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Stirring the Pot: A Response to Rothman's Right of Publicity

Stacey Dogan*

Any commentary on Jennifer Rothman's terrific book has to begin with a compliment to her extraordinary commitment to the right of publicity. For the uninitiated, her website, *Rothman's Roadmap to the Right of Publicity*, provides a treasure trove of information about the right of publicity in each of the fifty states.¹ Professor Rothman has also written several articles and a number of excellent amicus briefs in some of the most important right-of-publicity cases in recent years.² Finally, this latest contribution—her book—harnesses this exhaustive research and presents it as a historical narrative that is comprehensive, thoughtful, and readable.³ This book will serve as required reading for scholars, lawyers, and historians trying to understand the history, foundations, and key attributes of this perplexing area of law.

Despite my admiration for Professor Rothman and her work, I view the role of a commentator as stirrer of the pot; so, while I agree with much of what she says in her book and her talk, I am going to focus on three points where I have a somewhat different perspective: first, the relationship between “privacy” and “publicity;” second, the role of alienability; and finally, prognosis and cure—or why the right of publicity is so hard, and how we might restore balance to this unwieldy cause of action.

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1. ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://perma.cc/2FM7-VXKQ> (last visited Dec. 17, 2018).

2. See, e.g., Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002); Brief of Amici Curiae Intellectual Property and Constitutional Law Professors in Support of Defendants-Appellants, *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Ct. App. 2018) (No. B285629); Brief of 31 Constitutional Law and Intellectual Property law Professors as Amici Curiae in Support of Petitioner, *Electronic Arts, Inc. v. Davis*, cert. denied, 136 S. Ct. 1448 (2016) (No. 15-424).

3. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (Harvard Univ. Press 2018) [hereinafter ROTHMAN].

I. PRIVACY AND PUBLICITY

The book's central contention is that the law took a wrong turn when it began to treat "privacy" and "publicity" as distinct concepts rather than under the broad umbrella of the "right of privacy." If courts had stuck with the original formulation, the book suggests, we might have avoided some of the more egregious expansions of the right and the attendant tensions with speech and other interests.⁴

The problem with this argument, though, is that Rothman's own telling gives little reason for confidence that a privacy framework would have constrained growth of the right any more than "publicity" has. In particular, a privacy right broad enough to encompass the disparate values she attributes to it would likely suffer the same expansionist tendencies as the existing right of publicity. To see why, consider two paradoxical claims at the center of Rothman's argument.

First, Rothman describes the early-twentieth-century right of privacy as extraordinarily broad, in both normative and doctrinal terms. It protected public as well as private figures.⁵ It protected economic as well as personal interests.⁶ It guarded not only against harm in the form of hurt feelings or damaged reputations, but also against exploitation of individuals' names, images, or other personal indicia.⁷ Indeed, this right against exploitation could extend to the use of a person's identity in fictional works.⁸ Rothman describes the right in the broadest possible terms: "From the start there was a property-based conception of the right of privacy. It was understood as a right of self-ownership."⁹

This expansive account of privacy is essential to Rothman's attempt to debunk the conventional wisdom around the right of publicity. In particular, she argues that if courts had appreciated the breadth of the right of privacy, they would never have seen a need to create an independent publicity right.¹⁰ According to Rothman, the *Haelan* court—which first recognized a separate right of publicity¹¹—based its decision on a cramped and inaccurate reading of existing law. Specifically, she argues that if the court had appreciated the full scope of the right of privacy, it could have resolved the case on that basis.¹² Instead, "[i]n so misreading state law, the

4. See, e.g., *id.* at 7 (describing the right of publicity as "a misunderstood, misshapen, bloated monster" that "got off track when it transformed from a personal right . . . into a powerful intellectual property right").

5. See *id.* at 30–44.

6. *Id.* at 43–44 (noting that "public figures retained a broad right of privacy and could enforce it, and even recover economic damages without regard to whether they suffered emotional distress or specific reputational harm").

7. *Id.* at 38–39.

8. *Id.* at 38 ("Fictional uses [of identity], such as the movie from *Binns* [v. Vitagraph Co. of Am., 210 N.Y. 51 (N.Y. Ct. App. 1913)], were deemed exploitative and for trade purposes, while non-fiction uses were not.")

9. *Id.* at 48.

10. *Id.* at 43–44.

11. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

12. ROTHMAN, *supra* note 3, at 61 ("The suggestion by the Second Circuit—that absent a right of publicity the players would not have been able to prevent Topps's (or Haelan's) use of their names and likenesses if such uses had been without permission—was unquestionably wrong.")

federal appellate court in *Haelan* marked the beginning of federal courts taking the lead in improperly developing and expanding the right of publicity—a state law.”¹³

Whatever the merits of Rothman’s claim as a descriptive matter,¹⁴ it clashes with her book’s core premise that the right of privacy would have avoided the excesses of the “misunderstood, misshapen, bloated monster” that the right of publicity has purportedly become.¹⁵ Although the book repeatedly asserts that privacy offers a more modest alternative to the right of publicity, that proposition seems unlikely in a privacy right as capacious and unbounded as the one that Rothman describes. If, indeed, the right of privacy encompassed both harm-based and exploitation-based claims and protected public figures as well as private ones, then there is no reason to think it would have served as a bulwark against expansionist tendencies. Indeed, privacy could well have led to even greater threats to speech. As Rothman documents in the book, the anti-exploitation impulse, paired with attention to dignitary concerns, sometimes led courts to award damages in privacy cases involving fictionalized movies based on real-life people.¹⁶ While courts may well have developed robust defenses to guard against these results, the book does not explain why such defenses would fare better against a right of privacy than they do under a right of publicity regime.¹⁷

In short, I am not convinced that a right of privacy—at least the one that Rothman describes in this book—would have constrained the growth of the right or reduced the threats that it poses to speech, copyright interests, and related concerns.

II. ALIENABILITY AND TRANSFERABILITY

Despite their many similarities in purpose and scope, the privacy and publicity rights described in the book diverge with respect to one critical attribute: alienability. Unlike the more personal, inalienable privacy right, publicity rights constitute independent economic interests that may be exclusively licensed, transferred, sold, and, in some states, passed on through will or intestacy after death.

13. *Id.*

14. While Rothman makes a strong case that some mid-twentieth-century courts and scholars exaggerated the limitations of the right of privacy, her account suffers from some lack of precision and, in some cases, arguable inaccuracy in its eagerness to make its point. In discussing *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), for example, Rothman contends that “the primary basis for rejecting [the plaintiff’s] claim was that the ‘use of [a] photograph [of him] was by permission.’” *Id.* at 42. In reality, however, the *O'Brien* court gave several reasons for rejecting the claim, including the fact that the plaintiff was a public person who had sought out publicity. 124 F.2d at 170 (“Assuming then, what is by no means clear, that an action for right of privacy would lie in Texas at the suit of a private person, we think it clear that the action fails; because plaintiff is not such a person and the publicity he got was only that which he had been constantly seeking and receiving; and because the use of the photograph was by permission, and there were no statements or representations made in connection with it, which were or could be either false, erroneous or damaging to plaintiff.”) (emphasis added).

15. ROTHMAN, *supra* note 3, at 7.

16. *See id.* at 37–38 (citing *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51 (1913)).

17. *See, e.g.*, *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Ct. App. 2018) (recognizing First Amendment defense against actress’s right-of-publicity claim based on fictional portrayal of her in a television miniseries).

In Rothman's portrayal, alienability converts the right of publicity into a vehicle that harms identity holders' interests rather than helping them. From an economic perspective, the book contends that individuals would be better off if the law prevented them from assigning their rights, including the right to sue.¹⁸ More ominously, the book warns that alienability can injure identity-holders in myriad ways, ranging from speech restrictions to loss of control over identity to effective enslavement.¹⁹ Given these harms, the book expresses puzzlement over the Screen Actors Guild's support for alienable publicity rights, which she suggests must have resulted from a lack of awareness of their risks.²⁰ "If the right to publicity is truly transferable, then these laws, rather than furthering the interests of its constituents, allow for SAG-AFTRA's members to lose control over their own identities—potentially forever, even after they die."²¹ Eliminating alienability, she argues, would "fix many of the right's excesses" and "provide[] guidance for resolving its growing conflicts with free speech and with copyright laws."²²

Here again, however, the book arguably proves too little and claims too much. The book's economic claim—that identity holders would benefit financially from a rule against alienability—relies on anecdote and speculation, rather than empirical data or economic theory.²³ Undoubtedly, *American Idol* contestants and NCAA athletes suffer from exploitation at the hands of powerful commercial interests. Indeed, in *Haelan* itself, the individual baseball players may well have been better off if the law had prevented them from conveying exclusive licenses to one baseball card manufacturer.²⁴ But to assess the economic impact of transferability on identity-holders more generally would require a more rigorous inquiry into the relative gains from exclusive licenses versus non-exclusive ones. Economic theory suggests that the ability to give exclusive licenses may benefit identity-holders by commanding a higher price. This intuition helps to explain SAG-AFTRA's support for alienability: the ability to sign exclusive licenses likely allows its members to maximize their potential earnings on endorsements and other licensing deals. Alienability may or may not serve the interests of identity-holders across society; in many contexts (including *Haelan*), the disparate bargaining power between the parties makes it likely that the identity holder will get the short end of the stick. But it is important

18. ROTHMAN, *supra* note 3, at 116 ("Achieving . . . transferability was . . . the primary motive for the shift away from the right of privacy and toward the right of publicity, but it has never served the interests of identity-holders upon whom the right is purportedly based.")

19. *See id.* at 130 (quoting *Pavesich v. New England Life Ins.*, 50 S.E. 68, 80 (Ga. 1905)).

20. *Id.* at 117 ("SAG-AFTRA so far has seemed unaware of the risks that these laws pose to the very people it represents.")

21. *Id.*

22. *Id.* at 137.

23. *Id.* at 132–33 (contending that alienability "primarily rewards third parties rather than identity holders").

24. *Haelan* involved baseball players who had granted exclusive licenses to a single manufacturer to make and sell baseball cards with their images. As Rothman explains, the players lacked legal representation and typically gave little thought to the contracts, signing them hastily and often failing to read the terms. *Id.* at 53–54. Given that context, the players' compensation likely fell far short of the value of the exclusive licenses that they signed, and they may well have earned more by licensing their image to multiple firms.

to recognize the net effect of alienability as an empirical point, on which the book offers speculation rather than evidence.

While its economic claims stand on speculative footing, the book's warning about other harms from alienability relies on a false dichotomy between non-transferability and complete alienation. Alienability, Rothman argues, threatens the very foundations of individual personhood: "[T]he possibility of a truly alienable right of publicity is a chilling one—such unfettered transferability would put control and ownership of a person's identity in the hands of third parties."²⁵ This dystopian view of alienability treats it as an all-or-nothing choice: The law must either prohibit alienation or allow unrestricted transfers of people's names, images, and personalities to third parties. The book gives only passing reference to a third option of allowing some forms of exclusive licenses, but blocking them when they would threaten individual liberties such as employment mobility or freedom of speech.²⁶ By refusing to entertain this more nuanced approach, the book uses alienability as a straw man—a one-dimensional on-off switch—rather than a flexible doctrine responsive to normative concerns. As such, alienability bears responsibility for all manner of dire consequences: some real, some imagined, and some that, upon examination, have nothing to do with transferability of publicity rights.

Many of the book's concerns about alienability involve the loss of individuals' ability to define themselves through their lifestyle, speech, and choice of work. "If the right is transferable," the book contends, "then publicity holders could restrict a variety of fundamental rights held by identity holders—such as controlling what an identity holder can say or do, or compelling speech and associations by using the identity holder's image, name, likeness, or voice."²⁷ Publicity holders could also limit the identity holder's career choices: "If an actor cannot assign, license, or waive right of publicity claims for the limited purposes of a motion picture or television series because a third party owns her publicity rights, producers will not hire that actor."²⁸

Although restrictions like these would indeed provide cause for concern, courts could address them with existing legal doctrines, without prohibiting alienability altogether. In California, for example, state law provides that "[e]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."²⁹ Just as they do with employment contracts generally, California courts could invoke this provision to invalidate any right-of-publicity transfer that effectively prevented someone from practicing her profession or trade.³⁰ Other states apply a balancing test to evaluate non-compete agreements.³¹

25. ROTHMAN, *supra* note 3, at 115.

26. *See, e.g., id.* at 137.

27. *Id.* at 129.

28. *Id.* at 130.

29. Cal. Bus. & Prof. Code § 16600 (2017).

30. *See, e.g.,* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291 (Cal. 2008) (California courts "have consistently affirmed that [S]ection 16600 evinces a settled legislative policy in favor of open competition and employee mobility.").

31. *See, e.g.,* Perry v. Moran, 748 P.2d 224, 228 (Wash. 1987), *modified on reconsideration*, 766 P.2d 1096 (Wash. 1989) ("Whether a covenant is reasonable involves a consideration of three factors: (1)

The same approach could distinguish between reasonable exclusive licenses and unreasonable restraints on individuals' fundamental rights. Indeed, as Rothman acknowledges, at least one court has refused to allow an involuntary transfer of publicity rights to creditors, finding that "neither the law, nor the limits of [the] court's equity jurisdiction, support outright transfer of a . . . debtor's inter vivos right of publicity."³² In other words, accepting the possibility of alienability does not require courts to enforce all transfers of publicity rights. The book's contrary assumption inflates the harms from alienability.

Whatever the misimpression caused by this all-or-nothing view of alienability, the book's more troubling gaffe comes in attributing to alienability harms that have little to do with transfer of publicity rights. For example, the book uses alienability of the right of publicity to explain the artist Prince's decision "to change his name to an unpronounceable symbol when Warner Brothers controlled the use of his name under a lengthy recording contract, and prevented him from making the music and public appearances that he wanted."³³ In fact, Prince's decision was motivated by dissatisfaction with his recording contract, which gave the label control over how many albums he could record.³⁴ He changed his name—and performed with the word "slave" written across his cheek—in protest of the label's restrictive policies.³⁵ Such artificial limits on artistic productivity may well exploit artists and disserve the public,³⁶ but their legality does not depend on the transferability of publicity rights. Even if the law prohibited Prince from assigning his right of publicity, his recording studio could enforce its contractual restriction against him. Invalidating that restriction would require a more fundamental change to contract and employment law.

The book similarly misattributes harms suffered by children due to parental "assignment" of publicity rights. Rothman discusses two cases in which parents purportedly "assigned, often unwittingly, their children's right of publicity with no opportunity for the children to recapture them."³⁷ In both cases, courts rebuffed later efforts to "reclaim" the images and to prevent their use in ways that the parents or the children viewed as harmful.³⁸ Admittedly, both of these examples are profoundly

whether restraint is necessary for the protection of the business or goodwill of the employer, (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant nonenforcement of the covenant." (citation omitted).

32. See *Goldman v. Simpson*, 2006 WL 6845603 (Cal. Super. Ct. Oct. 31, 2006).

33. ROTHMAN, *supra* note 3, at 120.

34. Both of the articles that the book cites in support of the Prince story are in accord on this point. See Stephanie Merry, *The Story Behind Why Prince Changed His Name to a Symbol*, WASH. POST (Apr. 22, 2016), <https://perma.cc/MLX4-RUU4>; Geoffrey Himes, 'Emancipation': Prince-ly Freedom, WASH. POST (Jan. 10, 1997), <https://perma.cc/HAR7-3SHH>.

35. Himes, *supra* note 34.

36. See *id.* ("If . . . you're a prolific talent like [Prince], who creates dozens of songs every year, such an artificial limitation prevents much of your work from enjoying the public interaction that both artists and audiences crave.")

37. ROTHMAN, *supra* note 3, at 121.

38. *Id.* (citing *Faloon ex rel. Fredrickson v. Hustler Mag., Inc.*, 799 F.2d 1000 (5th Cir. 1986); *Shields v. Gross*, 448 N.E.2d 108 (N.Y. 1983)).

disturbing and illustrate the need for limits on the enforceability of parental consent. But neither of the examples had anything to do with assignment of publicity rights. In both cases, the parents had signed a *release* allowing the use of their children's images. Such a release—a form of non-exclusive license—does not require alienability of publicity rights; indeed, it does not require publicity rights at all. Absent some public policy exception, a release signed by a legally competent party would bar a subsequent privacy claim by that party as well. Eliminating alienability, in other words, would do nothing to address the harm with which Rothman is concerned.³⁹

In short, the book's chapter on alienability overstates its threats to identity holders, underestimates potential benefits, and fails to consider alternatives to outright prohibition. Courts could easily develop tools to limit the damages that worry Rothman, while still preserving the ability of individuals and licensees to enter into certain exclusive contracts involving name, voice, or identity.

III. PROGNOSIS AND CURE

Despite these differences over the role of alienability and the roots of the publicity/speech conflict, I applaud the book's explanation of that conflict and the ways in which current doctrine systematically under-protects speech.⁴⁰ As Rothman points out, and as I have argued elsewhere, the lack of a coherent normative rudder for the right of publicity has led courts to balance publicity and speech interests in an ad hoc manner that favors traditional forms of expression, penalizes uses that courts view as exploitative, and inevitably chills speech.⁴¹ Scholars have sought ways to restore balance. Rothman advocates a "return" to a privacy-oriented, harms-based approach.⁴² Mark Lemley and I have urged a consumer protection-focused model.⁴³ Mark McKenna suggests an emphasis on individuals' autonomous self-definition.⁴⁴ By focusing on the normative justifications for the right of publicity,

39. As with alienability more generally, legislatures or courts could place specific limits on the ability of parents to assign their children's right of publicity. Indeed, the new publicity law proposed by the New York state legislature prohibits parents or guardians from assigning their children's right of publicity. See N.Y. Assemb. B. No. A08155-B, § 2 (proposing amendments to NY Civil Rights Law § 50-f.2) (May 31, 2017).

40. See, e.g., Rothman, *supra* note 3, at 138–59.

41. *Id.* at 138–39; see also Stacey L. Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, in INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP (Rochelle C. Dreyfuss & Jane C. Ginsburg eds., 2014); Stacey Dogan, *The Right of Publicity: A Cautionary Tale from the United States*, in THE INTERNET AND THE EMERGING IMPORTANCE OF NEW FORMS OF INTELLECTUAL PROPERTY (Suzy Frankel & Daniel Gervais, eds., 2016); Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U. L. REV. 1293 (2016). See generally Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

42. ROTHMAN, *supra* note 3, at 155.

43. Dogan & Lemley, *supra* note 41.

44. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005); see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127 (1993) (interrogating all of the independent justifications for the right of publicity and finding none of them persuasive).

these and other contemporary critiques imply confidence that, if courts could only settle on a single rationale for the right, a logical right/speech balancing test would follow.

While the quest for normative coherence deserves continued attention, experience suggests that in the right of publicity context, raw judicial intuition shapes the law as much as, or perhaps more than, commitment to any particular normative theory. Many judges have a deep visceral reaction to the sale of products that use people's images without paying them. This intuition drove the original *Haelan* opinion,⁴⁵ and it continues to move judges, particularly in cases involving individual plaintiffs complaining of exploitation by commercial interests.⁴⁶ Although speech concerns can sometimes override those intuitions, the prevailing legal standards offer little certainty to defendants, except in cases involving dramatic transformation, direct critique, or widely accepted traditional forms of expression such as books and news reports.⁴⁷ In these contexts, judges appreciate the social value of the defendant's expression and shape doctrines to enable it to continue, for the benefit of the public.

The persistence of the anti-exploitation impulse, paired with courts' sympathy toward uses that they view as having social value, suggest a shift in emphasis for those of us worried about the balance between publicity rights and other interests, including expressive speech. Thus far, the scholarly critiques of the right of publicity have largely focused on the flimsiness of its normative justifications. Advocates have given less particularized attention to the costs that the right of publicity imposes upon the public. Yet a broad right of publicity does not merely guarantee individuals a share of the profits from use of their identities; it makes products more expensive, deprives the consuming public of quality and variety in celebrity-focused expressive products, and in some cases may eliminate products from the market altogether.⁴⁸ By describing, demonstrating, and quantifying some of these costs, scholars may at least complicate courts' sense of the equities in cases involving unauthorized uses of

45. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (recognizing a right of publicity because "it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways").

46. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.2d 1268, 1281 (9th Cir. 2013) (finding right-of-publicity violation by videogame manufacturer who used college athletes' likeness in videogame, and describing the rationale underlying the athlete's claim: "[The athlete's] claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field."); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (2001) ("In sum, society may recognize, as the Legislature has done here, that a celebrity's heirs and assigns have a legitimate protectible interest in exploiting the value to be obtained from merchandising the celebrity's image, whether that interest be conceived as a kind of natural property right or as an incentive for encouraging creative work.").

47. See Dogan, *Haelan Laboratories v. Topps Chewing Gum: Publicity as a Legal Right*, *supra* note 41, at 27–37.

48. After the video game litigation involving NCAA football players, for example, the manufacturer dropped the college version from its line of sports-related video games. See Alex Kirshner, 'NCAA Football' Last Came Out 5 Years Ago. Here's How Gamers Are Keeping It Alive and What Might Happen Next, *SBNATION* (July 9, 2018), <https://perma.cc/BCK2-GWZE>.

names and images. Over time, this sort of advocacy may soften the automatic anti-exploitation impulse that supports today's extravagant right of publicity.

IV. CONCLUSION

Although I have focused my comments on areas of divergence, Rothman's book shares much in common with my views of the state of today's right of publicity. The right is excessive and unpredictable, it lacks an adequate normative rationale, and it poses unjustifiable costs on speech and other interests. The book does an enormous service in shining a spotlight on these problems and theorizing about their causes, effects, and appropriate responses. I'm grateful to Professor Rothman for writing it and to the Kernochan Center for giving me this opportunity to share my reactions.