

NEW FAME IN A NEW BALLGAME: RIGHT OF PUBLICITY IN THE ERA OF INSTANT CELEBRITY

MICHAEL MULLINS*

INTRODUCTION

The right of publicity emerged as a distinct, named doctrine only as recently as 1953.¹ A philosophical cousin of the right to privacy, right of publicity doctrine asserts that an individual whose likeness has commercial value should have the exclusive, but assignable, right to control the commercial use of his likeness and reap the profits from its use.² All but necessarily, the right applies only to the well-known—only to celebrities.

The 1953 court decision that gave the right of publicity its name, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, involved a baseball player's conflicting contracts with rival baseball card manufacturers; the defendant had induced the player to allow it to use his likeness on its baseball cards when it was aware that the player had already signed a contract granting the plaintiff the exclusive use of his likeness on the plaintiff's baseball cards.³ The court recognized that the injury suffered by the plaintiff—which was not loss of the use of the player's likeness, but rather loss of the value of the *exclusive* use of the player's likeness—was cognizable only if the right to use a person's likeness were assignable.⁴ And for the right to be assignable, it had to be recognized as property, or at least something in the nature of property.⁵ The court held that an individual has just such a quasi-property right to control the commercial use of his likeness, and dubbed the right the “right of publicity.”⁶

In the decades since *Haelan Laboratories*, adoption of the right of publicity

* J.D. Candidate, 2012, Indiana University Robert H. McKinney School of Law; B.S., 1997, Interdisciplinary Engineering, Purdue University, West Lafayette, Indiana. I would like to thank Professor Jonathan Faber, whose course in this subject piqued my interest in it, and Mr. Robert Roach, my seventh and eighth grade English teacher, for making me a writer.

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

2. Black's Law Dictionary defines the right of publicity as: “The right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent.” BLACK'S LAW DICTIONARY 1439 (9th ed. 2009). In one of the most influential treatises on the subject, J. Thomas McCarthy describes the right more philosophically as: “[T]he inherent right of every human being to control the commercial use of his or her identity.” 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2d ed. 2008).

3. *Haelan Labs., Inc.*, 202 F.2d at 867.

4. *Id.* at 868 (“This right of publicity would usually yield [prominent persons] no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.”).

5. *Id.* (“Whether it be labelled [sic] a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”).

6. *Id.*

has been confined to state law—statutory law in some states, common law in others⁷—that is substantively different from state to state. This lack of uniformity has led some legal commentators to call for a federal right of publicity commensurate with federal protection for copyrights.⁸ However, the right of publicity doctrine itself has not been uniformly accepted by legal theorists. The right of publicity has been attacked as needless—duplicative of the protections of copyright, trademark, and unfair competition law and of the false endorsement protections of the Lanham Act⁹—as constitutionally suspect,¹⁰ or even as fundamentally adverse to society’s interests.¹¹ Some commentators have called

7. See *Statutes*, RIGHT PUBLICITY, <http://rightofpublicity.com/statutes> (last visited March 1, 2011). Jonathan Faber, an attorney who specializes in right of publicity cases and teaches a course on the subject at Indiana University Robert H. McKinney School of Law, cites at least twelve states that statutorily confer some form of a right of publicity, but estimates that when states whose courts have recognized a common law right of publicity are included, only two states can be said to have no right of publicity at all. E-mail from Jonathan Faber, attorney, McNeely Stephenson Thopy & Harrold, to author (Dec. 9, 2010, 9:04 EDT) (on file with author).

8. See, e.g., Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 227 (1999); Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Sean D. Whaley, “I’m a Highway Star”: *An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257 (2009). State enactment of a uniform law that is substantively identical in every state—like the Uniform Commercial Code—has been suggested as an alternative to a federal right of publicity statute. Compare Brittany A. Adkins, Comment, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 526-28 (2010) (advocating a uniform act as preferable to federal legislation, for reasons including flexibility in responding to changes in this still-evolving area of the law, respect for federalism, and the promise of states learning from one another’s experiences), with Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209, 210 (1998) (American Bar Association joint task force on federalizing the right of publicity concluded that a federal right of publicity law is preferable to a uniform act, due to unlikelihood that such an act would pass in identical form in every state and unlikelihood that states would repeal their own, existing right of publicity laws in favor of such an act).

9. See, e.g., Lee Goldman, *Elvis Is Alive, But He Shouldn’t Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 606, 610-11, 621-24.

10. See, e.g., *id.* at 616-21; Jeremy T. Marr, Note, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 878-99 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. REV. 903, 908-29 (2003); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 35, 53-82 (1998).

11. See, e.g., Goldman, *supra* note 9, at 604-05 (questioning rhetorically whether “we want a society in which fame has economic value apart from the activity that creates celebrity”), 613-17 (right of publicity creates monopolies that result in higher costs for consumers), 620 (right of publicity curtails consumers’ ability to express themselves through choices in celebrity imagery); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81

for a halt to expansion of the right of publicity, in terms of both the right's statutory adoption in additional states¹² and the scope of its application in those states that have already adopted it,¹³ and others have gone so far as to recommend its outright abolition.¹⁴ In some respects, the hostility directed at the right of publicity reflects discomfiture with the reality that while the right applies to all, it provides a remedy only insofar as one's persona has marketable value. Thus, in a very literal sense, the measure of one's right of publicity is one's fame.

However, the very nature of fame in our society is undergoing a seismic change, to the extent that fame today is a very different creature than it was in 1993, much less 1953. In the past decade, the Internet—representing the latest development in an exponential change in mass media heralded by the growth of cable television and specialized, niche marketing—has very nearly brought to manifest reality Andy Warhol's putative prediction that “[i]n the future, everyone will be world-famous for fifteen minutes.”¹⁵ In all likelihood, the judge in *Haelan Laboratories* could not have imagined the ever-expanding constituency to whom the doctrine he begat might someday apply. This changing nature of fame in our society will necessarily have ramifications for right of publicity doctrine, rendering many of the justifications proffered for the right since *Haelan Laboratories* infirm—but at the same time, rendering many of the arguments against the right moot. In the place of the old conversation regarding the right of publicity, two surprising developments will emerge: right of publicity will be reborn as nothing so much as a populist doctrine, and its existence will find singular justification in the reasoning that gave rise to it in the first place, in 1953 in *Haelan Laboratories*.

Part I of this Note briefly reviews how the right of publicity emerged, how it has developed in the decades since its formal christening in *Haelan Laboratories*, and how those post-*Haelan Laboratories* developments have diluted the formative conception of the right in ways that have made it a target of

CALIF. L. REV. 125, 136-37 (right of publicity allocates more wealth to already-wealthy individuals), 137-46 (right of publicity “facilitate[s] private censorship of popular culture”), 211-12 (right of publicity may decrease cultural creation by allowing individuals to subsist on the value of their fame alone, without further creative endeavor), 216-19 (right of publicity may result in disproportionate pursuit of fame-generating careers at the expense of pursuit of more socially beneficial fields of endeavor, especially amongst economically disadvantaged segments of the population); 226-28 (right of publicity further elevates disproportionate power of celebrities as a cultural and political influence) (1993); Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 752-61 (1995) (right of publicity stifles cultural discourse).

12. See Goldman, *supra* note 9, at 628.

13. See *id.*; Sen, *supra* note 11, at 754-55.

14. See Goldman, *supra* note 9, at 602.

15. This quote is most often attributed to the catalog that accompanied Warhol's 1968 exhibition at the Moderna Museet gallery in Stockholm, Sweden. See, e.g., RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 288 (2006).

skepticism and criticism.¹⁶ Part II describes the tremendous, unprecedented changes in mass media wrought by the Internet in the last decade, which may already be reshaping the very character of “fame” in our society and, consequently, the application of the right of publicity in our law.¹⁷ Even before the dawning of this new age of Internet celebrity, the “raging debate . . . about whether [publicity] rights should exist at all”¹⁸ had already seemed to have reached an academic stalemate.¹⁹ Part III reviews the arguments that have long been made in this debate, both for and against the right of publicity.²⁰ These arguments, almost without exception, concern post-*Haelan Laboratories* developments in right of publicity doctrine and serve to neither strengthen nor weaken the case for the right of publicity as articulated by the court in *Haelan Laboratories*; rather they serve simply to highlight the doctrinal confusion evinced by these developments. Part III concludes that nearly every argument in this theoretical debate over the justification for a right of publicity will be rendered moot by the new paradigm of fame ushered in by the Internet’s revolutionizing of mass media. Part IV posits that what remains in the wake of the old conversation regarding the right of publicity is the right as originally articulated in *Haelan Laboratories*—as cogent and relevant today as it was when *Haelan Laboratories* was decided.²¹

I. HISTORY OF THE RIGHT OF PUBLICITY

A. *The Right of Publicity Distinguished from the Right to Privacy*

To understand the right of publicity, how it has changed in the decades since it was first recognized, and how it will apply in the changing culture of today’s media personalities, it is necessary to recognize how the right evolved from the right to privacy. While the two doctrines ultimately serve fundamentally different purposes, as explicitly noted by the court in *Haelan Laboratories*,²² one important effect of the changing nature of fame will be to highlight not the differences between the two doctrines, but rather their common foundations. In particular, both doctrines are grounded in a humanist concern for personal sanctity and autonomy that serves as the most compelling justification for both.

16. See *infra* pp. 872-79.

17. See *infra* pp. 879-80.

18. David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 118 (2005).

19. See *id.* at 122 (declaring the debate over the justifiability of a right of publicity to have become “pointless,” inasmuch as “the right of publicity is both hard to object to and hard to support”); see also *id.* at 121 (stating, “neither those favoring publicity rights nor those opposed to publicity rights have managed to articulate particularly strong policy rationales supporting their positions”).

20. See *infra* pp. 880-93.

21. See *infra* pp. 893-95.

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

The humanist concerns undergirding a right of privacy were recognized when the right was still little more than academic theory. In their seminal article on the subject in 1890, Samuel Warren and Louis Brandeis described privacy as “a part of the more general right to the immunity of the person,—the right to one’s personality.”²³ Warren and Brandeis described this right as akin to a property right, though not to any recognized at the time:

[S]ince the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

....

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense.²⁴

Some seventy years later, William Prosser built upon the Warren and Brandeis article with his own influential treatise on the right of privacy.²⁵ Prosser included as one of his four enumerated privacy torts the tort of appropriation, which he characterized as “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”²⁶ In doing so, Prosser, like Warren and Brandeis, recognized that this brand of privacy tort derived from one’s intrinsic rights in one’s own identity:

It is the plaintiff’s name as a symbol of his identity that is involved here, and not his name as a mere name.

....

The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity. It seems quite pointless to dispute over whether such a right is to be classified as “property.” If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses.²⁷

Haelan Laboratories had already been decided, but not yet followed,

23. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 207 (1890).

24. *Id.* at 211, 213.

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

26. *Id.* at 389.

27. *Id.* at 403, 406 (citation omitted).

when Prosser's privacy article was published.²⁸ While Prosser's acknowledgement of an inherent right in one's identity was an important academic validation of the nascent right of publicity, he missed a crucial distinction that the court in *Haelan Laboratories* did not: in defining the right of publicity as simply a variant of the right to privacy, Prosser failed to recognize that the interest protected by the right of publicity is fundamentally distinct from the interest protected by the right of privacy. The right of privacy protects an individual from the emotional and reputational harm caused by unauthorized distribution of the individual's likeness; the kinds of cases cited by Prosser as exemplary of his appropriation tort involved unauthorized use of the likeness of a person who felt embarrassed or aggrieved by the use.²⁹ This kind of tort had, in fact, been recognized in some states long before Prosser published his privacy treatise. In 1909, the New York state legislature, in response to the state's lack of statutory authority to grant relief to a private person whose likeness had been used in advertisements without her permission,³⁰ passed the nation's first law proscribing the unauthorized use of a private individual's likeness.³¹ The Georgia Supreme Court, also in the absence of such statutory authority, chose to recognize such a tort judicially in 1905.³²

But as the court in *Haelan Laboratories* rightly noted, not only may the famous not object to having their likenesses disseminated, they may actually desire it—provided they can exercise control of the dissemination and any monetary gain earned from it.³³ Hence, the right of publicity protects an individual's ability to control the use of, and to profit from, the use of his identity in commerce, allowing an individual whose likeness carries a merchantable value to recoup the putative market value of an unauthorized commercial use of his likeness.³⁴ So while the right of publicity shares as a common foundation with

28. *Id.* at 406-07.

29. *Id.* at 401-02 nn.156-61. In one of the cases cited by Prosser, the plaintiff in fact brought a claim for the presumptive loss in value in any future use he might make of the photograph of him that was used by the defendant—a claim akin to a right of publicity claim. *See Cont'l Optical Co. v. Reed*, 86 N.E.2d 306 (Ind. App. 1949). This claim was, however, rejected by the court, which held that the plaintiff had no more right to the particular photograph in question than did the defendant. *Id.* at 310.

30. *See Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1901).

31. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009) (enacted 1909).

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

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

34. *See, e.g., Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 733-35 (8th Cir. 1995) (holding that lower court did not abuse its discretion in accepting, for purposes of assessing damages, expert testimony as to a speculative royalty rate for plaintiff, a professional wrestler, based on royalty rates that had been negotiated for comparable sports and entertainment figures); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 872-73 (C.D. Cal. 1999), *rev'd on other grounds*, 255 F.3d 1180 (9th Cir. 2001) (awarding actor \$1,500,000 in compensatory damages for unauthorized use of his image, based on actor's stature in the motion picture industry and long-time eschewal of commercial endorsements, and the unique promotional opportunity represented by use of the image

the right of privacy a recognition of the intrinsic right one has in one's own identity—what Warren and Brandeis called “the right to an inviolate personality”³⁵—the right of privacy recognizes an abstract emotional and social interest in one's personality, while the right of publicity recognizes a commercial one.

B. Haelan Laboratories

Haelan Laboratories merits close inspection not only because it was the court decision that first put a name to the right of publicity, but also because it defined the right with such startling clarity and prescience. The plaintiff in *Haelan Laboratories*, chewing gum manufacturer Haelan, signed a contract with a famous baseball player granting Haelan the exclusive use of the player's image in marketing chewing gum; the defendant, Topps, a rival chewing gum manufacturer, and aware of the player's contract with Haelan, induced the player to sign a contract granting Topps the right to use the player's image in marketing its chewing gum.³⁶ Topps claimed that the player's contract with Haelan constituted nothing more than a release of Haelan from liability under New York's landmark 1909 law proscribing unauthorized use of a person's likeness, and that the player's rights under that law were personal and thus non-assignable.³⁷ The court disagreed, holding in two paragraphs that constituted nearly the entirety of the substance of its decision:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled [sic] a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be

in question); *Apple Corps, Ltd. v. Leber*, 229 U.S.P.Q. 1015, 1018 (Cal. Sup. Ct. 1986) (holding that because the Beatles could have “named [their] own price” had they reunited for a tour, it was reasonable to assess as damages against a Beatles imitator group a royalty rate of 12.5% of the gross receipts of the imitator group's tour and \$2,000,000 for the film made from the tour).

35. Warren & Brandeis, *supra* note 23, at 211.

36. *Haelan Labs., Inc.*, 202 F.2d at 867.

37. *Id.*

made the subject of an exclusive grant which barred any other advertiser from using their pictures.³⁸

In the course of two compact paragraphs, the court not only christened the right of publicity, but illuminated its nature and scope with a precision belying further elaboration: the right is personal; is distinct from the right to privacy; is akin to a property right (in the manner suggested by Warren and Brandeis with regard to privacy); and is assignable. The right would never again be so exactly delineated.

C. Adoption and Expansion; Dilution and Dissent

In the decades that followed *Haelan Laboratories*, the right of publicity saw sporadic adoption in state law.³⁹ But as the right was invoked and interpreted in various courts, the neat boundaries of the right drawn by the court in *Haelan Laboratories* also became blurred, as different courts, interpreting different state laws, arrived at different conclusions as to the scope and the precise contours of the right.⁴⁰ In the process, the right of publicity became increasingly vulnerable to criticism: already a legal doctrine that could easily be painted as providing

38. *Id.* at 868.

39. *See, e.g.*, CAL. CIV. CODE § 3344.1 (2011) (enacted 1984); FLA. STAT. § 540.08 (West 2012) (enacted 1967); 765 ILL. COMP. STAT. ANN. 1075/1 to 1075/60 (West 2011) (enacted 1999); IND. CODE §§ 32-36-1-1 to -20 (2011) (enacted 1994 as IND. CODE §§ 32-13-1-1 to -20); KY. REV. STAT. ANN. § 391.170 (West 2011) (enacted 1984); NEV. REV. STAT. ANN. §§ 597.790 to-.810 (West 2011) (enacted 1989); OHIO REV. CODE ANN. § 2741.01 to -.09 (West 2011) (enacted 1999); OKLA. STAT. tit. 12 § 1448-1449 (2011) (enacted 1986); 42 PA. CONS. STAT. § 8316 (West 2011) (enacted 2002); TENN. CODE ANN. §§ 47-25-1101 to -1107 (2012) (enacted 1984); TEX. PROP. CODE ANN. §§ 26.001 to -.015 (West 2011) (enacted 1987); WASH. REV. CODE ANN. §§ 63.60.010 to -.080 (West 2011) (enacted 1998), *declared unconstitutional in part by* Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd., 766 F. Supp. 2d 1122 (W.D. Wash. 2011); *see also* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982) (recognizing common-law right of publicity in Georgia).

40. *Compare, e.g.*, Winter v. DC Comics, 69 P.3d 473 (Cal. 2003) (using the artistic transformation test to determine whether right of publicity of professional musicians under California right of publicity statute was superseded by First Amendment right of comic book artist who used the musicians as the basis for comic book characters), *with* Doe v. McFarlane, 207 S.W.3d 52 (Mo. Ct. App. 2006) (using the predominant use test to determine whether right of publicity of professional hockey player under common law right of publicity was superseded by First Amendment right of comic book artist who used the hockey player as the basis for a comic book character). *Compare, e.g.*, Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (holding that in order for an individual's common law right of publicity to be exercised by his heirs or assigns after his death, the individual must have commercially exploited his right of publicity during his lifetime), *with* Martin Luther King, Jr. Ctr. for Soc. Change, Inc., 296 S.E.2d at 706 (holding that the right of an individual's heirs or assigns to exercise the individual's common-law right of publicity after his death is not dependent on whether the individual commercially exploited his right of publicity during his lifetime).

economic relief for those who need it least, the occasional, anomalous extensions of the right's scope—frequently by the Ninth Circuit, whose jurisdiction encompasses the heart of the entertainment industry—allowed naysayers further justification to impugn the right as governmental pandering to the rich and famous.

Perhaps no other court decision did more to simultaneously validate and undermine the right of publicity than the Supreme Court's sole consideration of the right in *Zacchini v. Scripps-Howard Broadcasting Co.*⁴¹ Importantly, the Court in *Zacchini* affirmatively recognized the right (at least insofar as it is implemented by state law).⁴² However, the Court's decision construed the right in a way that obscured it more than illuminated it, and has provided more grist for condemnation of the right than for support of it. *Zacchini* performed a human cannonball act, and brought suit when a local newscast, reporting on the state fair at which he was performing, broadcast his act in its entirety.⁴³ The Supreme Court of Ohio recognized that *Zacchini* had a "right to the publicity value of his performance" and that the network had violated this right by broadcasting his entire act, thus depriving him entirely of its economic value.⁴⁴ However, the court held that *Zacchini's* right of publicity was trumped by the station's First Amendment right to "report in its newscasts matters of legitimate public interest . . . unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."⁴⁵ The Supreme Court reversed, holding that the news network's First Amendment rights did not entitle it to completely deprive *Zacchini* of the economic value of his performance.⁴⁶

Aside from the fact that the case hardly presented a model of the kind of interest the right of publicity is generally thought to protect (after all, it was not appropriation of *Zacchini's* likeness that was at issue, but rather the appropriation of his act), or perhaps because of that fact, the Court justified the right of publicity in terms of protecting and promoting creative endeavor, the traditional rationale behind copyright and patent law:

[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. . . . [T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting

41. 433 U.S. 562 (1977).

42. *Id.* at 566 ("There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law.").

43. *Id.* at 563-64.

44. *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 455 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

45. *Id.*

46. *Zacchini*, 433 U.S. at 574-76.

feelings or reputation.⁴⁷

This rationale for the right of publicity is completely at odds with the right as articulated in *Haelan Laboratories*, which recognized the right not in terms of a state or societal interest, but as a right protecting a personal interest.⁴⁸ The Court gave passing acknowledgment to the right of publicity as recognized in *Haelan Laboratories*, but compounded its earlier mischaracterization by explicitly devaluing the *Haelan Laboratories* court's formative model of the right of publicity as a protection of the promotional value of an individual's likeness:

[I]n this case, Ohio has recognized what may be the *strongest case* for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.⁴⁹

This attempt to analogize the right of publicity to copyright and patent law is doctrinally untenable. The right of publicity protects not an individual's right to a tangible result of his labors, but a more abstract right in the sanctity of his person, making it an ill-fitting conceptual stable-mate with copyright and patent doctrine. As such, attempts to lash right of publicity doctrine to existing intellectual property rationales—rather than to rationales for the right to privacy, to which the right of publicity is more closely related—serve only to obscure the humanist concerns that drive this outwardly commercial doctrine. Regardless, the Supreme Court's doctrinally confused characterization of the right to publicity has provided critics of the right with some of the most perennially resonant aspersions against the right, particularly to the extent that the Court justified the right in terms of rewarding one's endeavors—a justification that is unpersuasive if one considers the right as protecting only the already rich and famous.⁵⁰ In short, the Supreme Court's recognition of the right of publicity in *Zacchini* may have been more damaging to the subsequent vitality of the right than the Court's recognition was worth.⁵¹

Similarly, the degree to which courts have expanded the scope of the right of publicity since *Haelan Laboratories* has made the right an easier target for critics. The chief void in the right that has led to the creeping outward advance of its

47. *Id.* at 573 (citation omitted).

48. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953).

49. *Zacchini*, 433 U.S. at 576 (emphasis added).

50. *See, e.g.*, Madow, *supra* note 11, at 189 ("Publicity rights operate to channel additional dollars to the very people—Einstein rather than Bohr, Vanilla Ice rather than Too Short—who happen to draw first-prize tickets in the fame lottery.").

51. Advocates of the right of publicity have seemed no happier with the *Zacchini* decision than are opponents of the right. *See, e.g.*, Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 402 (1999) ("Despite its affirmation of the right of publicity . . . *Zacchini*'s distortion of state law and its fixation on act rather than identity has had a profound, and negative, effect on publicity rights doctrine.").

scope is ambiguity over what constitutes a person's "likeness" for purposes of protection under the right. Courts have ruled that because a singer's voice and idiosyncratic, identifiable singing style are a part of the singer's persona, a singer's right of publicity can be violated when an advertiser employs a sound-alike to imitate the singer,⁵² even when the sound-alike is not employed to perform a song associated with the singer.⁵³ In even more striking extensions of the right, courts have held that a party may violate an individual's right of publicity through commercial use of the image of a robot that broadly invokes the individual,⁵⁴ and even of a robot that broadly invokes not the individual himself, but the character played by the individual on a television show (a character to which the individual does not own the copyright).⁵⁵ These decisions can be seen as the product of courts struggling to define the scope of a legal doctrine still very much in its infancy, but they may also contribute to a perception of courts employing the right of publicity in fawning deference to the rarified needs of the rich and famous.

II. THE EMERGING MEDIA: A WHOLE NEW BALLGAME

In July 2010, Antoine Dodson was interviewed by a local newscast after an intruder allegedly broke into his Huntsville, Alabama home and attempted to rape his sister.⁵⁶ Dodson's videotaped diatribe was posted to YouTube, where it garnered over a million views by the next day.⁵⁷ Only a few days later, the comedy troupe behind the YouTube series "Auto-Tune the News" transformed Dodson's rant into a song.⁵⁸ Three weeks later, the song was number sixteen on the pop sales chart of music download retailer iTunes, and Dodson claimed he had made enough money from sales of the song, sales of his merchandise, and donations through his Internet site to buy his family a new home in a better neighborhood.⁵⁹

Dodson provides a startling example of fame in a new media age. The Internet—in addition to, and even more so than, preceding developments in niche programming and niche marketing driven by cable television and its ever-proliferating array of specialty channels—has changed the media landscape profoundly, to an extent that likely could not have been imagined only a decade before Dodson's fateful interview, much less when *Haelan Laboratories* was

52. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

53. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

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

55. See *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999).

56. See Ki Mae Heussner, *From Sex Assault Fury to Internet-Fueled Fortune*, ABC NEWS, Aug. 17, 2010, <http://abcnews.go.com/Technology/sex-assault-fury-internet-fueled-fortune/story?id=11413687>.

57. *Id.*

58. *Auto-Tune the News: Bed Intruder Song!!! (now on iTunes)*, YOUTUBE.COM, <http://www.youtube.com/watch?v=hMtZfW2z9dw> (last accessed April 25, 2012).

59. Heussner, *supra* note 56.

decided in 1953. This new media age may fundamentally and permanently alter the very nature of fame in our society: in terms of fame, what the baseball player at the center of the *Haelan Laboratories* controversy took years, or perhaps even the better part of his lifetime, to accomplish through practice, work, and perseverance, Antoine Dodson arguably accomplished in little more than three weeks with very little effort at all.

The hallmark of the new, Internet-driven media age is accessibility. No longer are the channels of wide-spread commercial distribution controlled by a small oligarchy of corporate gatekeepers: television networks, radio stations, record labels, and the like. The Internet provides anyone with a computer and an Internet service provider direct access to not only nation-wide distribution, but world-wide distribution. The “Auto-Tune the News” comedy group that immortalized Antoine Dodson in song epitomizes the drastically reduced economic barriers to entry engendered by the Internet: where even a decade earlier, the group’s access to nation-wide media distribution of its works would have entailed laborious, highly competitive, and (at best) uncertain campaigning for patronage, capital, and access to television networks or record labels, the group was able, through the Internet, to market a profitable song in a few weeks at nominal cost. This accessibility extends not only to the channels of distribution, but also to the means of production: increasingly advanced home video cameras, inexpensive audio samplers and synthesizers, and digital video editing and digital audio recording software now allow one to produce, on a relatively inexpensive home computer, media of a quality scarcely distinguishable from that of similar works produced by traditional, corporate media providers.

The drastically lower barriers to the production and dissemination of media in the Internet age necessarily result in correspondingly reduced barriers to fame. Antoine Dodson’s three-week rise to nation-wide prominence may have been a particularly exceptional example of just how far the barriers to fame have fallen—or it may represent the dawning of an emerging, unprecedented new paradigm of fame in our society. Either way, the right of publicity applies to the prominent persons of the Internet age just as it did to star baseball players in the 1950s, and just as it has to prominent persons of all stripes in the decades in between. Invocation of the right of publicity by this new breed of “instant” celebrity will, however, reshape the debate over the right of publicity, and may well reshape the doctrine itself—ironically, bringing it right back to where it started in 1953.

III. THE DYING DEBATE

It is the perception of the right of publicity as a legal gratuity granted exclusively to the rich and famous that is perhaps most damaging to the right’s credibility in the legal and academic world. Criticism of the right of publicity is almost invariably shot through with explicit or implicit indignity over the notion that the right serves as a legal remedy to reimburse individuals who may be seen as already financially well-off, as living lives of leisure, or as having not done any

“real” work to achieve their rarified positions.⁶⁰ What is most striking about this criticism, however, is that it is, in the main, criticism of the post-*Haelan Laboratories* developments in right of publicity doctrine. These developments, like the Supreme Court’s reshaping of the doctrine to conform it to the mold of existing intellectual property principles,⁶¹ have distanced the right of publicity from its initial conception in *Haelan Laboratories*, spawning both justifications for and arguments against the doctrine that are suspect at their root. As such, the debate over the right of publicity can be seen, if viewed from the vantage of *Haelan Laboratories*, as little more than rhetorical tail-chasing. And for whatever vitality remains of this debate, the emergent changes in the nature of fame wrought by the Internet will render the majority of the contentions on both sides of the argument moot. A survey of these arguments, on the cusp of becoming a retrospective exercise, is instructive in understanding just how sweepingly the landscape defining the purview of the right of publicity is about to change.

A. Right of Publicity as a Reward and Incentive for Creative Endeavor

The right of publicity has been justified as a reward and an incentive for creative endeavor, in the same way that copyright and patent protection are justified. That this justification for the right of publicity was consecrated by the Supreme Court⁶² does not compulsorily render it persuasive, and critics of the right of publicity have been quick to assail its logic.⁶³ And its logic—at least as applied within the traditional purview of the right of publicity—is flimsy at best, and very nearly absurd on its face. The Internet age of celebrity may bifurcate the traditionally-related intellectual property rationales of reward and incentive as applied to the right of publicity, leaving the former as unpersuasive as it has ever been and providing the latter with a potency it never previously had.

1. *The Right of Publicity as a Reward for Creation.*—The “Lockean”⁶⁴ rationale for intellectual property protection as an assurance that one’s creative

60. See, e.g., Goldman, *supra* note 9, at 604 (“It is the Madonnas and Michael Jordans who reap the greatest rewards from the right of publicity, not the struggling actor or author.”); Madow, *supra* note 11, at 137 (“Why, we may properly ask, should the law confer a source of *additional* wealth on athletes and entertainers who are already very handsomely compensated for the primary activities to which they owe their fame?”).

61. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

62. *Id.* at 576.

63. See, e.g., Goldman, *supra* note 9, at 603-05; Madow, *supra* note 11, at 182-96; Zimmerman, *supra* note 10, at 77-78.

64. See Madow, *supra* note 11, at 175 n.239 (“It was John Locke who first elaborated a philosophical argument for private property based on individual ‘labor.’ He purported to derive the right of private property from logically prior property rights in one’s body and its labor.”); see also Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954) (“It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.”).

effort is properly rewarded has never been cogent as a justification for the right of publicity. This impotency stems from the rationale's necessary assumption that an individual who has achieved fame has earned it through hard work deserving of reward—an assumption of dubious credibility.⁶⁵ We as a culture may debate whether achievement in sports or the arts sufficiently benefits society to merit rewarding effort in these areas; the even more subjective question as to whether acting, singing in a popular band, or playing baseball truly constitutes hard work—or even “work” at all—that merits supplementary, commendatory compensation is more a debate for social scholars than for the law. Even so, this debate serves to highlight another way in which the work-reward rationale of copyright and patent law fails as a justification for the right of publicity.

Copyrights and patents protect and reward the tangible product of creative endeavor. While reasonable people might debate the relative usefulness of a given invention or a given work of art, the law, through copyrights and patents, recognizes a presumptive societal value in the creation of more inventions and more art. The “end product” protected by the right of publicity, on the other hand, is the persona of the individual. The benefit that the right of publicity seeks to protect is not a broad societal benefit in this end product, but rather—like the right of privacy—an individual “benefit” in one's personal sanctity and autonomy.⁶⁶ This distinction between the interest protected by the right of publicity and the interests protected by copyrights and trademarks becomes transparently obvious when one attempts to quantify the right of publicity in terms of the societal value that copyrights and trademarks seek to serve: How much does society benefit from the fame Madonna has worked so hard to achieve? And given that assessment, to what degree should we reward Madonna

65. See, e.g., Goldman, *supra* note 9, at 611 (“One might even question whether the commercial value of a celebrity's identity should be regarded as the fruits of the celebrity's labor. Fame frequently is fortuitous.”); Madow, *supra* note 11, at 188 (“[A]n elementary, but occasionally overlooked, sociological truth about fame [is that] fame is a ‘relational’ phenomenon, something that is *conferred by others*. A person can, within the limits of his natural talents, *make himself* strong or swift or learned. But he cannot, in this same sense, make himself famous, any more than he can make himself loved.” (citation omitted)); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 252 (2005) (“Fame is complex and paradoxical, a phenomenon for which labor is neither a necessary nor sufficient condition. In some instances, an individual with a public persona has indeed worked to create that persona, making professional and lifestyle choices aimed at developing a particular look or image. But that is certainly not true of every celebrity.”).

66. See generally Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345 (2009); see also Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 115 (2011) (describing right of publicity as a “[cause] of action relating to a violation of one's dignity”); Haemmerli, *supra* note 51, at 421 (“The right to control the use of one's image or other objectification of identity is a property right based directly on freedom, autonomy, or personality.”); Ira J. Kaplan, *They Can't Take That Away from Me: Protecting Free Trade in Public Images from Right of Publicity Claims*, 18 LOY. L.A. ENT. L. REV. 37, 46-49 (1997) (describing unauthorized use of one's persona as a “dignitary harm”).

for the effort she expended in achieving fame? To ask these questions is to realize the futility of attempting to contort the right of publicity into the work-reward model of copyrights and patents.⁶⁷

Further, the right of publicity affords individuals an exclusionary right: An individual, however prominent, may choose not to license his likeness for commercial gain.⁶⁸ Notable examples of celebrities who eschewed licensure of their likenesses, and whose right of publicity became the subject of legal wrangling as a result, range from civil rights leader Martin Luther King, Jr.,⁶⁹ to singer and songwriter Tom Waits.⁷⁰ The incongruence of the right of publicity as a right to exclude with the conception of the right as a reward for one's labors highlights the fundamental level at which this rationale for the right is inapposite, because it fails to recognize the humanist underpinnings of the right: While the right of publicity protects an interest that is economic, it also protects an interest in the sanctity and autonomy of the person.⁷¹ To recognize the right of publicity as a right to exclude is to recognize again that the right of publicity is more closely related, philosophically and doctrinally, to the right of privacy than it is to traditional intellectual property doctrines like copyright and patents.

Regardless of how persuasive or unpersuasive legal academics might have traditionally found the work-reward justification for the right of publicity, the degree to which the emergent mass media have lowered the barriers to production and distribution—making it faster, easier, and less expensive than ever to achieve fame—serves to moot the debate regarding the work-reward rationale altogether. As Lee Goldman and Michael Madow observe, fame is not something “earned”

67. The related rationale for the right of publicity as a remedy for the unjust enrichment of the appropriator of an individual's identity for commercial gain—the rationale that free-riders should not be able to reap what others have sown, so to speak—is incumbent upon this same assumption that fame deserves protection because it is the product of one's labors, and is therefore untenable on the same grounds. *See, e.g.,* McKenna, *supra* note 65, at 248 (“Unjust enrichment is an empty concept A defendant is only ‘free riding’ (and his enrichment therefore ‘unjust’) if one assumes that the value of identity belongs to the plaintiff in the first instance.”).

68. A salient schism in both state law and academic opinion regarding the right of publicity is in regard to whether the right should be descendible post-mortem; a constituent branch of that debate is whether the descendibility of the right should be dependent upon whether the decedent used his right of publicity for commercial gain in his lifetime. *See, e.g.,* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705-96 (Ga. 1982) (examining, but declining to follow, prior case law holding that an individual's right of publicity is descendible only if the individual commercially exploited his right of publicity during his lifetime).

69. *Id.*

70. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

71. *See* Kwall, *supra* note 66, and McKenna, *supra* note 65, for a more comprehensive examination of this aspect of the right of publicity. *See also* Haemmerli, *supra* note 51 (making the same argument regarding the right and buttressing it philosophically in terms of Immanuel Kant's conception of humanity as a function of individual self-determination).

at all.⁷² It is more accurate to characterize it as something one simply inherits, or as a windfall.⁷³ To tie one's right of publicity to the effort one expended in achieving fame would be no more justified, legally or morally, than depriving an heir of money or property gained through testamentary inheritance simply because he did not "work for it." Antoine Dodson did little or nothing to achieve his fame.⁷⁴ Should this mean that Dodson does not deserve the right to control the use of his likeness for profit? To concede that he is no less deserving of that right than an athlete or actor who worked at his profession for decades is to drive the final nail in the coffin of the work-reward justification for the right of publicity.

2. *The Right of Publicity as an Incentive for Creation.*—The incentive rationale of intellectual property rights holds that assuring a financial benefit in one's societally-beneficial creation encourages such efforts by the creator and by others, with society benefitting from the additional creation thus encouraged.⁷⁵ This same incentive rationale has been cited as a justification for the right of publicity: assuring a person's right to the financial benefits of the marketing opportunities attendant to fame encourages individuals to pursue careers in the arts and in sports, to the benefit of society.⁷⁶

In the context of the traditional celebrity to which the right of publicity has customarily applied, this incentive rationale of intellectual property is singularly unpersuasive: It strains reason to presume that an individual would choose to

72. See *supra* note 65.

73. Madow's characterization of fame as "conferred" by the public, see *supra* note 65, on the other hand, overstates the consciousness and deliberateness of the role played by the public in making a person famous.

74. See *supra* notes 56-59 and accompanying text.

75. See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

76. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("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."); see also, e.g., D. Scott Gurney, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 707 (1986) ("By protecting the right of celebrities to commercially exploit their fame generally rather than solely in the context of performances or commercial endorsements, the law would help maximize incentive to develop and maintain skills and talents that society finds appealing."); David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 681 (1981) ("Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public.").

pursue a career in the arts or in sports, or would choose to continue pursuing it, based on the promise of earnings from his right of publicity. The court in *Haelan Laboratories* made no assertion that the baseball player whose image was at issue would not have played baseball, or would not continue to play baseball, were he not allowed to earn money by licensing his image to baseball card manufacturers; such an assertion would be almost laughable. And that assertion would be equally laughable when applied to the gamut of famous persons to whom the right of publicity has traditionally applied. A much more credible proposition is that most people who pursue such careers do so out of reverence for the career itself (keeping in mind that careers in sports and the arts are, in and of themselves, fairly enviable and inherently rewarding fields of endeavor), in pursuit of fame as its own reward, or because the work that the career inherently entails is traditionally well-compensated. Further, this argument treats the right of publicity as a purely economic protection, which it is not: Again, the right of publicity affords one an exclusionary right in one's persona, allowing an individual—like Martin Luther King, Jr.,⁷⁷ and Tom Waits⁷⁸—to deny the world the use of his persona and forego the financial opportunities such use may offer.

However, to the new breed of media creators plying their craft on the Internet, the ability to profit from merchandising may indeed be a strong incentive to create, inasmuch as the income generating possibilities afforded by their creations themselves may be slim or, particularly in the case of individuals employing free-access web sites like YouTube to disseminate their works, none. Antoine Dodson was quick to parlay his Internet notoriety into shirts, coffee mugs, and other trinkets bearing his image or excerpts from his infamous rant;⁷⁹ it is not unreasonable to think that this merchandise will continue to provide steady income for Dodson even after sales of his song no longer are. For Internet celebrities who do not have a creation as marketable as a song, merchandise may provide the only income their creative endeavors will yield. As such, in the dawning age of Internet celebrity, the incentive function of intellectual property doctrine, once logically and doctrinally bootless in the debate over the justifiability of the right of publicity, suddenly seems relevant (if still subject to disagreement over the value of the kinds of works whose creation is being incentivized).

B. Right of Publicity as a Cultural Thief and Enemy of Free Speech

The idea that fame is granted by the public, and that the public thus retains a certain interest in it, dovetails into two related sociological criticisms of the

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

78. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

79. See *Antoine Dodson*, FACEBOOK, <http://www.facebook.com/pages/Antoine-Dodson/102461723145137> (last visited April 3, 2012); *Antoine Dodson Official Merchandise*, DISTRICT LINES, <http://www.districtlines.com/antoine-Dodson-bed-intruder> (last visited April 3, 2012).

right of publicity: that the right deprives society of the free use of celebrity personae, which provide some of modern society's most vibrant and powerful cultural symbols and articles of common cultural currency;⁸⁰ and that the right allows celebrities to stifle free speech, possibly to an extent sufficient to raise First Amendment concerns.⁸¹

The famous can, of course, take on a cultural meaning beyond their control (or that of their heirs or assigns). Michael Madow offers as an example John Wayne, whose persona came to symbolize virile masculinity; in this context, Wayne's persona has been both invoked by a United States president on the eve of war and subverted by a greeting card manufacturer catering to the gay and lesbian community.⁸² In another example of how a celebrity persona might be used as a signifier in cultural debate, Lee Goldman opines that one could paint a red "X" through a picture of Madonna to express a great many things, from a simple dislike of Madonna to a more complex statement about sexual politics.⁸³ Madow argues that to grant celebrities monopolistic control over the use of their personae is to rob our society—and in particular, culturally under-represented segments of our society—of one of its most powerful tools for defining itself:

What it comes down to, then, is that the power to license is the power to suppress. When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power, if she so chooses, to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers; power to deny to others the use of her persona in the construction and communication of alternative or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us.⁸⁴

But the cultural censorship accusation ignores the limitation of the right of publicity to *commercial* use of a celebrity's persona. The right of publicity—correctly construed—cannot prevent an artist from creating an image of John Wayne superscribed with lipstick, nor one from wearing a shirt on which one has drawn an large, red "X" through a picture of Madonna; it serves only to prevent one from profiting from the sale of such an image without the consent of the

80. See Goldman, *supra* note 9, at 616-21 (arguing that First Amendment rights of consumers to make cultural statements through their choices of which celebrity representations to endorse via their purchases may outweigh celebrities' economic interest in their personae); Madow, *supra* note 11, at 137-46 (right of publicity "facilitate[s] private censorship of popular culture"); Sen, *supra* note 11, at 752-55 (1995) (arguing that expansion of right of publicity to protect all aspects of identity may stifle cultural dialogue).

81. See generally Marr, *supra* note 10; Volokh, *supra* note 10; Zimmerman, *supra* note 10.

82. Madow, *supra* note 11, at 128, 144-45.

83. Goldman, *supra* note 9, at 620.

84. Madow, *supra* note 11, at 145-46.

pictured celebrity.⁸⁵

Arguments that the right of publicity may infringe the First Amendment are similarly unavailing. The Supreme Court has held that commercial speech is entitled to a lesser degree of protection under the First Amendment than is expressive speech.⁸⁶ However, a print of the aforementioned image of John Wayne superscribed with lipstick is arguably expressive speech, accorded stringent protection under the First Amendment.⁸⁷ Displayed in an art gallery,

85. Courts have held that cultural criticism regarding celebrities is expression that should be afforded generous First Amendment protection. *See, e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996) (“While not core political speech,” social commentary on public figures engaged in “an important social institution constitutes protected expression.”); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001) (“Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.”); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907) (“It is certain that a man in public life may not claim the same immunity from publicity that a private citizen may.”). Likewise, the Supreme Court has held that factual, informational reporting on matters of public interest constitutes fully protected First Amendment expression, *see, e.g.,* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”), and that information regarding even private individuals may be such a matter of public interest, *see, e.g.,* *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) (First Amendment protections for freedom of speech and press are not limited to reporting on public officials), *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574 (1977) (“It is evident, and there is no claim here to the contrary, that petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act.”). Thus, the invocation of a celebrity’s persona in the context of factual, informational reporting on the celebrity should not give rise to injuries cognizable under the right of publicity.

86. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561-66 (1980); *see also* *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 637 (1985) (“There is no longer any room to doubt that what has come to be known as ‘commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech.’”).

87. *See, e.g.,* *Cardtoons, L.C.*, 95 F.3d at 969-70 (holding that reproduction of the image of a public figure in the context of parody and social commentary is fully-protected, expressive speech). Additionally, factual, informational reporting on celebrities is not necessarily commercial speech, even when the reporting is in the context of commercial, for-profit publishing, and even when it is disseminated strictly for the purposes of entertainment. *See, e.g.,* *Zacchini*, 433 U.S. at 578 (“There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news.”). If the reporting is not in service of the public interest or the information reported is false, the legal regimes of privacy, defamation, and libel provide proper avenues of relief. *See, e.g.,* *Time, Inc.*, 385 U.S. at 387-88 (holding that the First Amendment precludes redress for publication of false information regarding matters of public interest unless it can be shown that the publisher disseminated the information “with knowledge of its falsity or in reckless disregard of the truth”); *Jenkins v. Dell Publ’g Co.*, 251 F.2d

sold as an original work, or plastered on a wall in public, such an image is entitled to rigorous First Amendment protection that would almost inarguably trump Wayne's right of publicity.⁸⁸ Additionally, courts have held that even mechanical reproductions of a work of expression, sold for profit, are not necessarily commercial speech, and may be due the same stringent level of First Amendment protection as is the original work.⁸⁹

447, 450 (3d Cir. 1958) (noting that "the interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts have been reluctant to make such factually accurate public disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear and its offensiveness to ordinary sensibilities is equally clear"); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1092 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007) ("Courts have found that First Amendment freedom of expression is applicable in cases where the subject matter at issue involved *factual data and historical facts*.").

88. See, e.g., *Cardtoons, L.C.*, 95 F.3d at 970 ("The fact that expressive materials are sold neither renders the speech unprotected, nor alters the level of protection under the First Amendment.") (internal citations omitted); *Comedy III Prods., Inc.*, 21 P.3d at 810 ("[B]ecause single original works of fine art are not forms of merchandising, the state has little if any interest in preventing the exhibition and sale of such works, and the First Amendment rights of the artist should therefore prevail."). The Supreme Court of California in *Comedy III* held that the element separating an artistic portrait that is expressive speech from one that is commercial speech is the degree to which the artist has transformed the image of the individual portrayed. *Comedy III Prods., Inc.*, 21 P.3d at 808-10. In its broadest outlines, this "artistic transformation" doctrine holds that there is a point at which an artist has sufficiently imbued the image of a given person with the artist's own expression that the image becomes more definable as the work of the artist than as an image of the person pictured; conceptually, this can also be thought of as the point at which it can be assumed that a purchaser is purchasing the image as a work of the artist, and not as an image of the person depicted, and that the artist is thus not competing with the depicted person in the market for images of the person. *Id.* Discerning where this line is crossed is a somewhat subjective judgment. For contrasting examples of courts locating this boundary, compare *Comedy III Prods., Inc.*, 21 P.3d 797 (finding defendant's charcoal drawings of the Three Stooges were not sufficiently artistically transformative to merit judgment that consumers were likely buying his work as examples of his art, and not as Three Stooges merchandise), with *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (finding comic book characters clearly based on musicians Edgar and Johnny Winter did not violate the musicians' right of publicity, because the comic's invocation of the musicians was not intended to attract buyers based on the musicians' fame, and because the comic book depictions did not compete with real images of the musicians). Cf. *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc) (rejecting artistic transformation test in favor of predominant use test in determining whether artistic representation of individual was more accurately classified as commercial or expressive in nature).

89. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003) (holding that artist's painting of golfer Tiger Woods was expressive speech under the *Comedy III* transformative effects test, that even the sale of mechanically reproduced copies of the painting constituted "expression which is entitled to the full protection of the First Amendment and not the more limited protection afforded to commercial speech," and that this First Amendment protection outweighed

In short, the right of publicity cannot prevent people from using celebrity images as symbols or signifiers, or from incorporating celebrity images into their own artistic expressions. The right constrains only unauthorized commercial exploitation and profit-taking from the commoditization of such expression, activities philosophically divorced from the cultural concerns expressed by critics like Goldman, Madow, and Sen⁹⁰ and addressed by the protections of the First Amendment.

Further, even at the acme of celebrity's power as a cultural touchstone, its importance to consumers cannot supersede the intrinsic personal interest an individual has in the sanctity of his identity. To cast the argument in more human terms, even if Madonna were the most powerful symbol of female sexuality in our culture, she remains first and foremost a human being, whose intrinsic authority over her person should be given stronger recognition than the desire of consumers—even of every other man, woman, and child in the United States—to use her persona to express their beliefs. To hold otherwise is not only to demean Madonna's humanity, but to devalue the expressive abilities of those wishing to make a cultural statement: Surely, even if we were to be completely deprived of the use of Madonna as a common cultural signifier, society would not be wholly deprived of its ability to express its feelings regarding female sexuality.⁹¹

That the cultural deprivation argument against the right of publicity neglects the much more compelling countervailing consideration of individual autonomy is brought into sharper relief when the right is considered in the context of its application to a celebrity like Antoine Dodson. While it is perhaps easy to lose sight of the fact that a celebrity of Madonna's or Michael Jordan's stature is a human being—especially when the celebrity himself is also a brand in commerce, and may have even encouraged or actively participated in commoditizing himself as such—human beings they are. Even the biggest stars, seemingly remote and abstract, seen only through carefully composed and vetted pictures, are individuals with an intrinsic right to the sanctity of their individual humanity—of their “inviolable personality,” as Warren and Brandeis christened it.⁹² However

Woods's right of publicity); *Comedy III Prods, Inc.*, 21 P.3d at 810 (“[A] reproduction of a celebrity image that . . . contains significant creative elements is entitled to as much First Amendment protection as an original work of art.”); see also 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. & POL'Y 283, 299-301 (2000) (questioning whether the First Amendment should recognize a difference between sale of an original work and copies of that work).

90. See *supra* note 80.

91. And yet Michael Madow, ostensibly advocating the position of the cultural proletariat, demeans the public's ability to express itself by making this very argument: “Individuals and groups must do this symbolic work with centrally produced and distributed commodities. They must make their culture out of these commodities, for there are no other material or discursive resources available to them.” Madow, *supra* note 11, at 140.

92. Warren & Brandeis, *supra* note 23, at 211.

unsympathetic one might be toward the super-rich and the super-famous,⁹³ it is much harder to disclaim the right of someone like Antoine Dodson—an unknown private person one day, and a national celebrity through happenstance literally the next—to be secure in his authority over his own persona. It is also much harder to demand that he surrender this right for the good of a richer cultural commons.

Dodson may represent an extreme—and extremely sympathetic—example of an Internet celebrity to whom the right of publicity applies; after all, the “fifteen minutes of fame” on which he is financially capitalizing were the result of circumstances in which he was largely a passive player, making his case one much closer to those that precipitated early developments in privacy law.⁹⁴ But even for individuals who deliberately use the Internet for the purposes of self-expression and who achieve a degree of marketable recognizability as a result, the demand that they sacrifice the ability to profit from that recognizability, or the right to not allow it to be commercialized at all, for the good of simplifying⁹⁵ cultural discourse for the rest of us is much harder to rationalize.

C. Right of Publicity as a Redundant Legal Protection

The right of publicity has been attacked as legally redundant, its protections duplicative of those already provided by existing intellectual property law. But this conclusion is a product of doctrinal mischaracterization of the right of publicity. As noted in Part I with regard to the Supreme Court’s characterization of the right of publicity in *Zacchini*, copyright and trademark law protect the end product of creative endeavor, while the personal autonomy protected by the right of publicity is an intrinsic human entitlement that is not necessarily the end product of any endeavor.⁹⁶ And nowhere is that more clear than in the case of a

93. And to be sure, Michael Madow explicitly impugns the right of publicity in part because it “redistributes wealth *upwards*,” suggesting that the right of publicity is inherently suspect because, “governmental actions that make the rich richer surely demand very compelling justification.” Madow, *supra* note 11, at 137.

94. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (recognizing right of action for invasion of privacy, arising out of natural law, for plaintiff whose name was used without his permission in advertisements); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (holding that neither common law nor state law provided a cause of action for plaintiff whose image was used without her permission in advertisements).

95. Notwithstanding critics’ couching of the cultural-commons argument against the right of publicity in terms of “democratizing” the elements of popular culture, see Madow, *supra* note 11, at 239, or protecting the “emotive and communicative value” of celebrity for consumers of popular culture, Goldman, *supra* note 9, at 620, the gravamen of this argument is a decidedly more prosaic—and decidedly less compelling—concern over the ease and convenience with which cultural dialogue may be conducted.

96. The court in *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), made a game effort at adapting for use in right of publicity claims the eight-prong test enumerated in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979), for evaluating the likelihood of trademark confusion. The results, however, provide more than anything a demonstrative illustration of the

celebrity like Antoine Dodson⁹⁷: Dodson did not endeavor to create anything, and yet he should be no less entitled to control the exploitation of his persona than should be a famous athlete who worked for years honing his craft.

In part, the redundancy accusation leveled at the right of publicity is a response to another suspect, post-*Haelan Laboratories* justification advanced for the right. Advocates of the right of publicity assert that the right performs a consumer advocacy function, protecting consumers from being duped by unlicensed merchandise into believing that a particular celebrity has endorsed a product he has not.⁹⁸ But as critics rightly point out, this very protection is already provided by the federal Lanham Act,⁹⁹ which provides a civil remedy for an individual who feels he has been, or is likely to be, injured by another's false implication that the individual is associated with a product.¹⁰⁰

It is notable that the debate over the legal redundancy of the right of publicity circles entirely around post-*Haelan Laboratories* justifications espoused for the right. Nowhere did the *Haelan Laboratories* court contend that the harm suffered by the ball-player was deprivation of earnings from a commodity he had created. Instead—in what could be characterized as a pedagogical omission or as a thoroughly forward-looking understanding of the intersection of fame and commerce—the court simply accepted that the ball-player's likeness had commercial value, however the value came about, and moved directly to the question of where the rights in that value should vest.¹⁰¹ Nor did the court express concern over consumers of baseball cards being deceived. The right of publicity as articulated by the *Haelan Laboratories* court was a unique and thoroughly modern response to an emergent, unaddressed issue in the law. So prescient was the court's conception of the right that it is as apposite a remedy for a celebrity like Antoine Dodson as it was for a famous baseball player of the 1950s.

D. Right of Publicity as Agent of Economic Inefficiency

A purely economic argument against the right of publicity notes that the right grants a monopoly, and that monopolies result in economic inefficiency. In the context of the right of publicity, what this means is that if celebrities are granted monopolistic control over the use of their personae, the cost of using celebrity personae in commerce increases. The countervailing argument is that if society at large is allowed untrammelled use of celebrity personae, they will be rendered

degree to which the two doctrines are incongruent. See *White*, 971 F.2d at 1399-1401.

97. See *supra* notes 56-59 and accompanying text.

98. See, e.g., James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).

99. Lanham Act, 15 U.S.C. § 1125 (2006).

100. At least one advocate of a federal right of publicity statute has suggested simply amending the Lanham Act, under Congress's commerce clause authority, to incorporate the right of publicity. See Haemmerli, *supra* note 51, at 477-91.

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

valueless for all.

The latter argument is a variation of the “tragedy of the commons” theory, which posits that if all comers are allowed to exploit a resource in the absence of the restraint of property rights in the resource, their unrestrained use will completely deplete the resource, to the detriment of all.¹⁰² However, as both right of publicity critic Michael Madow and right of publicity advocate Mark McKenna point out, the hypothetical pasture of the tragedy of the commons and the value of celebrities’ fame are neither logically analogous nor economically fungible.¹⁰³ While the tragedy of the commons theory relies on the exhaustibility of a resource, the exhaustibility of a famous individual’s marketability is much more questionable. Even if one can conceive of a point at which a particular celebrity becomes “over-exposed” to the point at which his marketable value drops to zero, this point is highly speculative, and likely inextricably dependent on the celebrity in question, on the degree of the celebrity’s fame, and on any number of other, external factors. Further, it is equally likely that up to that point, additional exposure *increases* the marketability of the celebrity: all publicity is good publicity, as they say.¹⁰⁴

But the tragedy of the commons argument for the right of publicity becomes particularly infirm when applied to a celebrity like Antoine Dodson. Only time will tell as to the longevity of celebrity in the new media. Quite possibly, the expected “shelf life” of an Internet celebrity will conform to the same model that celebrity has always followed: Some personalities will be enduring in their popularity, while others will be “flashes in the pan.” But for an individual like Dodson, elevated to instant fame by a moment of happenstance given worldwide attention via the Internet,¹⁰⁵ it is not unlikely that fame will be fleeting indeed. Thus, for Dodson and celebrities like him, there is likely no such thing as “over-exposure.” By the time the hypothetical point of “face wearout”¹⁰⁶ has been reached for an individual who gains fame via an Internet video that becomes a brief sensation, the public will likely have moved on to the next Internet phenomenon. The blindingly quick turnover rate of Internet phenomena—a function of the massive deluge of information that continuously issues forth from the Internet—likely ensures that the tragedy of the commons is a peril to which Internet celebrity is immune: to return to the original analogy, there can be no tragedy of the commons when the grass is sprouting faster than the ability of any

102. See, e.g., Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411-13 (1978) (“[T]he multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero.”). The “tragedy of the commons” theory itself was given full explication in Garrett Hardin, *The Tragedy of the Commons*, 162 SCI., Dec. 13, 1968, at 1243, available at http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html.

103. See Madow, *supra* note 11, at 220-25; McKenna, *supra* note 65, at 268-75.

104. See, e.g., Madow, *supra* note 11, at 221-22 (“A Madonna T-shirt may be worth *more*, not less, to consumers precisely because millions of her fans are already wearing them. The value of the T-shirt may be greater just because ‘everybody’s got one.’”).

105. See *supra* notes 56-59 and accompanying text.

106. Madow, *supra* note 11, at 222.

number of grazing animals to consume it.

On the other hand, it is a fair accusation that if celebrities are allowed a monopoly on their likenesses, they can charge whatever they like in the absence of competing unofficial merchandise, with the likely result being that celebrity merchandise becomes more expensive. However, while some critics of the right of publicity cite this consequence as cause for alarm in and of itself,¹⁰⁷ it is fair to ask: of just what consequence is this consequence? How concerned should the law be about consumers being forced to pay more for a Madonna shirt or a Michael Jordan poster than they otherwise would in a competitive marketplace? One can ascribe the maximum importance one wishes to celebrities as cultural touchstones and still inevitably conclude that celebrity merchandise is not an indispensable commodity in our society.

Further, as applied to celebrities such as Antoine Dodson, the argument that the right of publicity fosters market imbalance very nearly functions as an argument in favor of the right. Again, only time will tell if the Internet will produce celebrities with long-lasting careers, but the ephemeral nature of the Internet phenomena that produce celebrities like Dodson would seem to augur against the Internet producing long, economically-productive media careers. For Dodson, and other celebrities born of fleeting Internet phenomena, the monopolistic power granted them by the right of publicity may be the only way for them to capitalize in any meaningful manner from their sudden notoriety. To shift the market in favor of such individuals hardly represents Lee Goldman's postulated result of giving yet more money to Madonna or Michael Jordan.¹⁰⁸ Dodson is scarcely someone one would begrudge the fruits of his unexpected fame; he could be any one of us—and in the age of the new media, any one of us could be him.

IV. THE NEW CONVERSATION

So what remains of the debate over the propriety of the right of publicity in the Internet age? Is the right of publicity more or less justifiable in an age in which one can become famous literally overnight, if only for a few weeks (or less), literally without trying?

The foremost change in the debate is that after weathering decades of derogation as law made only to benefit the rich and famous, the right of publicity will function in the Internet age as a surprisingly populist doctrine. This is not because of any expansion of the applicability of the right itself—the right was always universally applicable in theory. Rather, *fame* in our society has expanded.¹⁰⁹ Had Antoine Dodson's on-camera rant occurred ten years ago, it is

107. See Goldman, *supra* note 9, at 620.

108. See *supra* note 60.

109. For a consideration of the right of publicity as applied to individuals who achieve fame through reality television, see Porsche T. Farr, *What Good Is Fame if You Can't Be Famous in Your Own Right?: Publicity Right Woes of the Almost Famous*, 16 MARQ. INTELL. PROP. L. REV. 467 (2012).

conceivable that his distinctive visage may have been used without his permission in a local advertisement. If it had, Dodson could have brought a claim for a violation of his right of publicity. However, the damages to which he would have been entitled would have been nominal at best; Dodson would have been a marketable personality only in the viewing area of his local newscast, his opportunities to market himself limited to those to which his local notoriety (if any) would give rise in that geographic area. Today, in a media age in which Dodson's rant could be seen around the world mere hours after it occurred, and turned into a marketable song in only a day with little or no capital investment, Antoine Dodson's putative market value as a personality is that of a bona fide national—or even international—celebrity. It could happen to any of us—making any of us a potential claimant for substantive damages under the right of publicity.

As its applicability expands, so too will the importance and visibility of the right of publicity. One must concede this to the critics of the right of publicity: Humanist concerns aside, the right traditionally operated financially as a protection to those who least needed financial protection. As such, the right of publicity made good grist for academic debate, but the limited, rarified constituency to which it had any practical application ensured that it was less than a vital concern of wider public or judicial debate. That will likely change, as the Internet provides the opportunity for anyone with a camcorder and a phone line to potentially make his personality a product. For a celebrity like Antoine Dodson, the right of publicity may well be *the* most important business law on the books.¹¹⁰

Increasing prominence of the right of publicity and the inevitable, concomitant increase in its invocation as a legal remedy cannot help but add voices to the long-standing call for a preemptive federal right of publicity. What would such a federal right of publicity law look like? Ironically, with most of the post-*Haelan Laboratories* arguments both for and against the right rendered moot by the changed nature of fame wrought by the new media (the incentive rationale for intellectual property—elevated from baseless justification to cogent justification—being an exception), it might look very much like the right articulated in *Haelan Laboratories*: a legal protection encompassing elements of both a property right and a civil right; a unique, and uniquely modern, legal doctrine tailored to address a distinct, emergent legal concern.¹¹¹ In fact, perhaps

110. It is not mere idle speculation to consider the potential for violation of Antoine Dodson's right of publicity: rival, non-licensed merchandise bearing Dodson's image and quotes from his famous declamation can be found for sale on multiple Internet sites. See, e.g., *Bed Intruder Gifts*, ZAZZLE.COM, <http://www.zazzle.com/bed+intruder+gifts> (last visited Apr. 6, 2012); "*Antoine Dodson*" *Gifts*, CAFEPRESS, <http://shop.cafepress.com/antoine-dodson> (last visited Apr. 6, 2012). Dodson himself complained publicly about unauthorized "Bed Intruder" costumes offered for sale in competition with his own Halloween costume issued in his image. See Robert Quigley, *Antoine Dodson Not Amused by Unauthorized Halloween Costumes*, GEEKOSYSTEM (Sept. 27, 2010, 10:50 AM), <http://www.geekosystem.com/antoine-dodson-halloween-costumes>.

111. For proposals as to the possible shape of a federal right of publicity, see Haemmerli,

the key to defining the proper scope of the right of publicity in the future is to cease to circumscribe the right under the umbrella of intellectual property, and begin to view it instead as equally, or even predominantly, a civil right, based on the sanctity of one's dominion over one's own person.

If the right of publicity is adopted as federal law, or if it gains wider recognition in state law, yawning doctrinal questions remain to be addressed. The most substantive of these unresolved issues is the descendibility of the right. Because the right is at once both a property right (typically descendible) and a civil right (typically vested in the individual, and not surviving him), the question of whether an individual's heirs or assigns should be able to continue to exercise the individual's right of publicity after his death will necessarily be a question of public policy—and in all likelihood, spirited debate. If the right is defined as descendible, related questions as to how long an individual's heirs or assigns may continue to exercise the individual's right of publicity, and whether the descendibility of an individual's right of publicity should be dependent upon whether the individual exercised the right during his lifetime, will have to be resolved. While these issues will, if anything, likely be less salient in the practical application of the right to celebrities like Antoine Dodson (given the reasonable likelihood that Internet celebrity will confer marketability of a particularly fleeting nature), these details will keep the debate over the contours of the right of publicity burning even once the right's justification in the Internet era is established beyond question.

CONCLUSION

Invocation of the right of publicity by Internet celebrities will serve as an overdue reminder that the right of publicity shares with the right of privacy an underlying concern with protecting personal autonomy and the sanctity of the self. As the barriers to fame fall ever lower in concert with the barriers to media creation and distribution in the digital age, the right will become a vital legal protection for an increasingly broad and diverse constituency. Consequently, the right will be transformed from an esoteric subject of academic debate to a legal doctrine on the forefront of legal and economic discourse.

This ensures one thing above all else: The debate over the justifiability of the right of publicity is over. The right of publicity is, and will remain, as practical and as necessary a legal doctrine in today's Internet age as it was in the age of baseball cards.

supra note 51, at 477-92 and Whaley, *supra* note 8, at 267-82.