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value, and for which he would normally pay."¹²⁴

The Court remanded Zacchini's case, where upon it settled on the second day of trial, without any determination of the facts, particularly whether the broadcast would have helped or hurt Zacchini's career. Both parties claimed victory. The news station suggested that the small settlement amount—less than Zacchini had sought—demonstrated its continuing ability to show such clips. Meanwhile, Zacchini claimed victory, and concluded that the settlement established that the station had no right to show his performance.¹²⁵ Regardless of the parties' views, there is no question that the Supreme Court's decision in *Zacchini* forever altered our understanding of both the right of publicity and the right of privacy.

The Court turned the right of publicity into a form of intellectual property, under a distinct moniker. The Court explicitly analogized the right of publicity to patent

120. *Zacchini*, 433 U.S. at 573.

121. *Id.*

122. *Id.* at 573, 576.

123. *Id.* at 573.

124. *Id.* at 572–78, n.10. The citation to and reliance on Kalven's essay is somewhat surprising given that Kalven's essay was largely critical of privacy-based torts, and the oft-quoted language that the Supreme Court adopted was an effort to articulate a possible justification for Prosser's misappropriation branch of the privacy torts, rather than an affirmative effort by Kalven to develop such a right. See Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331–41 (1966); see also ROTHMAN, *supra* note 1, at 80, 213 n.26.

125. ROTHMAN, *supra* note 1, at 80–81, 208 n. 32; see also *Human Cannonball, WEWS Settle Suit in Out-of-Court Pact*, PLAIN DEALER, Aug. 23, 1979, at 2-B; Mary Strassmeyer, *Inflation Hits the Courts*, PLAIN DEALER, Aug. 23, 1979, at 3-A.

and copyright laws, and imported the justifications used for these IP laws, particularly the incentive rationale and the labor-reward rubric, to justify the state law. Although these bases may have some traction in performance-based cases, like *Zacchini*, they do not map well onto the right of publicity more broadly outside of this context.¹²⁶ The Supreme Court's shift in the framework for the right of publicity from the privacy-based origins rooted in the individual to a broader IP basis justified a far more expansive right—one that could survive death, that was broader in scope, encompassing even the mere evocation of a person's identity, and that started from a presumption that uses should be paid for.¹²⁷

A few months after the *Zacchini* decision issued, Elvis Presley died—adding fuel to the fire started by the Supreme Court. *Zacchini* strongly influenced courts deciding the many lawsuits involving who, if anyone, would own Elvis after his death. The Court's analogizing of the right to copyright and patents strongly pushed courts and legislatures toward accepting postmortem rights of publicity.¹²⁸ Litigation involving dead celebrities was already pending at the time *Zacchini* was decided. The heirs of Bela Lugosi, who famously played Dracula, had sued Universal Studios over uses of Lugosi's likeness on merchandise, claiming that the rights to his name and likeness survived his death. The California Supreme Court decided *Lugosi v. Universal Pictures* shortly after the U.S. Supreme Court issued its decision in *Zacchini*. While the majority of the state court held that Lugosi's rights did not survive death, Chief Justice Rose Bird was convinced that Lugosi's rights to his name and likeness should survive death under the logic of *Zacchini*.¹²⁹ She advocated for using the copyright framework of life plus fifty years (later raised to seventy years) for postmortem rights of publicity.¹³⁰ Although the majority of the California Supreme Court did not agree with her, her view ultimately prevailed, as the California legislature (and soon thereafter the Tennessee legislature) passed legislation creating postmortem rights of publicity.¹³¹

In addition to shoring up expansions in the scope of the right and supporting a survivable right that passed on to heirs at the identity-holder's death, *Zacchini* also established an influential precedent that the right of publicity could apply in the context of noncommercial speech without running afoul of the First Amendment, even in the usually preferred context of news reporting. At the same time that the IP turn exacerbated conflicts with free speech, it undercut the ability of the First Amendment to function as an effective defense in such cases, for reasons that I will consider in more depth shortly. Separate from the First Amendment analysis itself,

126. *Zacchini*, 433 U.S. at 572–78; ROTHMAN, *supra* note 1, at 77–80. For a more in-depth discussion of various justifications for right of publicity laws, and an analysis of the validity of each, see ROTHMAN, *supra* note 1, at 98–112.

127. ROTHMAN, *supra* note 1, at 81–98.

128. *Id.* at 81–86, 208–09 nn.33–46.

129. *Lugosi v. Universal Pictures*, 603 P.2d 425, 434–49 (1979) (Bird, C.J. dissenting).

130. *Id.*

131. Cal. Civ. Code § 3344.1 (2012) (originally enacted as Act of Sept. 30, 1984, ch. 1704, 1984 Cal. Stat. 6169, Cal. Civ. Code § 990); Personal Rights Protection Act of 1984, ch. 945, § 1, 1984 Tenn. Pub. Acts 950 (codified at Tenn. Code Ann. § 47-25-1101); ROTHMAN, *supra* note 1, at 83–86, 208–09 nn.40, 45.

the expansions in the right (beyond actual uses of a person's name or likeness, and after death) also increased its clashes with free speech.

VI. THE AFTERMATH OF THE IP TURN

The right of publicity's IP turn in *Zacchini* and thereafter raises three major challenges that confront us today with regard to right of publicity laws. The shift in the framework from a right rooted in the underlying person (whether understood as a property right or not) to something external to the person that is understood as an IP right, like a copyright or patent, has made it possible for people to lose control and ownership of their own identities. The paradigm shift to an IP right also has undermined the role of the First Amendment in limiting right of publicity claims, and set up a more problematic relationship with the competing rights of copyright holders, their licensees, and the public's otherwise acceptable use of copyrighted works.

The shift to an IP framework need not have created these problems. And many of these problems reflect and highlight challenges in IP law more generally. Nor should the IP box be understood as a one-size-fits-all regime. There are many variations among IP laws, and for good reason. Despite the variety of possible ways to import the right of publicity into an IP-based rubric, the right of publicity's designation as IP has not been done in a nuanced way. It has lacked consideration of how the right of publicity differs from other types of IP, particularly copyrights and patents to which the Supreme Court analogized the right. Instead of facilitating such analysis, the shift to understanding the right of publicity as a form of intellectual property has obstructed deeper interrogation of its aims and justifications. Right of publicity laws also lack many of the advantages of the federal IP statutes. Right of publicity laws are not uniform or consistent across states, and they lack the limits and defenses that federal copyright, patent, and trademark laws provide. Courts have largely ignored these significant differences when analyzing right of publicity laws. The shift to the IP rubric therefore has papered over deeper thinking about appropriate constitutional and federal limits on the enforcement of right of publicity laws.

A. TURNING PEOPLE INTO TRANSFERABLE INTELLECTUAL PROPERTY

The first problem with the shift to the IP framework is that it turned people into a form of intellectual property. Although the right of privacy was often thought of in property terms—as having a property right in one's own name or likeness with a corresponding right to exclude others from using that property—it was never thought to be a transferable right. The reason for this inalienability was intuitive, and almost too obvious to require explanation. The right of privacy was a right over oneself, something that could never be parted from one's being. One's likeness, name, and voice were inextricably attached to oneself. The property right was in the form of self-ownership, rather than ownership of an external thing (whether it be tangible or intangible). Even if it were possible to transfer ownership over oneself to another person or company, it was viewed as akin to selling oneself into slavery or indentured

servitude, and produced the exact opposite result of what the right of privacy was intended to protect.¹³²

The same remains true in the context of the right of publicity. Treating our right of publicity as freely alienable like other IP rights, particularly copyrights and patents, makes it possible for each of us to lose ownership of our own names, likenesses, voices, and other indicia of our identities. The property rubric is not itself the problem. Although property is most often freely transferable, alienability has long been limited when it comes to contested commodities, transfers that produce negative externalities, and those that implicate fundamental rights. Various laws bar transferability or limit it in the context of ownership of people, human organs, historic buildings, hazardous waste, voting rights, and protected or endangered animals (including limits on the sale of tusks and feathers).¹³³

Understanding the right of publicity as a form of IP did not require that it be treated as a transferable form of property, or at least not one without any limits on such transfers. But because of *Zacchini's* analogizing the right to copyrights and patents, courts and legislatures have simply presumed or adopted largely unfettered transferability. This unthinking importation is dangerous, and also leaves out anything similar to copyright's termination provision.¹³⁴ Similarly, states (and courts) have often adopted a postmortem period that mirrors (or exceeds) that of copyright law without bothering to justify why the term should be so long, or should be imported from copyright, rather than patent law, or from either of these regimes.¹³⁵ To determine the appropriate term for postmortem rights, and decide who should be able to hold such rights (and even if they should exist), one needs to think more deeply about why we should create postmortem rights in a person's identity in the first place.¹³⁶

If the right of publicity is truly alienable, such transfers could take place even in involuntary contexts, as they do in the context of patents and copyrights. This means that the rights to your own name, likeness, and voice could be transferred to creditors and ex-spouses in bankruptcies, divorces, and to pay judgments.¹³⁷ Voluntary transfers may seem less problematic than these forced ones, but even voluntary transfers of one's own identity are a troubling possibility. This is particularly so given the differential bargaining power of parties to contracts, the prevalence of contracts of adhesion, ever-changing terms of service online that we agree to simply

132. For further discussion of these issues, see ROTHMAN, *supra* note 1, at 115–37; Rothman, *supra* note 89 *passim*.

133. See ROTHMAN, *supra* note 1, at 125; Rothman, *supra* note 89, at 208–33; see also RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 3.4 (2000); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 450, 461 (4th ed. 2006); Fennell, *supra* note 89 *passim*; Radin, *supra* note 89, at 1853–55; Rose-Ackerman, *supra* note 89, at 942–61.

134. See 17 U.S.C. § 203.

135. See, e.g., Cal. Civ. Code § 3344.1 (g) (providing a 70-year postmortem term); Indiana Code § 32-36-1-8 (providing a 100-year postmortem term); Tenn. Code § 47-25-1104 (allowing indefinite continuation of right if exploited); see also *Lugosi v. Universal Pictures*, 603 P.2d 425, 446–47 (Bird, J., dissenting) (advocating for adoption of fifty-year duration on basis of copyright term).

136. For additional discussion of postmortem rights see ROTHMAN, *supra* note 1, at 108–09, 112, 136, 184; Rothman, *supra* note 100, at 592–97, 598–99.

137. ROTHMAN, *supra* note 1, at 122, 216–17 nn.14–15; Rothman, *supra* note 89, at 199–202.

by continuing to use various websites, and the ability of parents to assign forever the rights of their children's own identities to third parties.¹³⁸

Such possibilities mean that the person upon whom the rights are based—what I have dubbed the “identity-holder”—could be different from the person who owns the rights—the “publicity-holder.”¹³⁹ Whether considered voluntary or involuntary, the prospect of losing ownership of one's public identity forever is a chilling prospect. This is especially so because the scope of what can be owned by someone other than the underlying identity-holder is much greater than is usually thought. What is owned by a publicity-holder is not just the right to the earnings from various uses of the underlying person's identity, as is often claimed. A person or company who owns another's right of publicity can control the identity-holder's freedom of association, freedom of speech, and even her liberty to appear in public and decide her own future.

Recall Nimmer's primary example of the benefits of adopting a right of publicity—studios could use it to stop an actress from appearing in a bathing suit advertisement that it didn't want her to appear in. Only the studio, he contended, should get to select which advertisements she could appear in. If the studio owned the actress's right of publicity, it could not only bar her from appearing in such ads, but also from making unapproved public appearances, and taking unauthorized acting jobs. A publicity-holder's rights could extend even further. Although the studio could not force actors to physically appear, it could use their images to create computer-generated performances. If the studio owned an actor's right of publicity, she would not be able to complain of a right of publicity violation if her performance was recreated in an advertisement, video game, or motion picture. The publicity-holder—here, the studio—would have “authorized” these uses.

Consider a contemporary hypothetical involving the pop star Ariana Grande. Suppose that as part of an onerous agreement she signed with her first manager, Grande assigned in perpetuity her right of publicity to him. This would make Grande the identity-holder of her own identity, but not the publicity-holder, which would now be her manager. Grande is vegan and may wish to encourage people not to eat or use animal products. Suppose Grande wishes to expressly endorse PETA (People for the Ethical Treatment of Animals), appear at its events, be on a billboard for the organization, and encourage donations. Her manager (even if not her current manager), as the publicity-holder, could potentially enjoin her from doing any of these things. He could certainly stop her from appearing in advertisements for a tofu brand, like Nasoya. At the same time, the manager could force her to virtually appear in advertisements for Oscar Mayer lunch meat—something she would find anathema. The manager could potentially approve the digital reanimation of her in ads, TV shows, and even create new songs using recordings of her voice. Even though some other laws might keep the manager from being wholly unfettered in

138. ROTHMAN, *supra* note 1, at 119–22, 215–16 nn.9–13; Rothman, *supra* note 89, at 191–99, 234–37.

139. I developed this terminology in Rothman, *supra* note 89, at 187; *see also* ROTHMAN, *supra* note 1, at 116.

doing so, a transferable right of publicity would grant him the power to do all these things.¹⁴⁰

It is no wonder then that the only court to explicitly consider a motion to transfer a debtor's right of publicity to a creditor called such a transfer akin to "involuntary servitude."¹⁴¹ This makes it particularly bizarre that SAG-AFTRA is supportive of such transferability. It is many of its members that will be most affected, negatively, by such transferability. While its most powerful and successful members, perhaps its top earners, could negotiate more favorable terms, and have some tax-advantaged strategies that flow from having transferable rights, most of its members will be hurt by unfettered transferability. Additionally, the rest of us will be left worse off, without even the protection of a union's collective bargaining agreements or advocacy that can sometimes prevent overreaching by producers, social media companies, managers, sports leagues, and employers.

The law should prohibit the transfer of ownership of a person's identity. As I have written, allowing such transferability "burdens fundamental rights, works at cross-purposes with the right of publicity's purported objectives, sometimes forcibly commodifies a person, and is inefficient."¹⁴² Some have suggested that we have nothing to worry about because no court would enforce a contract that transferred a person's identity.¹⁴³ Relying on such a hope, however, is unwise. Courts have already suggested a willingness to enforce assignments of publicity rights in limited contexts.¹⁴⁴ The author of the dominant treatise on the right of publicity, J. T. McCarthy, has concluded that even a total assignment of a person's right of publicity *cannot* be invalidated under existing contract law principles absent a showing of duress.¹⁴⁵

We are putting in place laws that expressly allow free alienability in perpetuity of a person's right of publicity, and are doing so with full awareness of what that means. It is a dangerous business to hope that the laws being advocated for will not pass constitutional muster or that they will be invalidated by contract law. And on a more mundane level, business transactions, tax bills, and inheritance regimes are being

140. This example is adapted from ROTHMAN, *supra* note 1, at 130–31. Both federal regulations and federal and state trademark and unfair competition laws limit false endorsements, and advertisements that deceive consumers about whether a person, usually a celebrity, actually uses the product. But, it is not clear that there can be a false endorsement claim if a publicity-holder authorized the use. This complexity itself points toward the right of publicity not being alienable.

141. *Goldman v. Simpson*, No. SC03-6340, slip op. at 12–13 (Cal. Super. Ct. Oct. 31, 2006); *see also* ROTHMAN, *supra* note 1, at 118; Rothman, *supra* note 89, at 200, 212–17.

142. ROTHMAN, *supra* note 1, at 115–37; Rothman, *supra* note 89 *passim*.

143. *See, e.g.,* Stacey Dogan, *Stirring the Pot: A Response to Rothman's Right of Publicity*, 42 COLUM. J.L. & ARTS 321 (2019).

144. *See, e.g.,* *Cepeda v. Swift & Co.*, 291 F. Supp. 242, 245–47 (E.D. Mo. 1968) (holding assignment of exclusive rights to baseball player's identity enforceable over player's objections); *Cory v. Nintendo of Am., Inc.* 592 N.Y.S.2d 6, 8–9 (App. Div. 1993) (holding that model's agent had control of model's right of publicity and could authorize uses over model's objections); *cf.* *Faloona ex rel. Fredrickson v. Hustler Magazine, Inc.*, 799 F.2d 1000, 1005 (5th Cir. 1986) (holding that photo release applied to reuse of photographs of children in pornographic magazine); *Shields v. Gross*, 448 N.E.2d 108, 109, 111 (N.Y. 1983) (holding that actor Brooke Shields could not stop the continued use of photos of her as a child naked because her mother had consented to such uses).

145. MCCARTHY, *supra* note 17, § 10:14; *see also* ROTHMAN, *supra* note 1, at 119–22, 136–37.

determined on the basis that such transferability is possible and will be enforced by the courts.

Already athletes, aspiring musicians, models, reality television contestants, and sometimes average citizens have been asked to and have assigned their rights of publicity. The NCAA, for example, as a condition of playing college sports, used to require student-athletes to sign a form that the NCAA claims transfers the players' rights to their own names and likenesses to the NCAA forever, and in any context.¹⁴⁶ Such assignments are routine in a variety of fields, particularly in the adult entertainment context, and used to be standard in reality television contestant contracts in which participants assigned their rights of publicity to the producers in perpetuity.¹⁴⁷

Just because we have not yet seen the worst-case scenarios played out in the public eye, does not mean they will not arise. Publicity-holders may hesitate to enforce the full extent of their rights for a variety of reasons, out of fear of bad publicity (particularly if a major performer is involved), or concerns of costly litigation. But it may take only one major case where it is worth fighting over, and that comes out in favor of a publicity-holder over an identity-holder, to work a sea-change in enforcement patterns and the law.

Take one example that was recently brought to my attention at a media law conference: As mentioned, the adult entertainment industry routinely has required its actors to assign the rights to their names and likenesses to the production companies and producers in any context and in perpetuity. These companies have long used these agreements to assert their performers' right of publicity claims along with their own copyright claims in infringement suits.¹⁴⁸ I was asked about the following scenario—a number of these adult entertainment performers have crossed over to doing more mainstream entertainment work. The companies know they could enforce their prior assignments with these actors. These contracts by their own terms would give the publicity-holders (the adult entertainment companies) the right to block the actors' future work, or to at least collect some of the payments for the actors' work. The companies could also digitally reanimate the performers in new works now that they are more widely known, and would likely refuse to appear in new pornographic works. Rather than being far-fetched, this is what a freely alienable right of publicity allows. Turning the right of publicity into IP need not

146. See, e.g., Complaint at 6–7, *Thrower v. NCAA*, No. CV-10-00632 (N.D. Cal. Feb. 12, 2010); Complaint at 5–6, *O'Bannon Jr. v. NCAA*, No. CV-09-3329 (N.D. Cal. July 21, 2009). The NCAA's revised form now has a more limited transfer of rights.

147. See, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007); Complaint at 4, *Perfect 10, Inc. v. Netsuits, B.C.*, No. 10-1773 (S.D. Cal. Aug. 25, 2010); Complaint at 8, 18, 22–23, 26, 33, 44–45, *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) (No. CV-02-7624); *Cory v. Nintendo of Am., Inc.*, 592 N.Y.S.2d 6, 8–9 (App. Div. 1993); Release, *America's Got Talent*, at 6 (granting exclusive rights in perpetuity to contestant's "name, likeness, voice . . . sounds, signature, [and] biographical data" in all contexts) (on file with author); Release, *The Apprentice*, at 2 (same) (on file with author). See also ROTHMAN, *supra* note 1, at 119–22, 215–16 nn. 9–13; Rothman, *supra* note 89, at 195–99, & nn.41–56.

148. See *supra* note 147.

inevitably lead to unfettered transferability, but so far it has been interpreted as doing so.

B. THE IP EXCEPTION TO THE FIRST AMENDMENT

The second major problem created by the turn toward the IP model for the right of publicity is its increased collision with free speech. The current analysis for First Amendment defenses in right of publicity cases is, simply put, a mess.¹⁴⁹ But that is a story for another day. Here, I want to focus on the fact that placing the right of publicity in the IP box shored up its strength, and led to an expansion in its scope, thereby increasing clashes with free speech. At the same time, its status as IP has undercut the effectiveness of First Amendment defenses in right of publicity cases.¹⁵⁰

The expansion of the right of publicity and the failure of the First Amendment to clearly rein it in has jeopardized our ability to honor, depict, criticize, and refer to real people that form part of our history, culture, and lives.¹⁵¹ The IP turn has exacerbated this not only by supporting a more expansive view of what the right of publicity covers, but because First Amendment defenses to IP-related infringement claims have been analyzed with greater deference to the property-holders' interests. There is less First Amendment scrutiny of IP claims than there is in the context of other content-based laws. I have termed this the "IP Exception" to the First Amendment.¹⁵² It is not an absolute exception to the speech protections of the First Amendment, like those for obscenity, true threats, incitement, and child pornography. Nevertheless, while not exempted from First Amendment review, IP laws get differential treatment. Restrictions on the use of others' IP are not subject to strict scrutiny as are most other speech restrictions.¹⁵³

Consider copyright as an example. The First Amendment is virtually a nondefense to copyright claims.¹⁵⁴ We allow copyright laws to restrict speech for three primary reasons: First, because it is understood as an engine of free expression that supposedly creates more speech than it prohibits. Second, the use of other people's property is a disfavored manner of speech—you usually cannot use other people's property (whether tangible or intangible) to make your speech. Third, speech in the context of uses of others' copyrighted works is thought of as less valuable because it is perceived as lacking originality. Accordingly, it is viewed as adding less to the marketplace of ideas.¹⁵⁵

149. ROTHMAN, *supra* note 1, at 138–39, 145–54.

150. See *id.* at 138–59 for further in-depth discussion of these and other First Amendment issues.

151. *Id. passim.*

152. *Id.* at 143–45.

153. *Id.* at 143–45, 220–221 nn. 9–13. *Cf. Sorrell v. IMS Health*, 564 U.S. 552, 566 (2011).

154. See *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003) (suggesting that it will be only the rare instance in which an independent First Amendment analysis will apply in copyright cases).

155. *Id.*; see *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535–41 (1987); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); see also ROTHMAN, *supra* note 1, at 143–45, 220–21 nn.11–13.

Even if there is a legitimate basis for treating IP laws (such as copyright) differently when it comes to First Amendment analysis (something I am skeptical of), it is particularly problematic to do so in the context of right of publicity claims.¹⁵⁶ Why? First, the justifications for doing so in the copyright context do not map on well to the right of publicity. There is little basis for concluding that the right of publicity is an engine of expression like copyright laws are. Outside of the anomalous performance cases like *Zacchini*, the broader right to control uses of one's name, likeness, voice, and other indicia of identity does not provide the same type of incentives, nor is the same regime needed to encourage creative productions. Those who are already successful in commercializing their identities, such as well-known musicians and actors, are already incentivized by being paid to perform, and are rewarded with increased salaries, fame, and awards. Athletes with the most successful endorsement careers are the ones who collect large salaries. This suggests that, if anything, the right of publicity is giving incentives to the wrong people. Those who most need incentives to keep going will not receive them, while those who already have more than enough incentive to continue what they are doing will have even more rewards heaped upon them. Additionally, even without a right of publicity, false endorsement laws would remain and provide protection against unauthorized endorsements, therefore lucrative endorsement careers would remain largely unaffected.¹⁵⁷

So, it is not clear that the right of publicity incentivizes much of anything. But if it does, and we are operating under a utilitarian, engine-of-free-expression model, we need to consider what the right of publicity incentivizes. To the extent that it incentivizes anything, it might not be incentivizing more of what we want—whether that be more ideas in the marketplace, more creative works, or more performances. Instead, the right of publicity might be incentivizing the commercialization of personalities in and of themselves without incentivizing any broader contributions to society. We may be encouraging more Paris Hiltons or Kardashians, who are “famous for being famous,” rather than people who are famous for their substantive accomplishments. And if we do want to encourage more Hiltons and Kardashians, we need a better explanation for why, and need to consider what is lost in the process.¹⁵⁸

A second reason not to import the First Amendment deference given to other IP regimes is that the right of publicity poses a greater threat to free speech; it limits the ability to depict real people, and lacks the uniform speech-protective defenses that other IP regimes contain. Although some state right of publicity statutes have

156. For a discussion of some concerns about the lesser First Amendment scrutiny in copyright cases, see Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 476–93 (2010); see also Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunication Regulation*, 42 B.C. L. REV. 1 (2000) (considering the anomalous First Amendment treatment of copyright laws).

157. I provide a more developed analysis (and critique) of the incentive rationale and other justifications for right of publicity laws in ROTHMAN, *supra* note 1, at 99–112.

158. *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010); ROTHMAN, *supra* note 1, at 100–02.

exemptions for certain types of uses, such as in sports or news broadcasts, many state publicity laws have no exemptions. Nor have states adopted as part of a statutory structure something similar to copyright's four-factor fair use analysis, or the nominative fair use or *Rogers* test analyses from trademark law that allow some uses of others' marks and identities. California has extracted one consideration from copyright's fair use defense—transformativeness—in its First Amendment-based analysis in right of publicity cases, and some federal appellate courts have used the *Rogers* test or something similar to it to analyze First Amendment defenses in right of publicity cases. But these tests are not consistent from state to state, and sometimes not even between state and federal courts in the same jurisdictions.¹⁵⁹

Not only do right of publicity laws lack the internal speech protections that justify lesser independent First Amendment scrutiny, but they also can pose a greater threat to free speech, as the laws are often far broader than other IP laws. Trademark laws, for example, usually require a showing that a use of a similar mark is likely to cause confusion, and copyright law does not protect facts, yet the right of publicity requires no showing of likely confusion, and prohibits the use of facts about a person, such as their name, likeness, and other aspects of their identity.

C. INCREASED CLASHES WITH COPYRIGHT LAW

The third major challenge posed by the right of publicity's shift to the IP framework is that we are increasingly seeing clashes with the rights of copyright owners and licensees. There has long been a tension between the rights of privacy and publicity and the rights of copyright holders. The ability to use copyrighted works and to make derivatives from them often depends on being able to use the likenesses and voices of those captured in them, for example, on film or in recordings. These conflicts have become more frequent, especially as the right of publicity has expanded to encompass liability even when a person's likeness, name, and voice are *not* used.

Since most right of publicity claims arise in copyrighted works, how we navigate these conflicting interests is vitally important for finding the appropriate balance between subjects' and creators' interests. The balancing of these competing interests has been skewed by treating right of publicity claims as analogous to and on equal footing with federal copyright law.¹⁶⁰ For example, actors have been able to limit how producers and writers can reuse their own characters. This occurred in *Wendt v. Host International*.¹⁶¹ In *Wendt*, the Ninth Circuit Court of Appeals allowed the actors who played the roles Norm and Cliff on the hit show *Cheers* to proceed with right of publicity claims against a licensee of Paramount Pictures that used robots based on those characters in *Cheers*-themed airport bars, even though the district

159. ROTHMAN, *supra* note 1, at 146–47, 157–59.

160. For a more in-depth discussion of the conflict between copyright and right of publicity laws, see *id.* at 160–79.

161. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 809–12 (9th Cir. 1997).

court had concluded that the robots did not look like the actors.¹⁶² You can judge for yourself:



Figure 5. Screen Shot of Cliff and Norm, *Cheers: Norm and Cliff's Excellent Adventure*, (NBC television broadcast Dec. 6, 1990).



Figure 6. Photograph of Hank and Bob robots at Detroit Airport Bar. Photograph by William Archie, in Celcilia Deck, *A Round for Robots*, DETROIT FREE PRESS, Feb. 12, 1991, at 1E.

Federal law and the Supremacy Clause of the U.S. Constitution require that the right of publicity not “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives” of copyright law.¹⁶³ Copyright law therefore should have preempted the right of publicity claims in *Wendt*. The copyright holder had the right to authorize derivative works based on characters from its television series. And neither the copyright holder nor Host, the licensee, exploited or focused on the actors’ identities to promote the robots or airport bars. Copyright holders need latitude to depict the characters in ways that may have similarities with the actors, or that will likely evoke the actors in viewers’ minds since viewers are likely to associate the characters with the actors who played them. Writers and producers, and other copyright holders and licensees should not have to change characters’ body type, skin color, or hair color just to avoid right of publicity liability. Part of the problem in *Wendt*, however, is not specifically one of copyright preemption, but instead with the expansion in the scope of the right of publicity itself. The right of publicity has been stretched in some jurisdictions to apply even when a person’s name, likeness, and voice are never used, but are merely evoked in the minds of audiences. This has increased the clash of right of publicity claims with those of copyright holders.¹⁶⁴

162. *Id.*; *Wendt v. Host Int'l*, 1993 WL 13652548, No. 93-0142-R (C.D. Cal. Aug. 25, 1993); see also ROTHMAN, *supra* note 1, at 93–96, 160, 172–73.

163. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); ROTHMAN, *supra* note 1, at 164–67, 225 n.9. The Copyright Act also has an express preemption provision, 17 U.S.C. § 301, but it has caused more confusion than clarity, and is not the exclusive means of copyright preemption. I therefore focus here on the Supremacy Clause analysis. For a more developed discussion of Section 301 preemption, see ROTHMAN, *supra* note 1, at 161–64; Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 225–36 (2002).

164. ROTHMAN, *supra* note 1 *passim*.

There will be tough cases in which the right of publicity and copyright clash, particularly in the context of derivative works. Often, however, the right of publicity will be limited by contract, or the uses at issue will exceed the scope of initial consent. When this is not the case, or it is unclear, courts will need to carefully consider the impact on the copyright system of allowing right of publicity claims to proceed. Better understanding why we have a right of publicity, and what work it should be doing is essential to navigate these conflicts. But the first step in fixing the current misguided approach is to recognize that the right of publicity is a very different claim than that of copyright law, with different motivations and interests at stake. The second step is to remember that federal law should reign supreme when it comes into conflict with a state law. This will not happen every time the two laws clash, but courts must be cognizant of when the right of publicity is unconstitutionally disruptive of the broader copyright system—something I develop further in my book.¹⁶⁵

VII. IMPLICATIONS

So what do we do now about this turn to treating the right of publicity as an intellectual property right, and the challenges that have followed in its wake? We now know that the turn took place because of a series of missteps, misunderstandings (both intentional and accidental), and a good bit of serendipity. The right of privacy was not deficient when the Supreme Court heard *Zacchini*'s case, and the law might have been better off if the Supreme Court had simply left things as they were. But, at this point, we likely cannot turn the ship around, nor can we be certain that doing so would lead us to a better port.

Nevertheless, there are still useful and important insights that flow from the recognition that this turn in the right of publicity was not preordained, nor necessarily appropriate. Going forward, even if we understand the right of publicity as an intellectual property right, we cannot simply leave things there. We need to engage more deeply with why we have a right of publicity, and what objectives it seeks to further. We should question which objectives are legitimate, and consider whether these goals are actually furthered by the laws we have on the books. We also need to think through more carefully how we match up the right of publicity against competing interests, without the categorization of the right as an IP right resolving all questions.

The right of publicity is *not* just like copyright law. The incentive rationale is not a convincing basis for its existence. And the labor-reward rubric which is also often posited to support a right of publicity does not explain why a person should “reap *all* the rewards of uses of her identity. Those with lucrative personalities are likely not the only ones who created the value in their identities.”¹⁶⁶ In addition, this basis—like that in other IP contexts—provides little guidance as to what the right of publicity's boundaries should be. “To the extent that the unjust enrichment rationale

165. *Id.* at 164–79.

166. *Id.* at 106–07 (emphasis added).

holds up as a basis for entitlement to (some) of the (monetary) rewards for uses of one's identity, it provides little to no guidance as to what the right of publicity's boundaries should be, or when uses are just or unjust."¹⁶⁷

There will be many instances in which we wish to encourage the use of other people's identities. "Public figures and celebrities are part of our culture and uses of their identities are often necessary and appropriate, rather than unjust."¹⁶⁸ The question is when are the uses just or unjust. In the context of *Zacchini*, we were arguably in a circumstance in which we were far from a close call—one in which a performer's "entire act" was allegedly used in a substitutionary way that could disrupt his ability to make a living. But many of the problematic decisions in right of publicity cases, and in IP cases more broadly, stem from a presumption that if any profit is made from another's identity or work, only the identity-holder, copyright holder, patent holder, or trademark owner should profit.¹⁶⁹

The failure of the common justifications for IP laws to justify most of today's right of publicity laws reveals that the very best justifications for the right of publicity are the same ones that were central to the adoption of the right of privacy—ones rooted in personal liberty, dignity, and the prevention of likely economic, reputational, professional, and emotional injuries to identity-holders.¹⁷⁰ Starting on a clean slate we would not need an independent right of publicity—both it and the right of privacy seek to protect and further the same interests—but there is no point in trying to fix that turn in the law at this point. Nor is the treatment of the right of publicity as a form of IP likely to be altered. Nevertheless, the right of publicity's differences and unique qualities even under an IP umbrella should be highlighted, and its justifications and contours should be challenged, even if its existence is not. The recognition of privacy and publicity's commonalities could also help harmonize publicity laws across the states, and ideally harmonize how the First Amendment and other defenses to such claims are analyzed.

The history of the development of the right of publicity, and some compelling justifications behind both it and the right of privacy lead me to strongly support having a right of publicity or similar privacy-based laws, rather than to question the legitimacy of their existence. Nor do I think trademark and unfair competition laws could stand in for right of publicity laws, at least not outside instances in which the primary complaint is one of false endorsement. It is appropriate to have a broader law that limits nonconsensual uses of another's identity, even if no one is confused about sponsorship or participation. And a trademark-oriented rubric would often leave without a remedy those who lack a commercially-valuable personality.

167. *Id.* at 109.

168. *Id.*

169. *Id.*, at 105–12, 155–59 & *passim*; Stacy L. Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 17–18 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014) (criticizing reliance on an unjust enrichment approach to publicity rights, rather than a "harms-based approach"); *cf.* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031 (2005) (criticizing the contention that intellectual property owners should be able to capture all value derived from their inventions or creations).

170. ROTHMAN, *supra* note 1, at 98–112.

Recognizing that there are some convincing justifications for having a right of publicity leads me to conclude that right of publicity laws should actually be doing more work in some places. This is particularly true when private figures are involved, such as in the context of revenge porn, uses on mugshot sites, some instances of unauthorized livestreaming, and some uses by Facebook and Groupon, such as in nonconsensual advertising. Right of publicity laws also could play a role in addressing some deep fakes, and other nonconsensual digital reanimation that could substitute for performances by living actors.

At the same time, the right of publicity should be narrowed in other places. The right should not be a transferable one that can be taken away or transferred to others. The mere evocation (rather than use) of a person's identity without evidence of confusion as to endorsement or actual participation should not be actionable. And the First Amendment and copyright preemption should offer more robust defenses against publicity claims than they often do today. The addition of some statutory fair use-like protections and exemptions could also help matters.

When it comes to postmortem rights, we should recognize that very different issues are raised than in the context of uses of the living. Before granting postmortem rights for decades, sometimes centuries after death, we need to think more deeply about why we want such laws, and what work they should be doing. Current versions of these laws allow for companies held by those unrelated to heirs to reap windfalls at the expense of the public, while our current estate tax system forces commercialization of the deceased against the wishes of both the dead and their heirs. These laws also unduly limit speech about famous and important public figures in very troublesome ways. There may be reasons to provide a limited postmortem period of protection for a person's identity, especially in the aftermath of a person's death, but the laws should not be crafted as they are now, nor should we have fifty different approaches to doing so.¹⁷¹

VIII. CONCLUSION

Recognizing the harmony (rather than the divergence) of the right of publicity and the right of privacy is instructive. After the split with privacy law, the right of publicity became unmoored and we lost the thread of its justifications, leading to it being expanded without knowing why or how to limit it. The shift also led some courts to exclude those without commercially-valuable identities from its protections. At the same time, the split led privacy law to narrow for the worse. Privacy law and the "right to be let alone" became focused on private figures, seclusion, secrecy, and injured feelings, rather than on the broader frame rooted in autonomy and dignity with which it had originated, and that included protections for both public and private figures alike.

171. For additional suggestions about future directions in the law, see ROTHMAN, *supra* note 1, at 6–7, 123–24, 181–85. For some recent thoughts about postmortem rights, see Rothman, *supra* note 100, at 592–97, 598–99; Jennifer Rothman, *The Market in Dead People*, VOLOKH CONSPIRACY (May 10, 2018, 7:30 AM), <https://perma.cc/2UBT-YV3J>.

By suggesting that the differences between the right of publicity and the right of privacy have long been misunderstood and misconstrued, I do not intend to suggest that today's privacy law provides all the answers, nor do I think it likely that states will suddenly see the light and (re)integrate the right of publicity with privacy law. Nor would doing so magically solve the fundamental conflicts between limits on being able to use a person's name, likeness, or voice, and the First Amendment right to do so. Conflicts with both free speech and copyright law have existed since privacy laws were first adopted. The shift to the IP rubric is not the sole cause of the problems surrounding the right of publicity, nor is a return to a privacy-based rubric a panacea. Instead, my book and this Lecture are the first steps to rethinking what is at issue in right of publicity cases. We need to disrupt the common treatment of the right as akin to copyright, and recognize that both its origins and motivations are quite different.

In addition, the right of publicity's placement in the IP framework highlights some of the shortcomings in how we treat IP law itself more broadly, from the lesser scrutiny of restrictions on speech, to the strong thumb on the scale for expanding and protecting IP. Many have criticized these impulses throughout IP law, and they are amplified in the context of right of publicity laws. All IP laws would benefit from more modesty in scope, and greater recognition of the value of speech using other people's intellectual property.

Today, the right of publicity is a "misshapen, bloated monster."¹⁷² It is both too broad, and too narrow, and in many of the wrong places. But, properly understood and designed, the right of publicity could become an effective tool to address a number of twenty-first century challenges, not just for successful celebrities who are already winning at life's lottery, but for everyone from struggling actors to average citizens.

My goal has not been to present a model right of publicity law, but to clear out the erroneous understandings of it, and provide a foundation for rebuilding it. Where we go after this is likely to be a matter of debate and some disagreement and divergence. Just as more than one hundred years ago people began to complain when their names and likenesses appeared without their permission on products, advertisements, and, yes, in newspapers, in part because of changes in technology at the time, today's digital age is leading to new calls for change. The right of publicity provides an opportunity, as well as some dangers, going forward. My reset button provides us with a clear foundation to build this next generation of laws.

When Columbia holds its next right of publicity symposium, say in another twenty-five years, I am certain that challenges and disagreements will remain. At that time, however, I hope that the discussion of the right of publicity's goals and history will not be the same-old, same-old, but instead will be informed and influenced by the true story of the right of publicity.

172. ROTHMAN, *supra* note 1, at 7.