

DISENTANGLING THE RIGHT OF PUBLICITY

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ABSTRACT

Intellectual property law has an embarrassing secret: Neither scholars nor courts have yet articulated what the right of publicity actually covers. The doctrine 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 caselaw, and thus it aims to elucidate, in clear terms, what the right of publicity actually is.

This Article explains how, in the absence of a clear articulation 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 maddeningly 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 and causes of action: an endorsement right, a merchandizing entitlement, and an action for virtual servitude. 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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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 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 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 actually regarded to be has caused a great deal of confusion.~

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*. This has been a recipe for confusion, and 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 a right against virtual servitude.

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 breaking up the right of publicity into 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 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. In this Part below, 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 disentangle varying labels that have been applied to the doctrine in this area, including "appropriation" and "misappropriation."

A. The Traditional Narrative Sketch

First, in this Subpart 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 Subpart 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 that laid out in a comment to the 1995 Restatement of Unfair Competition.⁶ It runs like this: The right of publicity was born out of tort law's right of privacy.⁷ 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*.⁸ Subsequent to Warren and Brandeis' 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.*,⁹ which used the term "right of publicity"¹⁰ and is said to

be the first case that recognized the right of publicity as such.¹¹ 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.¹² *Haelan Labs*, according to Prosser, belonged within the fourth category, appropriation of name or likeness.¹³

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.¹⁴ Correspondingly, the right of publicity is said to have represented a transition from concern over redressing an injury to concern over enforcing property rights.¹⁵

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.¹⁶

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 of American jurisdictions, either by obtaining common-law recognition or through statutory enactment.¹⁷

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. ~

*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 structural, 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.”~

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.¹⁸ And the U.S. Supreme Court has lumped the terms together.¹⁹

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.”²⁰ ~

In this Article, I treat appropriation (or misappropriation) and the right of publicity as one.~

II. THE RIGHT OF PUBLICITY’S SUBTRACTIVELY DEFINED SCOPE

The blackletter formulation of the right of publicity²¹ 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 delimiting²² of the right of publicity works, and I suggest why it is troublesome.

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, as well, 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.²³

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.²⁴ 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. The same goes for copyright preemption and the other subtrahends. They end up more as servants of the common law than masters of it.²⁵

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.”²⁶ For fellow litigators he saw upside in this, advising that they “should feel free to be creative in their proposed theories.”²⁷ 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.²⁸ 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.”²⁹ 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.”³⁰ The 1977 Restatement of Torts says, “One who

appropriates to his own use or benefit the name or likeness of another is subject to liability.”³¹

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.³² That is, unquestionably, appropriating a person’s name and other indicia of identity for the credit agency’s own benefit.³³ Yet the right of publicity does not, in the real world, reach such situations.³⁴

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.³⁵

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 “The 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[.]”³⁶ 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.”³⁷ Ensuring additional breadth, the statute expressly provides that there does not need to be any publication for liability to attach.³⁸ Both Wisconsin 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 ~

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 double duty.

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 servitude. 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.³⁹ The *merchandising entitlement* provides a right to not have one's name, image, or identity marketed on coffee mugs, lunch boxes, or other merchandise.⁴⁰ And the *right against virtual servitude*—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.⁴¹

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

front-line work of deciding in run-of-the-mill cases whether an action for right-of-publicity infringement can be maintained.⁴² That is, instead of policing the law at its outer bounds or in its broadest strokes, the First Amendment is constantly invoked to micromanage the application of right of publicity law and resolve routine cases.⁴³

The interaction of the First Amendment and the right of publicity is puzzling.⁴⁴ 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 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.⁴⁵ 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.⁴⁶ One might wonder, how can courts apply the First Amendment so routinely in right of publicity cases without well-articulated tests of 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 cases 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 of right of publicity law that leads courts constantly to invoke the First Amendment. ~

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* 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.⁴⁷ In a performance that lasted all of fifteen seconds, Zacchini was shot from a cannon to land in a net about 200 feet away.⁴⁸ 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.⁴⁹ And the reporter initially complied.⁵⁰ 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.⁵¹ 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.⁵²

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.⁵³ The Ohio Supreme Court, however, did entertain his suit on the basis of a “right to the publicity value of his performance.”⁵⁴ 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.⁵⁵

At the U.S. Supreme Court, Zacchini vaulted the First Amendment to win with a 5–4 decision authored by Justice Byron White that emphasized the economic-incentive rationale of the right of publicity.⁵⁶ Observing that perfecting the human cannonball act required great talent and effort, 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.”⁵⁷ Broadcasting the act on TV thus “poses a substantial threat to the economic value” of Zacchini’s act.”⁵⁸

In this way, White’s opinion found the state’s interest in protecting an individual’s proprietary interest to encourage such entertainment⁵⁹ 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.⁶⁰

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 the blunt what blows the First Amendment might strike against it. Wendy Gordon noted because copyrights are classified as property, "courts seem willing to overlook the most basic canons of the law of free expression."⁶¹ 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 . . . [y]et in copyright cases judges routinely enjoin books prior to publication without even appearing to notice the anomaly."⁶² 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 Amendment.⁶³ 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.⁶⁴

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.~

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 state-law courts 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.⁶⁵ 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-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.⁶⁶ 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.⁶⁷

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 servitude.⁶⁸

One area in which the First Amendment has been used repeatedly to strike down right-of-publicity claims in the context of non-fictional books. A leading case is *Matthews v. Wozencraft*, in which the Fifth Circuit decided that the First Amendment bars a former law-enforcement officer's right-of-publicity claim for portraying his life in a book and movie.⁶⁹ The cases do not disclose a per se rule making biography First Amendment protected, but biography cases have led to consistent defendant victories.⁷⁰ 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 servitude.

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 baseball players' names in fantasy baseball games.⁷¹ 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 publicities of Major League Baseball (MLB) players.⁷² The Eighth Circuit held that C.B.C.'s conduct was, under Missouri law, sufficient for a prima facie case for right-of-publicity infringement.⁷³ But *C.B.C.* used the First Amendment to bar the claim, cutting a large swath out of the nominal scope of the right of publicity.⁷⁴

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.”⁷⁵ It is a peculiar citation, because the *Zacchini* court did not say rights of publicity must be balanced with the First Amendment—nor, even, is it fair to say the court implied this.⁷⁶

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].”⁷⁷ 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.”⁷⁸ 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[.]”⁷⁹

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 t-shirts, buttons, and posters⁸⁰—all of which are much more straightforwardly within the First Amendment sphere, being vehicles of viewpoint-bearing communication, than the game of fantasy baseball.⁸¹ Notably, however, the use of player names in fantasy baseball does not fit easily within the categories of endorsement, merchandizing, or virtual servitude.

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 privilege” to the right of publicity, which “is akin to a First Amendment privilege and arises from the same roots as that privilege.”⁸² 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 on by the newsworthiness privilege⁸³—notwithstanding that the passage of three or four decades would seem to take subject matter out of the category of “news.”⁸⁴ But while an

ill-fit for newsworthiness, *Dryer* makes sense as a case that makes sense neither as endorsement, nor merchandizing, nor virtual servitude.

New York has recognized a newsworthiness exception as well—and has also applied it in surprisingly broad ways. In *Stephano v. News Group Publications*, 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.⁸⁵ 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’s⁸⁶—seems strained, to say the least. But it does seem clear that as an editorial photo spread as opposed to an ad, the usage tread on none of the rights of endorsement, merchandizing, or virtual servitude.

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 seems incoherent when taken on their own terms.

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.⁸⁷ 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.~

A leading case regarding the application of copyright preemption to a right-of-publicity claim is the Ninth Circuit’s 2006 case *Sony v. Laws*.⁸⁸ 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.⁸⁹ 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.”⁹⁰ 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.⁹¹

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 § 3344.⁹² Because the blackletter scope of the right of publicity is so broad, Laws had a clear-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 copyright law’s express preemption provision at 17 U.S.C. § 301.⁹³ 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.⁹⁴

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.”⁹⁵ 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.⁹⁶ 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 *Sony v. Laws* logic, since his performance was fixed on film.⁹⁷ 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,⁹⁸ involves the a plaintiff’s name, likeness, voice, or other indicia of identity being incorporated into a copyrighted work.~

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.⁹⁹ The *Laws* court distinguished both on the basis that the voices were imitated, rather than copied verbatim.¹⁰⁰ 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.*¹⁰¹ 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.¹⁰² 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.¹⁰³ By contrast, Sony had only licensed the "Very Special" sound recording, not owned it outright.¹⁰⁴ 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.

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 servitude.¹⁰⁵

Many cases have followed the illogic of *Sony v. 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*, a 2010 case, plaintiff Ken Aronson took video of himself and a friend during a trip to England.¹⁰⁶ 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.¹⁰⁷ ~

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.

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.*,¹⁰⁸ 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.¹⁰⁹ The *Benally* use is one that would fail to 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.”¹¹⁰

An example of selectively ignoring the law can be found in *Landham v. Lewis Galoob Toys*.¹¹¹ 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.¹¹² 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”¹¹³ was not shown to have “significant commercial value.”¹¹⁴ In support of its assertion that the law required this showing, the court cited common-law cases not considering the Kentucky statute.¹¹⁵ 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.¹¹⁶

An example of spuriously characterizing the facts of a case to avoid right-of-publicity liability can be found in *Polydoros v. Twentieth Century Fox Film Corp.*,¹¹⁷ in which the California Court of Appeal considered a right-of-publicity claim¹¹⁸ brought against a studio for the film *The Sandlot*.¹¹⁹

In the movie, a “comedic coming-of-age story set in the 1960s,”¹²⁰ a new kid moves into a San Fernando, California

neighborhood and tries to fit in by joining the local sandlot baseball team.¹²¹ Hijinks ensue. The film was well-received by many. Famed film critic Roger Ebert gushed about the absorbing world created by the movie.¹²² 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."¹²³

Contrary to how Ebert saw it, however, 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.¹²⁴ 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.¹²⁵ Both the plaintiff and the character played sandlot baseball with friends.¹²⁶ Both swam in a community pool.¹²⁷ 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."¹²⁸ The character and the plaintiff also shared the characteristic—according to the court—of being "somewhat obstreperous."¹²⁹

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 been schoolmates when growing up.¹³⁰

Overall, the undisputed facts clearly showed that Polydoros's name, identity and likeness had been appropriated. In terms of alleging a prima facie case under the blackletter law, Polydoros had it made. Under the 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."¹³¹ It cannot seriously be disputed that this 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.¹³²

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.”¹³³ The court said this notwithstanding that the film portrayed events happening thirty years earlier.¹³⁴ “No person seeing this film could confuse the two,”¹³⁵ the court then asserted—a conclusion belied, among other things, by the fact—recited by the court—that, after the movie people had begun calling the plaintiff by the movie character’s nickname “Squints.”¹³⁶

As with preposterously reasoned cases using the banner of the First Amendment or copyright preemption, *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’s indicia of identity was neither for endorsement, nor merchandizing, nor virtual servitude.

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 servitude. 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.~

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 non-adherents, 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 this 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.*

~ The right not to be portrayed as endorsing a commercial enterprise applies regardless of whether the person actually uses or recommends that product.¹³⁷ 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 caselaw in many jurisdictions. One of the earliest uses of a right-of-publicity-type claim was for endorsement.¹³⁸ In the 1905 case of *Pavesich v. New England Life Ins. 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."¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴² The court characterized the claim as concerning “the alleged misappropriation of [the plaintiff’s] name, likeness, personality, *and endorsement*.”¹⁴³ ~

B. The Merchandizing Entitlement

Along with endorsement cases, right of publicity actions are also routinely successful in where a person’s name, likeness, or other indicia of identity is used in merchandizing¹⁴⁴—placing a recognizable symbol (name, likeness, etc.) on a product to propel the sale of that product.¹⁴⁵

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.¹⁴⁶ 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.*

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.¹⁴⁷ 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.¹⁴⁸ Many merchandizing-entitlement-type right of publicity cases have followed. They include: *Bi-Rite 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;¹⁴⁹ *Factors v. Pro Arts*, a successful suit by a holding company of the Elvis Presley estate against the distributor of “memorial” posters after singer’s death;¹⁵⁰ *Comedy III Productions v. Saderup*, 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;¹⁵¹ *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*, a successful suit by the slain civil-rights leader’s rights-holding organization against

the seller of memorial busts.¹⁵² These cases are all regarded by the courts as standard right of publicity cases.

~

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.¹⁵³ 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.¹⁵⁴

C. Right Against Virtual Servitude

Beyond the endorsement right and the merchandizing entitlement, there is a third constellation of right-of-publicity cases—arising infrequently in at least some courts. I will call it “virtual servitude,” although it might also be called “unwitting employment,” “unwitting performance,” or “virtual conscription.”¹⁵⁵ At the broadest level of generality, this species of right-of-publicity violation involves some kind of virtual or constructive conscription of the plaintiff to provide a performance, one 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 servitude 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 servitude can be seen as the law imposing itself to reverse what is understood to be a windfall.~

Compared to other right-of-publicity cases, the virtual servitude cases are infrequent. And whether the law ought to recognize such a cause of action at all seems to be much more of an open question than it is with regard to merchandizing-entitlement or endorsement-right cases.

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”¹⁵⁶ and “digital reanimation.”¹⁵⁷ While generally unexplored by the courts, the subject of digitally created performances has received considerable attention in the literature, with commentators finding right-of-publicity law relevant, if less than clear, as to extent to which such depictions are actionable.¹⁵⁸

A virtual-servitude 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*,¹⁵⁹ Ryan Hart, former quarterback for Rutgers University, sued Electronic Arts (EA), the maker of the NCAA Football videogame series. A 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.¹⁶⁰

In a separate NCAA/EA sports videogame case, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*,¹⁶¹—decided a few weeks after *Hart*—the Ninth Circuit rejected a First Amendment defense, similarly citing a lack of transformativeness.¹⁶² 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.¹⁶³

In a third videogame case, *No Doubt v. Activision*,¹⁶⁴ 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 No Doubt avatars to perform not only No Doubt songs, but songs by other bands as well.¹⁶⁵

An even lower-tech kind of virtual servitude situation involves people functioning as impersonators. An early case in this vein is *Presley’s Est. v. Russen*¹⁶⁶ from 1981. In that case, a New Jersey federal district court issued a preliminary injunction against Rob Russen, producer of The Big El Show,¹⁶⁷ “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.”¹⁶⁸

The court was aware the case was distinct from the

endorsement and merchandizing cases that characterize most of the right-of-publicity landscape.¹⁶⁹ 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 “whether 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 by the imitator or show’s producer of the famous entertainer’s likeness or as a valuable contribution of information or culture.”¹⁷⁰ 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.”¹⁷¹

Some courts have followed *Russen* in finding liability in connection with musical impersonator concerts, including impersonations of the Beatles.¹⁷² But one cannot say right-of-publicity liability for live-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.¹⁷³ Nevada’s exemption clearly has special relevance for Las Vegas stage productions, where one can see impersonated performances of everyone from Frank Sinatra and Sammy Davis, Jr. to Madonna and Elton John.¹⁷⁴ And even the Beatles survive in recreated form at the Planet Hollywood Hotel & Casino.¹⁷⁵

In attempting to explicate a “right of virtual servitude,” my intent is to make sense of a cluster of cases that have evident coherence, even if they are comparatively rare birds among right of publicity cases. I mean to take no position normative or prescriptive position on the matter. Thus, in referring to a “right,” I am not making a declaration of its existence and validity. To be precise, I am saying that a line of cases from some jurisdictions that can be explained as producing outcomes as if such a right exists.

IV. SOME IMPLICATIONS ~

A. Theoretical Distinctions ~

B. Precision in Judicial or Legislative Adoption ~

CONCLUSION

Since its birth a little over sixty years ago, the right of publicity has lacked a solid articulation. ~

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 a right against virtual servitude. ~

[Students: This is the end of the assigned reading. The remaining pages in this document are footnotes (reformatted to endnotes), which have been retained for completeness, but which are not assigned as reading.]

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

² See, e.g., Michael Madow, *Private Ownership of the Public Image: Popular Culture and Publicity Rights*, 81 CAL. 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”); 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 HIGH TECH. L.J. 1 (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 may provide a starting point, but it does not clearly explain when there are countervailing policy considerations”).

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) to suppress disfavored meanings and messages.”).

⁴ See, e.g., 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”); 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); Julee L.

Milham, *XIV Publicity Rights*, in *THE PRACTICE OF MUSIC LAW IN FLORIDA* 122 (2006) (observing that a “stew of standards can make right of publicity actions particularly unpredictable”).

⁵ See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. 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. American Express Co.*, 652 N.E.2d 1351, 1355 (Ill. App. 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 omitted; internal quotation marks omitted)). See also, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (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 . . .”).

⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995)

⁷ 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 (1995) (“The principal historical antecedent of the right of publicity is the right of privacy.”).

⁸ Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). See also, M.C. Slough, *Privacy, Freedom, and Responsibility*, 16 U. KAN. L. REV. 323, 325–27 (1968) (discussing the seminal importance of the Warren & Brandeis article); 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, 6 (2013) (noting that “The standard account of the right of publicity begins with Samuel Warren and Louis Brandeis’ 1890 article . . .”).

⁹ *Haelan*, 202 F.2d at 866.

¹⁰ 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, “[T]he 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.”)

¹¹ 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 LAW & 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, where publicity plaintiffs merely felt injured by a lack of compensation. *Id.*

¹² William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹³ *Id.* at 406–07.

¹⁴ 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 . . .”) and *id.* at 151 (“the 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.”). See also, *Comedy III Productions, 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.

¹⁵ See, e.g., RESTATEMENT (THIRD) UNFAIR COMPETITION, § 46 cmt. b (“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 J. THOMAS MCCARTHY, 1 RIGHTS OF PUBLICITY AND PRIVACY § 4:3 (2d ed, 2015) (“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.”).

¹⁶ See, e.g., *KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Cal. App. 2d Dist. 2000) (“California’s appropriation statute is not limited to celebrity plaintiffs . . .”); *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995) (regarding 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); *Hetter v. Eighth Jud. Dist. Ct. of State In and For County of Clark*, 874 P.2d 762, 765 (Nev. 1994) (“The Nevada statute has not limited the cause of action to celebrities . . .”).

¹⁷ 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 cites).

¹⁸ See, e.g., Kelli L. Sager, *Summary of Right of Publicity Issues* (2012), available at https://law.ku.edu/sites/law.ku.edu/files/docs/media_law/Summary_of_Right_of_Publicity_Issues.pdf.

¹⁹ 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).

²⁰ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (1997).

²¹ 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 note 5, *supra*.

²² 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 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.

²³ In mathematics, a “subtrahend” is a quantity that is subtracted from another quantity. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2281 (1993) (a “subtrahend” is “a quantity that is to be deducted from a minuend in the mathematical operation of subtraction[.]”).

²⁴ One example is intentional infliction of emotional distress. See *Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

²⁵ 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.

²⁶ Brian D. Wassom, *Identity and its Consequences: The Importance of Self-Image, Social Media, and the Right of Publicity to IP Litigators*, ASPATORE, July 2012 at 1.

²⁷ *Id.*

²⁸ See Part II.C., *infra*, for examples.

²⁹ *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 649 (Cal. App. 1996).

³⁰ *Dwyer v. Am. Exp. Co.*, 652 N.E.2d 1351, 1355 (Ill. App. 1995) (citations omitted).

³¹ RESTATEMENT (SECOND) OF TORTS § 652(C) (1977).

³² 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, 610–11 (1997).

³³ Here I am translating “appropriate” as “to take (something) for one’s own use.” *New Oxford American Dictionary* (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.* (italics original).

³⁴ 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”).

³⁵ 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 Part II.C.1., *infra*.

³⁹ See Part III.A., *infra*.

⁴⁰ See Part III.B., *infra*.

⁴¹ See Part III.C., *infra*. The virtual-servitude type of right of publicity case is much rarer than cases of the endorsement or merchandizing type.

⁴² 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 . . . how large a role has been greatly and continuously underestimated.”).

⁴³ 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 (2013) (“Freedom of speech under the First Amendment is a common defense to the right of publicity action.”). See also Drew Sherman, *The Right of Publicity and the First Amendment Defense in California*, 9 INTELL. PROP. L. BULL. 29 (2004) (“Freedom of speech under the First Amendment is a common defense to the right of publicity action.”).

⁴⁴ 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).

⁴⁵ See the discussion of *Zacchini v. Scripps-Howard Broadcasting*, *infra*, particularly notes 57–63 and accompanying text.

⁴⁶ 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*, 117 HARV. L. REV. 1275, 1275–76 (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[.]”).

⁴⁷ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977).

⁴⁸ *Id.*

⁴⁹ *Id.* at 563–64.

⁵⁰ *Id.*

⁵¹ *Id.* at 564.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 565. 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 v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 459-60 (Ohio 1976), rev’d and remanded, 433 U.S. 562 (1977).

⁵⁵ 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 independent state ground that the U.S. Supreme Court appropriately granted certiorari to decide the First Amendment issue. 433 U.S. at 566.

⁵⁶ *Id.* at 573.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *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.”).

⁶⁰ *Id.* at 576–77 (internal quotation marks and citations omitted).

⁶¹ 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).

⁶² *Id.* at 1536–37.

⁶³ *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)).

⁶⁴ 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).

⁶⁵ *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860 (Cal. 1979).

⁶⁶ *New Kids On The Block v. News Am. Pub., Inc.*, 745 F. Supp. 1540, 1545 (C.D. Cal. 1990) *aff’d*, 971 F.2d 302 (9th Cir. 1992).

⁶⁷ *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Cal. 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.

⁶⁸ 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.

⁶⁹ *Matthews v. Wozencraft*, 15 F.3d 432, 436 (5th Cir.1994).

⁷⁰ *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”).

⁷¹ *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, 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 (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.

⁷² *C.B.C. Distrib. and Mktg., Inc.*, 505 F.3d at 818.

⁷³ *Id.* at 822–23.

⁷⁴ 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 (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.

⁷⁵ *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

⁷⁶ *See* 433 U.S. at 578.

⁷⁷ *Id.* at 823.

⁷⁸ *Id.* at 824.

⁷⁹ *Id.* at 824.

⁸⁰ *See Bi-Rite v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983) supplemented sub nom. *Bi-Rite v. Button Master*, 578 F. Supp. 59 (S.D.N.Y. 1983) (buttons); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (posters); *Comedy III Productions v. Saderup, Inc.*, 25 Cal.4th 387 (Cal. 2001) (t-shirts). These cases are discussed below; see notes 149–151 and accompanying text.

⁸¹ *Cf. Cohen v. California*, 403 U.S. 15, 19 (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).

⁸² *Dryer v. Natl. Football League*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014).

⁸³ *Id.*

⁸⁴ Plaintiff Fred Dryer played football in the NFL from 1969 to 1981. *Id.* at 1186.

⁸⁵ *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 581–82 (N.Y. 1984).

⁸⁶ *Id.* at 582.

⁸⁷ 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 . . .”).

⁸⁸ *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134 (9th Cir. 2006).

⁸⁹ *Id.* at 1136, 1138 & 1143.

⁹⁰ *Id.* at 1136; Shirley Halperin, *Who Destroyed Epic Records?*, BILLBOARDBIZ (Nov. 17, 2010), <http://www.billboard.com/biz/articles/news/1197460/who-destroyed-epic-records> (Epic owned by Sony). The *Sony* court reported that “The 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.).

⁹¹ *Laws*, 448 F.3d at 1136.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1140.

⁹⁶ 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.

⁹⁷ See *supra* note 47 and accompanying text regarding the *Zacchini* case.

⁹⁸ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §§ 7 & 9, 102 Stat. 2853, 2857–58 (codified at 17 U.S.C. §§ 405 & 408(a)) (neither notice nor registration is required).

⁹⁹ Those cases are *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (rejecting a pre-emption 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 (9th Cir. 1992) (upholding claim for the imitation of musician Tom Waits’ voice in a Doritos commercial).

¹⁰⁰ *Laws*, 448 F.3d at 1140–41.

¹⁰¹ *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005).

¹⁰² *Id.*

¹⁰³ *Laws*, 448 F.3d at 1142.

¹⁰⁴ See *id.*

¹⁰⁵ The closest would be virtual servitude, a right-of-publicity species implicitly recognized by at least some courts. See Part III.C., *infra*.

¹⁰⁶ See *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1108 (W.D. Wash. 2010).

¹⁰⁷ See *id.* at 1114–16.

¹⁰⁸ *Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.C.N.M.1985), *reversed on other grounds*, 858 F.2d 618 (C.A.10, 1988).

¹⁰⁹ *Id.* at 980. The court's analysis appears to arise from misconstruing the Restatement's mention of "incidental."

¹¹⁰ With "judge nullification," 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 (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).

¹¹¹ *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619 (6th Cir. 2000).

¹¹² *Id.* at 621; *Predator* (1987), IMDB, <http://www.imdb.com/title/tt0093773/> (last visited April 13, 2016).

¹¹³ *Landham*, 227 F.3d at 621.

¹¹⁴ *Id.* at 622–23.

¹¹⁵ *Id.* at 624–26.

¹¹⁶ Ky. Rev. Stat. § 391.170 ("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 50 year post-mortem right for a person who is a "public figure." *Id.* at section (2).

¹¹⁷ *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 79 Cal. Rptr. 2d 20 (Cal. App. 1997).

¹¹⁸ The court generally referred to the plaintiff's common law claim as one for "invasion of privacy" or "commercial appropriation." 7 Cal. Rptr. 2d at 306, 309.

¹¹⁹ 7 Cal. Rptr. 2d at 306.

¹²⁰ *Id.*

¹²¹ *See* Roger Ebert, *The Sandlot Movie Review & Film Summary*, ROGEREBERT.COM, April 7, 1993, <http://www.rogerebert.com/reviews/the-sandlot-1993>.

¹²² 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.*

¹²³ *Id.*

¹²⁴ 67 Cal. App. 4th at 320. It is not clear from the record whether there was any difference in pronunciation in the names of the character and the plaintiff.

¹²⁵ *Id.*

¹²⁶ *Id.* at 321.

¹²⁷ *Id.*

¹²⁸ *Id.* at 320–21.

¹²⁹ *Id.* at 321.

¹³⁰ *Id.* at 320.

¹³¹ *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 649 (Cal. App. 1996).

¹³² 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.” *Star Wars, Episode IV, A New Hope*, Lucasfilm Ltd. (1976) (script by George Lucas). Clip available at <https://www.youtube.com/watch?v=532j-186xEQ>. 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 (2016) (referencing the scene in discussing how the persuasiveness of judicial writing can work on an unconscious level).

¹³³ 67 Cal. App. 4th at 323. In this, the court cited to *Aguilar v. Universal City Studios, Inc.*, 174 Cal.App.3d 384, 388 (Cal. App. 1985), which made a similar move with regard to the plaintiff’s age.

¹³⁴ 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.

¹³⁵ 67 Cal. App. 4th at 323.

¹³⁶ *Id.* at 321.

¹³⁷ 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.).

¹³⁸ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 74 (Ga. 1905).

¹³⁹ *Id.* Note that the court labeled the claim an invasion of the “right of privacy.” *Id.* The court also, however, obliquely reference a “right of publicity.” *Id.* at 70.

¹⁴⁰ *Id.* at 68–69.

¹⁴¹ *Id.* at 69.

¹⁴² *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

¹⁴³ *Id.* at 822 (italics added).

¹⁴⁴ The terms “merchandise” and “merchandizing” are used variably in business. I am using the term in one of its particular senses, as I will explain.

¹⁴⁵ Cf. Jennifer A. Konefal, *Dastar: Federal Trademark Law in an Uncertain State*, 11 B.U. J. SCI. & TECH. L. 283, 298 (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)).

¹⁴⁶ 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”).

¹⁴⁷ *Haelan*, 202 F.2d 866.

¹⁴⁸ 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 Part I of

this Article, particularly *supra* notes 14 & ____ and accompanying text.

¹⁴⁹ *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983) supplemented sub nom. *Bi-Rite v. Button Master*, 578 F. Supp. 59 (S.D.N.Y. 1983).

¹⁵⁰ *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

¹⁵¹ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (Cal. 2001).

¹⁵² *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc.*, 296 S.E.2d 697, 698 (Ga. 1982).

¹⁵³ *See, e.g., Comedy III*, 25 Cal. 4th at 404–06 (rejecting First Amendment defense because use of Three Stooges likenesses was not sufficiently “transformative”). More generally, see Part II.D.1 and II.D.2, *supra*.

¹⁵⁴ *See, e.g., ETW Corp. v. Jireh Pub., 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).

¹⁵⁵ Yet another name might be called “unfair exploitation,” which hints at the underlying unjust enrichment essence of the claim, but that label is perhaps too potentially embracing of unrelated situations.

¹⁵⁶ *See, e.g., Alice Haemmerli, Whose Who? The Case for A Kantian Right of Publicity*, 49 DUKE L.J. 383, 383 & 492 n.21 (1999) (discussing “digitalcasting”).

¹⁵⁷ *See e.g., Thomas Glenn Martin Jr., 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”).

¹⁵⁸ *See, e.g., 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 to be a right-of-publicity issue); 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, 169 (2005) (acknowledging the relevance of right of publicity doctrine to digitally simulated performance); 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 (2013) (arguing that law is needed to protect against post-mortem digitally-created virtual performance).

¹⁵⁹ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

¹⁶⁰ *Id.* at 167–68.

¹⁶¹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

¹⁶² *Id.* at 1284.

¹⁶³ *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. The settlement was part of the O'Bannon v. NCAA antitrust litigation.

¹⁶⁴ *No Doubt v. Activision Publg., Inc.*, 122 Cal. Rptr. 3d 397 (Cal. App. 2011) (denying an anti-SLAPP motion to strike on right of publicity claim and specifically rejecting Activision's asserted First Amendment defense).

¹⁶⁵ *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).

¹⁶⁶ *Presley's Est. v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

¹⁶⁷ *Id.* at 1348–49.

¹⁶⁸ *Id.* at 1359.

¹⁶⁹ *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)).

¹⁷⁰ *Id.* at 1359.

¹⁷¹ *Id.*

¹⁷² *See, e.g., Apple Corps Ltd. v. Leber*, C 299149, 1986 WL 215081, at *3 (Cal. Super. June 3, 1986) (right-of-publicity liability under New York law for Beatles-impersonators’ *Beatlemania* show); *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342 (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”).

¹⁷³ Nev. Rev. Stat. § 597.790.

¹⁷⁴ *See* Georgi Schultz, Guide to Las Vegas Impersonator Shows, Showtickets (Feb. 19, 2015), <http://lasvegas.showtickets.com/articles/top-las-vegas-impersonator-shows-guide/>. *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”).

¹⁷⁵ *Id.*