

# Articles

## DISENTANGLING THE RIGHT OF PUBLICITY

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**ABSTRACT**—Despite the increasing importance attached to the right of publicity, its doctrinal scope has yet to be clearly articulated. The right of publicity supposedly allows a cause of action for the commercial exploitation of a person’s name, voice, or image. The inconvenient reality, however, is that only a tiny fraction of such instances are truly actionable. This Article tackles the mismatch between the blackletter doctrine and the shape of the case law, and it aims to elucidate, in straightforward terms, what the right of publicity actually is.

This Article explains how, in the absence of a clear enunciation of its scope, courts have come to define the right of publicity negatively, through the application of independent defenses based on free speech guarantees and copyright preemption. This inverted doctrinal structure has created a continuing crisis in the right of publicity, leading to unpredictable outcomes and the obstruction of clear thinking about policy concerns.

The trick to making sense of the right of publicity, it turns out, is to understand that the right of publicity is not really one unitary cause of action. Instead, as this Article shows, the right of publicity is best understood as three discrete rights: an endorsement right, a merchandizing entitlement, and a right against virtual impressment. This restructuring provides predictability and removes the need to resort to constitutional doctrines and preemption analysis to resolve everyday cases. The multiple-distinct-rights view may also provide pathways to firmer theoretical groundings and more probing criticisms.

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A&M Intellectual Property Scholars Roundtable, the Central States Law School Association Conference at the University of Arkansas, and the Works-in-Progress Intellectual Property Colloquium at Seton Hall University School of Law. © 2017 Eric E. Johnson. Konomark—most rights sharable. Please contact the author at [www.ericjohnson.com](http://www.ericjohnson.com).

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INTRODUCTION

Since the right of publicity first sprang up some sixty years ago,<sup>1</sup> a steady stream of scholars has singled it out for disdain: It is theoretically unsound.<sup>2</sup> It is socially pernicious.<sup>3</sup> It is wildly unpredictable in practice.<sup>4</sup>

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<sup>1</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>2</sup> See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162–63 (2006) (noting the “absence of any clear theoretical foundation” for the right of publicity and concluding that “no one seems to be able to explain exactly why individuals should have this right”); William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 16, 18 (2012) (noting the lack of wide acceptance of the economic-incentives argument for the right of publicity and noting the existence of “many benefits, including monetary benefits, to celebrity status separate from the revenue tied to the right of publicity,” and further noting “[t]he Lockean explanation

But in all the criticism that has been heaped on the right of publicity, what has been ignored is the congenital problem at the center of the doctrine: courts have yet to clearly articulate what the right of publicity is. Strangely, this fault has been glossed over for decades.

According to blackletter law, the right of publicity provides persons with a cause of action against anyone who makes a commercial use of their name, image, likeness, or other indicia of identity. This account, with slight variations in language, is recited by countless courts,<sup>5</sup> but a moment's reflection demonstrates that it is not true.

Imagine what would happen if people really could recover just because their names are being exploited commercially. Every credit reporting agency would shutter instantly. Every celebrity gossip magazine would be drowned in liability. And every company that sells customer lists

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may provide a starting point, but it does not clearly explain when there are countervailing policy considerations"); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 177–78 (1993) (arguing that the right of publicity expanded in scope and jurisdictional recognition despite an absence of compelling rationales); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 226–27 (2005) (regarding an alleged grounding in economic theory, observing that “courts by and large have refused to draw the one distinction a theory based on economic value is capable of drawing—between claimants whose identities have value and those whose identities do not”).

<sup>3</sup> See, e.g., Madow, *supra* note 2, at 239 (“There is no doubt that the right of publicity makes private censorship of popular meaning-making possible. It creates an opportunity for celebrities (or their assignees [sic]) to suppress disfavored meanings and messages.”).

<sup>4</sup> See, e.g., JULEE L. MILHAM, *THE PRACTICE OF MUSIC LAW IN FLORIDA* ch. XIV (2006) (observing that a “stew of standards can make right of publicity actions particularly unpredictable”); Joel Anderson, *What’s Wrong with This Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 168 (2005) (noting “the crazy-quilt variety of judicial decisions that show the unpredictable nature of the law” in the context of actors); Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41, 41 (2004) (noting that “[t]he parameters of these permissible or defensible uses are at times unclear” and “[t]he lack of defined parameters potentially allows a party to benefit from the unauthorized use of another’s identity while the subject in use remains exploited and uncompensated”).

<sup>5</sup> See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983) (“A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” (citations omitted)); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995) (“Considering plaintiffs’ appropriation claim, the elements of the tort are: an appropriation, without consent, of one’s name or likeness for another’s use or benefit. This branch of the privacy doctrine is designed to protect a person from having his name or image used for commercial purposes without consent.” (citations omitted)); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (“The interest protected by the misappropriation of name tort is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or others.” (citations and internal quotation marks omitted)); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (explaining that the right of publicity provides a cause of action for the appropriation of “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”).

to direct mailers and telemarketers would have to run for the hills. The right of publicity, by its own blackletter terms, should stop all these commercial uses of identity. Yet it does not. One thing is certain: the right of publicity is not what it says it is.

The right of publicity is not a nullity or a phantom. It exists, and it has de facto coherence. Lawyers, judges, and commentators seem generally to share an intuitive sense of its boundaries. But those boundaries lack meaningful articulation. And the mismatch between what the right of publicity is said to be and how it is handled by courts has caused a great deal of confusion.

If any progress is to be made with the right of publicity—whether in criticizing it, supporting it, repairing it, or even dismantling it—the first order of business should be figuring out what, exactly, it is and how to express that. To that end, this Article aims to lay bare the doctrinal decrepitude of the right of publicity, explain what havoc it wreaks, and propose a reformulation of the doctrine that conforms to its real-world scope. Disentangling the doctrine should ultimately be of service to the right of publicity’s supporters and its detractors, as well as to those who simply want to know, as a practical matter, whether a given situation is likely to create liability.

In endeavoring to clear up the longstanding infirmity of right-of-publicity doctrine, this Article makes a couple of observations that should contribute to a much better understanding of the right of publicity.

First, unlike most legal doctrines, the right of publicity is currently defined negatively. That is, the law lacks a good positive description of what the right of publicity *is*. Instead, the cases are constantly working on the question of what the right of publicity *is not*. Much of the theoretical and practical trouble with the right of publicity can be traced to this doctrinal inversion.

The second point is related to the first: The scope of the right of publicity is mostly defined extra-doctrinally. That is, instead of being self-limiting, the right of publicity, by its own letter, expands far beyond its permissible scope. It is up to other doctrines from other fields—notably the First Amendment and preemption by federal copyright law—to lop off the right of publicity’s doctrinal excess and force it back within intuitive limits.

With the goal of uninverting the doctrinal architecture, this Article proposes to recast the blackletter doctrine. The trick to doing this successfully is to observe that what courts and commentators have been calling “the right of publicity” is really multiple rights: the endorsement right, the merchandizing entitlement, and the right against virtual impressment.

Describing the right of publicity as multiple causes of action rather than one is not only more faithful to the state of the law in practice, it should also allow us to begin a more fine-tuned theoretical discussion of the right of publicity, allowing both proponents and opponents to provide more clearly articulated arguments as to when and whether the imposition of liability is justifiable.

This Article is organized as follows. Part I provides a historical framing of the right of publicity. Part II describes the flawed architecture of the right of publicity, explaining how current blackletter formulations of the right of publicity fail to correspond to the results reached by courts. Part III proposes reconceptualizing the right of publicity as three separate causes of action. Part IV discusses some implications.

## I. HOW THE RIGHT OF PUBLICITY GOT TO BE THE WAY IT IS NOW

Articles about the right of publicity conventionally include a brief narrative of its history. I will do the same here, but with a critical bent. Since this Article's project is to disentangle the doctrine of the right of publicity, it is necessary to confront squarely the law's convolutions and muddles. That being the case, I want to avoid providing a pat, overly tidy account of the right of publicity's origins. So, in this Part, I first set out the traditional narrative sketch of the origins of the right of publicity. Next, I try to give a sense of how that classic account glosses over substantial disorder. Last, I work to untangle varying labels that have been applied to the doctrine, including "appropriation" and "misappropriation."

### *A. The Traditional Narrative Sketch*

First, in this Section A, I will lay out the classic sketch of how the right came to be. This is more than curiosity-satisfying background knowledge. Given the opacity of right-of-publicity doctrine itself, the origin story provides a way of imposing some sense of order on key right-of-publicity concepts. But a warning: while not necessarily inaccurate, this traditional origin story can be misleading. Smoothing over the chaos in the right of publicity's history makes it seem as if the doctrine has more order than it really does. So, in the following Section B, I will try deliberately to muss up, at least a little, this classic account.

The conventional thumbnail sketch of the history of the right of publicity generally tracks the one laid out in a comment to the 1995 Restatement (Third) of Unfair Competition.<sup>6</sup> It runs like this: the right of

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<sup>6</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b.

publicity was born out of tort law's right of privacy.<sup>7</sup> The tort-based right of privacy—what can be called the right to be left alone—traces back to a seminal 1890 law review article by Samuel D. Warren and Louis D. Brandeis, *The Right of Privacy*.<sup>8</sup> Subsequent to Warren and Brandeis's article, the right of privacy was embraced by courts in increasing numbers until it became a majority rule in the United States. The right of publicity then obtained an independent existence around the mid-twentieth century. This emancipation of the right of publicity is principally pinned on two references. One is the 1953 baseball-cards case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>9</sup> which used the term “right of publicity”<sup>10</sup> and is said to be the first case that recognized the right of publicity as such.<sup>11</sup> The other is a highly influential 1960 law review article by William L. Prosser, which, in analyzing seventy years of cases since Warren and Brandeis, declared that the right of privacy was really four separate torts: intrusion upon seclusion, public disclosure, false light, and appropriation of plaintiff's name or likeness.<sup>12</sup> *Haelan*, according to

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<sup>7</sup> See, e.g., *Montgomery v. Montgomery*, 60 S.W.3d 524, 528 (Ky. 2001) (“The common-law right of publicity evolved from the appropriation prong of the right of privacy. But ‘it is a distinct cause of action intended to vindicate different interests.’ As originally postulated, the right of privacy protects one’s right ‘to be let alone.’ Whereas the right of publicity protects the right to control the commercial value of one’s identity. The appropriation prong of the invasion of privacy originally sought to compensate for the emotional distress accompanied by the unauthorized use of one’s likeness and identity. But as the tort has evolved, it is clearly the commercial interests in one’s identity that the appropriation prong of tort serves to protect the most.” (footnotes and citations omitted)); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (“The principal historical antecedent of the right of publicity is the right of privacy.”).

<sup>8</sup> Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); see also Ford, *supra* note 2, at 6 (noting that “[t]he standard account of the right of publicity begins with Samuel Warren and Louis Brandeis’ 1890 article”); M.C. Slough, *Privacy, Freedom, and Responsibility*, 16 U. KAN. L. REV. 323, 325–27 (1968) (discussing the seminal importance of Warren and Brandeis’s article).

<sup>9</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>10</sup> Although it is fair to give credit to *Haelan* for sewing on the label “right of publicity” to the doctrine it is credited as creating, the *Haelan* court was not the first to use the phrase “right of publicity.” That honor appears to go to an English case. See *Kelly v. Morris*, 1 Law Rep. Eq. 697, 702 (1866) (in a case regarding a copyright claim that would not be supported by modern law concerning factual information in a business directory, “the defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of publicity in the names of private residents, who had, as he expressed it, ‘given their names for public use’”).

<sup>11</sup> See, e.g., Madow, *supra* note 2, at 147 (“Despite intimations in earlier cases, the right of publicity was recognized for the first time” in *Haelan*). An article titled *The Right of Publicity*, published the year after *Haelan*, helped give scholarly accreditation to the right of publicity. See Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203 (1954). Echoing *Haelan*, Nimmer argued that publicity causes of action were distinct from privacy causes of action, since privacy plaintiffs felt injured by intrusion into their lives, whereas publicity plaintiffs merely felt injured by a lack of compensation. *Id.*

<sup>12</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

Prosser, belonged within the fourth category, appropriation of name or likeness.<sup>13</sup>

Along with pointing to these mileposts in the development of the right of publicity, customary accounts of the right of publicity identify a number of story arcs or themes to characterize the law's progression.

One such theme is that the right of publicity is said to have evolved progressively from a tort cause of action to a form of intellectual property.<sup>14</sup> Correspondingly, the right of publicity is said to have represented a transition from concern over redressing an injury to concern over enforcing property rights.<sup>15</sup>

Another historical evolution ascribed to the right of publicity is that in its early days the right of publicity was reserved for celebrities—that is, those few people who had a present pecuniary value attached to their fame—but it has, over the decades, been increasingly recognized as a right belonging to the everyday person.<sup>16</sup>

Finally, the traditional historical narrative emphasizes the right of publicity's dispersion through the courts and its increasing fixedness in law. Indeed, the right of publicity has found a place in the law of a majority

<sup>13</sup> *Id.* at 406–07.

<sup>14</sup> *See, e.g.*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150 (3d Cir. 2013) (“The right of publicity grew out of the right to privacy torts. . . .”); *id.* at 151 (“[T]he goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort. Additionally, as with protections for intellectual property, the right of publicity is designed to encourage further development of this property interest.” (citation omitted)); *see also* *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (stating that “[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility”). Whether, in fact, the right of publicity ought to be considered a form of intellectual property is best regarded as an open question—one I won’t weigh in on here.

<sup>15</sup> *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“The ‘appropriation’ tort as described by Prosser and the Restatement, Second, of Torts subsumes harm to both personal and commercial interests caused by an unauthorized exploitation of the plaintiff’s identity. Classification of the tort as an aspect of the right of privacy, however, led some courts to deny relief to well-known personalities whose celebrity precluded the allegations of injury to solitude or personal feelings normally associated with an invasion of privacy. The historical connection with personal privacy also impeded the transfer of rights in the commercial value of a person’s identity.”); *see also* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 4:3 (2d ed. 2009) (“The ephemeral and relative nature of ‘celebrity’ and ‘fame’ makes such concepts much too slippery to use as any firm ground for overall legal analysis.”).

<sup>16</sup> *See, e.g.*, *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995) (regarding a common law right-of-publicity action, stating that celebrity status should not be a prerequisite for a right-of-publicity claim; what matters is that the plaintiff’s identity has commercial value); *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 2000) (“California’s appropriation statute is not limited to celebrity plaintiffs.”); *Hetter v. Eighth Judicial Dist. Court of Nev.*, 874 P.2d 762, 765 (Nev. 1994) (“The Nevada statute has not limited the cause of action to celebrities . . .”).

of American jurisdictions, either by obtaining common law recognition or through statutory enactment.<sup>17</sup>

### B. *Complications*

The problem with the traditional genesis story of the right of publicity is that it may leave the reader with the impression that the law unfolded like a seedling tree, putting out branches in an orderly way, as if preordained, following some internal logic eventually manifested in the doctrine. A more fine-grained look at the development of the right of publicity, however, reveals that the doctrine's origin story is much less tidy than the usual account would let on.

While I will not attempt a thorough re-evaluation of the history of the right of publicity here, I do want to draw attention to some of the complications in the right of publicity's development. My aim is to remove some of the gloss of orderliness that the right of publicity has accumulated.

One portion of the history due for some musing is the Warren and Brandeis article.<sup>18</sup>

The Warren and Brandeis article is cited with great frequency, almost reflexively, by courts<sup>19</sup> and scholars<sup>20</sup> when the topic of the right of publicity comes up. The reference seems obligatory. After all, the Warren and Brandeis article is credited with begetting the right of privacy. And the right of privacy is, thanks to Prosser, understood to have eventually split off into four branches, of which the right of publicity is one. Yet while the article may have in fact touched off the chain of jurisprudence that led to the right of publicity, the article's reasoning arguably fails to support the modern doctrine at all.

Warren and Brandeis's motivation in writing was the burgeoning "evils"<sup>21</sup> of mass media. They noted that while photographers had formerly needed a cooperative subject who sat still for a prolonged exposure, new

<sup>17</sup> See Sean Elliott, *Dancing Promotions, Dodging Preemption, and Defending Personas: Why Preempting the Right of Publicity Deprives Talent the Publicity Protection They Deserve*, 73 NOTRE DAME L. REV. 1625, 1634 & n.51 (1998) (collecting citations).

<sup>18</sup> See Warren & Brandeis, *supra* note 8.

<sup>19</sup> See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 74 (Ga. 1905) ("[T]he authors ably and forcefully maintained the existence of a right of privacy . . ."); *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (N.Y. Sup. Ct. 1891) (The article is "an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer."). As of January 17, 2017, the Westlaw database counts 400 cases citing Warren and Brandeis.

<sup>20</sup> As of May 27, 2017, the Westlaw database counts 2,848 law review articles citing Warren and Brandeis.

<sup>21</sup> Warren & Brandeis, *supra* note 8, at 198.

technology allowed quick, surreptitious snapshots.<sup>22</sup> With technology ascending, they saw morals sliding. Warren and Brandeis decried the social ills of newspaper gossip: “Easy of comprehension, appealing to that weak side of human nature . . . no one can be surprised that it usurps the place of interest in brains capable of other things.”<sup>23</sup> These twin developments—the quickening of shutter times and the easing of editorial standards—were what necessitated the recognition of a tort-based right of privacy. In other words, to the extent Warren and Brandeis were able to see into the future, what they wanted most to save us from is the cell-phone-video-and-long-lens-fueled stream of gossip that permeates our society through cable television, checkout-aisle news racks, and a vast array of websites and social media platforms.

Insofar as Warren and Brandeis’s article is the ultimate source of the right of publicity, it is deeply ironic. For although the right of publicity is broad in scope and penetrating in its effects on the media, if there is one thing it does not protect against, it is TMZ and the gossip industry. Warren and Brandeis had hoped that lawsuits could stop the camera-abetted publication of trivialities.<sup>24</sup> What we have instead is a legal safe-zone for ambush video journalism about celebrities drinking coffee.<sup>25</sup> Meanwhile, the law provides a solid cause of action for celebrities to use against merchandisers selling their likeness on a coffee mug<sup>26</sup>—something that appears entirely removed from Warren and Brandeis’s project.

If Warren and Brandeis’s article does not provide a firm foundation for the right of publicity, one might think the recognized first right-of-publicity case would—that is, Judge Jerome Frank’s 1953 opinion in the Second Circuit case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>27</sup>

The case involved rival manufacturers of chewing gum, both of whom packaged baseball cards with their gum. Plaintiff Haelan Labs had an exclusive contract with several baseball players to waive their right of privacy claims so that Haelan Labs could print baseball cards with their

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<sup>22</sup> *Id.* at 211.

<sup>23</sup> *Id.* at 196.

<sup>24</sup> *Id.* (“The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade . . .”).

<sup>25</sup> See *TMZ’s Top Coffee Drinkers: It’s Time for the Percolator (Part Two)*, TMZ (Sept. 30, 2015, 12:07 PM), <http://www.tMZ.com/2015/09/30/celeb-coffee-drinking-video/> [<https://perma.cc/8SX8-9CE3>].

<sup>26</sup> See, e.g., Ford & Liebler, *supra* note 2, at 3 (using likeness-bearing coffee mugs as a classic right-of-publicity violation).

<sup>27</sup> 202 F.2d 866 (2d Cir. 1953).

names and likenesses.<sup>28</sup> Notwithstanding the purported exclusivity of those contracts, some baseball players subsequently signed similar baseball card contracts with Topps.<sup>29</sup>

*Haelan* went to the Second Circuit on a claim of inducing breach of contract.<sup>30</sup> But the court moved in a different doctrinal direction to resolve the case. The court held that, independent of any right of privacy, “a man has a right in the publicity value of his photograph.”<sup>31</sup> The court explained that this right was assignable: “*i. e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ *i. e.*, without an accompanying transfer of a business or of anything else.”<sup>32</sup> The court then christened the right it had identified with the name “right of publicity” and shaped thinking about it for decades to come by explaining that the right’s essence was not about hurt feelings—as it was with the right of privacy—but about money.<sup>33</sup>

The literature generally recognizes this as the birth of the right of publicity, not only for its christening, but also for marking two key related doctrinal transitions: becoming independent of the right of privacy and making a transition from tort to property. This clean picture of the right of publicity’s birth, however, glosses over some wrinkles.

For one, the story of the right of publicity ascending from the tort sphere to property sphere is weakened when one considers an often-ignored part of Frank’s opinion. “Whether it be labelled a ‘property’ right is immaterial,” he wrote, “for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”<sup>34</sup> Given this context, it seems likely that *Haelan* did not mean to propertize the doctrine in full.

Also glossed over is the issue as to whether the acknowledgment of the right of publicity, as such, was necessary to the outcome of the case. *Haelan Labs* won 3–0. But on the issue of creating the right of publicity, the court was split 2–1. Chief Judge Thomas Walter Swan issued a terse concurrence agreeing with the panel only insofar as perceiving a cause of

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<sup>28</sup> *Id.* at 867.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 869.

<sup>31</sup> *Id.* at 868.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (“This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements . . .”).

<sup>34</sup> *Id.*

action for intentional inducement of breach of contract.<sup>35</sup> Swan's concurrence suggests that the majority's statements acknowledging the existence of a right-of-publicity cause of action should have been regarded as dicta, on the grounds that it was not necessary to the disposition of the case.<sup>36</sup>

What is more, instead of creating the right of publicity as an evolution or derivation of the right of privacy, the court claimed to rely on two cases it said had already recognized the right.<sup>37</sup> This supposition, however, does not stand up to scrutiny. One of the two cases was *Wood v. Lucy, Lady Duff Gordon*,<sup>38</sup> a contracts case whose result is consistent with a straightforward theory of trademark rights in a name and which implies nothing about a right of publicity.<sup>39</sup> The other case, *Madison Square Garden Corp. v. Universal Pictures Co.*,<sup>40</sup> is even further removed from anything resembling a right of publicity. In that case, a sports arena sued a film studio for inserting into a movie crowd-scene footage filmed at the arena.<sup>41</sup> While *Madison Square Garden Corp.* is an analytical muddle,<sup>42</sup> it is clear the decision could not have rested implicitly or otherwise on the right of publicity, for there was no issue of a commercial exploitation of the identity of any identifiable natural person in the case—a commonality of all right of publicity violations.<sup>43</sup>

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<sup>35</sup> *Id.* at 869 (Swan, C.J., concurring).

<sup>36</sup> *See, e.g.*, JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 261 (1921) (To have “the weight of a precedent,” a proposition must be “necessary for the decision of a particular case”; otherwise it is dictum.). It should be noted that what in an opinion ought to be regarded as dicta is subject to considerable debate. *See, e.g.*, Ryan S. Killian, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 8–15 (discussing differing ideas of what constitutes dicta).

<sup>37</sup> *Haelan*, 202 F.2d at 868.

<sup>38</sup> 118 N.E. 214 (N.Y. 1917).

<sup>39</sup> *Id.* (“The defendant styles herself ‘a creator of fashions.’ Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name.”).

<sup>40</sup> 7 N.Y.S.2d 845 (N.Y. App. Div. 1938).

<sup>41</sup> *Id.* at 847.

<sup>42</sup> The clearest thing that can be said about the decision is that the court, seemingly unconcerned with doctrine or precedent, emphasized its equitable power and painted the question before it as being about “whether the acts complained of are fair or unfair.” *Id.* at 853. Interestingly, the case was later relied upon by *National Basketball Ass’n v. Sports Team Analysis and Tracking Systems, Inc.*, 931 F. Supp. 1124, 1157 (S.D.N.Y. 1996), in issuing a permanent injunction against a business distributing real-time sports scores and information by pager. That decision was vacated by the Second Circuit, which held that to the extent New York law allowed a misappropriation claim for the sports data, it was preempted by the Copyright Act. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845–54 (2d Cir. 1997).

<sup>43</sup> *See, e.g.*, *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) (“[T]here is no right of publicity in a corporation . . .”); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION

Much more could be said about the episodic chaos in the origins of the right of publicity. But I hope with these few examples I have done something to dispel the patina of orderliness that comes with an idealized version of the right of publicity's development. My suspicion is that the overly romanticized origin story of the right of publicity and its frequent repetition have contributed to the fact that courts and commentators have generally not engaged with what should be glaring doctrinal problems with the way the right of publicity is formulated.

*C. Appropriation, the Right of Publicity, and Other Labels*

As a final matter of setting the stage for talking about the present state of the right of publicity and its doctrinal problems, it is necessary to address the confusing issue of labels—in particular, the use of the term “appropriation” in lieu of “right of publicity.”

Prosser, in his influential 1960 article, labeled his fourth privacy tort “appropriation,”<sup>44</sup> although he noted the use of the label “right of publicity” in the *Haelan* case.<sup>45</sup> Prosser's article, as influential as it was, created a question of whether the cause of action ought to go by the label “appropriation” or “right of publicity.” This issue has remained unresolved.

Even worse, the persistence of two labels seems unwittingly to have spawned the idea that the two labels might denote two separate doctrines. Many pragmatic commentators have found that “right of publicity” and “misappropriation” tend to be used interchangeably in the cases.<sup>46</sup> And the U.S. Supreme Court has lumped the terms together.<sup>47</sup>

Nonetheless, some authors have tried to distinguish appropriation (or “misappropriation”) from the right of publicity. For example, one commentator offered that the appropriation tort “centers on damage to human dignity” while the right of publicity “relates to commercial damage to the business value of human identity.”<sup>48</sup> Consistent with this line of

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§ 46 cmt. d (1995) (“The interest in personal dignity and autonomy that underlies both publicity and privacy rights limits application of the right of publicity to natural persons. The protection available against the unauthorized use of corporate or institutional identities is determined by the rules governing trademarks and trade names.”).

<sup>44</sup> Prosser, *supra* note 12, at 401.

<sup>45</sup> *Id.* at 406–07.

<sup>46</sup> See, e.g., KELLI L. SAGER, SUMMARY OF RIGHT OF PUBLICITY ISSUES 1 n.1 (2012), [https://law.ku.edu/sites/law.ku.edu/files/docs/media\\_law/Summary\\_of\\_Right\\_of\\_Publicity\\_Issues.pdf](https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Summary_of_Right_of_Publicity_Issues.pdf) [<https://perma.cc/8KQW-DVGU>].

<sup>47</sup> See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 (1977) (using the terms “right of publicity” and “appropriation” to describe a claim that is importantly different from a false light claim).

<sup>48</sup> 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (4th ed. 2009).

thinking, the Missouri Supreme Court called misappropriation and the right of publicity “separate yet similar” causes of action, with misappropriation protecting “private self-esteem and dignity” and the right of publicity protecting against “commercial loss.”<sup>49</sup> Then—after chiding the plaintiff for mislabeling a right-of-publicity action as misappropriation—the Missouri Supreme Court noted that “the elements of the two torts are essentially the same” and unabashedly proceeded to use “misappropriation” cases as precedent for the “right of publicity” case before it.<sup>50</sup> If precedent can be applied interchangeably, there seems to be little point in insisting on the existence of two separate causes of action.

It is hard to blame courts and commentators for trying to be helpful in making sense of the different labels. But at the end of the day, distinguishing appropriation from the right of publicity may be as helpful as asking a four-year-old to rake up leaves: instead of cleaning things up, it ends up making a bigger mess.

In this Article, I treat appropriation (or misappropriation) and the right of publicity as one. The fact is, to the extent one might perceive differences between cases labeled as “appropriation” and those labeled “right of publicity,” whatever fine distinctions one might find are dwarfed by bigger, more fundamental differences in the scope of liability imposed by different clusters of cases. And it is those more fundamental differences I am trying to delineate in this Article.

## II. THE RIGHT OF PUBLICITY’S SUBTRACTIVELY DEFINED SCOPE

The blackletter formulation of the right of publicity<sup>51</sup> persists in a state of illimitability, giving no meaningful guidance as to what the right of publicity is. The courts instead give the doctrine its essential shape by saying what the right of publicity is not. In this Part, I explain how this negative delimiting<sup>52</sup> of the right of publicity works, and I suggest why it is troublesome.

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<sup>49</sup> Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003).

<sup>50</sup> *Id.* at 368–69.

<sup>51</sup> That is, that the right of publicity gives a plaintiff a cause of action against anyone making a commercial use of the plaintiff’s name, image, voice, likeness, or other indicia of identity. *See supra* note 5.

<sup>52</sup> In talking about the “negative” aspect to the doctrinal structure of the right of publicity, let me head off a possible point of confusion. Intellectual property scholars have used the term “negative space” to describe “areas in which creation and innovation thrive without significant protection from intellectual property law.” Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011). These negative spaces include “fashion, cuisine, magic tricks, stand-up comedy, typefaces, open source software, sports, wikis, academic science and even roller derby pseudonyms.” *Id.*; *see also* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual*

In saying what the right of publicity is not, the courts largely rely on two doctrinal vehicles: (1) freedom of expression (including the application of the First Amendment and a “newsworthiness exception”) and (2) copyright preemption. There are, as well, other ad hoc means of subtracting from the scope of the right of publicity, including an “incidental use” exception and, on occasion, the selective ignoring of law or the facts of the case. I am going to use the word “subtrahend” to refer to all of these doctrinal vehicles that are variously used to give right-of-publicity doctrine its shape through subtractive or negative means.<sup>53</sup>

Let me be explicit about the claim I am making. I am not simply pointing out that the First Amendment, copyright preemption, and other defenses serve as external limitations on the right of publicity. That is unremarkable. The First Amendment, for instance, serves as an external limitation on all kinds of law.<sup>54</sup> The difference is that other areas of law are meaningfully demarcated doctrines in themselves—even in the absence of the First Amendment. We can routinely say, for example, that there is liability for intentional infliction of emotional distress in this situation, but not in that situation, all without resort to constitutional law. The intentional infliction of emotional distress case where the First Amendment comes into play is the outlier.

The right of publicity is different. The right of publicity is utterly dependent upon the First Amendment and other subtrahends to give it its essential shape. When the First Amendment comes up in other tort or property contexts, it is generally a case of the Constitution imposing itself in the proceedings, blocking the common law from what it would do if left to its own devices. The right of publicity, however, seems to be without its own devices. In right-of-publicity cases, the First Amendment is a tool the courts reach for in order to work the common law into some tenable form.

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*Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006) (introducing the term “negative space” in this sense). In talking about how the right of publicity’s scope is defined subtractively or negatively, I am talking about something quite distinct from intellectual property’s negative space, as scholars have talked about it. IP’s negative spaces are places where the scope of the law has not previously been extended, even nominally. Thus, the discussion of IP negative spaces is not concerned with the means by which courts demarcate the boundaries of IP doctrines, which is what I am concerned with here.

<sup>53</sup> In mathematics, a “subtrahend” is a quantity that is subtracted from another quantity. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2281 (1993) (defining “subtrahend” as “a quantity that is to be deducted from a minuend in the mathematical operation of subtraction”).

<sup>54</sup> One example is intentional infliction of emotional distress. *See Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

The same goes for copyright preemption and the other subtrahends. They end up more as servants of the common law than masters of it.<sup>55</sup>

In this Part, I begin in Section A by reviewing the blackletter formulation of the right of publicity, pointing out the implausibility of its nominal scope. Then, in Section B, I discuss the problems inherent in delineating legal doctrine negatively—that is, starting with an implausibly expansive doctrine and then subtracting from its scope to reach palatable results—rather than building doctrine positively in such a way that the doctrine explains its own boundaries. Finally, in Section C, I look at the right of publicity’s subtrahends in detail, providing multiple examples of how courts have used free expression rights, copyright preemption, and other devices to give the right of publicity meaningful shape.

#### A. *The Great Overbreadth of the Blackletter Law*

One media law litigator summed up the state of right-of-publicity doctrine aptly, if not flatteringly, when he wrote that the field of publicity rights “remains a ‘Wild West’ environment.”<sup>56</sup> For fellow litigators, he saw upside in this, advising that they “should feel free to be creative in their proposed theories.”<sup>57</sup> From a more objective standpoint, however, the doctrine is in a woeful state. Cases are all over the map in terms of outcomes and analysis.<sup>58</sup> There is, however, one aspect in which right-of-publicity cases are remarkably consistent: the broad terms in which they describe the blackletter law.

Some examples: In California, “an individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”<sup>59</sup> In Illinois, an action requires “an appropriation, without consent, of one’s name or likeness for another’s use or benefit,” and “is designed to protect a person from having his name or image used for commercial purposes without consent.”<sup>60</sup> The 1977

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<sup>55</sup> In this paragraph, for the sake of concision, I have spoken of the common law. The same, however, can be said of the varied state statutes providing for right-of-publicity causes of action with broad formulations that mimic the common law.

<sup>56</sup> Brian D. Wassom, *Identity and Its Consequences: The Importance of Self-Image, Social Media, and the Right of Publicity to IP Litigators*, in LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES: LEADING LAWYERS ON ANALYZING KEY DECISIONS AND EFFECTIVELY LITIGATING IP CASES \*1 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> See *infra* Section II.D for examples.

<sup>59</sup> *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 649 (Cal. Ct. App. 1996).

<sup>60</sup> *Dwyer v. Am. Exp. Co.*, 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995) (citations omitted).

Restatement of Torts says, “One who appropriates to his own use or benefit the name or likeness of another is subject to liability . . . .”<sup>61</sup>

Note that these descriptions of the right of publicity embrace not only classic situations creating liability, such as unlicensed celebrity-image-bearing lunch boxes or making a person appear to endorse a product. These formulations also embrace what credit reporting agencies do—which is attach financial data to person’s identities and then commercially exploit those identities by selling credit reports to banks and other entities interested in knowing a person’s financial history.<sup>62</sup> That is, unquestionably, appropriating a person’s name and other indicia of identity for the credit agency’s own benefit.<sup>63</sup> Yet the right of publicity does not, in the real world, reach such situations.<sup>64</sup>

Similarly, the blackletter definition creates liability for celebrity gossip magazines, whose business is entirely devoted to using, for purposes of commercial gain, the names and images of celebrities. Yet it is taken for granted that there is no right-of-publicity liability for such magazines—or for the photographers and reporters who stock their pages.<sup>65</sup>

Common law formulations of the right of publicity are not the only ones that are nonsensically overbroad. Many statutes are similarly unbounded. Wisconsin’s statute, for instance, allows a cause of action for “[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person.”<sup>66</sup> Rhode Island’s statute provides, simply, “The right to be secure from an appropriation of one’s name or likeness,” and for establishing a violation of the right, the statute requires only proof that the appropriation was without consent and that it is “of a benefit to someone other than the claimant.”<sup>67</sup> Ensuring additional breadth, the statute

<sup>61</sup> RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>62</sup> For background on credit reporting agencies, their business model, and their economic incentives, see Virginia G. Maurer & Robert E. Thomas, *Getting Credit Where Credit Is Due: Proposed Changes in the Fair Credit Reporting Act*, 34 AM. BUS. L.J. 607, 610–12 (1997).

<sup>63</sup> Here I am translating “appropriate” as to “take (something) for one’s own use.” NEW OXFORD AMERICAN DICTIONARY 77 (3d ed. 2010). Interestingly, the New Oxford American Dictionary’s use-in-a-sentence example of appropriate, in its verb form, is a right-of-publicity usage: “[H]is images have been appropriated by advertisers.” *Id.*

<sup>64</sup> See *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1005, 1009–10 (N.H. 2003) (rejecting claim of appropriation where a “private investigator or information broker obtains a social security number from a credit reporting agency . . . and then sells the information”).

<sup>65</sup> To the extent anyone tried to bring such a futile claim, a successful First Amendment defense would be assured. Regarding the use of the First Amendment to circumscribe the scope of the right of publicity, see *infra* Section II.D.1.

<sup>66</sup> WIS. STAT. § 995.50(2)(b) (2014).

<sup>67</sup> 9 R.I. GEN. LAWS 1956 § 9-1-28.1(a)(2) (2016).

expressly provides that there does not need to be any publication for liability to attach.<sup>68</sup> Both Wisconsin's and Rhode Island's statutes would, for example, encompass the activities of credit-reporting agencies and gossip magazines.

So if the blackletter incarnation of the right of publicity does not describe the confines of the doctrine, what does? Answering that question is the ultimate aim of this Article, and I attempt to set out an answer in Part III, further below. Next, however, I want to discuss what is troublesome about defining legal doctrine by what it is not rather than by what it is.

### B. *The Trouble with Subtractive Demarcation of Law*

To analogize to sculpture,<sup>69</sup> the right of publicity's blackletter doctrine is like a large, shapeless block of material—wood or marble, for example. That block represents the scope of prohibited conduct—that is, conduct for which liability will occur under the right of publicity. The subtrahends are tools for cleaving away portions of the block, thus giving the right of publicity its essential shape. The process is subtractive. Courts carve away what they don't want.

The subtractive or big-block-of-marble method is not how most legal doctrines are constructed. Most legal doctrines, if they are like sculptures, are made from clay. They get their essential shape from the deliberate adding of material. It is an accretive process. Liability, like clay, is added as needed, and the doctrine takes on the appropriate size and shape.<sup>70</sup>

A skilled sculptor can get to the same form whether she or he starts with a block of marble and subtracts, or starts with a void and adds clay. But the law is not indifferent to these two techniques. When doctrine is created in a common law manner, the accretive method works well, but the subtractive method can be disastrous.

To continue with the sculpture analogy, just as subtractive sculpting generates a lot of waste, so too there is a price to pay with defining the right of publicity in a subtractive manner. The most obvious problem is that it is inefficient: we must work our way through multiple levels of analysis,

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<sup>68</sup> *Id.* § 9-1-28.1(a)(2)(B)(ii).

<sup>69</sup> I am not the first to analogize the common law to sculpture. Unfortunately, other authors' uses of the metaphor seem to diverge from my broader point. *See infra* notes 70–71. I also acknowledge that, in service of a metaphor to explain law, my portrayal of sculpture is necessarily simplistic and that the artistic process of many must go far afield of my characterization.

<sup>70</sup> That is not to say that the common law results in a static doctrine that is polished, smoothed, and set into a museum. *See Note, Business Expenses, Disallowance, and Public Policy: Some Problems of Sanctioning with the Internal Revenue Code*, 72 *YALE L.J.* 108, 109 (1962) (“It may be received learning that the path of the common law resembles rather the gnarled oak than the clean lines of a Brancusi sculpture.”).

bringing in law from other areas, just to get in the neighborhood of the correct result. In the litigation context, issues that are more complicated to resolve are also generally more expensive to resolve.

Perhaps worse, the added analytical complexity makes right-of-publicity problems more prone to erratic results and thus makes the case law less scrutable for lawyers who want to provide solid advice to clients. One case is never exactly the same as another, and law defined by precedent has fuzzy boundaries. But when the law is built up additively, the fuzziness is less problematic than when the law is defined negatively. This is because we are better guided by precedent that tells us where scope of doctrine has been found to extend in the past, rather than by precedent centered around saying where it has been found not to exist.

Beyond the inefficiency, however, there is a larger and more important problem with the negative way in which right-of-publicity doctrine is structured: it leads to bad law.

With sculpture, there is generally one artist with one unitary vision of what the sculpture should look like in the end. Thus, either accretive or subtractive techniques can yield the same result. When working with marble, for instance, the sculptor does not decide where to chisel based on what chunks of the marble she or he does not like.<sup>71</sup> Instead, the sculptor chisels material away as a means of reaching a pre-envisioned shape.

Unlike a sculpture, however, which is authored by one artist, legal doctrines are authored by a crowd. An unbounded number of judges each leave a mark on the doctrine by way of trying to resolve a single case at a time.

The fact that the common law generally works well, despite being authored by an uncoordinated crowd, depends in large part on the fact that most doctrines are shaped in an additive way. Judges add liability here and there where doing so is warranted.<sup>72</sup> Doctrine can evolve in the direction of efficiency and justice despite a lack of coordination under any one individual's vision.<sup>73</sup>

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<sup>71</sup> *But cf.* Benjamin Means, *The Vacuity of Wilkes*, 33 W. NEW ENG. L. REV. 433, 448 (2011) (“In a common law system it is not unusual for courts to consider all relevant facts and to allow the legal principles to reveal themselves over time, as when a sculptor carves away everything that does not belong in the finished image.”).

<sup>72</sup> That is not to suggest, of course, that even when working in an overall accretive or additive mode the courts won't trim back on liability when circumstances change, or that they won't engage in some fine-tuning by sanding down rough spots. *Cf.* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881) (discussing how rules are modified according to backwards-constructed policy rationales).

<sup>73</sup> An example might be the addition of strict liability for defective products alongside existing negligence law. *See Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (introducing

The common law, however, does not work so well in the big-block-of-marble mode. That is the lesson of the right of publicity. Judges have been cleaving off from the right of publicity those aspects of it with which they are uncomfortable, rather than building up what is needed.

The object now left on the pedestal looks very different than it would if it had been built through addition. First, the scope of liability that remains from this subtractive mode is—as it necessarily must be—too large. There is margin between the scope of liability we care enough to add and the scope of liability we care enough to hack off. Thus, if the doctrine is shaped negatively, it will retain that margin. Second, what remains is inevitably unsound in terms of theory and policy. The scope of liability, as it persists in whole, reflects no affirmative judgment that it ought to be there, because subtracting only what is unwanted in a particular case is done without thinking through whether to retain the remainder. Thus, the doctrine ends up being misshapen—unhewed to reason, policy, or theory.

Another way to think about how the subtractive method creates bad law is to consider that wherever the right of publicity extends, it excludes some quantum of freedom. If we believe freedom should generally be the default under the law—whether out of a moral conviction about liberty or an economic ideology rooted in laissez-faire thought—then the subtractive method of developing common law doctrine is troubling: The right of publicity begins as a large block of prohibition, thus needlessly burdening freedom by requiring judges to form a juridical rationale to provide for a lack of prohibition in a particular case.

Throughout this discussion of the troubles stemming from the subtractive demarcation of law, I have spoken of the right of publicity as a common law doctrine. The same concepts, however, apply where the right of publicity is based in a statute. Right-of-publicity statutes provide, by their letter, for a sweeping scope of liability,<sup>74</sup> leaving it up to the courts to carve that scope down to some tenable size through ad hoc means.

### C. *A Preview of the Three-Rights Approach*

Next, I want to move from the abstract to the specific and discuss the subtrahends the courts have used to carve the right of publicity. Before I do, however, I want to take advantage of an opportunity that will allow my discussion of the subtrahends to perform double duty.

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strict products liability); see also Jill Wieber Lens, *Warning: A Post-Sale Duty to Warn Targets Small Manufacturers*, 2014 UTAH L. REV. 1013, 1038 (discussing *Greenman*).

<sup>74</sup> See, e.g., *supra* notes 66–68.

In Part III of this Article, I suggest a way to build a positive conceptualization of the right of publicity by conceiving of it as three particular rights. Here I want to preview those three rights. Then, as I explore the subtrahends, I will be able to point out how those subtrahends tend to be used in such a way as to not tread on those three rights.

The three separate rights are (1) an endorsement right, (2) a merchandising entitlement, and (3) a right against virtual impressment. The *endorsement right* is the right to not be featured in advertising in a way that implies an endorsement of a commercial enterprise—featuring a celebrity wearing a brand of shoes in an ad for those shoes would infringe.<sup>75</sup> The *merchandising entitlement* provides a right to not have one’s name, image, or identity marketed on coffee mugs, lunch boxes, or other merchandise.<sup>76</sup> And the *right against virtual impressment*—which can be perceived only in a limited number of jurisdictions—protects one’s image and identity from being employed, marionette-like, as a virtual actor in a film or video game.<sup>77</sup>

#### D. Subtrahends of the Right of Publicity

Now I will move from the abstract to the concrete, providing examples of how courts have used free expression guarantees, copyright preemption, and other means to excuse the imposition of liability in cases unilluminated by the right of publicity’s sprawling doctrine.

1. *The First Amendment, Freedom of Expression, and Newsworthiness.*—With the blackletter right-of-publicity doctrine being as broad as it is, the First Amendment is constantly called upon to do the frontline work of deciding in run-of-the-mill cases whether an action for right-of-publicity infringement can be maintained.<sup>78</sup> That is, instead of policing the law at its outer bounds or in its broadest strokes, the First Amendment is invoked to micromanage the application of right of publicity law and resolve routine cases.<sup>79</sup>

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<sup>75</sup> See *infra* Section III.A.

<sup>76</sup> See *infra* Section III.B.

<sup>77</sup> See *infra* Section III.C. The virtual-impressment type of right-of-publicity case is much rarer than cases of the endorsement or merchandizing type.

<sup>78</sup> See, e.g., Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. 283, 292 (2000) (“[T]he right of publicity has been somewhat unusual because, from its earliest roots in the tort law of privacy, writers have acknowledged that the First Amendment plays a limiting role. . . . [H]ow large a role has been greatly and continuously underestimated.”).

<sup>79</sup> See, e.g., Andreas N. Andrews, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 127, 130 (2013) (“Traditionally, the vast majority of defenses against right of publicity claims focused on the First Amendment.”); see also Drew Sherman,

The interaction of the First Amendment and the right of publicity is puzzling.<sup>80</sup> In the right-of-publicity context, the First Amendment is both incredibly weak and incredibly strong. It is weak because the courts have made it clear in a number of ways that the right of publicity can proceed largely unhassled by the First Amendment because of the right of publicity's economic-incentive rationale and its status as a property right.<sup>81</sup> On the other hand, one does not need to read many cases to see that the right of publicity is dogged by the First Amendment at every turn.

Let me try to sharpen this point. I am not talking about cases brought with the purpose of challenging the constitutionality of right-of-publicity statutes. Of course such cases would require the involvement of the First Amendment, just as cases challenging the constitutionality of gun laws will require involvement of the Second Amendment. But suppose that most criminal trials involving a weapons charge required Second Amendment analysis to resolve. That would be analogous to the current state of right-of-publicity litigation.

Exactly how much the First Amendment limits the right of publicity, and what tests should be used when deciding the matter, have long been vexing for courts and scholars.<sup>82</sup> One might wonder, how can courts apply the First Amendment so routinely in right-of-publicity cases without well-articulated tests or standards for doing so? The answer to this question is that it points up a false dilemma. Using the First Amendment to resolve a right-of-publicity case is not constitutional jurisprudence—not really. It is better thought of as ordinary, non-constitutional private-law jurisprudence, done under a First Amendment label. In other words, we should not be vexed by the lack of articulation of First Amendment law in the right-of-publicity context. We should be troubled instead by the lack of articulation

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*The Right of Publicity and the First Amendment Defense in California*, 9 INTELL. PROP. L. BULL. 29, 29 (2004) (“Freedom of speech under the First Amendment is a common defense to the right of publicity action.”).

<sup>80</sup> Addressing intellectual property scholars at a symposium, Mary-Rose Papandrea said, “I am a First Amendment scholar, and the right of publicity often seems in conflict with everything I know about the freedom of expression. Except for those cases involving fraudulent commercial endorsement, the right of publicity seems largely unsupportable [under First Amendment strictures].” Mary-Rose Papandrea, *Where Intellectual Property and Free Speech Collide*, 50 B.C. L. REV. 1307, 1307 (2009).

<sup>81</sup> See the discussion of *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 (1977), *infra* notes 99–105 and accompanying text.

<sup>82</sup> See, e.g., Note, *First Amendment — Right of Publicity — Missouri Supreme Court Creates “Predominant Purpose” Test for First Amendment Defenses to Publicity Right Claims*. — *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), cert. denied sub nom. *Twist v. McFarlane*, 2004 WL 46675 (U.S. Jan 12, 2004) (No. 03-615), 117 HARV. L. REV. 1275, 1275 (2004) (“The extent to which the First Amendment protects a defendant in a right of publicity case is an issue that has vexed courts and commentators . . .”).

of right-of-publicity law that leads courts constantly to invoke the First Amendment.

One way to see the nature of the problem is to look at this through the lens of constitutional avoidance. As a general matter, courts seek to avoid reaching constitutional questions by interpreting statutes in a way that prevents serious doubts about their constitutionality.<sup>83</sup> But that principle is frequently thrown to the wind in right-of-publicity cases, as the First Amendment often seems to be the first thing courts reach for in explaining why a plaintiff must lose in everyday cases.<sup>84</sup>

Some legal authorities do seek to conform to norms of constitutional avoidance insofar they may bring in free expression rights under some banner other than the First Amendment. For instance, First Amendment-type concerns may be addressed under the label of a “newsworthiness” exception or privilege.<sup>85</sup> California’s statute, for instance, has a “news” and “public affairs” exception that serves as a statute-based means of bringing free speech protections to bear without directly invoking the First Amendment.<sup>86</sup> And sometimes courts seek to introduce some sheltering vagueness by using “First Amendment” as an adjective, speaking in terms of “First Amendment considerations.”<sup>87</sup> Notwithstanding the occasional nods to constitutional avoidance, however, there is an epidemic of courts dealing with right-of-publicity litigation by directly invoking the First Amendment without first trying to re-interpret statutory language or clarify common law doctrine.<sup>88</sup>

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<sup>83</sup> See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 181–82 (explaining that the doctrine of constitutional avoidance “encourages a court to adopt one of several plausible interpretations of a statute in order to avoid deciding a tough constitutional question”). The doctrine is “also known as the ‘avoidance canon.’” *Id.* at 181.

<sup>84</sup> I discuss examples of this below.

<sup>85</sup> *Lane v. Random House, Inc.*, 985 F. Supp. 141, 146 (D.D.C. 1995) (“The newsworthiness privilege applies to advertisements for books, films, and other publications concerning matters of public interest. A plaintiff cannot recover for misappropriation based upon the use of his identity or likeness in a newsworthy publication unless the use has ‘no real relationship’ to the subject matter of the publication.” (citation omitted)).

<sup>86</sup> Cal. Civ. Code § 3344(d) (2016) (“For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).”).

<sup>87</sup> *E.g.*, *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001) (“Furthermore, to the extent that courts have been reluctant to extend the right of publicity to depictions of life-stories based on First Amendment considerations, those considerations are no less relevant whether the work in question is fictional, non-fictional or a combination of the two.” (citation omitted)).

<sup>88</sup> For an example of this, see *infra* note 97 (discussing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977)).

The U.S. Supreme Court has addressed the right of publicity and its interaction with the First Amendment only once. *Zacchini v. Scripps-Howard Broadcasting Co.* concerned a claim under Ohio law brought by “human cannonball” Hugo Zacchini, who performed his daredevil act at the Geauga County Fair in Burton, Ohio.<sup>89</sup> In a performance that lasted all of 15 seconds, Zacchini was shot from a cannon to land in a net about 200 feet away.<sup>90</sup> The dispute arose out of a visit by a freelance reporter with a video camera. When Zacchini first saw the man, he asked him not to film his performance.<sup>91</sup> And the reporter initially complied.<sup>92</sup> But the next day, on instructions from a news producer, the reporter returned to the fair and videoed the entire act, which was then shown on the local news.<sup>93</sup> Zacchini sued. The broadcast of his cannonball act apparently offended his sense of family pride: Zacchini asserted that the act, which his father invented, had been performed exclusively by the Zacchini family for the past half century.<sup>94</sup>

As plaintiff, Zacchini pursued his lawsuit on a variety of claims that ultimately proved unworkable, including the tort of conversion and a claim based on a purported common law copyright.<sup>95</sup> The Ohio Supreme Court, however, did entertain his suit on the basis of a “right to the publicity value of his performance.”<sup>96</sup> Although the Ohio high court impliedly recognized that Zacchini had proved a prima facie violation of the right of publicity, the court nonetheless ruled in favor of the broadcaster on the basis of the First Amendment.<sup>97</sup>

At the U.S. Supreme Court, Zacchini vaulted the First Amendment to a win with a 5–4 decision authored by Justice Byron White that

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<sup>89</sup> 433 U.S. at 563.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 563–64.

<sup>92</sup> *Id.* at 564.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 565 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 455 (Ohio 1976), *rev'd and remanded*, 433 U.S. 562 (1977)). The blackletter law from Ohio that the U.S. Supreme Court understood the cause of action to rest on was “first that one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation, over petitioner’s objection and in the absence of license or privilege, of petitioner’s right to the publicity value of his performance.” *Id.*; *see also Zacchini*, 351 N.E.2d at 459–60.

<sup>97</sup> *Zacchini*, 433 U.S. at 565–66. The U.S. Supreme Court noted specifically that the Ohio Supreme Court did not rest on state law, and that it was because of the lack of an adequate and independent state ground that the U.S. Supreme Court appropriately granted certiorari to decide the First Amendment issue. *Id.* at 566.

emphasized the economic-incentive rationale of the right of publicity.<sup>98</sup> Observing that perfecting the human cannonball act required great talent and effort, Justice White reasoned that “if the public can see the act free on television, it will be less willing to pay to see it at the fair.”<sup>99</sup> Broadcasting the act on TV thus “poses a substantial threat to the economic value” of Zacchini’s act.”<sup>100</sup>

In this way, Justice White’s opinion found the state’s interest in protecting an individual’s proprietary interest to encourage such entertainment<sup>101</sup> to be persuasive in allowing the right-of-publicity claim to proceed—the First Amendment notwithstanding:

Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides 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. . . . These laws . . . were intended definitely to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public. The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer’s incentive in order to encourage the production of this type of work.<sup>102</sup>

By putting the right of publicity into the same constitutional basket as copyright, the Supreme Court’s rationale gave the right of publicity a powerful shield to blunt what blows the First Amendment might strike against it. Wendy Gordon notes that because copyrights are classified as property, “courts seem willing to overlook the most basic canons of the law of free expression.”<sup>103</sup> Enforcing a prior restraint against speech, as she points out, is “one of the most troublesome things a judge can do under classic First Amendment jurisprudence. . . . Yet in copyright cases judges routinely enjoin books prior to publication without even appearing to notice the anomaly.”<sup>104</sup> And while defamation law—as a species of tort—is subject to intensive First Amendment policing, copyright—as a species of intellectual property—tends to get a free pass under the First

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<sup>98</sup> *Id.* at 575.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 573 (“[T]he State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.” (footnote omitted)).

<sup>102</sup> *Id.* at 576–77 (internal quotation marks, citations, and footnotes omitted).

<sup>103</sup> Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1536 (1993).

<sup>104</sup> *Id.* at 1536–37.

Amendment.<sup>105</sup> Thus, by analogizing the right of publicity to copyrights, *Zacchini* seems to have given the right of publicity exceptional status with regard to free expression guarantees.<sup>106</sup>

The fact that the U.S. Supreme Court has not revisited the right of publicity since *Zacchini* seems to be a clear signal that state legislatures and courts are free to apply and even expand the right of publicity with little worry about First Amendment impingement. In this vein, it is particularly telling to consider the appellate posture of *Zacchini*. The Ohio Supreme Court fettered its own common law by imposing First Amendment limitations, and the U.S. Supreme Court reversed on the basis that the First Amendment did not function to limit the Ohio law as the Ohio court had said it did.

Why then, if the U.S. Supreme Court has signaled that the First Amendment will treat the right of publicity with a light touch, have lower and state courts brought the hammer of the First Amendment down on the right of publicity over and over again? It is part of the right of publicity's dysmorphia that courts interpreting state law have reached for the First Amendment to bash the doctrine into the shape they want. That is, instead of the First Amendment providing an externally imposed outer boundary on the reach of state law, courts have been using free speech rights to laser away unwanted liability.

Examples abound, but I will start with three cases. In *Guglielmi v. Spelling-Goldberg Productions*, a 1979 California Supreme Court case, the court held that a motion picture about silent film heartthrob actor Rudolph Valentino was protected from right-of-publicity liability on the basis of the First Amendment.<sup>107</sup> In *New Kids on the Block v. News America*, a 1992 case, a California federal court used the First Amendment to halt a right-of-

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<sup>105</sup> *Id.* at 1537 (“Similarly, in libel and related areas of tort law the Supreme Court has held that the First Amendment requires giving the defendant special privileges, yet no constitutional privileges are provided when suits are brought under copyright or trademark. It is supposed that as long as ideas are free for all to use, no harm to free speech can result from forbidding the copying of expression.” (footnotes omitted)). Note that since Gordon wrote, the First Amendment has been significantly brought to bear on some of the more expansive and leading-edge invocations of trademark. *See, e.g.,* *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (“The First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark, but trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view. Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment.” (internal quotation marks, brackets, and citation omitted)).

<sup>106</sup> It should be noted that part of the rationale for copyright's quasi-immunity from the First Amendment comes from the understanding that copyright's idea/expression dichotomy and fair-use defense give copyright “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (citation omitted).

<sup>107</sup> 603 P.2d 454, 458 (Cal. 1979).

publicity claim by a boy band against a newspaper using the band members' names in connection with a pay-to-call 1-900-number survey to determine the most popular or sexiest New Kid.<sup>108</sup> In *Gionfriddo v. Major League Baseball*, a 2001 case, a California court held that the First Amendment privileged professional baseball to print game-day programs, publish websites, and release documentaries with names and identities of retired ballplayers who had never given their consent for such commercial exploitations—actions that, otherwise, would ostensibly qualify as common law right-of-publicity infringement.<sup>109</sup>

*Guglielmi*, *New Kids on the Block*, and *Gionfriddo* illustrate the wide array of cases in which the First Amendment is applied as a constraint. But note that neither *Guglielmi*, nor *New Kids on the Block*, nor *Gionfriddo* fall into any of the three categories of endorsement right, merchandising entitlement, or right against virtual impressment.<sup>110</sup>

One area in which the First Amendment has been used repeatedly to strike down right-of-publicity claims is in the context of non-fictional books. A leading case is *Matthews v. Wozencraft*, in which the Fifth Circuit decided that the First Amendment barred a former law-enforcement officer's right-of-publicity claim for portraying his life in a book and movie.<sup>111</sup> The cases do not disclose a per se rule making biographies First Amendment protected, but biography cases have led to consistent defendant victories.<sup>112</sup> While the First Amendment interest in non-fiction books is clearly strong, courts could reach the same result in these cases without confronting free speech rights at all by noting that non-fiction constitutes neither endorsement, nor merchandizing, nor virtual impressment.

A case that may illustrate how the First Amendment can be an ill fit in right-of-publicity cases is *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, in which the Eighth Circuit used the First Amendment to stop a right-of-publicity claim against the use of

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<sup>108</sup> 745 F. Supp. 1540, 1545 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992).

<sup>109</sup> 114 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001). The court stopped short of saying that a cause of action was stated for common law right-of-publicity infringement, because it proceeded straight to the constitutional analysis. *Id.* at 313.

<sup>110</sup> That is not to say that one couldn't make the argument that one or more of these cases are a close call with one of the categories. In fact, the extent to which that might be true could be seen as the unarticulated motivation for litigating the case to the appellate stage.

<sup>111</sup> 15 F.3d 432, 437 (5th Cir. 1994).

<sup>112</sup> *See* *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001) (analyzing cases and observing that "courts have been reluctant to extend the right of publicity to depictions of life-stories based on First Amendment considerations").

baseball players' names in fantasy baseball games.<sup>113</sup> Complainant C.B.C., a provider of web-based fantasy baseball services, sought declaratory judgment that its game-running services did not violate the rights of publicity held by Major League Baseball (MLB) players.<sup>114</sup> The Eighth Circuit held that C.B.C.'s conduct was, under Missouri law, sufficient for a prima facie right-of-publicity infringement case.<sup>115</sup> But the Eighth Circuit used the First Amendment to bar the claim, cutting a large swath out of the nominal scope of the right of publicity.<sup>116</sup>

The *C.B.C.* case is interesting as an example of the strained way in which *Zacchini* has been dealt with by lower courts. *C.B.C.* cited *Zacchini* for the proposition that “[t]he Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations.”<sup>117</sup> It is a peculiar citation, because the *Zacchini* case did not say rights of publicity must be balanced with the First Amendment—nor, even, is it fair to say the U.S. Supreme Court implied this.<sup>118</sup>

Nonetheless, proceeding to the First Amendment balancing it felt obliged to do under *Zacchini*, the *C.B.C.* court weighed heavily the “public value of information about the game of baseball and its players,” referring to the “substantial public interest” in the “recitation and discussion of factual data concerning the athletic performance of [MLB players].”<sup>119</sup> And the court gave little weight to economic interests of baseball players, observing that “major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”<sup>120</sup> Comparing these two sets of interests, the court concluded “CBC’s first amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity.”<sup>121</sup>

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<sup>113</sup> 505 F.3d 818, 824 (8th Cir. 2007). Fantasy baseball “allows ordinary people to act as the owner and general manager of an imaginary baseball team made up of Major League Baseball (MLB) players. . . .” Robert T. Razzano, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take Its Fantasy Ball and Go Home?*, 74 U. CIN. L. REV. 1157, 1157 (2006). The game works by allowing fantasy team owners to draft and trade players, with the winner being determined by aggregating statistics from the ballplayer’s real-world statistics. *Id.* at 1160–61.

<sup>114</sup> *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 820.

<sup>115</sup> *Id.* at 822–23.

<sup>116</sup> *Id.* at 824.

<sup>117</sup> *Id.* at 823.

<sup>118</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

<sup>119</sup> *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 823–24 (internal quotation marks and citation omitted).

<sup>120</sup> *Id.* at 824.

<sup>121</sup> *Id.*

Viewed exclusively through a First Amendment lens, the *C.B.C.* decision is strange when considered alongside other right-of-publicity decisions. For instance, a right-of-publicity cause of action has been upheld in the cases of celebrity identities being used on buttons, posters, and t-shirts<sup>122</sup>—all of which are much more straight-forwardly within the First Amendment sphere, being vehicles of viewpoint-bearing communication, than the game of fantasy baseball.<sup>123</sup> Notably, however, the use of player names in fantasy baseball does not fit easily within the categories of endorsement, merchandizing, or virtual impressment.

The same free speech interests upheld by the First Amendment in right-of-publicity cases are sometimes pursued under other labels. In Minnesota, for instance, the courts recognize a “newsworthiness defense” to the right of publicity, which “is akin to a First Amendment privilege and arises from the same roots as that privilege.”<sup>124</sup> The Minnesota case of *Dryer v. National Football League* held that a former football player’s right-of-publicity claim for the use of old film footage in new documentary-style television productions was barred by the newsworthiness privilege<sup>125</sup>—notwithstanding that the passage of three or four decades would seem to take subject matter out of the category of “news.”<sup>126</sup> But while an ill fit for newsworthiness, *Dryer* makes sense as a case that involves neither endorsement, nor merchandizing, nor virtual impressment.

New York has recognized a newsworthiness exception as well—and has also applied it in surprisingly broad ways. In *Stephano v. News Group Publications, Inc.*, a model plaintiff’s right-of-publicity claim was rejected where photos for which he posed were used for more than the one article to which he had agreed.<sup>127</sup> The photo sued over featured the plaintiff modeling a bomber jacket. The newsworthiness value of the photo—the jacket had a “‘fun fur’ collar” and would be on sale the following week at Bloomingdale’s<sup>128</sup>—seems strained, to say the least. But it does seem clear

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<sup>122</sup> See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (posters); *Bi-Rite v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983) (buttons); *Comedy III Prods. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (t-shirts). These cases are discussed below. See *infra* notes 224–26 and accompanying text.

<sup>123</sup> Cf. *Cohen v. California*, 403 U.S. 15, 26 (1971) (overturning, on the basis of the First Amendment, a criminal conviction of a man for wearing a jacket bearing the words “Fuck the Draft” in a courthouse).

<sup>124</sup> *Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014).

<sup>125</sup> *Id.*

<sup>126</sup> Plaintiff Fred Dryer played football in the NFL from 1969 to 1981. *Id.* at 1186.

<sup>127</sup> *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 581–82 (N.Y. 1984).

<sup>128</sup> *Id.* at 582.

that as an editorial photo spread as opposed to an ad, the usage tread on none of the rights of endorsement, merchandizing, or virtual impressment.

In the overall calculus, the cases reveal that the right of publicity is not merely *constrained* by free speech interests. The doctrine gets much of its *essential shape* from courts' habitual use of free-speech-type defenses, even as the application of these defenses is often incoherent.

2. *Copyright Preemption.*—Another subtrahend that cuts the scope of the right of publicity down to a tenable size is copyright preemption. Compared with the ubiquity of free speech jurisprudence in right-of-publicity decisions, copyright preemption is more rare.<sup>129</sup> Nonetheless, copyright preemption seems to play a substantial role as a pressure-relief valve for the extreme expansiveness of the right of publicity's blackletter doctrine. The fact is, some claims that are at odds with our right-of-publicity intuitions do not lend themselves to disposal through a free speech defense.

A brief background on copyright law may be helpful before delving into the role of copyright preemption in shaping the right of publicity: Copyright provides a monopoly right over original works of authorship.<sup>130</sup> Works of authorship is a broad category.<sup>131</sup> It includes books, poems, photographs, paintings, sculptures, and other modes of expression of natural persons.<sup>132</sup> There is no need to apply for a copyright—the copyright in a work of authorship arises instantaneously when the work is “fixed in any tangible medium of expression.”<sup>133</sup> That means, for instance, that as soon as creative expression is written down on paper, recorded to tape, captured on film, or stored digitally by a computer, copyright protection commences.

With the exception of sound recordings made before February 15, 1972, copyright law in the United States is exclusively federal<sup>134</sup> and

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<sup>129</sup> See Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U. CAL. DAVIS L. REV. 199, 225 (2002) (“[F]ew courts have found that copyright preempts the right of publicity. . . .”).

<sup>130</sup> See 17 U.S.C. § 102(a) (2012) (copyright provided for “original works of authorship fixed in any tangible medium of expression”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

<sup>131</sup> See § 102(a)(1)–(8).

<sup>132</sup> See, e.g., *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1059 (C.D. Cal. 2000) (discussing breadth of subject matter of copyright).

<sup>133</sup> See § 102(a); see also *Express, LLC v. Fetish Grp., Inc.*, 424 F. Supp. 2d 1211, 1218 (C.D. Cal. 2006) (“[A] copyright exists as soon as the original expression is fixed in a tangible medium.”).

<sup>134</sup> See § 301 (exclusivity of federal law in copyright); excepting sound recordings made before February 15, 1972); Holly M. Sharp, Comment, *The Day the Music Died: How Overly Extended Copyright Terms Threaten the Very Existence of Our Nation's Earliest Musical Works*, 57 EMORY L.J.

preempts state law. There is an express preemption provision at 17 U.S.C. § 301.<sup>135</sup> In addition, generally applicable theories of federal preemption—not based on an express statutory provision—would appear to apply to copyright as well.<sup>136</sup> Like other invocations of preemption in litigation, copyright preemption is an affirmative defense.<sup>137</sup>

A leading case regarding the application of copyright preemption to a right-of-publicity claim is the Ninth Circuit’s 2006 case, *Laws v. Sony Music Entertainment, Inc.*<sup>138</sup> The case is particularly interesting because its awkward, improbable reasoning regarding preemption demonstrates how right of publicity’s doctrinal crisis can put other law under strain.

The dispute arose out of the 2002 song “All I Have,” recorded by Jennifer Lopez and LL Cool J for Epic Records. That song used a sample containing the voice of R&B singer Debra Laws, from her 1981 ballad “Very Special,” an Elektra Records release.<sup>139</sup> Epic’s parent, Sony Music Entertainment, obtained a license for the sound-recording sample from Warner Special Products, Inc., which acted as agent for Elektra/Asylum Records, owner of the sound-recording copyright in “Very Special.”<sup>140</sup> But although Sony got the license for the sound-recording copyright, Sony did not seek permission from Laws to use her voice, nor was Laws compensated in any way for Sony’s usage.<sup>141</sup>

Based on the use of her voice in “All I Have,” Laws sued Sony for common law right-of-publicity misappropriation and misappropriation under California’s right-of-publicity statute, Civil Code § 3344.<sup>142</sup> Because the blackletter scope of the right of publicity is so broad, Laws had a clear-

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279, 284–88 (2007) (explaining that copyright law applied to sound recordings made before February 15, 1972).

<sup>135</sup> § 301.

<sup>136</sup> See Rothman, *supra* note 129, at 208, 242–43 (discussing the applicability of generally applicable preemption theories derived from the Supremacy Clause in the copyright context).

<sup>137</sup> See, e.g., *Smith v. CSX Transp., Inc.*, No. 14 C 5704, 2015 WL 350981, at \*1 (N.D. Ill. Jan. 27, 2015) (holding that preemption is an affirmative defense in the context of the Interstate Commerce Commission Termination Act of 1995); 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 18:8.50 (2016) (noting that copyright preemption is an affirmative defense).

<sup>138</sup> 448 F.3d 1134 (9th Cir. 2006).

<sup>139</sup> *Id.* at 1136, 1138, 1143.

<sup>140</sup> *Id.* at 1136; Shirley Halperin, *Who Destroyed Epic Records?*, BILLBOARDBIZ (Nov. 17, 2010, 12:00 AM), <http://www.billboard.com/biz/articles/news/1197460/who-destroyed-epic-records> [<https://perma.cc/P67W-JDN4>] (Epic owned by Sony). The *Laws* court reported that “[t]he agreement required Sony to include a credit stating, ‘Featuring samples from the Debra Laws recording “Very Special” in any reproduction.’” *Laws*, 448 F.3d at 1136. Interestingly, “All I Have,” when purchased from iTunes, does not include this credit. (Digital file information on file with author.)

<sup>141</sup> *Laws*, 448 F.3d at 1136.

<sup>142</sup> *Id.*

cut violation to sue over: There was a commercial exploitation. And it was of Laws' voice, identifiable as Laws'.

The *Laws* court declined to say anything about whether a claim had been stated. Instead, the opinion skipped straight to the affirmative defense of copyright preemption. The court applied a two-part test for preemption under 17 U.S.C. § 301, copyright law's express preemption provision.<sup>143</sup> According to the *Laws* court, a claim is preempted under § 301 if (1) the subject matter of the plaintiff's right-of-publicity claims comes within the subject matter of copyright and (2) the state-law rights asserted by the plaintiff are equivalent to those created under the federal copyright statute.<sup>144</sup>

The court held Laws' claim preempted. The court's analysis, particularly with regard to the first prong, is largely inscrutable. The court seemed to be persuaded by Sony's argument that "once a voice becomes part of a sound recording in a fixed tangible medium it comes within the subject matter of copyright law."<sup>145</sup> This cannot be right, however. If this were how a court is to construe the subject matter of copyright, then almost all right-of-publicity claims would be preempted by copyright.<sup>146</sup> All uses of voices and likenesses in print, on film, in audio recordings, or affixed to any lunch box, coffee mug, or t-shirt would be preempted. To take just one example, Zacchini's claim regarding his human cannonball act would be preempted under the *Laws* logic, since his performance was fixed on film.<sup>147</sup> In fact, with the exception of perhaps a handful of live-performance cases, every right-of-publicity case arising since 1989, when copyright law changed so that copyright attaches immediately upon fixation,<sup>148</sup> involves the plaintiff's name, likeness, voice, or other indicia of identity being incorporated into a copyrighted work.

In trying to make sense of the *Laws* court's work, one might initially suspect that what the court was actually talking about is an implied license theory—that Laws impliedly licensed her right of publicity as part of her recording deal with Elektra. That, however, cannot be the explanation, because it was apparently undisputed in the case that Laws had not given Elektra a sublicensable right to exploit her voice in the future beyond the

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See id.* at 1139.

<sup>146</sup> That is, assuming they also meet the second prong of the test. That second prong does not winnow the field either, however, as I discuss next.

<sup>147</sup> *See supra* note 89 and accompanying text regarding the *Zacchini* case.

<sup>148</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §§ 7(e), 9(a), 102 Stat. 2858–59 (codified at 17 U.S.C. §§ 405, 408(a) (2012)) (neither notice nor registration is required).

distribution of her own records.<sup>149</sup> Thus an implied license theory cannot explain the court's holding.<sup>150</sup>

The *Laws* court strained to distinguish various cases that seem incompatible with its holding. A particular problem for the *Laws* court were two Ninth Circuit cases that upheld right-of-publicity claims for commercial exploitation of the plaintiff's voice: one where Bette Midler's voice was imitated in a Ford television advertisement and another where Tom Waits' voice was imitated in a Doritos radio commercial.<sup>151</sup> The *Laws* court distinguished both on the basis that the voices were imitated, rather than copied verbatim.<sup>152</sup> The court's implication was that the imitated voices were not the subject of copyright. Yet in both *Midler* and *Waits*, the imitation voices were fixed in the sound recording for the advertisement, and as such, they were then within the subject matter of copyright—at least as the *Laws* court had construed the concept.

Another case that would seem to be incompatible with the *Laws* holding was *Toney v. L'Oreal USA, Inc.*<sup>153</sup> There, the Seventh Circuit held that model June Toney's right-of-publicity claim was not preempted by copyright where she sued the L'Oreal cosmetics company for using her image in advertising and on packaging after the expiration of L'Oreal's endorsement deal with Toney.<sup>154</sup> The *Laws* court clumsily attempted to distinguish *Toney* on the grounds that the defendants in that case had each, at some point, owned the copyright to the photo bearing the plaintiff's likeness.<sup>155</sup> By contrast, Sony had only licensed the "Very Special" sound recording, not owned it outright.<sup>156</sup> This logic, if taken seriously, would have bizarre implications. For one, it would mean that copyright licensees have a greater ability to exploit a copyrighted work than the copyright owner does.

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<sup>149</sup> *Laws*, 448 F.3d at 1143–44.

<sup>150</sup> An additional reason the implied license theory does not greatly help explain the court's holding is that implied license is its own robust defense to right-of-publicity infringement. So, a court wanting to invoke the implied-license concept could do so straightforwardly, without engaging the issue of copyright preemption.

<sup>151</sup> Those cases are *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (rejecting a preemption argument to uphold a right-of-publicity claim based on the imitation of Bette Midler's voice in a Ford commercial) and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1112 (9th Cir. 1992) (upholding claim for the imitation of musician Tom Waits' voice in a Doritos commercial).

<sup>152</sup> *Laws*, 448 F.3d at 1140–41.

<sup>153</sup> 406 F.3d 905 (7th Cir. 2005).

<sup>154</sup> *Id.* at 908–10.

<sup>155</sup> *Laws*, 448 F.3d at 1142.

<sup>156</sup> *See id.*

While the *Laws* case is impossible to make sense of on its own terms, its result, along with the results of the cases it sought to distinguish, conforms without difficulty to a three-rights framework view of the right of publicity. *Midler*, *Waits*, and *Toney* were each endorsement cases, thus a right-of-publicity cause of action was upheld, notwithstanding the specter of copyright preemption. The usage in *Laws*, however, does not fit as endorsement, merchandizing, or virtual impressment.<sup>157</sup>

Many cases have followed the illogic of *Laws* in using copyright preemption against right-of-publicity claims. And they can be reconciled in the same way. In *Aronson v. Dog Eat Dog Films, Inc.*, a 2010 case, plaintiff Ken Aronson took video of himself and a friend during a trip to England.<sup>158</sup> When the video was used in Michael Moore's feature-film documentary *Sicko*, Aronson sued for copyright infringement and right-of-publicity infringement. The court held his right-of-publicity claim was preempted by copyright since his voice and image were fixed in a copyrighted videotape.<sup>159</sup> In another 2010 case, *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, an adult film performer, director, and producer sued for right-of-publicity infringement over the unauthorized distribution and marketing of films he had made and performed in.<sup>160</sup> The court held that his claim was preempted by copyright because the subject of the alleged misappropriation was "contained within a copyrighted medium."<sup>161</sup> In *Ray v. ESPN, Inc.*, a 2014 Missouri case, Steve "Wild Thing" Ray, a former professional wrestler, sued over television network ESPN's use of film clips that depicted him in the ring.<sup>162</sup> The court in *Ray* followed *Laws* in holding that since Ray's likeness was contained within a copyrighted film, it was preempted by copyright.<sup>163</sup> The most sensible explanation for the maladroitness in these cases is that the right of publicity's stated blackletter scope is erroneously broad, and the right of publicity does not, in fact, generally create liability for commercial exploitation of indicia of identity of natural persons. Commercial use of a person's identity in advertising does—as in the *Midler*, *Waits*, and *Toney* cases. But the gravamina of the other cases fail to fit within the advertising/endorsement ambit or within the scope of merchandizing or virtual impressment.

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<sup>157</sup> The closest would be virtual impressment, a right-of-publicity species implicitly recognized by at least some courts. See *infra* Section III.C.

<sup>158</sup> 738 F. Supp. 2d 1104, 1108 (W.D. Wash. 2010).

<sup>159</sup> See *id.* at 1114–16.

<sup>160</sup> 617 F.3d 1146, 1149–50 (9th Cir. 2010).

<sup>161</sup> *Id.* at 1153 (quoting *Laws*, 448 F.3d at 1141).

<sup>162</sup> No. 13–1179–CV–W–SOW, 2014 WL 2766187, at \*1 (W.D. Mo. Apr. 8, 2014), *aff'd*, 783 F.3d 1140 (8th Cir. 2015).

<sup>163</sup> *Id.* at \*5.

So, in the end, *Laws* and the cases following it got to the right result, but copyright preemption did not have—and logically could not have had—anything to do with it.

There is an alternative way, proposed by David Nimmer, to try to make sense of the work of the courts on copyright preemption and the right of publicity. But the approach is ultimately unconvincing. Nimmer's suggestion is that when a use of a person's identity is in an advertisement or is otherwise "for purposes of trade," then it is not preempted, whereas if it is for "expressive works," then a right-of-publicity claim is preempted.<sup>164</sup> The first problem with this view is that, as far as copyright is concerned, advertisements *are* expressive works, and in terms of what is protectable, copyright does not draw a distinction between advertisements and works with a higher "expressive" value.<sup>165</sup> Copyright, in fact, famously refuses to draw a distinction between works on the basis of low or high artistic value.<sup>166</sup> If copyright does not observe such a distinction in terms of protectability, why should it in terms of preemption? The second, more general problem with Nimmer's view is that it is needlessly ad hoc and complex, as Nimmer's theory ultimately takes the form of an exception to an exception. The more cogent explanation is simply that the right of publicity itself does not extend liability to portrayals in non-advertising, non-merchandizing, non-virtual-impression contexts.

3. *Other Subtrahends.*—Beyond the application of free speech rights and copyright preemption, there are other means occasionally employed by the courts to avoid allowing plaintiffs to proceed where a right-of-publicity claim, though supported by the nominal blackletter doctrine, is nonetheless at odds with judicial intuition.

Many courts have applied an "incidental use" exception to the right of publicity. For instance, in *Benally v. Hundred Arrows Press, Inc.*,<sup>167</sup> a court in New Mexico cited "incidental use" in granting summary judgment for a defendant publisher who used a photograph of the plaintiff in an article about the photographer.<sup>168</sup> The *Benally* use is one that would fail to

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<sup>164</sup> See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][3][b][iv][I] (Matthew Bender, rev. ed. 2016); see also *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1029–30 (3d Cir. 2008) (discussing Nimmer's theory).

<sup>165</sup> See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (holding that advertisements are protected by copyright).

<sup>166</sup> Oliver Wendell Holmes, Jr. wrote, "It would be a dangerous undertaking for persons trained only [in] the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." See *id.* at 251.

<sup>167</sup> 614 F. Supp. 969 (D.N.M. 1985), *rev'd on other grounds*, 858 F.2d 618 (10th Cir. 1988).

<sup>168</sup> *Id.* at 979. The court's analysis appears to arise from misconstruing the Restatement's mention of "incidental."

establish a prima facie case under the three-rights view of the right of publicity.

Other courts seem to have selectively ignored the law or facts—a phenomenon that one could call “judge nullification” or “bench nullification.”<sup>169</sup>

An example of selectively ignoring the law can be found in *Landham v. Lewis Galoob Toys, Inc.*<sup>170</sup> Actor Sonny Landham sued a toy company under Kentucky law over his apparent depiction in the form of an action figure for Billy—a camo-clad, machine-gun-wielding operative whom Landham portrayed in the 1987 movie *Predator* alongside Arnold Schwarzenegger.<sup>171</sup> The court affirmed summary judgment against the plaintiff’s statutory right-of-publicity cause of action on the basis that the identity of the plaintiff, whom the court derided as a “fringe actor”<sup>172</sup> was not shown to have “significant commercial value.”<sup>173</sup> In support of its assertion that the law required this showing, the court cited common law cases not considering the Kentucky statute.<sup>174</sup> Yet Kentucky’s statute very clearly has no requirement that a person be a celebrity or that her or his identity have significant commercial value.<sup>175</sup>

An example of spuriously characterizing the facts of a case to avoid right-of-publicity liability can be found in *Polydoras v. Twentieth Century Fox Film Corp.*,<sup>176</sup> in which the California Court of Appeal considered a right-of-publicity claim<sup>177</sup> brought against a studio for the film *The Sandlot*.<sup>178</sup>

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<sup>169</sup> With this phrasing, I mean to draw an analogy to jury nullification. The phrase “judge nullification” has been employed sporadically in the past. See, e.g., Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 831 & n.213 (1997) (using the phrase to describe judge’s departure from doctrine in certain scientifically complex cases where fairness concerns sided with plaintiffs in toxic tort cases). I thank Greg Gordon for suggesting the phrase “bench nullification.”

<sup>170</sup> 227 F.3d 619 (6th Cir. 2000).

<sup>171</sup> *Id.* at 621; PREDATOR (1987), IMDB, <http://www.imdb.com/title/tt0093773/> [<https://perma.cc/2SMN-C8XV>].

<sup>172</sup> *Landham*, 227 F.3d at 621.

<sup>173</sup> *Id.* at 624.

<sup>174</sup> *Id.*

<sup>175</sup> KY. REV. STAT. ANN. § 391.170(1) (2017) (“The General Assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation.”). Confirming the plain language of the statute is a separate provision that provides for a fifty-year post-mortem right for a person who is a “public figure.” *Id.* § 391.170(2).

<sup>176</sup> 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997).

<sup>177</sup> The court generally referred to the plaintiff’s common law claim as one for “invasion of privacy” or “commercial appropriation.” *Id.* at 208.

<sup>178</sup> *Id.*

In the movie, a “comedic coming-of-age story set in . . . the 1960’s,”<sup>179</sup> a new kid moves into a San Fernando, California neighborhood and tries to fit in by joining the local sandlot baseball team.<sup>180</sup> Hijinks ensue. The film was well received by many. Famed film critic Roger Ebert gushed about the absorbing world created by the movie.<sup>181</sup> Ironically, Ebert also wrote that the film doesn’t have “any connection with the humdrum reality of the boring real world,” and he saluted its ability to “tap directly into a vein of nostalgia and memory that makes reality seem puny by comparison.”<sup>182</sup>

Contrary to how Ebert saw it, plaintiff Michael Polydoros perceived a very tight connection between the movie and real life. In particular, Michael Polydoros thought his resemblance to the film’s “Michael Palledorous” character was no coincidence.<sup>183</sup> Polydoros had a number of compelling facts on this score. Both the plaintiff and the character grew up in a similar neighborhood in the early 1960s.<sup>184</sup> Both the plaintiff and the character played sandlot baseball with friends.<sup>185</sup> Both swam in a community pool.<sup>186</sup> Moreover, as the court acknowledged, “A photograph of [the plaintiff] dating from the 1960’s is similar to a photograph of the Palledorous character in the movie, right down to appellant’s eyeglasses and the color and design of his shirt.”<sup>187</sup> The character and the plaintiff also shared the characteristic—according to the court—of being “somewhat obstreperous.”<sup>188</sup>

Given these compelling similarities between *The Sandlot*’s world and the real world, it will come as no surprise that writer–director David Mickey Evans and the plaintiff were schoolmates when growing up.<sup>189</sup>

Overall, the undisputed facts clearly showed that Polydoros’ name, identity, and likeness had been appropriated. In terms of alleging a prima facie case under the blackletter law, Polydoros had it made. Under

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<sup>179</sup> *Id.*

<sup>180</sup> See Roger Ebert, *The Sandlot*, ROGEREBERT.COM (Apr. 7, 1993), <http://www.rogerebert.com/reviews/the-sandlot-1993> [<https://perma.cc/L6X3-GLUN>].

<sup>181</sup> Ebert explained what happened when one character hit a line drive: “I ducked and held up my mitt, and then I realized I didn’t have a mitt, and it was then I also realized how completely this movie had seduced me with its memories of what really matters when you are 12.” *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Polydoros*, 79 Cal. Rptr. at 208. It is not clear from the case whether there was any difference in pronunciation in the names of the character and the plaintiff.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

California common law, “an individual’s right to publicity is invaded if another appropriates for his advantage the individual’s name, image, identity or likeness.”<sup>190</sup> It cannot seriously be disputed that Polydoros had proved his case by this standard. Yet the intuitive result would be that no right-of-publicity violation should lie.

The *Polydoros* court could have confronted head-on the uncomfortable breadth of the blackletter law and its failure to conform to a collective intuition about the right of publicity. It did not. Instead, the court proceeded to boldly draw one implausible factual inference after another until it reached the result that made intuitive sense.<sup>191</sup>

The court explained “there was a marked difference in age and appearance between our appellant, the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous.”<sup>192</sup> The court said this notwithstanding that the film portrayed events happening thirty years earlier.<sup>193</sup> “No person seeing this film could confuse the two,”<sup>194</sup> the court then asserted—a conclusion belied by, among other things, the court’s mention that after the movie people had begun calling the plaintiff by the movie character’s nickname, “Squints.”<sup>195</sup>

As with preposterously reasoned cases using the banner of the First Amendment or copyright preemption, the result of *Polydoros* can be justified with reference to a particularized depiction of the right of publicity as three distinct rights: the studio’s use of Polydoros’ indicia of identity was neither for endorsement, nor merchandizing, nor virtual impressment.

<sup>190</sup> *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 649 (Cal. Ct. App. 1996).

<sup>191</sup> The *Polydoros* opinion’s factual analysis is reminiscent of the “Jedi mind trick.” In the original *Star Wars* movie, sage hero and Jedi knight Obi-Wan Kenobi, traveling with Luke Skywalker and two fugitive droids, is stopped by stormtroopers of the evil Empire. Waiving his hand and speaking in a soothing voice, Obi-Wan says to the stormtroopers, “These are not the droids you’re looking for.” Mesmerized, the lead stormtrooper announces, “These are not the droids we’re looking for.” Radio9704, *These Aren’t the Droids You’re Looking for...*, YOUTUBE (Aug. 9, 2014), <https://www.youtube.com/watch?v=532j-186xEQ> [<https://perma.cc/A8DN-V4FU>]; see also Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY 123, 132 n.26 (2001) (referencing the scene in analogy to avoiding questions of gender identity); Anne E. Mullins, *Jedi or Judge: How the Human Mind Redefines Judicial Opinions*, 16 WYO. L. REV. 325, 325–26 (2016) (referencing the scene in discussing how the persuasiveness of judicial writing can work on an unconscious level).

<sup>192</sup> *Polydoros*, 79 Cal. Rptr. 2d at 210 (Cal. Ct. App. 1997). In this, the court cited to *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891 (Cal. Ct. App. 1985), which made a similar move with regard to the plaintiff’s age.

<sup>193</sup> Downplaying the similarity of names—Michael Polydoros and Michael Palledorous—notice that the court replaced the character name “Michael” with “Squints,” which was the character’s nickname. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 208.

## III. RE-CONCEPTUALIZING ONE RIGHT OF PUBLICITY AS THREE

If right-of-publicity issues are to become more predictable and better moored in sound policy and theory, we need to define the right of publicity positively. We must be able to say what it is, not merely what it is not. That is the aim of this Part, to build a positively-described picture of the right of publicity—self-limited, such that it does not require free speech defenses, copyright preemption, or other exceptions to give it its essential shape.

To do this, I divide the right of publicity into three separate rights: (1) the endorsement right, (2) the merchandizing entitlement, and (3) the right against virtual impressment. For clarity in developing the law going forward, it would be best for courts to regard the violation of each to be a distinct cause of action.

A couple of caveats. First, in attempting to delineate these three rights, I mean to take no normative position on any of them. It is my intent to leave entirely open the question of whether judicial or statutory recognition of any of them is sound policy. My aim, instead, is to bring analytical clarity to thinking about the law in this area by providing a structure that imposes some meaningful order on the tangle of cases that currently are found under the banner of the right of publicity. In fact, far from seeking to champion or to oppose any of these rights, it is my hope that bringing some clarity to the doctrine might enable a more productive and focused debate on whether their legal recognition is a good idea.

Second, although this may be obvious, I wish to point out that I am not making the claim that every single right-of-publicity case corresponds with this three-rights schema. Rather, I assert that the three-rights approach shows strong general correspondence to the results of cases, and viewing cases through the three-rights lens reveals a great deal of coherence and uniformity. Cases that do not conform might, of course, be thought of as erroneous. Alternatively, they might be seen as purposefully nonadherent, either seeking deliberately to recognize new areas of exclusive rights, or interposing principled objections to a relatively new legal entitlement whose wisdom remains very much a live issue.

A. *The Endorsement Right*

The right of publicity has been consistently invoked with success where the plaintiff has been unwittingly contrived to endorse commercial goods or services. To sum up the corresponding right in a Restatement-style manner:

*Persons have a right not to be represented as making a commercial endorsement or to appear in an advertisement in such a way that suggests endorsement absent their specific consent. An identifiable use of a person in*

*advertising for a product or service or on product packaging is generally a violation.*

In terms of the dignitary and reputational interests the endorsement right protects, it shows a marked kinship with defamation, false light, common law trademark, and the Lanham Act.<sup>196</sup>

The right not to be portrayed as endorsing a commercial enterprise applies regardless of whether the person actually uses or recommends that product.<sup>197</sup> Thus, it would be a violation of the endorsement right for a boot manufacturer to distribute an advertisement with a photo identifiably depicting the plaintiff where the photo has been digitally altered to make it appear that the plaintiff was wearing the defendant's brand of boots, when, in fact, the plaintiff was not actually wearing those boots. But it also would be a violation of the endorsement right to use in an advertisement an unaltered photo identifiably depicting a person wearing the defendant's boots, even when that person actually wore the defendant's boots.

The existence of this endorsement right is well-supported by case law in many jurisdictions. One of the earliest uses of a right-of-publicity-type claim was for endorsement.<sup>198</sup> In the 1905 case of *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court recognized a cause of action for "the publication of one's picture without his consent by another, as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser."<sup>199</sup> A picture of the plaintiff was used in a newspaper ad for life insurance, attributing to him the entirely fictional sentiment that he was glad he purchased insurance during the "healthy and productive period" of his life.<sup>200</sup> The plaintiff's picture was juxtaposed with a picture of a sickly looking man said to regret that he had not purchased insurance when he could have.<sup>201</sup>

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<sup>196</sup> In fact, the action for false endorsement under the Lanham Act § 43(a)(1)(A) has considerable overlap, but the right of publicity's endorsement/advertising liability is substantially broader. *See, e.g.,* *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1014 (3d Cir. 2008) (noting that to make out a false endorsement case under § 43(a), "a plaintiff must show that: (1) its mark is legally protectable; (2) it owns the mark; and (3) the defendant's use of the mark to identify its goods or services is likely to create confusion concerning the plaintiff's sponsorship or approval of those goods or services").

<sup>197</sup> *See* Madow, *supra* note 2, at 231 (observing that the right of publicity can be used to enjoin truthful representations about the association of a given celebrity and a given product).

<sup>198</sup> *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>199</sup> *Id.* Note that the court labeled the claim an invasion of the "right of privacy." *Id.* at 69. The court also, however, obliquely referenced a "right of publicity." *Id.* at 70.

<sup>200</sup> *Id.* at 68–69.

<sup>201</sup> *Id.*

The recognized birth-case of the right of publicity, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>202</sup> also acknowledged the essence of the endorsement right by specifying that the right of publicity is a means of allowing people to “receive[] money for authorizing advertisements.”<sup>203</sup>

Many of the best-known right-of-publicity cases have been endorsement-right cases. For instance, the 1974 Ninth Circuit case of *Motschenbacher v. R. J. Reynolds Tobacco Co.* upheld a right-of-publicity cause of action for a magazine advertisement for Winston cigarettes.<sup>204</sup> The court characterized the claim as concerning “the alleged misappropriation of [the plaintiff’s] name, likeness, personality, and endorsement.”<sup>205</sup>

Right-of-publicity cases that deal with endorsement rights may not explicitly categorize themselves as such. In the 2001 case *Downing v. Abercrombie & Fitch*, the Ninth Circuit upheld a right-of-publicity cause of action brought by famed surfers against a trendy clothing retailer for their depiction in a photograph used in an endorsement context.<sup>206</sup> The plaintiff’s photo appeared in a print publication, *Abercrombie & Fitch Quarterly*, that was styled as a magazine but which functioned in essence as a catalog to which one subscribed.<sup>207</sup> The right-of-publicity claim in the case was analyzed without any reference to endorsement being the crux of the action.<sup>208</sup> Yet the importance of the endorsement aspect of the case can be discerned in other ways. For one, the endorsement aspect was central to the court’s analysis of the surfers’ Lanham Act § 43(a)<sup>209</sup> claim for “confusion and deception indicating sponsorship of Abercrombie goods.”<sup>210</sup> That discussion centered on whether consumers were likely to be confused in thinking that the plaintiff surfers had endorsed Abercrombie & Fitch.<sup>211</sup> The court concluded that “[a]ppellants have raised a genuine issue of material fact concerning a likelihood of confusion as to their endorsement”; thus the

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<sup>202</sup> 202 F.2d 866, 866 (2d Cir. 1953). For the full discussion of this case, see *supra* note 27 and accompanying text.

<sup>203</sup> *Haelan*, 202 F.2d at 868.

<sup>204</sup> 498 F.2d 821 (9th Cir. 1974).

<sup>205</sup> *Id.* at 822 (italics added).

<sup>206</sup> 265 F.3d 994, 1008 (9th Cir. 2001).

<sup>207</sup> *See id.* at 999.

<sup>208</sup> *See id.* at 1001–03.

<sup>209</sup> 15 U.S.C. § 1125(a) (2012).

<sup>210</sup> *Downing*, 265 F.3d at 999. The Lanham Act § 43(a) claim analysis is found at 265 F.3d at 1007–09.

<sup>211</sup> *See id.* at 1009.

court reversed the district court's dismissal of the § 43(a) claim on summary judgment.<sup>212</sup>

The *Downing* court's concern with endorsement can also be discerned, at least implicitly, in its rejection of Abercrombie & Fitch's First Amendment defense to the right-of-publicity claim. Although the photograph of the plaintiff surfers was used in combination with a journalistic-style story about surfing,<sup>213</sup> the court rejected, not very plausibly, the idea that the photos had editorial value,<sup>214</sup> saying the photos "d[id] not contribute significantly to a matter of the public interest."<sup>215</sup> Strangely, the court's ad hoc constitutional analysis did not draw at all on the U.S. Supreme Court's teachings on First Amendment protection for commercial speech in reaching its result. The court's short shrift with the First Amendment suggests that the analysis was not, in substance, about rejecting constitutional concerns, but about separating this case, as an endorsement-right case, from cases where an endorsement was not part of the allegations.

The existence of the endorsement right finds support, as well, in the American Law Institute's Restatement of Unfair Competition.<sup>216</sup> It should be noted that, like other blackletter pronouncements about the right of publicity, the Restatement's description is overbroad. Yet the Restatement does specify that embraced within its conception of the right of publicity are situations in which a person's identity is "used in advertising the user's goods or services."<sup>217</sup>

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<sup>212</sup> *Id.* at 1010.

<sup>213</sup> *Id.* at 1000 ("The Spring 1999 Quarterly, 'Spring Fever,' contains a section entitled 'Surf Nekkid.' The 'Surf Nekkid' section includes an article recounting the history of surfing. Abercrombie also included a 700-word story, entitled 'Your Beach Should Be This Cool,' describing the history of Old Man's Beach at San Onofre, California. The following page exhibits the photograph of Appellants. The two pages immediately thereafter feature [clothing for sale].").

<sup>214</sup> *Id.* at 1002–03. ("In the current action, there is a tenuous relationship between Appellants' photograph and the theme presented. Abercrombie used Appellants' photograph essentially as window-dressing to advance the catalog's surf-theme. The catalog did not explain that Appellants were legends of the sport and did not in any way connect Appellants with the story preceding it. In fact, the catalog incorrectly identifies where and when the photograph was taken. We conclude that the illustrative use of Appellants' photograph does not contribute significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First Amendment defense. Accordingly, we reverse the district court's grant of summary judgment in favor of Abercrombie.").

<sup>215</sup> *Id.* at 1002.

<sup>216</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–47 (1995).

<sup>217</sup> See *id.* § 46 ("One 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 . . . ."); *id.* § 47 ("The name, likeness, and other indicia of a person's identity are used 'for purposes of trade' under the rule stated in § 46 if they are used in advertising the user's goods or services . . . .").

The Restatement's use of the word "advertising" brings up an important clarifying point. Despite speaking of "use[] in advertising" rather than "endorsement," the Restatement nonetheless seems to be getting at the endorsement concept. But the terms "advertising" and "endorsement" are not equivalent. The word "advertising" does not get at the essence of the matter. There are uses in advertising that would not imply an endorsement, and which, correspondingly, are not right-of-publicity violations. For instance, there is no implied endorsement in using a person's identity in advertising for a motion picture where that person is a subject of the motion picture. The same would be true of advertising for a television news program or an unauthorized biographical book about a person. Indeed, the Restatement recognizes this, but it does so in a doctrinally inverted way, saying that the scope of the right of publicity "does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."<sup>218</sup>

#### B. *The Merchandizing Entitlement*

Along with endorsement cases, right-of-publicity actions are also routinely successful where a person's name, likeness, or other indicia of identity is used in merchandizing<sup>219</sup>—placing a recognizable symbol (name, likeness, etc.) on a product to propel the sale of that product.<sup>220</sup>

With merchandizing, the consumer is generally buying the product—coffee mug, t-shirt, key chain, lunch box, etc.—because of the symbol and its message-carrying capacity; frequently the merchandise is a means of displaying cultural affinity.<sup>221</sup> The product's functional utility is secondary. Such goods are often called "merch."

The merchandizing entitlement can be summed up in a simple statement as follows:

*Persons have the exclusive privilege to exploit their name and likeness in merchandizing.*

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<sup>218</sup> *Id.* § 47.

<sup>219</sup> The terms "merchandise" and "merchandizing" are used variably in business. I use these terms in a particular senses, as I explain.

<sup>220</sup> Cf. Jennifer A. Konefal, Note, Dastar: *Federal Trademark Law in an Uncertain State*, 11 B.U. J. SCI. & TECH. L. 283, 298 n.130 (2005) ("[M]erchandising can be defined for purposes of this paper as 'licensing publicly recognizable properties for use on or in association with specific products or services to foster their sale.'" (citation omitted).

<sup>221</sup> See Madow, *supra* note 2, at 128–29 (noting that "celebrities haul . . . semiotic freight" and that "there is a large and increasingly lucrative market for merchandise (T-shirts, posters, greeting cards, buttons, party favors, coffee mugs, school notebooks, dolls, and so on) bearing the names, faces, or other identifying characteristics of celebrities, living and dead").

In terms of the interests it protects, the merchandizing entitlement has a strong kinship with copyright and design patent. It is, in other words, much more intellectual-property-like than the endorsement right, which is more tort-like in nature.

The case that is generally considered the first right-of-publicity case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, is best understood as a merchandizing-entitlement case.<sup>222</sup> The merchandise there was baseball cards. Moreover, the case is known for recognizing a property-type aspect in the right of publicity, a point which distinguished *Haelan* from the more tort-oriented cases that came before it.<sup>223</sup> Many merchandizing-entitlement-type right-of-publicity cases have followed. They include: *Bi-Rite Enterprises, Inc. v. Button Master*, a successful suit by Pat Benatar and other musical artists to stop the unlicensed distribution of buttons bearing their names and photos;<sup>224</sup> *Factors Etc., Inc. v. Pro Arts, Inc.*, a successful suit by a holding company of the Elvis Presley estate against the distributor of “memorial” posters after the singer’s death;<sup>225</sup> *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, a successful suit by the Three Stooges holding company against an artist who sold lithographs and t-shirts bearing his sketch of Larry, Curly, and Moe;<sup>226</sup> and *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, a successful suit by the slain civil rights leader’s rights-holding organization against the seller of memorial busts.<sup>227</sup> These cases are all regarded by the courts as standard right-of-publicity cases.

The centrality of the merchandizing aspect in these cases can be perceived when we compare successful merchandizing cases to certain cases where the courts rejected a right-of-publicity claim. For instance, the merchandizing essence of *Haelan* is made more clear by comparing it to another baseball card case that came along decades later, *Cardtoons, L.C. v. Major League Baseball Players Ass’n*.<sup>228</sup> In the 1996 *Cardtoons* case, the Tenth Circuit rejected a right-of-publicity claim, and the case can be read as doing so precisely because these particular cards—parody cards that

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<sup>222</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>223</sup> Whether the right-of-publicity cause of action is better understood as sounding in tort or being a species of intellectual property is a long-running question in right-of-publicity cases and commentary. For a discussion, see *supra* Part I, particularly *supra* notes 14, 34 and accompanying text.

<sup>224</sup> 555 F. Supp. 1188 (S.D.N.Y. 1983).

<sup>225</sup> 579 F.2d 215 (2d Cir. 1978).

<sup>226</sup> 21 P.3d 797 (Cal. 2001).

<sup>227</sup> 296 S.E.2d 697 (Ga. 1982).

<sup>228</sup> 95 F.3d 959 (10th Cir. 1996).

lampooned famous ballplayers—were not player merchandise.<sup>229</sup> The court did not say this expressly, but it bound up the merchandizing question with its First Amendment analysis, brushing off the players' characterization of the cards as merchandise and simultaneously upholding the paramount importance of the defendant's free speech interests.

The disposition of the *Cardtoons* case would have been simplified—and would have avoided the need to bring the First Amendment to bear—if it had simply asked whether the parody baseball cards were player merchandise, a question that would have been easily answered no.

Surveying the merchandizing cases shows that where the use of the plaintiffs' name or likeness is what would be considered a merchandizing use, then First Amendment and copyright preemption defenses fail.<sup>230</sup> On the other hand, where First Amendment or copyright preemption defenses succeed with likeness-bearing products, it seems to coincide with a determination that the product somehow rose above the level of mere merchandise to constitute art.<sup>231</sup>

### C. *The Right Against Virtual Impressment*

Beyond the endorsement right and the merchandizing entitlement, there is a third constellation of right-of-publicity cases—arising in at least some courts, albeit infrequently. I will call this cluster “virtual impressment.”<sup>232</sup> In proceeding to speak of a “right against virtual impressment,” I do not mean to make a declaration of its existence and

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<sup>229</sup> *Id.* at 971 (“Cardtoons’ expression requires use of player identities because, in addition to parodying the institution of baseball, the cards also lampoon individual players. Further, Cardtoons’ use of the trading card format is an essential component of the parody because baseball cards have traditionally been used to celebrate baseball players and their accomplishments.”).

<sup>230</sup> *See, e.g., Comedy III Prods., Inc.*, 21 P.3d at 811 (rejecting a First Amendment defense because use of the Three Stooges likenesses was not sufficiently “transformative”). *See generally supra* Sections II.D.1–2 (discussing the First Amendment and copyright preemption).

<sup>231</sup> *See, e.g., ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 919, 936 (6th Cir. 2003) (upholding a First Amendment defense for depictions of Tiger Woods in what the court characterized not as posters, but as serigraphs and lithographs, which were priced at \$700 and \$100, respectively).

<sup>232</sup> Other names could include “unwitting employment,” “unwitting performance,” “virtual conscription,” “virtual servitude,” or the like. Yet another name might be “unfair exploitation,” which hints at the underlying unjust enrichment essence of the claim. But that label seems too embracing of unrelated situations. Another term, used by some scholars, is “virtual kidnapping.” *See, e.g.,* Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 YALE J.L. & HUMANITIES 451, 480 (2001). That term, however, has also been used to denote a criminal ransom demand based on a kidnapping that has not actually occurred. *See, e.g.,* Samantha Kenney, *Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America*, 14 CONN. INS. L.J. 557, 569 (2008).

validity.<sup>233</sup> Rather, my aim is to make sense of a cluster of cases that have evident coherence, even if they are comparatively rare birds. To be precise, my claim is that there is a line of cases from some jurisdictions that can be explained as producing outcomes as if such a right exists.

At the broadest level of generality, this virtual-impressment species of right-of-publicity violation involves some kind of simulated or constructive enlistment of the plaintiff to provide a performance that, at least in the absence of enabling technology or a skilled impersonator, would require hiring the plaintiff. Here is a concise statement:

*Persons may recover from another who exploits their name, likeness, or voice in such a way that they have been unwittingly employed to produce a performance that might otherwise require voluntarily supplied labor.*

In terms of the interests it vindicates, the action for virtual impressment has kinship with unjust enrichment. It is notably not copyright- or patent-like, as the merchandizing entitlement is. And it is not tort-like, as the endorsement right is. Rather, the action for virtual impressment can be seen as the law imposing itself to reverse what is understood to be a windfall.

The action for virtual impressment is notably distinct from merchandizing-entitlement and endorsement-right cases in the occupation of the defendant. With merchandizing or endorsement cases, the plaintiff and defendant are generally in different industries. The plaintiff might be a famous actor while the defendant is a seller of coffee mugs. The battle is one of an entertainment-sector plaintiff versus a hard-goods manufacturer. In actions for virtual impressment, however, it is common to see a plaintiff and defendant both from the entertainment sector.

The most straightforward instance of this kind of right-of-publicity claim would be where a film celebrity is digitally modeled and inserted into a film, so that the actor's performance is included within the film even though the actor was not on set and rendered no real-world performance. This has been called "digitalcasting"<sup>234</sup> and "digital reanimation."<sup>235</sup> While generally unexplored by the courts, the subject of digitally created

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<sup>233</sup> Given the sparsity of virtual-impressment-type cases that have accumulated at this point, making such a declaration is a task that should be left to a court or legislature.

<sup>234</sup> See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 389 n.21 (1999) (discussing "digitalcasting").

<sup>235</sup> See e.g., Thomas Glenn Martin Jr., Comment, *Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California's Antiquated Right of Publicity*, 4 UCLA ENT. L. REV. 99, 127 (1996) (referring to "digital reanimation" as "digitally recreat[ing] live actors with no appreciable difference in likeness, voice, or acting quality [and] digitally resurrect[ing] deceased celebrities").

performances has received considerable attention in the literature, with commentators finding right-of-publicity law relevant, if less than clear, as to the extent to which such depictions might be actionable.<sup>236</sup>

A virtual-impresment fact scenario that has been explored in the courts is the depiction of real persons in videogames. Claims in this factual context have generally been successful in a series of cases concerning college athletes' depictions in video games that simulate the team identities and rosters for a given sport in a given year. In *Hart v. Electronic Arts, Inc.*, Ryan Hart, former quarterback for Rutgers University, sued Electronic Arts (EA), the maker of the NCAA Football videogame series.<sup>237</sup> The district court held that First Amendment interests outweighed Hart's right-of-publicity claim, but the Third Circuit reversed, holding that EA's use of player identities for game avatars was not transformative enough for First Amendment protection.<sup>238</sup>

In a separate NCAA/EA sports videogame case, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*<sup>239</sup>—decided a few weeks after *Hart*—the Ninth Circuit rejected a First Amendment defense, similarly citing a lack of transformativeness.<sup>240</sup> Subsequently, EA settled class-action claims in the suit with a payment to athletes of up to \$40 million (\$4,000 each for 100,000 athletes) for their videogame depictions.<sup>241</sup>

In a third videogame case, *No Doubt v. Activision Publishing, Inc.*,<sup>242</sup> members of the band No Doubt were successful with a right-of-publicity claim against videogame publisher Activision for their unauthorized depiction in the videogame *Band Hero*, which allowed players to cause the

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<sup>236</sup> See, e.g., Anderson, *supra* note 4, at 184 (2005) (acknowledging the relevance of right-of-publicity doctrine to digitally simulated performance); Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165, 1174, 1187 (2001) (characterizing a digitally created virtual performance of a real entertainer as a right-of-publicity issue); Shannon Flynn Smith, *If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications*, 2013 MICH. ST. L. REV. 1719, 1761 (arguing that law is needed to protect against post-mortem digitally created virtual performance).

<sup>237</sup> 717 F.3d 141, 145 (3d Cir. 2013).

<sup>238</sup> *Id.* at 147, 167–68.

<sup>239</sup> 724 F.3d 1268 (9th Cir. 2013).

<sup>240</sup> *Id.* at 1284.

<sup>241</sup> See Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 31, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm) [<https://perma.cc/R2Q7-NA7C>]. The settlement was part of the *O'Bannon v. NCAA* antitrust litigation. *Id.*

<sup>242</sup> 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).

No Doubt avatars to perform not only No Doubt songs, but songs by other bands as well.<sup>243</sup>

An even lower-tech kind of virtual impressment situation involves people functioning as impersonators. An early case in this vein is *Estate of Presley v. Russen* from 1981.<sup>244</sup> In that case, a New Jersey federal district court issued a preliminary injunction against Rob Russen, producer of The Big El Show,<sup>245</sup> “a live theatrical presentation or concert designed to imitate a performance of the late Elvis Presley[, which] stars an individual who closely resembles Presley and who imitates the appearance, dress, and characteristic performing style of Elvis Presley.”<sup>246</sup>

The court was aware the case was distinct from the endorsement and merchandizing cases that characterize most of the right-of-publicity landscape.<sup>247</sup> Yet the court was persuaded a right-of-publicity claim should lie in the simulated live performance context.

Invoking an unjust enrichment type of rationale, the court characterized the question in the case as: “[W]hether the use of the likeness of a famous deceased entertainer in a performance mainly designed to imitate that famous entertainer’s own past stage performances is to be considered primarily as a commercial appropriation . . . of the famous entertainer’s likeness or as a valuable contribution of information or culture.”<sup>248</sup>

The court answered that question by concluding that “the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.”<sup>249</sup>

Some courts have followed *Russen* in finding liability in connection with musical impersonator concerts, including impersonations of the Beatles.<sup>250</sup> But one cannot say right-of-publicity liability for live-

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<sup>243</sup> *Id.* at 402, 411 (denying an anti-SLAPP motion to strike on right of publicity claim and specifically rejecting Activision’s asserted First Amendment defense).

<sup>244</sup> 513 F. Supp. 1339 (D.N.J. 1981).

<sup>245</sup> *Id.* at 1348.

<sup>246</sup> *Id.* at 1359 (footnote omitted).

<sup>247</sup> *Id.* at 1358 (acknowledging that “most of those cases finding that the right of publicity, or its equivalence, prevails have involved the use of a famous name or likeness predominantly in connection with the sale of consumer merchandise or solely for purposes of trade—*e.g.*, merely to attract attention”) (footnote, citations, and internal quotation marks omitted).

<sup>248</sup> *Id.* at 1359.

<sup>249</sup> *Id.* (footnote omitted).

<sup>250</sup> *See, e.g.*, *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 344, 349–50 (M.D. Tenn. 1993) (right-of-publicity claim for advertising and marketing of performances, if not the performances themselves, of Beatles impersonator group “1964 at the Beatles”); *Apple Corps Ltd. v. Leber*, No. C 299149, 1986 WL 215081, at \*3 (Cal. Super. Ct. June 3, 1986) (liability under New York law for Beatles impersonators’ *Beatlemania* show).

performance has attained anything approaching a majority view. Notably, Nevada's right-of-publicity statute expressly exempts "an attempt to portray, imitate, simulate or impersonate a person in a live performance" from liability.<sup>251</sup> Nevada's exemption clearly has special relevance for Las Vegas stage productions, where one can see impersonators performing as Frank Sinatra, Sammy Davis, Jr., Madonna, and Elton John.<sup>252</sup> Even the Beatles have been recreated at the Planet Hollywood Hotel & Casino.<sup>253</sup>

#### IV. SOME IMPLICATIONS

In this Part, I want to suggest some implications of the three-rights view of the right of publicity. As I have stressed, my aim in this Article is not to argue either in favor or against any of the three rights I have delineated.<sup>254</sup> My aim, instead, is to provide a way of talking about right-of-publicity law with greater clarity. Thus, I think the most salient consequence of understanding the right of publicity as three specifically delimited rights, rather than as one amorphous one, is to see that courts can reach desired results without engaging in tortured machinations of the law or facts.<sup>255</sup>

As to other implications, in this Part, I explore how the three-rights view can lay the groundwork for a more fine-grained debate over theory, and I suggest that the tripartite formulation may be of use to courts and legislatures asked to make new recognitions of a cause of action in the publicity-rights arena.

##### A. Theoretical Distinctions

Many theories have been offered to justify the right of publicity. Notably, these theories appear to map differently onto each of the three rights described in this Article. I will not attempt to comprehensively theorize each of the three rights, but I will provide a couple of examples of how theory seems to apply to the rights differentially.

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<sup>251</sup> NEV. REV. STAT. § 597.790(2)(b) (2016).

<sup>252</sup> See Georgi Schultz, *Guide to Las Vegas Impersonator Shows*, SHOWTICKETS.COM (Feb. 19, 2015), <http://lasvegas.showtickets.com/articles/top-las-vegas-impersonator-shows-guide/> [https://perma.cc/4NHV-C63S]; see also Laura Hock, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 360 n.60 (2008) (opining that "exclusion is no doubt due to the large number of shows occurring each year in Las Vegas").

<sup>253</sup> Schultz, *supra* note 252.

<sup>254</sup> See the beginning of *supra* Part III.

<sup>255</sup> As two examples, see *supra* notes 138–63 and accompanying text (regarding *Laws*) and *supra* notes 176–95 and accompanying text (regarding *Polydoros*).

For instance, one justification offered for the right of publicity is what can be called the market-information/consumer-protection theory—that the right of publicity helps markets function by giving consumers useful information about products.<sup>256</sup> As one court invoked the concept, “[a]ssociating one’s goodwill with a product transmits valuable information to consumers.”<sup>257</sup> This market-information story of the right of publicity is essentially the same economic narrative that undergirds trademark: A functioning, efficient market is abetted by dependable information about the sources of products.<sup>258</sup> A consumer who sees a celebrity endorse a certain product may, according to theory, assume that the celebrity “would not associate himself, even for a fee, with a firm that provides inferior service.”<sup>259</sup>

The market-information theory has been subjected to strong criticism in the right-of-publicity context.<sup>260</sup> To the extent one accepts the theory on its own terms, however, it seems clear that it supplies support differentially to the endorsement right, the merchandizing entitlement, and the right against virtual impressment.

The theory’s support for the endorsement-right prong of the right of publicity seems relatively strong: To the extent that personal identities can transmit information about products—at least outside of the existing trademark context that is already covered by trademark law—the recognition of an endorsement right seems a straightforward way to achieve this.<sup>261</sup>

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<sup>256</sup> Douglas Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1187 n.7 (1978) (arguing that legally protected celebrity identities, when used in conjunction with products, “promote the flow of useful information about commercial goods and services to the public by ensuring that the public is not confused by a false implication that a particular celebrity has endorsed a particular good”).

<sup>257</sup> *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

<sup>258</sup> See, e.g., S. REP. NO. 79-1333, at 3 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1277 (explaining that Congress enacted trademark law to “protect the public so that it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and which it wants to get” and to protect investments in commercial reputation).

<sup>259</sup> James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 645 (1973).

<sup>260</sup> For example, Michael Madow posits that instead of reasoning logically about what celebrity endorsement indicates about a product, celebrity endorsement may derive its impact by working at the level of a consumer’s emotion. See Madow, *supra* note 2, at 231. Further, Madow points out that if the right of publicity is justified by a trademark/consumer-deception theory, then it seems anomalous that the right of publicity can be used to enjoin truthful representations about the association of a given celebrity and a given product. *Id.*

<sup>261</sup> See Treece, *supra* note 259, at 644–45 (“Names and pictures of celebrities more effectively produce customer responses than those of noncelebrities, but images of unknown people also motivate decisions to purchase.”).

For the merchandising entitlement, however, the rationale of providing needed market information and consumer protection appears relatively weak, or even nonsensical: In the merchandizing context, a celebrity's image on a product is not an indication of value; rather, the image is the source of value for that product.<sup>262</sup>

And for a right against virtual impressment, the market-information/consumer-protection theory appears non-applicable. When Elvis fans go to see an Elvis impersonator show, those fans are basing their decision entirely on the sort of entertainment they want to consume, not on a misapprehension that they are actually going to see Elvis. In such a case, the name "Elvis" does not provide information about the level of quality of the show; it provides nominative information about the subject matter of the live performance.

Personal autonomy or autonomous self-definition is another theoretical justification that has been offered for the right of publicity, and it too seems to apply to the three rights quite differently. The autonomy-centered idea is that the right of publicity provides a legal mechanism for people to control the image they project of themselves to the world by allowing them to choose what, if any, associations they will have with commercial ventures. This theory has been notably championed by Mark McKenna, who explains that "[t]he things and people with which individuals choose to associate reflect their character and values. An individual's choices therefore can be viewed as the text of her identity, and unauthorized uses of a person's identity in connection with products or services threaten to recreate that text."<sup>263</sup>

Insofar as autonomous self-definition is a compelling justification for law, it applies most strongly when it comes to unauthorized endorsements. In general, McKenna's examples of factual situations that implicate autonomous self-definition interests are examples of unauthorized endorsements, such as a football player unwittingly made to appear in an advertisement for beer.<sup>264</sup> Uses that suggest a person's endorsement of

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<sup>262</sup> The merchandizing entitlement, by its very nature, concerns objects whose value to the consumer derives principally from the fact that the objects carry the symbol, as opposed to deriving from the objects' functional nature. *See supra* Section III.B.

<sup>263</sup> McKenna, *supra* note 2, at 229.

<sup>264</sup> *Id.* at 280–82 (additionally citing as examples a person's picture used in a television ad for an erectile-dysfunction medication, a country singer's appearance in a home-appliance commercial, and a radio disc jockey's employment as a spokesperson for a fast-food restaurant).

goods or services can be said to impinge on a person's right of autonomous self-definition because they force someone to speak on another's behalf.<sup>265</sup>

As a justification for the merchandizing entitlement, by contrast, autonomous self-definition is clearly not as strong. It is at least plausible that persons could argue that their sense of self is undermined when their image is appropriated to merchandise. On the other hand, merchandizing might be characterized as a merely "referential" use of a person's identity, not a use that threatens to alter meaning and therefore impinge on a person's right of self-definition.<sup>266</sup> One can go even further and plausibly argue that personal autonomy tends to justify the rejection of a merchandizing-entitlement cause of action. When people wear or use merchandise bearing a celebrity name or likeness, they do so typically as a way of showing cultural identification with what that celebrity has come to represent.<sup>267</sup> Thus, the free availability of celebrity merchandise, unfettered by exclusive legal claims, could be seen as abetting the autonomous self-definition interests of merchandise purchasers.

By contrast, a theory of personal autonomy or autonomous self-definition seems plausibly strong in the virtual-impressment context, because to employ an entertainer in a capacity not reflecting that entertainer's vision of self could be said to infringe upon that entertainer's right to self-define. Suppose Jane Smith is a singer/songwriter who has made a decision, based on newfound religious convictions, to no longer perform the hit song that once made her famous, one which she now regards as blasphemous. An impersonator giving a live performance of that song might be regarded as interfering with Jane's decision to disavow her own song.<sup>268</sup>

These example, above, are meant to be just a sampling of how the three-rights view of the right of publicity might help advance and sharpen

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<sup>265</sup> *Id.* at 286 (stating, for example, that "an individual should be able to prevent uses that suggest her sponsorship or endorsement" on the basis that implied endorsement is essentially forcing someone to speak on behalf of another and carry their message).

<sup>266</sup> *See id.* at 291 (discussing the limitations of an autonomy-based right-of-publicity action, and noting that "[s]ince celebrity personas are packed with a rich set of connotations that are understood widely, they play a crucial role in the genesis and transmission of culture. Some uses then may simply draw on the cultural meaning of their time in order to communicate, without risk of redefining that meaning" (internal quotation marks and footnotes omitted)).

<sup>267</sup> *See, e.g.,* Madow, *supra* note 2, at 143 (discussing various examples, including the use of the image of Judy Garland in the 1950s as "a powerful means" for gay men "of speaking to each other about themselves").

<sup>268</sup> *See* Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1116 (2005) ("Compelling a person to express a message herself presents a particular sort of threat to her freedom of belief. It threatens her ability to control what she tells the world about who she is and what she holds important. . . .").

the debate about theoretical justifications for the right of publicity. Moreover, the above examples help to highlight, as a descriptive doctrinal matter, the very real conceptual distinctions among the endorsement right, the merchandizing entitlement, and the right against virtual impressment.

*B. Precision in Judicial or Legislative Adoption*

The right of publicity has, over the decades, grown in recognition among jurisdictions, and courts and legislatures will continue to face choices of whether to create additional legal recognition for the right of publicity. In making these decisions, the doctrinal architecture I have suggested in this Article may help lawmakers and judges in understanding the choices available to them. That is, the three-rights view of the right of publicity can provide courts and legislatures with a menu to use when making new law.

Specifically, viewing the right of publicity as three separate rights, each one associated with a distinct cause of action, invites jurisdictions to adopt one or two of the causes of action without adopting them all. This capacity should facilitate more purposeful development of the law across jurisdictions.

Prosser's ramification of the right of privacy into four separate rights and associated causes of action provided a similar opportunity to courts.<sup>269</sup> For instance, Florida courts have declined to recognize the existence of the false light tort.<sup>270</sup> Yet Florida courts have recognized a cause of action for public disclosure of private facts.<sup>271</sup> With a subdivided right of publicity, jurisdictions can take advantage of additional opportunities for choosiness.

CONCLUSION

Since its birth a little over sixty years ago, the right of publicity has lacked a solid articulation. To be sure, courts have recited a pat blackletter statement of the right, but the reality has always been at odds with this formulation. This broken aspect of the law, inconvenient as it is, has long been ignored by the bench, the bar, and the academy. But as this Article has shown, it is productive to think carefully about the difference between what is said and what is done in the right-of-publicity context, because the disconnect seems to lie at the root of the right of publicity's most urgent problems.

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<sup>269</sup> Regarding Prosser's four-way division of the right of privacy, see *supra* note 12 and accompanying text.

<sup>270</sup> See *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008) (declining to recognize false light as a cause of action on the grounds that it offers little over defamation).

<sup>271</sup> See *Doe v. Univision Television Grp., Inc.*, 717 So. 2d 63, 64 (Fla. Dist. Ct. App. 1998).

Lacking a means of talking about what the right of publicity *is*, courts have concentrated on what the right of publicity *is not*. Norms of constitutional avoidance have fallen by the wayside as courts have used the First Amendment to burn away the right of publicity's sprawling excesses in case after case. When the First Amendment would not work, courts have engaged in improbable and even incoherent copyright-preemption analysis, or else have ignored facts, logic, and precedent in ways that can be described as judge nullification.

This Article has sought to supply the missing blackletter explanation for what the right of publicity is. The trick to making sense of the right of publicity is to understand that rather than being one right and one cause of action, it is in reality three separate rights cognizable with three distinct actions. This Article has delineated those rights as the endorsement right, the merchandizing entitlement, and the right against virtual impressment.

As things stand today, the right of publicity needs help. Practitioners perceive rampant unpredictability in the resolution of publicity-rights disputes.<sup>272</sup> Judicial opinions reveal the courts' enduring befuddlement in applying the law.<sup>273</sup> And scholars see deep theoretical unsoundness.<sup>274</sup> My hope is that the analysis offered in the Article will be productively disruptive on all fronts, thus enabling real progress with what has been one of the most persistently vexing areas of modern intellectual property law.

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<sup>272</sup> See *supra* note 4.

<sup>273</sup> See discussion in *supra* Section II.D.

<sup>274</sup> See *supra* note 2.

