

Articles

DISENTANGLING THE RIGHT OF PUBLICITY

Eric E. Johnson

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.

AUTHOR—Associate Professor of Law, University of North Dakota School of Law. For suggestions and helpful feedback, I thank Mark McKenna, Joanne Clifford, Stephen Yelderman, Daniel B. Kelly, Peter K. Yu, Lisa P. Ramsey, Liam S. O'Melinn, Betsy Rosenblatt, Raizel Liebler, Felix Wu, Yvette Joy Liebesman, Alexandra J. Roberts, Jake Linford, Sandra L. Rierison, Greg Gordon, Deidré A. Keller, Rhett Larson, Melissa T. Lonegrass, Moon Hee Lee, Wyatt Honse, Todd W. Shaw, and Kit Johnson. I am grateful for having had the opportunity to present this work at the Notre Dame Law School Intellectual Property Lecture Series, the Texas

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INTRODUCTION

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

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

² 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,⁵ 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

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”).

³ 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.”).

⁴ 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”).

⁵ 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.

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.”⁴⁹ 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.⁵⁰ 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 publicity⁵¹ 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 delimiting⁵² of the right of publicity works, and I suggest why it is troublesome.

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

⁵⁰ *Id.* at 368–69.

⁵¹ 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.

⁵² 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.⁵³

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.⁵⁴ 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.

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.

⁵³ 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”).

⁵⁴ 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.⁵⁵

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.”⁵⁶ For fellow litigators, he saw upside in this, advising that they “should feel free to be creative in their proposed theories.”⁵⁷ 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.⁵⁸ 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.”⁵⁹ 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.”⁶⁰ The 1977

⁵⁵ 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.

⁵⁶ 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).

⁵⁷ *Id.*

⁵⁸ See *infra* Section II.D for examples.

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

⁶⁰ *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”⁶¹

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.⁶² That is, unquestionably, appropriating a person’s name and other indicia of identity for the credit agency’s own benefit.⁶³ Yet the right of publicity does not, in the real world, reach such situations.⁶⁴

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.⁶⁵

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.”⁶⁶ 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.”⁶⁷ Ensuring additional breadth, the statute

⁶¹ RESTATEMENT (SECOND) OF TORTS § 652C (1977).

⁶² 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).

⁶³ 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.*

⁶⁴ 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”).

⁶⁵ 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.

⁶⁶ WIS. STAT. § 995.50(2)(b) (2014).

⁶⁷ 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.⁶⁸ 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,⁶⁹ 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.⁷⁰

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,

⁶⁸ *Id.* § 9-1-28.1(a)(2)(B)(ii).

⁶⁹ 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.

⁷⁰ 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.”).

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.¹⁹⁶

The right not to be portrayed as endorsing a commercial enterprise applies regardless of whether the person actually uses or recommends that product.¹⁹⁷ 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.¹⁹⁸ 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."¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

¹⁹⁶ 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").

¹⁹⁷ *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).

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

¹⁹⁹ *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.

²⁰⁰ *Id.* at 68–69.

²⁰¹ *Id.*

The recognized birth-case of the right of publicity, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,²⁰² 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.”²⁰³

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.²⁰⁴ The court characterized the claim as concerning “the alleged misappropriation of [the plaintiff’s] name, likeness, personality, and endorsement.”²⁰⁵

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.²⁰⁶ 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.²⁰⁷ The right-of-publicity claim in the case was analyzed without any reference to endorsement being the crux of the action.²⁰⁸ 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)²⁰⁹ claim for “confusion and deception indicating sponsorship of Abercrombie goods.”²¹⁰ That discussion centered on whether consumers were likely to be confused in thinking that the plaintiff surfers had endorsed Abercrombie & Fitch.²¹¹ 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

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

²⁰³ *Haelan*, 202 F.2d at 868.

²⁰⁴ 498 F.2d 821 (9th Cir. 1974).

²⁰⁵ *Id.* at 822 (italics added).

²⁰⁶ 265 F.3d 994, 1008 (9th Cir. 2001).

²⁰⁷ *See id.* at 999.

²⁰⁸ *See id.* at 1001–03.

²⁰⁹ 15 U.S.C. § 1125(a) (2012).

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

²¹¹ *See id.* at 1009.

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

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,²¹³ the court rejected, not very plausibly, the idea that the photos had editorial value,²¹⁴ saying the photos "d[id] not contribute significantly to a matter of the public interest."²¹⁵ 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.²¹⁶ 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."²¹⁷

²¹² *Id.* at 1010.

²¹³ *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].").

²¹⁴ *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.").

²¹⁵ *Id.* at 1002.

²¹⁶ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–47 (1995).

²¹⁷ 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."²¹⁸

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 merchandizing²¹⁹—placing a recognizable symbol (name, likeness, etc.) on a product to propel the sale of that product.²²⁰

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.²²¹ 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.

²¹⁸ *Id.* § 47.

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

²²⁰ 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)).

²²¹ 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.²²² 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.²²³ 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;²²⁴ *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;²²⁵ *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;²²⁶ 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.²²⁷ 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*.²²⁸ 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

²²² 202 F.2d 866 (2d Cir. 1953).

²²³ 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.

²²⁴ 555 F. Supp. 1188 (S.D.N.Y. 1983).

²²⁵ 579 F.2d 215 (2d Cir. 1978).

²²⁶ 21 P.3d 797 (Cal. 2001).

²²⁷ 296 S.E.2d 697 (Ga. 1982).

²²⁸ 95 F.3d 959 (10th Cir. 1996).

lampooned famous ballplayers—were not player merchandise.²²⁹ 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.²³⁰ 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.²³¹

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.”²³² In proceeding to speak of a “right against virtual impressment,” I do not mean to make a declaration of its existence and

²²⁹ *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.”).

²³⁰ 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).

²³¹ 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).

²³² 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.²³³ 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"²³⁴ and "digital reanimation."²³⁵ While generally unexplored by the courts, the subject of digitally created

²³³ 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.

²³⁴ 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").

²³⁵ 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.²³⁶

A virtual-impressment 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.²³⁷ 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.²³⁸

In a separate NCAA/EA sports videogame case, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*²³⁹—decided a few weeks after *Hart*—the Ninth Circuit rejected a First Amendment defense, similarly citing a lack of transformativeness.²⁴⁰ 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.²⁴¹

In a third videogame case, *No Doubt v. Activision Publishing, Inc.*,²⁴² 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

²³⁶ 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).

²³⁷ 717 F.3d 141, 145 (3d Cir. 2013).

²³⁸ *Id.* at 147, 167–68.

²³⁹ 724 F.3d 1268 (9th Cir. 2013).

²⁴⁰ *Id.* at 1284.

²⁴¹ 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 [https://perma.cc/R2Q7-NA7C]. The settlement was part of the *O'Bannon v. NCAA* antitrust litigation. *Id.*

²⁴² 122 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.²⁴³

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 1981.²⁴⁴ In that case, a New Jersey federal district court issued a preliminary injunction against Rob Russen, producer of The Big El Show,²⁴⁵ “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.”²⁴⁶

The court was aware the case was distinct from the endorsement and merchandizing cases that characterize most of the right-of-publicity landscape.²⁴⁷ 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.”²⁴⁸

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.”²⁴⁹

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

²⁴³ *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).

²⁴⁴ 513 F. Supp. 1339 (D.N.J. 1981).

²⁴⁵ *Id.* at 1348.

²⁴⁶ *Id.* at 1359 (footnote omitted).

²⁴⁷ *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).

²⁴⁸ *Id.* at 1359.

²⁴⁹ *Id.* (footnote omitted).

²⁵⁰ 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.²⁵¹ 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.²⁵² Even the Beatles have been recreated at the Planet Hollywood Hotel & Casino.²⁵³

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.²⁵⁴ 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.²⁵⁵

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.

²⁵¹ NEV. REV. STAT. § 597.790(2)(b) (2016).

²⁵² 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").

²⁵³ Schultz, *supra* note 252.

²⁵⁴ See the beginning of *supra* Part III.

²⁵⁵ As two examples, see *supra* notes 138–63 and accompanying text (regarding *Laws*) and *supra* notes 176–95 and accompanying text (regarding *Polydors*).