

University at Buffalo School of Law

## Digital Commons @ University at Buffalo School of Law

---

Journal Articles

Faculty Scholarship

---

Spring 1-1-2018

### The Political Economy of Celebrity Rights

Mark Bartholomew

*University at Buffalo School of Law*

Follow this and additional works at: [https://digitalcommons.law.buffalo.edu/journal\\_articles](https://digitalcommons.law.buffalo.edu/journal_articles)



Part of the [Intellectual Property Law Commons](#), and the [Privacy Law Commons](#)

---

#### Recommended Citation

Mark Bartholomew, *The Political Economy of Celebrity Rights*, 38 Whittier L. Rev. 1 (2018).

Available at: [https://digitalcommons.law.buffalo.edu/journal\\_articles/913](https://digitalcommons.law.buffalo.edu/journal_articles/913)



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# THE POLITICAL ECONOMY OF CELEBRITY RIGHTS

MARK BARTHOLOMEW\*

If you ask legal academics, nobody cares much for the right of publicity. The right entitles those with commercially valuable personalities to block unauthorized use of their personas. If someone uses Kim Kardashian’s name without her agreement to help sell a product, Ms. Kardashian can use her right of publicity to halt such use and to seek damages. Moreover, unlike a trademark infringement claim for unauthorized use of a business’s trademark, the right of publicity does not require onlookers to be confused by the defendant’s use. Instead, merely employing some aspect of a celebrity persona without permission and in a commercial fashion is enough to trigger liability under the right of publicity.

The legal academy does not like this. The general sentiment seems to be that the right of publicity is unnecessary. Some suggest that the articulated rationales for the right—incentivizing the creation of captivating celebrity personas and rewarding the productive labor of creative individuals—do not really hold water. Others argue that consumer confusion is the only significant harm from unauthorized use of celebrity personas and trademark law already does an adequate job of policing such behavior. As a result, the right of publicity has been described as “a right in search of a coherent rationale.”<sup>1</sup>

---

\* Professor of Law, University at Buffalo School of Law. Some of the ideas in this Article are based, in part, on a larger discussion of celebrity rights that can be found in my article, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301 (2011).

1. Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 799 (2008). For some of the other scholarly criticisms of the right of publicity, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV.

Yet despite the legal academy's misgivings, the right has grown to be more and more expansive over time. First recognized in a decision by the Second Circuit in 1953, the right of publicity has become a potent tool in the arsenal of the famous and their agents. The right is a creature of state law. Most states considering the issue have elected to recognize the right, whether through statutory enactment or common law rulings. Originally limited to two specific aspects of the celebrity persona—name and likeness—the right now includes any potentially valuable reference to a celebrity. The right also extends long after the celebrity's passing, in some states for more than a century after death. In short, for those imbued with celebrity status, the right represents an effective means for controlling outside uses of one's persona, subject to little balance with other competing concerns.

This Article discusses how the right of publicity became such a robust property right—much more far-reaching than analogous rights in copyright or trademark. Part I explains why intellectual property scholars disfavor the right and why, therefore, one cannot explain the accretion of celebrity publicity rights as a matter of legal logic. It also partially debunks a competing narrative of the right's history. According to this narrative, in the 1950s, lawmakers first recognized the economic value of celebrity and immediately took steps to fully safeguard that value via the creation of a new intellectual property right. However, there are some problems with this “if value, then right” theory. Even after the right of publicity was first articulated in the 1950s, something held lawmakers back. Rather than championing full property rights in celebrity personas, courts and legislatures made sure that the right of publicity was not descendible and limited the aspects of persona it protected. It was obvious to these lawmakers that celebrities could attract consumers and that businesses were willing to pay them handsomely for doing so. Nevertheless, it was not until the 1980s and 1990s that lawmakers were willing to alter the terms of celebrity status, turning a limited legal privilege into a far-reaching economic entitlement. Hence, the history of the right of publicity cannot be described simply as a reaction to the growing economic value of celebrity endorsements.

Part II offers one alternative explanation for the right's expansion, outlining the political economy of modern celebrity from the perspective

---

125, 127 (1993); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. REV. 1503 (2009).

of state lawmakers. Critical innovations to the right of publicity occurred in the particular political environment of the 1980s and 1990s, not the 1950s. I discuss the lawmaking configurations that produced new statutory definitions of the right of publicity during this period. Different political actors battled for the votes of state legislators on the issue of expanded celebrity rights. Despite some groups' resistance to new, specialized entitlements for celebrities, the conditions were right for a particular coalition of interest groups to push through new vigorous interpretations of the right of publicity.

In Parts III and IV, I discuss the right's expansion from the perspective of a different political actor: judges. At the end of the twentieth century, the political optics of celebrity changed in a way that provided more comfort for judges who were once hostile to the anti-democratic implications of publicity rights. Judges had to evaluate statutory celebrity protections as well as create their own common law definitions of publicity rights. In this process, they confronted a changing social definition of celebrity that was no longer linked to merit or inner greatness. Anyone, it was now argued, had the potential to become famous. This change in the meaning of fame made celebrity legal protections seem less like a perk for a rarified few and more like a fundamental right available to all.

## I. EXPLANATIONS FOR THE GROWTH IN CELEBRITY RIGHTS

Before discussing the political and social factors that I believe help explain the development of the right of publicity, I want to address two explanations that do not adequately account for its full expansion.

### A. *THEORETICAL JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY*

In their public statements, judges and legislators contend that the right of publicity simply represents a rational tool of intellectual property protection, just like patents, copyrights, or trademarks. Few would maintain that these other types of intellectual property serve no purpose. Patent and copyright protection are meant to encourage the creation of public goods that otherwise might be in short supply. Trademark law stops unauthorized uses of particular source identifiers (words, symbols, designs, etc.) that can confuse consumers. Along similar lines, one might argue that lawmakers quite rationally adopted publicity rights protections, not because of self-interest or outside influences, but

because such protection made logical sense.

The problem with such an argument is that the rationales typically advanced for the right of publicity do not make much sense. Perhaps the most common argument for publicity rights is the need to encourage the development of captivating celebrity personas. Without the right of publicity, it is contended, we would face a world without Angelina Jolie, LeBron James, and Taylor Swift. Outsiders could commercially use their names and countenances without permission, thereby depriving them of the full benefit of their celebrity efforts and discouraging their attempts to achieve stardom. As one federal court of appeals explained in 1986, “The reason that state law protects individual pecuniary interests [through the right of publicity] is to provide an incentive to performers to invest the time and resources required to develop such performances.”<sup>2</sup>

The incentives story of the right of publicity is unconvincing. It is hard to believe that Ms. Jolie, Mr. James, and Ms. Swift never would have gotten into the entertainment business if they had been told that others might make use of their celebrity without their approval. Even without enjoying the remunerative potential of commercial endorsements, celebrities can still receive generous payouts in other forms, including performance fees. Moreover, in a world with no right of publicity, stars could still license the use of their names and likenesses for commercial purposes. It is true that without the right, they could not guarantee a retailer the exclusive use of their names or likenesses, but it is highly likely that many businesses would pay handsomely for the privilege of telling consumers that they were the sole retailer authorized to sell goods under the name of a particular celebrity. After all, a significant market for celebrity endorsements existed before the right of publicity’s creation.<sup>3</sup>

Perhaps most importantly, non-celebrities are often driven to become celebrities for non-monetary reasons. Many seek attention out of a desire to impress others or leave a monument to posterity. Others are born with all of the tools in place for celebrity and do not need legal incentives. For example, it was serendipity more than anything else that

---

2. *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 678 (7th Cir. 1986).

3. TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 225 (2016).

brought Jim Thorpe's prodigious athletic talents to the attention of football coach Pop Warner. A modeling scout spotted a then-unknown Channing Tatum on a Miami street, a story that mirrors Lana Turner's discovery in a Hollywood soda fountain. Given these alternative motivations and pathways to fame, it seems unlikely that publicity rights are a main impetus for the development of entertaining personas.

Moreover, despite the language of incentives often used in modern interpretations of the right of publicity, the early cases and commentaries concerning the right did not mention incentives. In addition to the reasons mentioned above, there was another reason for this omission, specific to the historical circumstances of the time. The particular structure of the entertainment industry in the first half of the twentieth century made it hard to believe that an award of publicity rights would incentivize the creation of new captivating personalities. It was the studios that controlled celebrity personas, not the celebrities themselves. Stars operated within a regime that placed economic and creative control in the hands of non-celebrities. "[F]ilm performers were essentially studio-owned-and-operated commodities."<sup>4</sup> The studios exercised tight legal and creative control over their stars, both on and off screen. Some contracts even prohibited celebrities from laughing in public.<sup>5</sup> The studios also routinely entered into deals to use the star's image in merchandising without the star's approval.<sup>6</sup> Although the studio system's heyday was over by the end of the 1940s, when the right was created in the early 1950s, the industry had not yet fully moved to the

---

4. JOSHUA GAMSON, *CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA* 25 (1994); see also DREW PINSKY & MARK YOUNG, *THE MIRROR EFFECT: HOW CELEBRITY NARCISSISM IS SEDUCING AMERICA* 33 (2009) ("Stars were little more than well-paid employees who could be rented or sold to other studios for profit.")

5. GAMSON, *supra* note 4, at 25 (noting that "Buster Keaton's contract . . . [prohibited] him from laughing in public.").

6. K.L. Lum et al., *Signed, Sealed and Delivered: "Big Tobacco" in Hollywood, 1927-1951*, 17 *TOBACCO CONTROL* 313, 318 (2008) (describing studio control over celebrity cigarette testimonials); Kembrew McLeod, *The Private Ownership of People*, in *THE CELEBRITY CULTURE READER* 649, 653 (P. David Marshall ed., 2006) ("Contracts enabled movie studios to use a star's name, voice and likeness to promote the film, and more underhandedly, it allowed for the use of a star's image to be licensed for product endorsements, even in the most questionable and tangential circumstances."); see KERRY SEGRAVE, *ENDORSEMENTS IN ADVERTISING: A SOCIAL HISTORY* 22, 23 (2005) ("Some contracts included a clause stating that the stars would not sign any testimonials except through the film studio's manager or publicity director. On the other hand, the studio could sign for the star.").

modern model of placing greater artistic and financial control in the hands of individual artists. Given the history of studio control over performers, publicity rights could be seen as inuring to the benefit of the movie studios, not the individual celebrity, making it hard to explain the right of publicity's creation in the 1950s through the incentives model.

*B. IF VALUE, THEN RIGHT*

Another way to explain the right of publicity's rise is not as a fully justified intellectual property creation but as a response to the increasing economic value of celebrity. This argument acknowledges that although the right is not necessary to encourage or reward celebrity seeking, lawmakers responded to the value of commercial endorsements in the 1950s by creating a new legal entitlement to protect that value. In other words, once the value of celebrity became apparent, the legal system stepped in.

The problem with this explanation is timing. Celebrities served as commercial spokespersons long before the right was introduced in 1953, and courts were aware of the financial advantages of celebrity throughout the twentieth century. It was no secret that advertisers were willing to pay handsomely to use celebrity names and pictures to stimulate demand for their merchandise. An early case involved Thomas Edison suing for the unauthorized use of his name and likeness on a type of pain relief medicine. In evaluating Edison's claim, the court explained that one's name and "the peculiar cast of one's features" may have a "pecuniary value" that belongs to a single individual.<sup>7</sup> If the right of publicity was simply a response to celebrity value, it seems like the right should have been created years before.

In addition, after recognizing the right of publicity in the 1950s and 1960s, state courts and legislators held back, imposing significant limitations on the right that dramatically limited its power. Chief among these limitations were refusing to grant posthumous publicity rights and narrowly defining the scope of the right to appropriations of name and likeness. The prohibition on posthumous rights represented an important check on the right of publicity. Strictly as a matter of timing, it meant that celebrity could only be monetized during a famous person's lifetime. The limited time frame diminished celebrities' worth as

---

7. *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 392, 394 (N.J. Ch. 1907).

merchandisers, and licensees could never be sure when their exclusive rights would expire, i.e., when a particular celebrity would die. Similarly, by restricting the right to use of a celebrity's name or picture, lawmakers permitted a host of other unauthorized uses and thereby reduced the right's effectiveness. These limits, which I will discuss in more detail in Part II, were only dispensed within the 1980s and 1990s. They suggest a discomfort with celebrity rights on the part of lawmakers and indicate that there is more to the story of the right of publicity than a desire to immediately protect celebrity value.

## II. LEGISLATING PUBLICITY RIGHTS

States adopted a variety of new, stronger publicity rights measures in the 1980s and 1990s. In a short period of time, the right of publicity morphed from a limited personal right protecting a living celebrity's name and likeness into an expansive descendible property right extending to all aspects of persona. In the past, the right had always died with the celebrity, but in the 1980s, several states passed new laws extending the right of publicity to fifty, seventy-five, even one hundred years after the death of the famous individual. Some states even made their new publicity rights statutes retroactive, providing postmortem protections for celebrities that had passed away decades before these statutes were passed. Simultaneously, courts decided to recognize common law posthumous publicity rights.

At the same time, legislators and judges took a more expansive view of the features protectable under the right of publicity, eventually deciding to protect anything used by another that might "identify" the celebrity. Voice, like name and likeness, became part of the celebrity property right, even if the secondary use at issue was only a close imitation.<sup>8</sup> Courts held that using actors bearing a striking resemblance to a celebrity in commercial activities violated the right of publicity.<sup>9</sup>

---

8. For example, the Ninth Circuit held that Ford potentially violated singer Bette Midler's right of publicity by airing a car commercial featuring a cover of one of Midler's famous songs, sung by another singer who was specifically told to imitate Midler's voice and style. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

9. *E.g.*, *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390, 395–96 (E.D. La. 1992) (celebrity chef's right of publicity allegation survived a motion to dismiss); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 367 (S.D.N.Y. 1988) (Woody Allen's right of publicity claim under a New York privacy statute survived a motion to dismiss); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 621, 623, 632 (S.D.N.Y. 1985) (holding

Courts also came to recognize claims based on uses of objects associated with a famous person, the best example being game show hostess Vanna White's successful suit against Samsung Electronics for its advertisement featuring a robot dressed in a blonde wig, gown, and jewelry standing next to a letter board resembling the one used on Wheel of Fortune.<sup>10</sup>

Given the weak theoretical basis for the right of publicity, it is hard to argue that this flurry of legislative and judicial activity represented a strictly rational lawmaking impulse. Nor is it correct to describe this activity as an immediate response by lawmakers to a newfound value in celebrity endorsements. Lawmakers knew about celebrity's economic value decades before the right's creation and nearly a century before the right became descendible. Hence, acknowledgement of celebrity's financial worth does not explain the right's dramatic expansion in the century's last two decades.

Instead, one way to explain this legal shift is to look at the particular forces that mobilized for and against publicity rights legislation. In this period, a particular political coalition formed for broadened publicity rights, chiefly comprised of celebrities, their heirs, and the licensing companies that stood to gain the most from an expanded right of publicity. Lined up against them were various stakeholders that had their own interest in exploiting celebrity personas without restriction. Somewhere in the middle were the media companies, which had cause to both favor and oppose expansion of the right of publicity. Left out of the equation were individual consumers of celebrity. The consuming public had reasons to protest the expansion of celebrity protections but lacked a voice in the legislative process.

#### A. *CELEBRITIES AND THEIR LICENSING AGENTS*

Understandably, two natural proponents of broader publicity rights are celebrities and their heirs. Celebrities lobbied state legislators for enhanced protections, and the historical record suggests that their efforts had some effect. It was no accident that the states passing particularly strong right of publicity laws in the 1980s and 1990s also served as the domiciles for entertainers with obvious postmortem commercial value.

---

that Woody Allen was "entitl[ed] . . . to relief under New York's privacy statute.").

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

The laws enacted in Indiana, Tennessee, and Washington benefitted the estates of James Dean, Elvis Presley, and Jimi Hendrix. Texas's postmortem statute was dubbed the "Buddy Holly Bill" because of the testimony of Buddy Holly's widow on behalf of the legislation. In California, the heirs of John Wayne, Groucho Marx, and Marilyn Monroe were all involved in various legislative enhancements of that state's right of publicity. In an analysis of the 1985 law that first enacted protections for deceased personalities' publicity rights, the California Senate Judiciary Committee contended that testimony "from the son of W.C. Fields, Priscilla Presley, and Burt Lancaster apparently convinced the [Senate Judiciary] committee and the Legislature that increasing protections for those rights . . . were called for."<sup>11</sup> A 1999 revision of that law, which further strengthened publicity rights in California, was deemed the Astaire Celebrity Image Protection Act because it was championed by Robyn Astaire, Fred Astaire's widow. Also in California, the Screen Actors Guild, a union representing celebrities and celebrity hopefuls, was critical in persuading the legislature to enact the 1985 postmortem statute as well as another law in 2007 that vested the right retroactively for celebrities who had already died before the 1985 law took effect.

Even more critical to shepherding celebrity rights legislation through statehouses were the efforts of celebrity licensing firms. In the 1980s, firms that specialized in the licensing of celebrity personas began to appear. The most important of these was CMG Worldwide, which represented the commercial interests of the estates of deceased celebrities such as Babe Ruth, Jackie Robinson, and Humphrey Bogart, as well as living clients like Lauren Bacall and Sophia Loren. Another firm, the Roger Richman Agency, represented the heirs of Albert Einstein, Sigmund Freud, Clark Gable, and Mae West. Firms like CMG and the Richman Agency lobbied for postmortem protections that could provide a potential revenue stream that was large enough and stable enough to trigger serious investment and rights management.<sup>12</sup>

---

11. *Deceased Personalities: Transfer of Publicity Rights By Testamentary Instrument: Hearing on SB 771 Before the S. Judiciary Comm.*, 2007–08 Reg. Sess. 1, 7 (Cal. 2007) (statement of Sen. Sheila James Kuehl, Member, S. Judiciary Comm.).

12. See Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 545 (2008) (describing the licensing of postmortem rights as "one of the most valuable sources of income for a celebrity's estate."); Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic*

Licensing firms benefit from longer-lasting rights and legal mechanisms for shutting down unlicensed competitors, making them natural supporters of enhanced publicity rights. These firms were particularly supportive of postmortem rights. Companies would be willing to pay more for exclusive celebrity licenses if they knew that their licenses would continue in their exclusivity past the death of the celebrity individual. Postmortem rights lent greater predictability to celebrity licensing, which put more money in the pockets of both the celebrities themselves and the licensing firms.

These licensing firms were critical in pushing forward the expansion of celebrity rights in the 1980s and 1990s. Indiana's right of publicity statute, passed in 1994 and described as the most expansive publicity right in the nation, was drafted by the head of CMG Worldwide, which is based in Indianapolis. When CMG received an adverse decision from a federal court regarding Marilyn Monroe's estate, it quickly turned to lobbyists to push a corrective bill through the California legislature. A few weeks later, the legislature passed a law abrogating the decision and benefitting CMG.<sup>13</sup> By the end of the 1990s, licensing firms were reaping millions of dollars in licensing fees from deceased celebrities, thanks in part to the newfound willingness of courts and state legislatures to recognize postmortem publicity rights.<sup>14</sup>

### B. RIVAL COPYRIGHT INTERESTS

While licensing firms are strong advocates for expanding publicity rights, a number of other groups resist any attempts at expansion. One interest group opposing the right of publicity is comprised of those who hold intellectual property rights that potentially conflict with celebrity rights. For example, photographers enjoy copyright protection for their

---

*Analysis of the Inheritability Issue*, 34 EMORY L.J. 1, 22 (1985); Eriq Gardner, *Indiana Moves to Grant Broad New Legal Rights to Dead Celebrities*, HOLLYWOOD REPORTER (Feb. 9, 2012, 12:09 AM), <http://www.hollywoodreporter.com/thr-esq/indiana-dead-celebrities-legal-rights-james-dean-law-288124>; Dennis Hevesi, *Afterlife of the Famous: Heirs Warn of 'Poachers,'* N.Y. TIMES (Feb. 26, 1988) <http://www.nytimes.com/1988/02/26/nyregion/afterlife-of-the-famous-heirs-warn-of-poachers.html>.

13. Gary Scott, *Protecting the Future of Marilyn's Past*, L.A. DAILY J., Oct. 8, 2007, at 1, 4.

14. Greg Johnson, *Protecting Dead Icons Back for an Encore*, L.A. TIMES (Apr. 8, 1999), <http://articles.latimes.com/1999/apr/08/business/fi-25343>.

photographs of celebrities. A new property right that vests in the celebrity herself (or the celebrity's heirs) reduces the value of the photographer's copyrights. A celebrity photographer may then be forced to purchase permissions from her subjects before selling her photos. Consequently, photographers have uniformly opposed legislation expanding publicity rights.

Other groups potentially opposed to celebrity rights are the publishing and advertising industries. Newspapers tried to stop publicity rights laws from being enacted. The *New York Times*, for example, challenged various attempts to enact a postmortem right in the state of New York. Similarly, the Committee on Communications and Media Law of the Association of the Bar for the City of New York opposed posthumous rights legislation because "[i]t would severely restrict the ability of New York media entities . . . to portray deceased private and public figures in their work."<sup>15</sup> In the state of Washington, publishers fought to amend a proposed statute so as to require some sort of culpable mental state before a newspaper could be held liable for invoking a celebrity. It is easy to see why newspapers would be nervous about enhanced publicity rights, which could potentially subject their reporting to a veto from celebrity interests concerned with unflattering journalistic portraits. While attempts to apply the right of publicity against the press present obvious free expression concerns, publishers could also find themselves forced to rely on ambiguous and potentially costly First Amendment defenses if facing lawsuits under the new legislation.<sup>16</sup>

It appears that for most states that have considered right of publicity legislation, the support of celebrities, licensing companies, and, as discussed next, movie and television studios trumped opposition from photographers, newspapers, and others. Since the 1980s, when legislatures have considered the right of publicity, they have generally acted to expand the right, thus enlarging celebrity economic power.

---

15. ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON COMM'NS & MEDIA LAW, REPORT ON LEGISLATION, A8836/S6005, at 1 (2007), [http://www.nycbar.org/pdf/report/Dead\\_Celebrities.pdf](http://www.nycbar.org/pdf/report/Dead_Celebrities.pdf).

16. Although publishers were largely unsuccessful at stopping the wave of new right of publicity protections in the 1980s and 1990s, they were able to convince both courts and legislatures to adopt exceptions for "newsworthy" uses of celebrities. Several right of publicity laws contain explicit exceptions for uses of celebrity in strictly journalistic activities. *E.g.*, IND. CODE § 32-36-1-1(b)-(c) (2016).

*C. STUDIOS*

The entertainment media, particularly movie and television studios, represent another key player in publicity rights legislation. Their perspective on celebrity rights is more complicated than that of the photographers and newspapers. On the one hand, entertainment interests may view an expanding right of publicity negatively. Expanding publicity rights could threaten efforts to generate new content. At the least, increased protections for celebrities could force media interests into significant payouts to celebrities and their heirs. For example, a studio producing a film depicting the life of a famous, deceased athlete may have to gain clearance from the athlete's estate before going forward with its film. Because of these fears, in California, the Motion Picture Association of America (MPAA)—as well as television networks CBS and NBC—opposed the initial recognition of postmortem rights in 1985.<sup>17</sup> ABC, CBS, and NBC made similar arguments opposing proposed legislation to create a postmortem right in New York.

On the other hand, these content providers also have a countervailing interest in strong publicity rights. Modern media companies now leverage celebrity in a variety of formats, not just a single medium like television or film. Strong publicity rights help provide consistent control over celebrity images, thereby making this important component of modern media more stable and reliable. By limiting the number of ways to legally use the celebrity's persona, publicity rights inoculate that persona from the potentially dilutive effects of multiple speakers sending inconsistent messages about that celebrity. Movie and television studios provide the stages for the population to experience celebrity. These businesses want to preserve their own ability to use celebrity to attract viewers while at the same time making sure that these celebrities are not subject to radical reappropriations by others. A strong right of publicity vested in the individual celebrity at least helps promote a consistent—and hopefully not oversaturated—image for their stars.

The support of these media companies became a critical factor in determining whether or not proposed celebrity rights legislation succeeded. Although motion picture studios originally opposed postmortem rights in California, they were able to secure significant

---

17. Heller, *supra* note 12, at 549–50.

changes in the proposed legislation that favored their own interests and tempered their opposition. Hence, the 1985 legislation was altered to exclude use of a celebrity persona in “a play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement.”<sup>18</sup> Texas’s postmortem publicity right was drafted in consultation with the motion picture industry and, during the floor debate over the legislation, its sponsor urged its passage without any amendments lest the industry withdraw its support. One assemblyman objected to the legislation and to the movie studios’ intimate role in its drafting, stating: “I’m sure the motion picture industry signed off on it because they were specifically exempted so it doesn’t apply to them.”<sup>19</sup> Indeed, during discussions over the Texas bill, revisions were made to ensure that use of deceased celebrity names, likenesses, and voices could be made in films and television programs without violating the new law.<sup>20</sup>

More recent alterations to the California right of publicity have also won the studios’ approval. In 1999, the California legislature decided to grant celebrity heirs an additional twenty years of protection, extending control of postmortem publicity rights from fifty years beyond the date of death to seventy years beyond the date of death and eliminating several prior specific statutory exemptions. The television networks and motion picture studios agreed to the expansion.<sup>21</sup> A proposed provision within that legislation that would have prohibited the manipulation of deceased personas through digital technology in expressive works was dropped at the behest of the MPAA.<sup>22</sup> Similarly, the studios managed to kill another provision that would have outlawed defamatory references to deceased celebrities in films and television shows. As one of the chief lobbyists for the MPAA explained after the passage of California’s 1999 law, “new language” was added during the drafting process that “resolved our objections.”<sup>23</sup> More recently, the California legislature

18. CAL. CIV. CODE § 990(n) (West 1988).

19. Audio tape: Floor Debate, Texas H.R. (Apr. 9, 1987) (on file with author).

20. *Id.*

21. See Heller, *supra* note 12, at 554–55; Thomas F. Zuber, *Everlasting Fame: Recent Legislation Has Clarified the Descendible Right of Publicity for Personalities Who Died Prior to 1985*, L.A. LAW., May 2009, at 30–31.

22. Joseph J. Beard, *Fresh Flowers for Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute*, ENT. & SPORTS LAW., Winter 2000, at 1, 25.

23. *Id.*

responded to a district court opinion holding that the estate of Marilyn Monroe had no publicity rights because a statutory descendible publicity right did not exist when she died in 1962.<sup>24</sup> Just a few weeks after the opinion issued, the legislature expanded celebrity postmortem rights by providing that such rights cover not just those celebrities who died when the original postmortem right was enacted in 1985, but also celebrities that died before 1985. The studios made no opposition to this legislation.<sup>25</sup>

In contrast, when the studios are not brought into the legislative process, proposed right of publicity laws die in committee. For example, in 2007, the New York legislature began its consideration of a postmortem publicity right. One reason that the proposed legislation failed might have been the exclusion of media companies. In letters of opposition to the proposed legislation, several studios expressed their displeasure at not being included in the drafting process.<sup>26</sup> Given the political economy of celebrity rights, such proposals are much less likely to secure the necessary legislative support when studio concerns are

---

24. *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1156 (C.D. Cal. 2008).

25. *Post-mortem Publicity Rights of Deceased Celebrities: Hearing on S.B. 771 Before the S. Rules Comm.*, 2007–08 Reg. Sess. (Cal. 2007) (listing those in support and opposition to the legislation).

26. *See, e.g.*, Letter from Stacey M. Byrnes, Senior Vice President, Intellectual Prop. Counsel, NBC Universal, to the Hon. Helene Weinstein, N.Y. State Assemb. (June 20, 2007) (explaining that NBC was crafting its own bill that it had not yet had the opportunity to put before the legislature); Letter from Martin D. Franks, Exec. Vice President, CBS Corp., to the Hon. Helene E. Weinstein, N.Y. State Assemb. (June 19, 2007) (“CBS Corporation will be profoundly affected by this Bill, which was introduced just two weeks ago on May 31, 2007, leaving CBS Corporation no opportunity to consider it thoroughly and present to the legislature our views on its impact on the work we do.”); Letter from Henry S. Hoberman, Senior Vice President, Counsel, ABC, Inc., to the Hon. Helene E. Weinstein, N.Y. State Assemb. (June 19, 2007) (“We urge you to delay further action on the Bill in order to afford interested parties, including Disney, ESPN and ABC, the opportunity to present our views and discuss them with you and other legislators in a meaningful way.”). In 2017, New York State legislators proposed a new right of publicity bill providing postmortem protections. Again, opposition from the motion picture industry (and other groups) caused the bill to be pulled before it could come up for a vote. *See* Jennifer E. Rothman, *New York Legislature Feels the Heat and Pulls Right of Publicity Bill*, RIGHT OF PUBLICITY ROADMAP, June 21, 2017, <http://www.rightofpublicityroadmap.com/news-commentary/new-york-legislature-feels-heat-and-pulls-right-publicity-bill>.

ignored.<sup>27</sup>

Along with film studios, the video game industry represents another sector disadvantaged by the expansion of the right of publicity. Although not a powerful lobbying interest in the 1980s and 1990s, the video game industry now represents an important actor in the conversation over celebrity rights. Several recent publicity rights cases have come out in the industry's favor.<sup>28</sup> One notable case involving Lindsay Lohan held that *Grand Theft Auto V*—which featured inexact imitations of Lohan and TV personality Karen Gravano—did not violate either celebrity's right of publicity.<sup>29</sup>

More to the point of this Part, the video game industry's opposition to the right of publicity likely has exerted pressure on legislators to reject recently proposed statutory expansions. During the past decade, both the New Hampshire and Massachusetts legislatures have failed to approve bills that would have created postmortem publicity rights for celebrities.<sup>30</sup> J.D. Salinger's son, Matt Salinger, was a notable proponent of the New Hampshire bill, which passed through the House and Senate but was vetoed by the state governor in 2012.<sup>31</sup> Notably, the video game industry opposed the bill because it failed to include video games in its list of works entitled to a specific statutory exemption.<sup>32</sup> A similar posthumous publicity rights bill in Massachusetts, supported by Bill

27. Leon Neyfakh, *Who Owns You After You Die?*, BOSTON GLOBE (Aug. 19, 2012), <https://www.bostonglobe.com/ideas/2012/08/18/who-owns-you-after-you-die/Ssv75hSRzbWGDcbNdSwh0K/story.html>.

28. See, e.g., *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *C.B.C. Dist. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823–24 (8th Cir. 2007) (holding that an online fantasy major league baseball game did not violate the players' right of publicity).

29. *Gravano v. Take-Two Interactive Software, Inc.*, 37 N.Y.S.3d 20, 21–22 (App. Div. 2016).

30. Cf. EDWARD H. ROSENTHAL, *THE RIGHT OF PUBLICITY* 9 (2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015\\_intellectual\\_property\\_lit/materials/the\\_right\\_of\\_publicity\\_article\\_rosenthal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_intellectual_property_lit/materials/the_right_of_publicity_article_rosenthal.authcheckdam.pdf).

31. Jonathan Faber, *Observations Regarding New Hampshire's Right of Publicity Effort and Governor Lynch's Veto of SB 175*, RIGHT OF PUBLICITY (June 22, 2012), <http://rightofpublicity.com/observations-regarding-new-hampshires-right-of-publicity-effort-and-governor-lynchs-veto-of-sb-175>.

32. Tamlin H. Bason & Mahira Khan, *New Hampshire's Publicity Statute Battle Showcases Rival Views of Evolving Doctrine*, 84 PAT. TRADEMARK & COPYRIGHT J. (BNA) 488 (2012).

Cosby, failed on three separate occasions to make it through the legislature, the last time being in 2014.<sup>33</sup>

#### D. INDIVIDUAL CONSUMERS

A final group with an interest in this debate is the consuming public. Celebrities serve as powerful cultural symbols that individuals can deploy to communicate something about themselves. When someone invokes the persona of John Wayne or Lady Gaga, they are saying something not just about the celebrity but also about themselves. Publicity rights threaten this process of identity formation and personal expression by giving the celebrity or her estate the power to determine which invocations of the celebrity persona are appropriate and which are not.

This Article focuses on a time period in which the critical understanding of how individuals use celebrity changed. Old understandings of celebrity culture described the interface between celebrities and their audiences as a one-way street with audiences accepting celebrity communications at face value. In the 1980s and 1990s, however, new academic disciplines emerged to emphasize the unexpected ways audiences interacted with celebrity symbols, and prior scholars of celebrity were criticized for portraying audiences as unrealistically passive. New critics of celebrity culture contended that the consumptive practices of those receiving cultural material deserved greater recognition. According to this new view of celebrity audiences, there was a dynamic exchange occurring between celebrities and their fans, with the latter constantly reworking the messages articulated by the former.<sup>34</sup>

This new view of the celebrity-audience dynamic did not favor the expansion of celebrity rights. The more that consumers of celebrity were seen as engaging in their own creative activity, the less justifiable restrictions on that creative process became. As a consequence, laws that prevented derivative use of celebrity messages threatened to take away

---

33. ROSENTHAL, *supra* note 30, at 9; Shira Schoenberg, *Bill Supported by Comedian Bill Cosby Would Protect Massachusetts Celebrities' Rights to Their Image After Death*, MASSLIVE (July 3, 2014, 11:52 AM), [http://www.masslive.com/politics/index.ssf/2014/07/bill\\_supported\\_by\\_comedian\\_bil.html](http://www.masslive.com/politics/index.ssf/2014/07/bill_supported_by_comedian_bil.html).

34. See, e.g., JOHN FISKE, UNDERSTANDING POPULAR CULTURE (1989).

valuable raw material for the construction of social identity.

The voices of individual consumers (and the academics who studied them) were not heard in the legislative process, however. As the various interest groups battled over extending celebrity protections, they paid little attention to the concerns of the consumers of celebrity themselves. The reason probably lies in a basic collective action problem. It is difficult for citizens concerned about personal expression to coalesce in ways that would make their presence felt by state legislators. The stakes are likely too small or too hidden for individual citizens to feel that they need to take action upon becoming aware of celebrity rights legislation. Some organizations could potentially articulate the interests of individual consumers. For example, the American Civil Liberties Union opposed, on personal expression grounds, California's initial decision to grant postmortem celebrity rights.<sup>35</sup> In 2017, the New York Civil Liberties Union protested proposed legislation broadly expanding New York's right of publicity law.<sup>36</sup> In general, however, the difficulties of mobilizing consumers to respond to increased publicity rights have proved insurmountable. Instead, the lobbying efforts of those favoring expanding publicity rights triumphed.

### III. MAKING CELEBRITY POLITICALLY PALATABLE

Special protections for celebrities suddenly became a safer political bet in the last years of the twentieth century. Part of the answer, on the legislative side, can be found in studying how celebrities, their heirs, and their licensing agencies were able to co-opt key rivals and convince legislators to enact broader and longer-lasting publicity rights. Another part of the answer lies in the cultural forces influencing judges in the relevant period.

At the same time that celebrity interest groups were scoring legislative victories, courts were announcing more generous interpretations of the right of publicity, widening its scope and recognizing postmortem rights. A partial explanation for this judicial about-face can be found in the changing definition of fame. Originally,

---

35. Stephen F. Rohde, *Dracula: Still Undead*, CAL. LAW., Apr. 1985, at 51, 53.

36. Victoria Tang, *NCAC, NYCLU Oppose Expansion of "Right to Publicity" Laws*, NAT'L COALITION AGAINST CENSORSHIP (June 26, 2017), <http://ncac.org/blog/ncac-nyclu-oppose-expansion-of-right-to-publicity-laws>.

celebrity status was something that only applied to a rarified few. In the 1980s and 1990s, however, the perceived relationship between the famous and their audiences changed in ways that appeared more inclusive and, hence, made special judicial protections for celebrities more politically palatable.

#### A. *THE CHANGING DEFINITION OF FAME*

Lawmakers establishing the right of publicity in the 1950s and 1960s acted in the context of a particular view of what it meant to be famous. This view led to several restrictions on the right. Instead of being something that anyone could potentially enjoy, fame was reserved for a select group that had demonstrated great achievement. As a result, the privileges afforded by the right of publicity were fundamentally undemocratic. Not everyone could be great, not everyone had equal access to the spotlight, and this caused reluctance in awarding special legal protections to celebrities.

Until the last part of the twentieth century, fame remained tied to some form of greatness in the popular imagination. Discourses of the nineteenth and early twentieth centuries spoke of rises to fame based on merit. Fame went to those whose accomplishments placed them ahead of the rest. In narratives describing early Hollywood celebrities, their stardom required a “virtue, genius, character, or skill that did not depend on audience recognition.”<sup>37</sup> In other words, the greatness linked to fame relied on special qualities inherent to the celebrity herself. The link between fame and inner greatness made celebrity an elite phenomenon. “Inner greatness was a precondition for celebrity, and . . . greatness only resided in a select few.”<sup>38</sup>

Evidence of this aristocratic view of fame can be seen in the publicity narratives of the first half of the twentieth century. Film stars from this era were described as “royalty.” Even as Hollywood began to present more inclusive descriptions of celebrity in the 1950s and 1960s, there was still a sense that the talent necessary for celebrity was innate. One could not plan to become famous. Instead, “[f]ame, based on an indefinable internal quality of the self, was natural, almost

---

37. GAMSON, *supra* note 4, at 28.

38. Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 347 (2011).

predestined.”<sup>39</sup> Celebrity was still reserved for a chosen few, those with the inner greatness that justified stardom.

By the 1980s, however, the understanding that fame was dependent on achievement had changed. As media outlets proliferated, particularly with the introduction of cable television, more and more celebrities were needed. Although narratives discussing a celebrity’s destiny or inner talents still existed, in large part, greatness became decoupled from celebrity. Cultural observers began to notice that talent and fame were no longer linked. Examples of famous artists and athletes who had actually achieved little in their particular fields began to multiply. Madonna, the quintessential 1980s celebrity, became known for self-promotion, not her talents as a singer or actor. Fame was no longer yoked to narratives of inner greatness and outside accomplishment. As a result, there was a new sense that anyone, not just those with special talents, could become a celebrity.

The Internet has only exacerbated this trend. Modern representations of celebrities, whether on television, in print, or online, depict familiarity rather than unapproachability. By portraying celebrities as regular people, social media has made fame more egalitarian. Surveys reveal a surge in the number of people who think they will someday be famous. Not everyone can be great, but everyone can be a celebrity.<sup>40</sup>

In today’s society, businesses continue to become more and more enamored with public figures that lack any apparent qualification for their fame. Modern marketing texts stress the value of “manufactured celebrities” over stars with great talent, because the former lack the bargaining power of the latter and thus can be exploited to the full potential of media companies and advertisers.<sup>41</sup> As a result, advertisers

39. GAMSON, *supra* note 4, at 32.

40. GRAEME TURNER, *ORDINARY PEOPLE AND THE MEDIA: THE DEMOTIC TURN* 14 (2010) (“[T]hese trends have resulted in the idea of celebrity itself mutating: no longer a magical condition, research suggests that it is fast becoming an almost reasonable expectation for us to have of our everyday lives.”). Andy Warhol famously articulated this decoupling of fame and achievement in 1968 by claiming that “[i]n the future, everyone will be world-famous for fifteen minutes.” David Abbitt, *Fifteen Minutes of Fame and the First and Fourteenth Amendments*, HUFFINGTON POST (Oct. 22, 2013), [http://www.huffingtonpost.com/david-abbitt/fifteen-minutes-of-fame-a\\_b\\_3789290.html](http://www.huffingtonpost.com/david-abbitt/fifteen-minutes-of-fame-a_b_3789290.html).

41. Egon Franck & Stephan Nüesch, *Avoiding “Star Wars” – Celebrity Creation as Media Strategy*, 60 KYKLOS 211, 226–27 (2007).

create their own celebrities, such as the Old Spice Guy or Jared from Subway, that offer no underlying talent or record of accomplishment to justify their notoriety. Businesses quickly sign “accidental” celebrities like O.J. Simpson’s houseguest Kato Kaelin and Jeremy Meeks, whose handsome mugshot became a viral sensation after being posted on the Facebook page of the Stockton, California police department. In some ways, these famous faces offer the perfect canvas for marketers looking to tell their own stories about their brands while attracting consumer attention. Paris Hilton has been described as the quintessential postmodern celebrity because there was no awareness or expectation of talent to get in the way of her image. Her fame spoke entirely for itself, and that fame translated into great commercial success.<sup>42</sup>

### B. JUDGING AND THE NEW DEMOCRATIC VIEW OF CELEBRITY

The new democratic notion of fame found purchase in courts, possibly providing one explanation for the expansion of celebrity rights in the 1980s and 1990s. Judges took steps to articulate a new vision of the right of publicity that could apply to everyone.

Prior cases and commentaries suggested that the availability of the right of publicity was limited to a small group of people that had become famous and managed to trade on that fame. Hence, the Georgia Supreme Court explained, “[W]hile private citizens have the right of privacy, public figures have a similar right of publicity.”<sup>43</sup> Legal scholars of the time contended that non-celebrities could only turn to the right of privacy, which did not provide any compensation for the economic value of the defendant’s unauthorized use, because they had no right of publicity cause of action.<sup>44</sup>

---

42. Alan Behr & Andria Beeler-Norrholm, *Fame, Fortune, and the Occasional Branding Misstep: When Good Celebrities Go Bad*, INTELL. PROP. & TECH. L.J., Nov. 2006, at 6, 9. In one case involving Ms. Hilton, the court noted that the producers of a feature film paid her \$1 million, not for her acting abilities, but because they hoped to capitalize on the “Paris Hilton” brand.” *Goldberg v. Paris Hilton Ent., Inc.*, No. 08-22261-CIV, 2009 WL 2525482, at \*1 (S.D. Fla. Aug. 17, 2009).

43. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982).

44. Howard I. Berkman, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527, 532–33 (1976); Richard B. Hoffman, *The Right of Publicity—Heirs’ Right, Advertisers’ Windfall, or Courts’ Nightmare?*, 31 DEPAUL L. REV. 1, 7 (1981).

The anti-democratic implications of celebrity rights sometimes bubbled to the surface of legal opinions. In a case involving postmortem rights in the persona of Elvis Presley, the Sixth Circuit offered several reasons for refusing to recognize postmortem publicity rights. Most troubling for the court was the thought of a celebrity's economic power descending from generation to generation. "[T]he law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual," the court explained.<sup>45</sup> Placing the fame's economic rewards "in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture."<sup>46</sup> Likewise, in 1979, the California Supreme Court fretted that posthumous publicity rights would create a world where a celebrity's heirs "are the only ones who should have the opportunity to exploit their ancestor's personality."<sup>47</sup>

In contrast, the modern interpretation of the right of publicity stresses the right's egalitarian nature. In the last years of the twentieth century, judges repeatedly took pains to note the universal eligibility for the right of publicity. Even though most right of publicity cases involve celebrity plaintiffs, modern courts emphasize that the right, in principle, can apply to anyone. Hence, the California Court of Appeal stressed that California's right of publicity statute needed to be construed to include both celebrity and non-celebrity plaintiffs.<sup>48</sup> One judge explained, "I am convinced that the right of publicity resides in every person, not just famous and infamous individuals."<sup>49</sup> The Eleventh Circuit altered the Supreme Court of Georgia's earlier definition of the right of publicity by replacing a 1982 decision that defined it as "a celebrity's right" with a new definition describing it as an "individual's right."<sup>50</sup> Rather than

45. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980).

46. *Id.*

47. *Lugosi v. Universal Pictures*, 603 P.2d 425, 430 (Cal. 1979).

48. *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000).

49. *Fanelle v. Lojack Corp.*, No. CIV.A. 99-4292, 2000 WL 1801270, at \*11 (E.D. Pa. Dec. 7, 2000).

50. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982); *Toffoloni v. LFP Publishing Group, LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009); *see also* *Cheatham v. Paisano Pubs., Inc.*, 891 F. Supp. 381, 386 (W.D. Ky. 1995) (in a case of first impression evaluating a claim under Kentucky's common law right of publicity, the court noted that "celebrity status" is not a prerequisite for such a claim); *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984) ("[A]ll persons, of whatever station in life, from the relatively unknown to the

requiring proof of commercial value in the plaintiff's identity, courts have come to presume such value from the defendant's unauthorized use, a doctrinal change friendly to less-than-famous litigants.<sup>51</sup>

These changes emphasizing a new, broader view of celebrity coincided with a blurring of the distinction between celebrities and legal actors. Recognizing that the requirements for celebrity have loosened and that demographic targeting now allows for stardom beyond the fields of sports and entertainment, lawyers have set out to find their own fame. Online legal "halls of fame" and law-themed gossip blogs confer their own celebrity status on different legal actors, including lawyers and judges. Cable news often centers on legal disputes, turning the spotlight on parties and their attorneys. At the same time, judges increasingly pepper their decisions with references from celebrity-infused popular culture.<sup>52</sup>

All of this translates into a newfound acceptance of celebrity protections. Rather than representing a valuable legal perk for an incredibly select few, the right of publicity became a property right that anyone can aspire to. As a result, judges increasingly described the right at the end of the twentieth century through strong property rights rhetoric.

Before the 1980s, judges seemed to view the right of publicity as an inferior sort of property, if it was even property at all. This was evident in the reluctance to recognize posthumous publicity rights. The right to bequeath one's property at death has been described by the United States Supreme Court as "one of the most essential sticks in the bundle of [property] rights."<sup>53</sup> By making the right of testamentary disposition inapplicable to publicity rights, courts made sure that the publicity right had an inferior status. As one court explained, the right of publicity was a type of property legally inferior to personal property. Instead, the right was more like "titles," "offices," "trust," and "friendship," "attribute[s] from which others may benefit but may not

---

world famous, are to be secured against rapacious commercial exploitation.").

51. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 3:2, 4:7 (2d ed. 2016).

52. Douglas E. Abrams, *References to Television Programming in Judicial Opinions and Lawyers' Advocacy*, 99 MARQ. L. REV. 993, 994 (2016); Nathan Koppel, *Court Jesting: These Sentences Don't Get Judged Too Harshly*, WALL ST. J. (June 29, 2011), <https://www.wsj.com/articles/SB10001424052702304453304576391700217502560>.

53. *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

own.”<sup>54</sup> In this period, judges often described the right of publicity and the personal right of privacy in the same breath. Privacy rights were not recognized as property. Rather, they were dignitary rights that resided with the individual and could not be exchanged with others. Just as the right to privacy was not meant to last after death and was not really “property,” neither was the right of publicity.

Courts moved past this way of thinking as the idea of celebrity shifted at the end of the twentieth century. They switched to describing the right of publicity as a robust property right. As one state court explained in its decision to recognize postmortem publicity rights, despite a prior decision of the Sixth Circuit to the contrary, the right of publicity had to be construed as “a species of intangible personal property” that, a fortiori, included the “unrestricted right of disposition.”<sup>55</sup> Along similar lines, courts began to recognize “celebrity goodwill” as marital property that was subject to equitable distribution upon divorce.<sup>56</sup> No longer were the “personal” right of privacy and the right of publicity lumped together. Instead, as the Tenth Circuit explained, there was a clear “distinction between the personal right to be left alone and the business right to control the use of one’s identity in commerce.”<sup>57</sup> The new view of fame made the right of publicity appear more democratic and, therefore, a subject that could be described through property rights rhetoric.

#### IV. CONCLUSION

This Article represents a partial attempt to trace out the history of one particular intellectual property right. That history shows that it took decades for the right of publicity to become the valuable economic property interest that it is today. The right first appeared in 1953, but it only became descendible, broad enough in scope to cover all aspects of persona, and defined as a property right at the end of the twentieth

---

54. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980).

55. *Tennessee ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 96–97 (Tenn. Ct. App. 1987).

56. *Piscopo v. Piscopo*, 555 A.2d 1190, 1193 (N.J. Super. Ct. Ch. Div. 1988); *Elkus v. Elkus*, 572 N.Y.S.2d 901, 901, 903–04 (App. Div. 1991); *Golub v. Golub*, 527 N.Y.S.2d 946, 950 (Sup. Ct. 1988); Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM.L.Q. 141, 141–42 (1995).

57. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996).

century. Although the commercial importance of celebrity increased during this period, that is not the whole story. Also important to this narrative, a particular political coalition formed that was able to push through broad new celebrity rights protections. At the same time, it was only when judicial perceptions of celebrity became democratized in the 1980s and 1990s that judges permitted doctrinal innovations greatly strengthening the rights of celebrities.

The story of the right of publicity is the story of only a single kind of intellectual property, one that is invoked much less frequently than other more traditional forms of intellectual property. But the history described above suggests that political and cultural forces, rather than legal logic or a simple desire to safeguard economic value, have a large impact on how intellectual property rights are constituted. If so, it would be advantageous for the legal community to be aware of this phenomenon. The right of publicity has become more relevant in an era where social media promises the ability to broadcast one's identity to millions, and popular narratives show Instagram, YouTube, and Snapchat catapulting everyday citizens to stardom. Courts seem to be responding, enlarging the definition of celebrity to include anyone with even a tiny online following.<sup>58</sup> Often, intellectual property law is criticized for not adequately adapting to current conditions. It seems, however, that in certain situations it is very much a product of its times.

---

58. *See Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1211 (N.D. Cal. 2014); *Fraleigh v. Facebook*, 830 F. Supp. 2d 785, 804–05 (N.D. Cal. 2011).