# Remarks on the Right of Publicity: Theory and Scope

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Let me just begin by reiterating the thanks to the organizers for having us all here, and also to Jennifer Rothman for writing such an interesting book.[1] I have written exactly one paper about the right of publicity.[2] It was in 2004. So this was a good chance to start thinking hard again about things I have not thought about in a while. That paper was the first paper I ever wrote as an academic. I reread it last week, and it felt a lot like the first paper I ever wrote as an academic. I do not advise that, by the way. It is not a good feeling. What I was most struck by in reading that paper is that nothing has changed in the time since I wrote it in terms of what the big issues are. I say this having reread Mark and Stacey's piece as well, which is about the same time period.[3]

What those papers were trying to do was to think about what the right of publicity is, what it should be about, whether it has a real conceptual core to it, and what would follow from that in terms of the structure of the right. This is the way academics tend to think: What is the right about, and then—on this naïve assumption that you might be able to deduce from the theory what the actual practice should be—whether the scope of the right is tethered to the right's justification. If you can work out the right at a conceptual level, then all the doctrinal limits would follow from that.

Many people during that era offered ways of thinking about the right that would have justified a right of *some* scope—probably a more limited scope than some folks on this panel might want, but a right nonetheless. I think it is a more difficult question to figure out whether that right would be meaningfully different from what is protected under Section 43(a) type claims of false endorsement.[4]

If you approach the issue, not from the perspective of theory, but from the doctrine itself, I do not think any fair-minded person could look at the right of publicity as it

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1. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD. (Harvard Univ. Press 2018).

2. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

3. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

4. Lanham Act, 15 U.S.C. §1125 (Westlaw through Pub. L. No. 115-281).

actually exists and believe that the doctrine derived from a coherent theory. It has characteristics of both personal and property rights. It resembles in different ways and at different times privacy and IP rights. But the mixture is hard to explain in any satisfactory way. Jennifer Rothman referred to it as having an identity crisis. I think that was probably generous. I think the fact is *that* is what really animated all the papers I was talking about: This sort of weird mixture of different things that make it hard to identify any particular coherent theory.

Beyond academic preferences for conceptual purity, the cost of not having a real theory is that I do not think you can find in doctrine any statement that you can really take seriously about this scope of this right in prima facie terms. I will just give a couple of examples. Take the claim that the prima facie right is against commercial uses of one's identity does not qualify. For one thing, a really large number of commercial uses have never been considered violations of the right of publicity. Take for example all the uses of your identity for data mining or targeted advertising. I will bracket here the problem of determining what counts as an identity, something that is made easier in states like New York but is obviously a huge rabbit hole in California.

The modern right is really patterned after paradigmatic uses that drove creation of the right, and those are essentially advertising uses. Beyond that, I think the right is better understood in negative terms by the force of external values, like those from the First Amendment. It is in the First Amendment sense that I think we should really think about the distinction between commercial and noncommercial uses. I should just put in a plug here: Eric Johnson has a nice piece that was published in the Northwestern Law Review, the thesis of which is pretty similar more or less to what I just described, which is that there really is no positive version of the right of publicity.[5] You have to understand it in negative terms.

What the lack of clarity means is that we have clusters of cases, but at least to my mind, no satisfying conceptual language that describes why those cases cohere or why other uses fall outside the right. Things are a little better in states like New York where you get a little clearer and more limited statutory language.[6] Still, I think even in many of the states that have passed statutes, there is no really satisfying conceptual justification for the basket of rules that get put into the statute at any given time.

Take again the example of targeted advertising: Why are somebody's sales of data, which are uniquely associated with you, not a commercial use of your identity? Even in New York terms, it is clearly use of your name for commercial purposes. You could try to say it is not uniquely your identity that makes those uses valuable. I do not think that is true. It is certainly not true in the targeted advertising example where the whole point of the data is that it is uniquely associated with you. We have been told for most of the history of the right of publicity that use of the identity itself is proof of its unique value. Sarah just said that a couple of minutes ago.[7] I doubt very much most right of publicity plaintiffs would want to have a rule where you

5. Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891 (2017).
6. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2019).
7. Sarah "Alex" Howes, *Likeness Rights for the 21st Century*, 42 COLUM. J.L. & ARTS 345 (2019).

have to prove the marginal value of your identity. So why does targeted advertising not fit? I do not know, just because it has never fit. It is not an advertising use that has ever been conceived of that way.

Or take the example of the use of a digital avatar of a person. If you take the commercial use requirement as paradigmatically referring to advertising use, how would you think of digital manipulation that makes someone appear in a film? It is not commercial in the First Amendment sense that has long been used to distinguish commercial and noncommercial speech to justify advertising restrictions. But it is probably also a much more central economic harm for most actors. In a world where the distinction between commercial and noncommercial speech as a First Amendment matter is at least eroding (and perhaps is not long for the world), how would you think about those uses? What is the constraint? I have a hard time seeing in the right of publicity theory or doctrine anything that would let you reason to an answer about that.

What this discussion reveals is that the right of publicity really is all about public choice. Its scope is now really just whatever famous people think costs them money and can persuade a court or legislature to give them minus whatever the First Amendment restricts. As you can see if you look at the mess of the cases dealing with the use of identity in expressive works like video games, whatever the First Amendment forbids is not something that has presented clarity in the right of publicity context. That should not be that surprising if commercial use is just a stand-in for the First Amendment. It does not really connect to any limit that derives from the nature of the right itself. It is no surprise courts struggle when the use seems both creative on the one hand, but on the other hand otherwise hard to distinguish from uses that are unquestionably actionable in other settings.

This story sounds to me a lot like modern trademark law. To be sure, a key difference is that there *is* a core justification of trademark law[8]—one that is widely accepted in a way that really has never been true for the right of publicity. I think many of us, myself included, believe that modern trademark law goes way beyond that core justification. Increasingly, the limits on trademark law are external in the sense that I am describing: The limits do not derive naturally from the justification of the right itself; rather they are imposed because of concerns about the First Amendment or of conflict with other kinds of IP rights, patent rights, copyrights.[9]

There is nothing wrong with external limits. I have spent a lot of time writing about those and trying to emphasize some, especially the conflicts with other kinds of IP rights. But at the end of the day, I think the right of publicity is a cautionary tale about over-reliance on external limits and inattention to internal ones. Many of the issues we contend with and the difficulty in reasoning through them are a consequence of these external limits.

8. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

9. *See* Stacey Dogan, *Stirring the Pot: A Response to Rothman's Right of Publicity*, 42 COLUM. J.L. & ARTS 321 (2019).