Book Review

THE COMMERCIAL APPROPRIATION OF PERSONALITY

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The right of the publicity, as a construct in American jurisprudence, begins with the 1953 opinion of Judge Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[1] This brief opinion, by one of the founders of the legal realist movement, recognizes that a celebrity[2] has a right to damages and other relief for the unauthorized commercial appropriation of the celebrity's persona and that such a right is independent of a common-law or a statutory right of privacy.[3] By 1953, the courts and the legislatures of the various states had come to recognize a "right of privacy," in the sense of a personal, subjective interest in anonymity.[4] The task for Judge Frank in *Haelan*

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1. 202 F.2d 866 (2d Cir. 1953).

2. For present purposes, the right of publicity is considered peculiarly celebrity based, arising only in the case of an individual who has attained some degree of notoriety or fame. Although commentators disagree over whether "celebrity" is a necessary element of the cause of action or relates only to the extent of damages sustained, in practice that debate is largely academic. *See, e.g.*, Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 296 S.E.2d 697, 702 (Ga. 1982). *See also* Tim Frazer, *Appropriation of Personality — A New Tort?*, 99 LAW Q. REV. 281, 308 (1983). *But cf.* Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 202–03 (1983) (advocating recognition of a "universal" right of publicity).

3. *See generally* Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VANDERBILT L. REV. 1199 (1986) (analyzing the development of a doctrinal right of publicity as a protection of distinct economic interests in personality).

4. *See, e.g.*, Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations*, 43 RUTGERS L. REV. 539, 540 (1991).

was to separate and differentiate this new "right of publicity" from its ties to the earlier right of privacy.[5]

Haelan thus was the start of a judicial and legislative movement delineating an economic right in one's persona distinct from the right of privacy or any of the other cognates and analogues in tort law. Over the course of the half-century that followed Judge Frank's articulation of the right, the right of publicity emerged as an independent construct. With only the ironic counterpoint of the New York Court of Appeals[6]—which held, in 1984, that New York's right of privacy statute precluded recognition of a common-law right of publicity[7]—in the years since *Haelan* we have seen a process of maturation in the development of a flexible common-law approach to the commercialization of identity and the "associative value"[8] inherent in celebrity.[9] The process effectively culminated in the embodiment of the right of publicity, as a separate right, recognizing the separate interest, in the *Restatement of Unfair Competition*.[10]

Whatever the social merit of commercialization of personality[11] and/or the morality of commercializing one's identity,[12] the economic reality is that, for good or ill, the phenomenon of celebrity generates value. As the Third Circuit observed, "[a] famous individual's name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation."[13] Whether we bemoan or applaud the fact, the marketplace creates this value; so too, whether, in the case of

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5. *See* Halpern, *supra* note 3, at 1201–08.

6. In *Haelen*, some 30 years earlier, Judge Frank purportedly was applying New York law. *Haelen*, 202 F.2d 866 at 867.

7. Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584 (N.Y. 1984).

8. "At its heart, the value of the right of publicity is associational." McFarland v. Miller, 14 F.3d 912, 919 (3d Cir. 1994).

9. *See generally* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995) (discussing the state of legal recognition of the right of publicity).

10. Section 46 of the Restatement, *Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity*, provides that: "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for [monetary and injunctive] relief." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

11. *Cf.* David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 163 (1981) (stating "[f]ame is not inconsistent with merit but neither is it evidence of merit").

12. *See generally* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (arguing that centralized, private ownership and control of celebrity images poses a threat to cultural pluralism and self determination).

13. McFarland v. Miller, 14 F.3d 912, 919 (3d Cir. 1994).

a given individual, the fame, and its attendant commercial value, is abstractly justifiable or earned by effort or totally fortuitous is largely irrelevant to the market reality. As the Ninth Circuit noted:

> Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.[14]

Of course, the simple assertion that something has value does not lead inexorably to the conclusion that the law must protect that value. The emergence and maturation of the right of publicity is recognition of a societal determination in the United States, through the courts and the legislatures, that the individual's interest in the associative value of his or her persona merits legal protection.

The American experience with the rights of publicity and privacy appears to have been notably homegrown and is quite different from the experience in other countries, particularly our sister common-law jurisdiction, the United Kingdom. That very different American experience serves as a continuing *ostinato* in THE COMMERCIAL APPROPRIATION OF PERSONALITY, by Huw Beverley-Smith, published in 2002 as part of the *Cambridge Studies in Intellectual Property Rights* series. The book considers the treatment of "commercial appropriation of personality" in the United Kingdom and the Commonwealth countries. As opposed to the United States, the United Kingdom has not recognized either a general right to privacy protecting interests in anonymity nor an independent right of publicity directed to the economic interest. The author, therefore, attempts to analyze "commercial appropriation of personality" in terms of its dignitary and proprietary interests, with the aim of determining how existing law in the United Kingdom deals with those interests and, in the words of the publisher, "whether a coherent justification for a new remedy may be identified from a range of competing theories."

Read in the context of clearly established independent rights of privacy and publicity in the United States and an equally clear rejection of such independent rights in the United Kingdom, the book may seem strange to an American reader. As the author suggests, "[t]o American lawyers, the whole project may have a vaguely nineteenth-century feel, as the English courts continue to debate whether to rec-

14. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992).

ognise interests that the U.S. courts have recognised and protected in various forms for over a century."[15]

Where the central issue in the development of the right of publicity in the United States lay in its linkage to the earlier right of privacy, the author locates the problem in the United Kingdom in the standards and limitations of the existing U.K. doctrines of "unfair competition" and "passing off," and a legal culture inimical to the development of independent causes of action separate from existing constructs. The book examines these English common-law doctrines at great length, with the intent to determine how, if at all, the interests that underlay the American right of publicity may be met by application of these doctrines. In that connection, there is rather elaborate discussion of these common-law torts in English law and Australian law, with particular emphasis on what appears to be the reluctance of the English courts to expand the boundaries of the established common-law principles to embrace more generally the interests involved in commercial appropriation of personality. The comparative analysis of the tort of "passing off" leads to an extended discussion of a broader concept of "unfair competition and the doctrine of misappropriation," with an apparently obligatory discussion of the old and, now, quite limited, U.S. Supreme Court *International News Service* opinion[16] and Justice Brandeis' dissent there.[17]

With acute awareness of the difficulties under the English system of formulating a new, independent tort not linked to the pre-existing common-law doctrines, the author attempts to find a way to analogize what is in effect a right of publicity to the established and recognized torts. Ultimately Beverley-Smith finds the analogies unsatisfying, concluding that a cognate of the American right of publicity is not a likely extension of existing U.K. doctrine (although he finds Australian law far more hospitable to expansion of the misappropriation doctrine); rather, if it is to stand, it must stand alone.

After examining "misappropriation" and "passing off," and the inadequacy of those torts to deal with the interests in commercial appropriation of persona, the book (in Part III) engages in a detailed analysis of the "dignitary interests" which the author asserts are implicated in commercial appropriation of personality. The laws of privacy and publicity in the United States are examined, as is the

15. HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY xi (2002) [hereinafter Beverley-Smith].

16. International News Service v. Associated Press, 248 U.S. 215 (1918).

17. *Id.* at 250.

"piecemeal recognition of privacy interests in English law," with discursions into Canadian and German law, as well as into defamation and "interests in freedom from mental distress."

It is here that the book shows its origins in a doctoral dissertation, as much of the material in Part III looks and feels like a kind of academic fill, encumbered as well with a bothersome repetitiveness. The author clearly recognizes that the signal accomplishment in the American development of the right of publicity was its *separation* from privacy, its divorce from other analogies, and its emergence as an independent tort founded on the economic interest in the associative value of personality. Nevertheless, he insists on creating what I believe are unnecessary complications by continuing to link the economic and "dignitary" interests,[18] recreating the kind of linkage that was so detrimental to the rational development of the right of publicity in the United States. With little explanation, other than the basic premise that the law of the United Kingdom is not hospitable to a general right of privacy directed to the dignitary interests, he perceives "commercial appropriation" as "a hybrid problem," whose solution "requires a remedy which encompasses both economic and dignitary aspects."[19]

Parts IV ("Pervasive problems") and V ("Conclusions") purport to examine this "hybrid" problem and related theoretical constructs in order to find an appropriate remedy. The author concludes that, at least in the United Kingdom, a satisfactory result that recognizes "the autonomy of appropriation of personality" cannot be reached by extending the boundaries of the existing common-law pigeonholes. However, he offers only the most tentative suggestions as to how the problem he postulates can or should be resolved and therefore leaves us with a grand anti-climax.

For the American reader, the value of the book lies more in its periphery than at its core. The discussion of the difficulties in fashioning new common-law remedies in the United Kingdom as compared to the more relaxed approach in Australia is interesting and informative, as is the author's suggestion of some (undefined role) in the United Kingdom for the "European Convention on the Protection of Human Rights and Fundamental Freedoms" and the U.K.'s "Human Rights Act of 1998."

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18. BEVERLEY-SMITH, *supra* note 15, at 319 (stating that "the two principal perspectives on the problem of appropriation of personality: the unfair competition perspective and the dignitary torts perspective").

19. *Id*. at 322.

So too, the discussion of the societal differences separating the English and American systems[20]—although a compilation of other sources, rather than original with the author[21]—is particularly worthwhile. In discussing why there are such profound differences between the English and American approach to the rights of privacy and publicity, Beverley-Smith discusses "sociological factors," "precedent and legal theory," "political and institutional factors," and "academic influences and differences in legal culture." In the process, he gives us insight into "how two superficially similar jurisdictions could have responded so differently to the same basic problem."

For the English reader, the book offers significant insights into the American approach and a model of interest-based rather than categorical law. Beverley-Smith's strong call for examination of the interests underlying a legal right is most welcome. I would have been happier if the discussion of American law were somewhat more meticulous and broader in its sources. The author has a tendency to weigh lower state court and federal District Court opinions as heavily as those of the federal Courts of Appeals and the highest state courts. Similarly, notwithstanding the great attention he pays to the subject, Beverley-Smith relies on a very few American academic and other writers, largely ignoring the significant body of more recent material concerned with the parameters and limitations of the right of publicity (rather than with its existence). More significantly, while recognizing that the right of publicity is a mature tort, whose foundation is now almost uniformly accepted in American law, he nevertheless gives disproportionate weight to the limited calls for re-examination of the tort, giving the erroneous impression that the issue is in considerable flux. The matter of the treatment of American sources and judicial opinions, which unfortunately colors the otherwise excellent treatment of the development of the rights of privacy and publicity in the United States, has the unintended consequence of making me, as one familiar with American law but not nearly so familiar with the law of the United Kingdom, similarly ask if the author's treatment of the U.K. approach to these issues is indeed as full and evenhandedly complete as it appears to be.

One would also have wished for greater clarity of structure; in its desire for completeness, the book at times seems to wander and, in consequence, be needlessly repetitive. Again, this is probably due to

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20. *Id*. at 189–99.

21. The discussion is taken from P. S. ATIYAH & R. S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987) and J. G. FLEMING, THE AMERICAN TORT PROCESS (1988).

its origin in a dissertation, and the constraints imposed by that model of writing. When this chaff is removed, however, what remains is a most useful, albeit shorter, work. While it is a work that does not meet its promise of identifying "a coherent justification for a new remedy," or demonstrate why its concern is with a "hybrid" problem, it does thoughtfully and informatively raise the significant issues that will have to be addressed if the right that has been clearly accepted in the United States, and that is moving to acceptance in the Commonwealth countries, is to become part of the jurisprudence in the United Kingdom.

In the United States, the attempt to analogize the right of publicity to privacy interests, or to pigeon-hole it in a "property" or "unfair competition" jacket were obstacles that had to be overcome. In the United Kingdom the analogic inflation problem revolves around the existing torts of "passing off" and "misappropriation." Analogies are useful, but they can also be deceptively dangerous.

> The strength of an analogical approach is that once the equivalence is established, previously developed rationales and conclusions can be brought to bear on the new situation . . . . But a major difficulty with analogies, derived from precisely the same source as their strength, is that they tend to impose a mature, elaborated system on what may well be an unformulated situation. The choice of the analogy may not be fully justifiable, and the analogy's application to the situation may carry with it a misleading certainty. [N]one of the analogies of privacy, defamation, or property law seems correct to apply to the publicity issue.[22]

In urging an interest-based analysis to "appropriation," Beverley-Smith recognizes the dangers of analogy in creating new rights and remedies. The ultimate value in this book is to be found in its call for finding ways to abandon the search for analogies and construct a meaningful legal right addressed to a recognized societal interest. If the book does not provide answers, it nevertheless asks the important questions and in so doing creates a necessary framework for action.

A brief coda on solemnity seems appropriate. A few of the contemporary American commentators approach the right of publicity with a frightening degree of portentousness, seeing recognition of this right as an assault on the public domain, if not on civilization as we know it. As I have suggested elsewhere,[23] recognition of the legal right is predicated on a societal reaction to the phenomenon of celeb-

22. Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L. J. 1125, 1127–28 (1980).

23. Halpern, *supra* note 9, at 871–72.

rity and the economic value associated with fame. The question of who should benefit from that value does not amount to choosing between the "public domain" in general and a perhaps undeserving celebrity fortuitously pocketing public largesse. Except at its margins, the limitations inherent in the right of publicity (such as the "commercial" nature of the activities to which it relates and the extensive reach of the "newsworthiness" defense) serve effectively to protect the public interest. The public interest involved in the commercialization of fame really lies in avoiding unfairness within the universe of the competing commercial interests.

To an unfortunate extent, a similar solemnity, particularly evident in the author's somewhat cavalier discussion and dismissal of the various theoretical justifications for the right of publicity, pervades this book. It is difficult to resist the urge to say to him, as well as to our own apocalyptic commentators: "Lighten up, it's only about money!" As opposed to the difficult compromises between society's interest in free expression and the individual's interest in decency and dignity, implicated by the law of defamation and the right of privacy—and the related compromises inherent in the law of copyright—the right of publicity has only the most tangential relationship to the fundamental nature of our society. Indeed, we enjoy the allure of fame and the foibles of celebrities; at bottom, the value we give to celebrity is funny and the subject begs not to be taken too seriously. It would have been nice to find some of that humor in this book's search for a rationale for a U.K. version of the right of publicity.