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THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR NEW YORK?♦

FEATURED LECTURE

JENNIFER E. ROTHMAN*

I want to thank the Cardozo Arts and Entertainment Law Journal for asking me to present some insights from my forthcoming book that have particular relevance here in New York as you consider adding, changing, or altering your right of publicity laws. The book is titled *The Right of Publicity: Privacy Reimagined for a Public World*, and is being published by Harvard University Press.¹

The right of publicity is something that we all have. Sometimes it is simply thought of as a property right in one's own personality. More precisely, it provides the right to stop others from using our identities—particularly our names or likenesses, and sometimes voices—without permission, usually for a defendant's advantage.²

What the right of publicity entails varies widely from state to state. To make order out of this chaos I created *Rothman's Roadmap to the Right of Publicity*, a website where you can click on a state and find out what the law is in that particular state.³ My book does not focus on these

♦© 2018 Jennifer E. Rothman. This annotated essay was adapted by the Author from a transcript of her lecture given at the Benjamin N. Cardozo School of Law on February 22, 2018, at the Cardozo Art & Entertainment Law Journal Spring 2018 Symposium. Symposium, *New York Right of Publicity Law: Reimagining Privacy and the First Amendment in the Digital Age*, 36 CARDOZO ARTS & ENT. L.J. 601 (2018). Much of the material is sourced from, JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (Harvard Univ. Press 2018). At the time of the lecture, the book was forthcoming, but it is now in print.

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

² ROTHMAN, *supra* note 1, at 3, 87–98. Many states limit right of publicity actions to instances in which a defendant has used a person's identity for a commercial purpose or advantage. Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1950–59 (2015) (discussing the wide variations in the scope of right of publicity laws, and the uncertain meaning of “commercial” in this context).

³ See ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [<https://perma.cc/B2AJ-MNDE>] (last visited May 18,

variations, but instead takes a broader look at how the right of publicity lost its way when it became unmoored from its origins in privacy law, and turned into an intellectual property right. But today I am going to focus on *one* state—the state of New York—and on its right of publicity and privacy laws.

New York is central to the development of both the right of privacy and the right of publicity in the United States. The archival research I did for the book reveals the true and lost origins of the right of publicity, and its connections with the right of privacy. Much of this history originates right here in New York.

Reclaiming the history of the right of publicity both in New York and elsewhere provides guidance for how to reimagine the right in ways that would interfere less frequently with free speech, and copyright law, and that would not jeopardize the liberty rights of the underlying people the right is supposed to be helping. At the same time, I suggest in the book that, properly understood, the right of publicity can address a number of 21st century problems from revenge porn, to mugshot websites that for a fee will take down photos (that they posted) of those who have been arrested, to Twitter-licensed trading cards that display users' names and likenesses, to Facebook using our name and likenesses to advertise Coca-Cola, and more generally using our identities for its own economic gain by allowing the harvesting of our personal data.⁴

New York's statutory right of privacy was enacted in 1903, and has worked well for over 100 years.⁵ Last Spring, a "right of publicity" bill was introduced that would revoke New York's current statutory right of privacy, and replace it with something very different, not just in name, but also in substance.⁶ The proposed bill would leave New York without an express privacy law, and would upend over a century of established privacy law in the state.

By the time of today's symposium I thought there would be a new draft of the proposed bill—one that took into account some of the widespread criticism of it—but so far there has not been one. The draft bill (from May 2017) is ill thought-out and dangerously expansive in ways that would limit free speech about public figures, and also

2018).

⁴ ROTHMAN, *supra* note 1, at 2, 6–7, 97, 182–85. The revelation that Facebook shared (or allowed the harvesting of) data with Cambridge Analytica became public after this lecture was given. See Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html> [<https://perma.cc/PP3K-E6C8>].

⁵ N.Y. Civ. Rights Law §§ 50–51 (McKinney 2018) (originally enacted as Act of April 6, 1903, ch. 132, 1903 N.Y. Laws 308).

⁶ New York Assembly Bill No. A08155, 2017 Leg., 240th Sess. (N.Y. 2017); N.Y. Civ. Rights Law §§ 50–51.

jeopardize the rights of the very people it is supposedly protecting.⁷ If the legislature wishes to update or amend New York's existing right of privacy statutes, this draft bill misses many opportunities to change the law for the better, such as adding statutory damages to protect people whose identities are used without permission, but who don't have sufficiently commercial identities to make a lawsuit worthwhile.⁸

Because the actual text of the bill is a moving target, there is little point in focusing here on the proposed language of last year's draft. Instead, I want to consider the broader features of the proposed bill, and its purported goals—so we can keep these in mind as I illuminate the historical context for the bill. Understanding the true story behind the emergence of the right of publicity and right of privacy both in New York and elsewhere lends insights for how to make both privacy and publicity laws work best for today's digital age.

Identified Goals of New York's Proposed 2017 Right of Publicity Bill

There are three primary goals that have been expressed by those advocating for the adoption of a new right of publicity law in New York—something that is primarily being spearheaded by SAG-AFTRA (the Screen Actors Guild-American Federation of Television and Radio Artists).⁹ The first is to turn it into a freely transferable right—this

⁷ The Motion Picture Association of America opposed the bill, as did the National Press Photographers Association, the Association of American Publishers, the Digital Media Licensing Association, the Electronic Frontier Foundation, numerous scholars, and many other groups. See, e.g., Christopher Buccafusco et al., 'Publicity' Bill Threat to Free Speech, ALBANY TIMES UNION (JUNE 19, 2017, 5:25 PM), <https://www.timesunion.com/tuplus-opinion/article/Publicity-bill-threat-to-free-speech-11231132.php> [<https://perma.cc/TTP5-7JJP>]; Advertisement, *Our First Amendment Rights are Under Attack*, ALB. TIMES UNION, June 16, 2017 (listing opponents of bill); Daniel Nazar, *New York Rushes to Enact Terrible Right of Publicity Law*, ELECTRONIC FRONTIER FOUNDATION (JUNE 12, 2017) <https://www.eff.org/deeplinks/2017/06/new-york-rushes-enact-terrible-right-publicity-law> [<https://perma.cc/F76D-EE9Y>] (last visited May 17, 2018); Jennifer E. Rothman, *Letters Submitted in Opposition to Proposed New York Right of Publicity Bill*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (JUNE 9, 2017, 12:00 PM), <https://www.rightofpublicityroadmap.com/news-commentary/letters-submitted-opposition-proposed-new-york-right-publicity-bill> [<https://perma.cc/UR9K-3RLD>]; Memorandum from Jeremy Sheff to New York State Senators and Assembly Members (June 16, 2017) (on file with Author).

⁸ I discuss the issue of statutory damages in further depth in ROTHMAN, *supra* note 1, at 97, 183, 208–09 n.40. Notably, California added statutory damages to its right of publicity, then understood to be the state's statutory right of privacy for just this reason. *Id.*; Cal. Civ. Code § 3344; Act of Nov. 22 1971, ch. 1595, 1971 Cal. Stat. 3426; Letter from Assemblyman John Vasconcellos to Governor Ronald Reagan (Nov. 10, 1971), in Governor's Chaptered Bill File (on file with Author).

⁹ These goals were expressed during a roundtable in which I participated at Columbia Law School. Jennifer E. Rothman, Remarks at the Columbia Law School Kernochan Center for Law, Media, and the Arts: Right of Publicity Roundtable (Oct. 20, 2017) (announcement at <http://www.law.columbia.edu/events/right-publicity-roundtable> [<https://perma.cc/2E6D-7D4M>]); see also, Symposium, *New York Right of Publicity Law: Reimagining Privacy and the First Amendment in the Digital Age*, 36 CARDOZO ARTS & ENT. L.J. 601 (2018); *Right of Publicity*, SAG-AFTRA, <https://www.sagaftra.org/right-publicity> (last visited May 8, 2018) [<https://perma.cc/F4AT-CR9R>].

would mean that the right can be taken from the underlying identity-holders and be held by a corporate entity or some other third party—something not allowed under current law. As I will discuss, this is a particularly troubling turn, and also a perplexing choice by the union, as its members may be particularly vulnerable to losing control over their own names, voices, and likenesses if the right is made transferable.

The second goal of the bill is to add a right that extends after death, often termed a “postmortem right of publicity.” Currently, New York law provides no such right. The right to a person’s name or likeness dies with that person. I note, however, that those with successful professional careers, particularly those who sell products or provide services, often have trademark rights that survive death, and several other state and federal claims can already be brought if a dead celebrity’s identity is used to suggest the endorsement of a product or service without permission, or if copyrighted images are used.

The third goal of the bill is to address the concern, particularly among actors, that their performances could be recreated or reanimated using digital technology. Without limits, the fear is that these computer-generated performances could potentially substitute for hiring actors. This is by far the most compelling of the suggested changes.

Let’s keep in mind these three goals, transferability, postmortem rights, and limiting the “replication of professional performance[s],” as we take a trip back in time to lay the groundwork for the upcoming panel discussion about what New York should do—if anything—to alter its privacy laws for the 21st Century.¹⁰

New York and the Original Right of Publicity

Most often those who know something about the right of publicity recognize its origins in the right of privacy that was first adopted in state tort laws across the United States beginning in the early 1900s. But most of those familiar with that story view the two rights today as radically different concepts—two legal rights with a historical connection, but substantive discontinuity. The right of publicity is often thought of as the “reverse side of the coin of privacy”, or in other words, its opposite. The right of *privacy* is commonly understood as protecting seclusion, secrecy, and hurt feelings, while the right of *publicity* is primarily, sometimes exclusively, thought to protect celebrities and their economic interests. Privacy is thought of as a

¹⁰ This is the digital avatar language from the proposed amendment to the May 2017 Assembly bill. Jennifer E. Rothman, *New York Legislature Amends Right of Publicity Bill for the Worse*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (JUNE 14, 2017 5:00 PM), <https://www.rightofpublicityroadmap.com/news-commentary/new-york-legislature-amends-right-publicity-bill-worse> [<https://perma.cc/7NVT-JMDN>].

personal right, while publicity as a property right. Despite how frequent and widespread such claims are, they turn out not to be true.¹¹

The original right of publicity was the right of privacy.¹² They were one and the same conceptually, and the language of controlling “publicity” about oneself emerged beginning in the mid-to-late 1800s. This was the primary feature of the right of privacy that everyone was calling for in the wake of a host of technological and cultural shifts driven by the Industrial Revolution.¹³

New York has long sat as the central figure in both the right of privacy and the right of publicity’s development in this country. Although New York was not the first state to pass a bill limiting the appropriation of a person’s likeness, it was the first to adopt an express “right of privacy.”¹⁴ At its origin, this right of privacy was primarily about the right to control “publicity” about oneself—when and how one’s image and name could be used by others in public—the same concern as today’s right of publicity laws.

Many of the first privacy cases to be decided by courts involve claims we would think of as typical right of publicity cases: cases in which a person’s image was used on a product or in advertising for that product.¹⁵ That was true here in New York. Figure 1 is from the 1902 case of *Roberson v. Rochester Folding Box Co.*¹⁶

¹¹ Rothman, *supra* note 1, at 4–5, 11–44.

¹² ROTHMAN, *supra* note 1, at 11–29 (providing a book chapter titled “The Original ‘Right of Publicity’” which tells the story of this original right of publicity).

¹³ *Id.*

¹⁴ Four years before New York passed its statutory right of privacy, what is now N.Y. Civil Rights Law §§ 50–51, California passed what is known as the “Anti-Cartoon Bill,” a law that barred the publication of portraits and caricatures of individuals without permission. Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258 (Deering 1915)); *The Anti-Cartoon Law*, SACRAMENTO RECORD-UNION, Feb. 24, 1899, at 2. For a discussion of this early—though apparently never-enforced law—see ROTHMAN, *supra* note 1, at 19.

¹⁵ See, e.g., *Pavesich v. New England Life Ins., Co.*, 50 S.E. 68 (Ga. 1905); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); *Riddle v. MacFadden*, 116 A.D. 353 (N.Y. App. Div. 1906); *Eliot v. Jones*, 120 N.Y.S. 989 (Sup. Ct. 1910); *Mackenzie v. Soden Mineral Springs*, 18 N.Y.S. 240 (Sup. Ct. 1891); *Astaire v. Esquire Magazine*, N.Y. L. J., Feb. 11, 1936, at 760; see also *Marks v. Jaffa*, 26 N.Y.S. 908 (Sup. Ct. 1893) (privacy claim based on use of actor’s name in newspaper popularity contest); ROTHMAN, *supra* note 1, at 11, 21–29.

¹⁶ *Roberson*, 64 N.E. 442.



Figure 1. Copy of Advertisement reproduced in “The Right of Privacy,” 12 PROFITABLE ADVERTISING 187 (1902)

The image is of a young woman, Abigail Roberson. She had sat for a portrait in a photographer’s studio—something that was very popular at the time. The photographer, without her permission, later allowed the photograph to be used by the Franklin Mills Flour company in advertisements. The company used her image on approximately 25,000 lithographic ads that were distributed, and ultimately brought to Ms. Roberson’s attention. She alleged that when she discovered the use of her photograph she suffered a nervous shock, became bedridden, and required medical assistance.¹⁷

Given New York’s role as the first state to expressly adopt a privacy law, it may be surprising to discover (if you don’t already know) that the New York Court of Appeals actually rejected Roberson’s claim, and concluded in a 4-3 split decision that there was no *common law* right to privacy in the state of New York—a conclusion that remains firmly in place today.¹⁸ The four judges in the majority were sympathetic to Roberson’s plight, and thought she should have a claim, but they were concerned about creating such a claim at common law. They concluded that a common law-based right of privacy would be too vague and uncertain, leading to a significant danger of shutting down speech about public figures. They thought courts were ill-equipped to draw lines between what were newsworthy uses and ones that were not.

¹⁷ *Id.*

¹⁸ *Id.*; *Stephano v. News Grp. Publ’ns*, 474 N.E.2d 580, 583–85 (N.Y. 1984) (rejecting the claim that a common law right of publicity or right of privacy exists in New York State).

Instead, they suggested that the legislature should tackle the problem, and provide clear guidance on where to draw the boundaries of privacy laws so as to limit their impact on free speech.¹⁹

Judge John Clinton Gray wrote a powerful dissent in the case. He contended that each of us have a property right in our own names and likenesses that we can use to stop unauthorized uses of our images for another's "commercial purposes or gain," like the one made by Franklin Mills of Ms. Roberson's features.²⁰ The weight of public opinion at the time was solidly on Roberson's side, and in agreement with Judge Gray's dissent. After the decision, the *New York Times* published an editorial lambasting the court for its "horrible" opinion rejecting Roberson's right of privacy, and calling on the legislature to pass a privacy law. Surprisingly from today's vantage point, the newspaper criticized the use of portable "detective" cameras to take pictures of people on public streets, including when the subjects were public figures, such as the President of the United States and the businessman J. P. Morgan. The *Times* criticized both the taking of the photographs, and their use in advertisements, on products, and even in newspapers.²¹

In the face of the outcry from the public, journalists, and scholars, the New York legislature passed a privacy law that abrogated the decision in *Roberson*. The 1903 Act to "Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade," made it both a misdemeanor and a civil cause of action to use "for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person" without written consent.²² This legislation remains mostly in its original form as today's New York Civil Rights Law Sections 50 and 51.²³ One of the few significant changes to these laws was the addition of "voice" to the list of characteristics of a person protected by the civil cause of action.²⁴ Although termed the state's "right of privacy," it is on its face a right of publicity law.

So the claim that New York lacks a right of publicity is simply not true. In fact, it has one of the very first right of publicity laws adopted in this country. Other states followed New York's lead. Most, however, adopted such laws under those states' common law, and criticized the New York Court of Appeals for requiring a legislative fix. The Georgia Supreme Court led the way in this regard. In 1905, in *Pavesich v. New*

¹⁹ *Roberson*, 64 N.E. at 446–48.

²⁰ *Roberson*, 64 N.E. at 448–51 (Gray, J., dissenting).

²¹ *Right of Privacy*, N.Y. TIMES, Apr. 23, 1902, at 8. For a more detailed discussion of *Roberson* and its aftermath, see ROTHMAN, *supra* note 1, at 22–25, 192 n. 26.

²² N.Y. Civ. Rights Law §§ 50–51 (McKinney 2018) (originally enacted as Act of April 6, 1903, ch. 132, 1903 N.Y. Laws 308).

²³ See *id.*

²⁴ Voice was added to New York law in 1995. Act of August 9, 1995, ch 674, 1995 N.Y. Laws 3642 (codified as N.Y. Civ. Rights Law § 51).

England Life Insurance, that court adopted a right of privacy under the state's common law.²⁵ The case had very similar facts to those from *Roberson*. The plaintiff, Paolo Pavesich, sat for a portrait, and then the photographer allowed the image to be used in an advertisement for life insurance without Pavesich's permission. The Georgia Supreme Court compared the New York court's rejection of *Roberson*'s claim as so wrong-headed that it was akin to burning innocent women at the stake thinking they were witches.²⁶

After New York adopted a statutory right of privacy, and Georgia a common law one, most other states followed suit. By the early 1940s, most states had adopted a right of privacy, and the right was an uncontroversial, well-established claim.²⁷ These laws were the original right of publicity laws. These rights of *privacy* were understood as synonymous with a right to stop or control "unwarranted *publicity*" or "wrongful *publicity*" about oneself, and were often defined expressly in these terms.²⁸

Busting Myths About Privacy's Failings

It is often claimed that the reason there was a turn away from the right of privacy, and toward something different and distinct—the right of publicity—was because the right of privacy had numerous failings. It is claimed that the right of privacy failed to adequately protect, or even to protect at all, public figures, and also that once information was made public or a person entered the public arena the right of privacy was extinguished. None of these claims, however, turn out to be true. New York's right of privacy is a prime example of this. It has long been established in New York that public figures can recover damages, both professional and personal, when their names and likenesses are used without permission.²⁹

Tellingly, many of the stories about privacy law's failings did not emerge during the heyday of privacy law, but instead largely emerged in the 1950s, 1960s and 1970s, as scholars and lawyers looked back on

²⁵ Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

²⁶ *Id.* at 81.

²⁷ Rothman, *supra* note 1, at 26–27.

²⁸ *Fairfield v. Am. Photocopy Equip.*, 291 P.2d 194, 197 (Cal. Dist. Ct. App. 1955) (emphasis added); *Brents v. Morgan*, 299 S.W. 967, 970 (Ky. 1927) (emphasis added); Case Comment, *The Right to Immunity from Wrongful Publicity*, 11 COLUM. L. REV. 566, 566–68 (1911) (emphasis added); see also ROTHMAN, *supra* note 1, at 27–29; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 1050, 1056 (1941). I note that the Georgia Supreme Court in *Pavesich* expressly used the term "right of publicity," and indicated that such a right long predated the right of privacy. But what the court was likely referring to was a somewhat different concept than both today's right of publicity, and what other courts and scholars at the time were referring to as a right of privacy or right of publicity. The court appears to have been referring to the right to appear in public if one so chooses, rather than to a right to control how one appears or what is done with one's name or likeness. See ROTHMAN, *supra* note 1, 27–28.

²⁹ ROTHMAN, *supra* note 1, at 30–44, 194–95 nn. 1, 2, 4, 7–9.

privacy law and tried to explain why we might need or want something new or different, such as a right of publicity. Often these commentators had particular motives for seeking to establish a new right, such as furthering the interests of a client who might benefit from one primary feature that was indeed lacking from privacy law—transferability.³⁰ This is a subject to which I will turn momentarily, but first I want to highlight the reality that here in New York, and elsewhere, the right of privacy was doing the exact work that it is so often claimed today that it did not do.

The right of privacy did protect public figures, did allow for recovery of economic injuries without regard to whether an emotional harm was suffered, and did provide significant monetary recoveries. As part of my research for the book, I read many case files from early privacy cases here in New York that were later cited as denying recoveries to public figures. And it turns out that these assessments of New York's privacy laws were incorrect.

There are numerous cases early on and throughout the history of privacy law here in New York (and elsewhere) that provided public figures with claims, including people who were famous and lived by publicizing their personalities. They had successful claims even when the images of them were taken in public, and even when the images had already been widely circulated as publicity stills.³¹ Celebrity endorsements were already common by the 1800s and active self-promotion dates back to ancient times.³² Privacy-based claims were most often categorized as rooted in property, and injuries to one's professional reputation and business harms were cognizable, including lost endorsement fees.³³ Despite claims that public figures could not recover economic damages, numerous cases out of New York and elsewhere granted significant monetary judgments under right of privacy claims for economic harms.³⁴

The True Missing Link: Transferability

Even though these myths about the failings of the right of privacy turn out not to be true, there was one thing that the right of privacy truly did not do—allow the rights to one's own name, likeness, or voice to be transferred to someone else. Recall that one of the primary goals of the

³⁰ Rothman, *supra* note 1, at 68–71, 73–75.

³¹ See Rothman, *supra* note 1, at 30–40.

³² *Id.* at 30–35, 195–96 n. 10.

³³ *Id.* at 22, 24, 26, 30–35, 48–49.

³⁴ See, e.g., Riddle v. MacFadden, 115 N.Y.S. 1142 (App. Div. 1909) (affirming jury award); Riddle v. MacFadden, 101 N.Y.S. 606 (App. Div. 1906); Extract from Minutes, Case on Appeal at 18, Riddle v. MacFadden, 115 N.Y.S. 1142 (on file with Author); Binns v. Vitagraph Co. of Am., 103 N.E. 1108 (N.Y. 1913); *Jack Binns to get \$12,500*, N.Y. TIMES, Dec. 31, 1913, at 5; see also ROTHMAN, *supra* note 1, at 30–44, 193–95, nn. 1, 4, 7–9 (documenting examples of public figures recovering economic damages for professional injuries).

proposed right of publicity bill here in New York is to make the right “freely transferable.”³⁵ Regardless of whether the current privacy-based rights are considered property or not, this proposed change would shift the right to our own name and likeness from a right that cannot be taken away from us, to one that can be.

Why SAG-AFTRA would be at the forefront of pushing such a change is mystifying. Most actors have no idea that the proposed bill their representatives are trying to get passed would allow managers, Broadway producers, film studios, television networks, Facebook, creditors, and ex-spouses to take away from them ownership of their own names, voices, and likenesses. That is what transferability allows. And such transfers could last forever.

It is a particularly ironic turn of events that a union representing actors is now advocating for a right that was originally spearheaded in part by movie studio lawyers. The studios were looking for a new vehicle to “own” and control their actors in the aftermath of the invalidation of the long-term employment contracts and star system that had dominated Hollywood for decades until the mid-1940s (and which had been detrimental to actors). A transferable right over a person’s identity was an attractive vehicle for the studios to be able to do so. Such transferability was never in the interests of identity-holders (such as actors), but was something that instead furthered the interests of corporations that profited from using the names and likenesses of others.³⁶

One of the first cases to consider the transferability of a person’s name or likeness to third parties was *Pakas Co. v. Leslie*, which was decided here in New York in 1915, and involved silent movie stars. A number of actresses gave permission to their movie studio, the Vitagraph Company, to which they were under contract, to use their images in a variety of ways for publicity. The studio licensed a number of the actresses’ photos for use on poster stamps by the defendants in the case. Without getting Vitagraph’s permission, the actresses also gave permission to the Pakas Company, the plaintiff, to sell the same sort of small poster stamps.³⁷

The Pakas Company sued Arthur Leslie (among others) to stop him and the other defendants from distributing the images of the actresses. The particular dispute probably would have gone into the

³⁵ New York Assembly Bill No. A08155, 2017 Leg., 240th Sess. (N.Y. 2017).

³⁶ Rothman, *supra* note 1, at 68–71.

³⁷ Judgment, *Pakas Co. v. Leslie* (N.Y. Sup. Ct. Mar. 19, 1915) (on file with Author); Findings of Fact and Conclusions of Law, *Pakas Co. v. Leslie* (N.Y. Sup. Ct. Mar. 19, 1915) (on file with Author); Complaint *Pakas Co. v. Leslie* (N.Y. Sup. Ct. July 28, 1914) (on file with Author). The case is often incorrectly referred to as *Pekas v. Leslie* because of what appears to have been a typographical error in the reporting of the case in the *New York Law Journal*. 52 N.Y.L.J. 1864 (Feb. 13, 1915). See also ROTHMAN, *supra* note 1, at 46–48, 57–58, 200 n.3.

dustbin of obscurity if it hadn't been plucked out by the litigants in a case we'll return to and that is far better known—the *Haelan Laboratories v. Topps Chewing Gum* case from 1953.³⁸ *Pakas* was cited in *Haelan* for the proposition that the actresses' privacy rights were not transferable.³⁹ A preliminary decision by the trial court in *Pakas* noted that the right of privacy was "purely personal and not assignable" under New York law.⁴⁰ The court denied the *Pakas* Company's request for a preliminary injunction to bar the sale of the competing posterettes.⁴¹ This was the decision that was reported in the *New York Law Journal*, and that led commentators to suggest that without assignability companies could not enforce contractual agreements, or assert them as a basis for tort claims of inducement or impairment of contract.⁴²

But this is not what actually happened in the case. The files from the case indicate that even without such an assignable right, the *Pakas* Company could enforce its contractual rights against Leslie so long as it did indeed have superior rights to the images in question.⁴³ As it turns out, many of the images that Leslie used were ones to which Vitagraph owned the copyright, and that had been taken long before the actresses gave *Pakas* permission to use their images.⁴⁴ As a result, the trial court ultimately enjoined some of Leslie's uses, but not the ones that involved these previously captured images of the actresses.⁴⁵ Thus, the decision in *Pakas* actually stood for the opposite proposition than that for which it is so often cited. The court ultimately did allow an injunction to issue without the right to the actresses' names and likenesses needing to be transferable or held by the *Pakas* Company.⁴⁶

Other courts to consider the question of transferability also concluded that the right of privacy was not something that could be transferred to others, regardless of whether it was understood as a property right. The Fifth Circuit Court of Appeals decision in *Hanna Manufacturing v. Hillerich & Bradsby* is probably the most well known

³⁸ *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). The filings from *Pakas* were submitted to the district court in the *Haelan* litigation on March 13th and 14th, 1952. The district court case was titled *Bowman Gum v. Topps Chewing Gum*, 103 F. Supp. 944 (E.D.N.Y. 1952) (No. 11852). All cited filings from the *Haelan* litigation are on file with the Author, along with many other documents from the case. *Haelan* Laboratories was the name of the plaintiff in the case for only a limited time. The original complaint was filed by a predecessor to *Haelan*, *Bowman Gum*, and *Connelly Containers* became the named plaintiff after it bought *Haelan*. See ROTHMAN, *supra* note 1, at 51–63.

³⁹ *Haelan Labs.*, 202 F.2d at 868–69; *Bowman Gum*, 103 F. Supp. at 951.

⁴⁰ *Pakas* [sic] Co., 52 N.Y.L.J. 1864.

⁴¹ *Id.*

⁴² *Id.*; Note, Possible Interests in One's Name or Picture, 28 HARV. L. REV. 689 (1915); see also ROTHMAN, *supra* note 1, at 46–48.

⁴³ Judgment, *Pakas Co. v. Leslie* (N.Y. Sup. Ct. Mar. 19, 1915).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*; ROTHMAN, *supra* note 1, at 46–48.

of these cases.⁴⁷ *Hanna* involved a lawsuit brought by *Hillerich & Bradsby*, the makers of the famous Louisville Slugger bats that had players' names and signatures printed on them. Hillerich & Bradsby sued Hanna, another company that was making similar bats with players' names printed on them, claiming that only it could make such bats. Although the federal appellate court concluded that the players had property rights in their names, it held that such property was not "vendible in gross," and could not be assigned to Hillerich & Bradsby.⁴⁸

This conclusion led commentators to (inaccurately) criticize the decision for leaving Hillerich & Bradsby without recourse.⁴⁹ In fact, the court did allow an injunction in the case against deceptive uses that would lead consumers to conclude that the Hanna bats were endorsed by the players.⁵⁰ The court, however, allowed Hanna to continue to sell bats with players' names on them, as long it was clear that they were not sponsored by the players. This conclusion had nothing to do with transferability or the question of whether an assignment of rights had been made. Instead, the court allowed these nonconfusing uses on free speech grounds. The court held that the public had a right to receive truthful information about the bats, including that a particular bat was designed in the style of one favored by a particular player. As long as consumers were not deceived, such useful information was protected speech.⁵¹

Enter Haelan Laboratories v. Topps Chewing Gum

Both *Pakas Co.* and *Hanna Manufacturing* figured prominently in the thinking and briefs in *Haelan Laboratories v. Topps Chewing Gum*, the Second Circuit of Appeals decision from 1953.⁵² It is commonly said that *Haelan* marked the birth of the right of publicity.⁵³

⁴⁷ *Hanna Mfg. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1935).

⁴⁸ *Id.*

⁴⁹ *See, e.g., Haelan Labs*, 202 F.2d at 869; *Bowman Gum v. Topps Chewing Gum*, 103 F. Supp. 944; *see also* ROTHMAN, *supra* note 1, at 48–50, 201 n. 8.

⁵⁰ *Hanna Mfg.*, 78 F.2d at 767–68.

⁵¹ *Id.*; *see also* ROTHMAN, *supra* note 1, at 48–50 (discussing case files in *Hanna* and analyzing commentary that followed decision).

⁵² *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953); Brief for Defendant, *Haelan Labs.* (No. 22564), at 29–39, 66 (on file with Author); *Bowman Gum v. Topps Chewing Gum*, 103 F. Supp. 944, 948–54; *see also* ROTHMAN, *supra* note 1, 50–64, 201–03 nn. 8–27, 29–33 (telling story of *Haelan* litigation on the basis of detailed review of case files from district court, federal court of appeals, and state court filings).

⁵³ *See, e.g., Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 148 (3d Cir. 1982); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STANFORD L. REV. 1161, 1172–73 (2006); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VANDERBILT L. REV. 1199, 1201 (1986); Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204, 218–23 (1954); *see also* ROTHMAN, *supra*

If any of you have studied the right of publicity before, that's probably what you understand to be the case. But in fact, it's not true. *Haelan* neither coined the term "right of publicity," nor created the concept, which, as I have discussed, both long pre-dated the case.⁵⁴

Haelan was a case that potentially raised the issue of transferability, but it was really a case about the validity and enforceability of contracts. It involved baseball trading cards that were included in packages of gum and other candy. The baseball players gave permission and received payment from two different companies (and other licensing agencies) for such uses. The problem was that the players had given permission to *both* companies to do so.⁵⁵

The defendant in the case, Topps Chewing Gum, either to avoid sorting through the nearly 2,000 contracts in the case or because the plaintiff's contracts predated theirs, made a creative, if ultimately losing argument. Topps contended that the contracts were simply waivers of privacy claims, and therefore were not enforceable against Topps, nor could they form the basis of an impairment of contract claim. Although this argument originally did not persuade the trial judge, upon reconsideration the trial judge tossed the case on these grounds, concluding that the contracts were mere waivers of the right to sue for privacy violations, and could not form the basis of a tort against Topps. Because of this framing, the plaintiff on appeal (now Haelan Labs.), contended that although that argument was incorrect, if the court thought otherwise, then what the contracts did was not waive privacy rights, but instead assign the players' rights to their names and likenesses.⁵⁶

There is much more to say about *Haelan*. An entire chapter of my book is devoted to telling the story of the case—one that we have not heard before, and that was revealed to me after I went into the archives, and read the case files both at the appellate and trial court level, as well as related state court files.⁵⁷ But for our purposes here, I want to primarily highlight that our conventional understanding of the case, as providing a claim to baseball players who otherwise would have been left without any way to protect against uses of their names and likenesses, is utterly untrue. The baseball players long had claims under New York's right of privacy statute for such unauthorized uses on the trading cards. Both *Haelan*'s predecessor company, Bowman Gum, and Topps Chewing Gum knew this, and therefore got the written consent of each player to use his name and image on the cards, and paid (or

note 1, at 45–46, 199–200 n. 1 (providing numerous examples of scholars and jurists making this erroneous claim).

⁵⁴ ROTHMAN, *supra* note 1, 11–64, 67–86.

⁵⁵ *Id.* at 50–64.

⁵⁶ ROTHMAN, *supra* note 1, at 45–64, 201–03 nn. 8–27, 29–33.

⁵⁷ *Id.*

promised to pay) each player for the use.⁵⁸

The Second Circuit opinion in *Haelan* highlighted that the case was about contracts and the tort of inducement, and that the trial court needed to develop the record to determine whether the “defendant, knowing of the [Bowman] contract, deliberately induced the ball-player to break that promise[.]” But the opinion did not stop there. It also suggested that if Topps’s view of the right of privacy was correct, then “in addition to and independent of that right of privacy[], a man has a right in the publicity value of his photograph.” The court dubbed this a “right of publicity.”⁵⁹

It is not clear that the appellate court thought it had created something new. But the majority opinion suggested that the “right to grant the exclusive privilege of publishing” a person’s likeness may validly be granted “in gross” without any related transfer of an underlying business or ongoing connection to the individual player.⁶⁰ It was this aside in the opinion, likely mere dicta, that set up the future focus on transferability in right of publicity laws, and a shift in our understanding of what was meant by both the right of privacy and the right of publicity.

Notably, Judge Thomas Walter Swan’s concurrence in the case criticized this unnecessary tangent in the majority opinion. He thought the decision should rest solely on the intentional inducement claim for encouraging players “to breach a contract which gave plaintiff the exclusive privilege of using [a ball-player’s] picture.”⁶¹ Swan therefore thought there was no need to engage with the right of privacy or publicity.⁶²

The litigants in the case and the trial judge agreed with Swan’s reading of the decision, and did not think the opinion created a new type of claim. Instead, they all understood the decision as simply an admonishment to the trial court judge that he would have to sort through all of the contracts to determine which were valid, and which had priority.⁶³

To the extent courts (almost all federal ones) later read *Haelan* otherwise—and as creating a new and transferable right of publicity in New York—New York courts expressly rejected this reading of the state’s law. There is no independent or common law right of publicity in New York State as of April 2018.⁶⁴

⁵⁸ ROTHMAN, *supra* note 1, at 45–64; *see also* Jansen v. Hilo Packing, 118 N.Y.S.2d 162 (Sup. Ct. 1952).

⁵⁹ *Haelan Labs.*, 202 F.2d at 867–68.

⁶⁰ *Id.* at 868.

⁶¹ *Haelan Labs.*, 202 F.2d at 870 (Swan, J., concurring).

⁶² *Id.*

⁶³ ROTHMAN, *supra* note 1, at 62–64, 67–68, 203–04 nn. 30–33.

⁶⁴ *Id.* at 64; Stephano v. News Grp. Publ’n., 474 N.E.2d 580, 583–85 (N.Y. 1984).

Movie Studios and Heirs, Not Ballplayers

Nevertheless, *Haelan* raised the possibility that the right to one's own identity could be transferred away to a corporation. It is often claimed, based on *Haelan*, that transferability was essential for individuals to monetize their identities, but that has never been true. Having a transferable right of publicity was never for the benefit of the individuals. This reality is highlighted by looking at who was advocating for such transferability during the decades that followed *Haelan*.⁶⁵

The language from *Haelan* gave ideas to movie studio lawyers and others who saw an opportunity to get more control over and money out of their actors, and other public personalities. Transferability was a great idea for studios who could own their actors once again after the demise of the star system by having their actors transfer rights over their names and likenesses to the studios. One of the prime examples of such an advocate is Melville Nimmer, who wrote one of the most famous and influential articles about the right of publicity while working as an attorney at one of the major studios, Paramount Pictures.⁶⁶

One of Nimmer's scenarios used to demonstrate the need for a transferable right of publicity was to give a film company the ability to stop one of its actresses from appearing in multiple bathing suit ads without the permission of the movie studio. He thought it was the studio that should get to decide what sorts of photo shoots and advertisements its actors could do. A transferable right of publicity could stop actresses from double-booking, as the baseball players had done in *Haelan*, and from appearing in ads that a movie studio thought inappropriate, or that were simply not what it had in mind for a particular actress's image.⁶⁷

Even without a transferable right, companies could enforce contracts against the players (and actors), and collect damages for breaches of agreements, such as to only appear on one baseball card (or in one company's advertisement for swimsuits). But a total transfer of rights would give even more control to the owner of the players' and actors' names and likenesses.⁶⁸

Who else thought that transferability was a great idea? Heirs and others who had an interest in dead people, particularly one in Elvis, who died in 1977. One of the main driving forces behind the proliferation of a transferable right of publicity were arguments by those who stood to profit from the deceased. If the right of publicity is personal to the

⁶⁵ ROTHMAN, *supra* note 1, 67–86, 116–17; *see, e.g.*, Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); Nimmer, *supra* note 53.

⁶⁶ Nimmer, *supra* note 53.

⁶⁷ *See* Nimmer, *supra* note 53, at 209–10; *see also* ROTHMAN, *supra* note 1, at 68–71.

⁶⁸ For a more in-depth discussion of the many alternative methods of enforcing rights to exclusive contracts that were wrongly dismissed by advocates for an independent and transferable right of publicity, *see* ROTHMAN, *supra* note 1, at 68–71.

individual, even if it's a property right, it dies with that person. Whereas if it's transferable, it can survive death, and the dead person can produce income for the living.⁶⁹

Tellingly, the primary advocate for making Elvis's right of publicity survive his death was Elvis's manager, Colonel Tom Parker, not his family. Parker had taken the vast majority of Elvis's earnings while he was alive. Elvis earned only 22% of the revenue from merchandise, while Parker earned close to 60% of the revenue. Parker wanted Elvis to keep him rich even after he was dead, and even at the expense of Elvis's family who would later fight the manager over rights and royalties.⁷⁰ Parker's efforts to keep Elvis alive (at least commercially, after his literal death) was integral to the adoption of postmortem rights in many states.⁷¹

So What Should New York Do?

With this backdrop of some of the history of how New York's law got where it is, and how the right of publicity developed, we are back at the questions with which we started. Should New York change its right of privacy laws, and, if so, how? At this point I've debunked the claim that New York doesn't have a right of publicity. It does. So the question is not whether New York should have a right of publicity, but whether it should change its law to make the right a transferable one, and also whether it should provide a similar right after death. These are distinct questions.

Bar or Limit Transferability

There are many downsides to having a freely transferable right, and few upsides. As discussed, transferability is not required to protect rights to one's name or likeness, nor to profit from authorizing such uses. A transferable right would mean that another person or company could take rights to a person's identity away from that person, and own them separate and apart from the underlying identity-holder. I have questioned in my prior work whether such a separation is even possible. But even if it were, it presents the chilling prospect of a person losing

⁶⁹ ROTHMAN, *supra* note 1, at 67–68, 73–75, 81–86.

⁷⁰ ROTHMAN, *supra* note 1, at 84; *see also* *Factors Etc. v. Creative Card*, 444 F. Supp. 279, 280–83 (S.D. N.Y. 1977); Robert Hilburn, *Eternal Revenue: Elvis' Millions Were Disappearing When Priscilla Presley Took Charge and Rebuilt the King's Fortune*, L. A. MAGAZINE, June 11, 1989, at 10, 18; *Parker is Accused of Cheating Presley in Royalty Dealings*, GLOBE AND MAIL, August 3, 1981, at 15.

⁷¹ *See, e.g.*, *Factors Etc. v. Pro Arts*, 701 F.2d 11 (2d Cir. 1983); *Factors Etc. v. Pro Arts*, 652 F.2d 278 (2d Cir. 1981); *Memphis Dev. Found. v. Factors Etc.*, 616 F.2d 956 (6th Cir. 1980); *Factors Etc. v. Pro Arts*, 579 F.2d 215 (2d Cir. 1978); *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987); *see also* ROTHMAN, *supra* note 1, at 84–86; Personal Rights Protection Act of 1984, ch. 945, § 1, 1984 Tenn. Pub. Acts 950 (codified at Tenn. Code Ann. § 47-25-1101).

control over her own identity.⁷²

As an example, consider the pop star Bruno Mars. He is the “identity-holder” of his own name, voice, likeness, and other indicia of his identity. If the right of publicity were transferable, then his record company, Atlantic Records, could insist that he assign his right of publicity to it, thereby becoming the “publicity-holder” of his identity, including his name, likeness, and voice.⁷³ Bruno Mars has enough power now that he would not need to sign such an all-encompassing transfer of his rights, but that is not true of those starting out in the music business.

What could publicity-holders do with a person’s identity? And what could they stop the identity-holder from doing? The boundaries of this are not entirely clear, but in my book I consider the example of Ariana Grande. Suppose that an early manager of hers—she was a child star—had her, or likely her parents, sign a broad, perpetual, all-encompassing exclusive assignment of her identity to him, including the rights to her name, likeness, and voice.⁷⁴ Some managers have obtained such assignments, and they are commonplace particularly in the world of adult entertainment.⁷⁵

If such transfers were allowed, Grande would not be able to reclaim those rights when she turned 18, and would be at least partially under the control of her first manager, even if she changed her representation. Grande is vegan and might want to support PETA (People for the Ethical Treatment of Animals), an animal rights organization, do a promotional campaign for the nonprofit, or perhaps a commercial encouraging people to eat more tofu, instead of meat.⁷⁶ If her manager thinks vegans are sort of weird and wacky, and won’t have broad commercial appeal, he could potentially block Grande from publicly supporting PETA, and from doing campaigns for the organization or for a tofu company. The manager could even authorize the use of her name and likeness for use in an Oscar Meyer lunch meat advertisement, something which would be anathema to Grande. Several federal and state laws and regulations might limit the use of Grande’s

⁷² For a more in-depth discussion of the challenges and dangers of transferability, see ROTHMAN, *supra* note 1, at 115–37; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO L. J. 185 (2012).

⁷³ I developed the terminology and distinction between “identity-holders” and “publicity-holders” in Rothman, *The Inalienable Right of Publicity*, *supra* note 72, at 186–188. This specific example is taken from ROTHMAN, *supra* note 1, at 116.

⁷⁴ ROTHMAN, *supra* note 1, at 130–31.

⁷⁵ See, e.g., *Corey v. Nintendo Am.*, 592 N.Y.S.2d 6, 7–8 (App. Div. 1993); *Perfect 10 v. CCBill LLC*, 488 F.23d 1102, 1008 (9th Cir. 2007); see also ROTHMAN, *supra* note 1, at 119–22, 215–16 n. 9–12.

⁷⁶ Michelle Kretzer, *Ariana Grande Goes Vegan—and That’s Not All*, PETA, <https://www.peta.org/blog/ariana-grande-goes-vegan/> [<https://perma.cc/7M2R-F6VA>] (last visited May 17, 2018); ROTHMAN, *supra* note 1, at 130–131.

name or image, if the use falsely suggested she personally ate meat or endorsed the product, but otherwise if the manager owns Grande's right of publicity, he is within his rights to use her name and likeness as he sees fit.⁷⁷ That's one of the downsides to having a transferable right of publicity.

This is problematic even in contexts that we might think of as voluntary—which this hypothetical fits into; either she or her parents voluntarily assigned her right of publicity to the manager. This is not pure fiction. Contestants on reality television shows often sign very broad contracts, that assign their life story rights, their names, likenesses, and voices to the producers. Facebook has at various points included very onerous terms, including ones that give it the right to use your name and image to advertise without additional permission.⁷⁸ It's not exclusive, but given how often the company changes its terms of service without making the changes apparent, it would be naïve to rely on the company to protect users from transfers of their rights of publicity either to Facebook or to third parties. Parents also sometimes sign away the rights of their children, sometimes intentionally, sometimes unwittingly. For example, Brooke Shields's mother assigned rights over Shields's image, at least for limited purposes, and Shields has tried in vain to regain control after her mother assigned her right of publicity to photographers.⁷⁹ There is no provision in the proposed bill for children to regain their rights of publicity at the age of 18 if their parents have assigned such rights to a third party or even to themselves. The history of the abuse of child actors by their parents and guardians led to the passage of laws in California to protect child actors from parents who profited off their children's work, while leaving their children destitute.⁸⁰ Making the right of publicity broadly transferable would provide a platform for future abuses of child actors, and of children more broadly.

If the right of publicity is transferable, it also can be involuntarily transferred to creditors, after judgments or in bankruptcy proceedings. It could also be divisible in divorces, something that would allow one's

⁷⁷ Rothman, *supra* note 1, at 130–34.

⁷⁸ See, e.g., Andy Denhart, *Survivor contestant contract: the waivers, agreements that cast members, families sign*, REALITY BLURRED (MAY 31, 2010 7:00), <https://www.realityblurred.com/realitytv/2010/05/survivor-cast-contract/> [<https://perma.cc/2V9J-FJF5>]; *Facebook Terms of Service* ¶¶ 2, 9, FACEBOOK, <https://www.facebook.com/terms.php> (last updated January 30, 2015) [<http://perma.cc/W35F-GCYL>]; see also ROTHMAN, *supra* note 1, at 119–21, 215 n. 10.

⁷⁹ *Shields v. Gross*, 448 N.E. 2d 108, 109, 111 (N.Y. 1983).

⁸⁰ Cal. Fam. Code §§ 6750–6753; *Coogan Law*, SAG-AFTRA, <http://www.sagaftra.org/content/coogan-law> [<https://perma.cc/GQ45-A3KZ>] (last visited May 10, 2018); see also *Faloon v. Fredrickson v. Hustler Magazine*, 799 F.2d 1000 (5th Cir. 1986); *Shields v. Gross*, 448 N.E.2d 108, 109, 111 (N.Y. 1983); Complaint, *Gonzales v. Gonzales*, No. CV-15-5498-DMG (C.D. Cal. July 20, 2015) (child sued to stop mother from transferring her right of publicity and trademark in her own name and clothing line).

ex-spouse to literally own a percentage of your name, likeness and voice.⁸¹ In a case involving football legend and Hertz pitchman O. J. Simpson, the family of Ron Goldman won a wrongful death suit against Simpson for killing Goldman and Simpson's ex-wife Nicole Brown Simpson. Although Simpson was acquitted in the criminal trial, he lost the civil case against him. Simpson vowed that he would never pay the multi-million dollar judgment against him, and even moved out of California to Florida to shelter his money using Florida's exemption of primary residences from assets available to creditors. The Goldman family filed a motion to have the copyright in Simpson's book, *If I Did It*, transferred to them. The court did not hesitate to do so. And the Goldman family then published the book making the "If" in the title so small that to most eyes it would simply read "I Did It." They also added an Introduction to the book titled "He Did It."⁸²

The Goldmans also filed a motion to have Simpson's right of publicity transferred to them. If the right is truly transferable, it should also have been transferred to the Goldman family, just as Simpson's copyright to the book was. A California trial court, however, denied the motion. The court concluded that the right of publicity could not and should not be transferred. The judge compared such a transfer of Simpson's right of publicity as akin to forcing Simpson into "involuntary servitude," something that would violate his right to liberty.⁸³

This decision, barring the transfer of Simpson's right of publicity to a creditor, is the right one, but we should not rely solely on judges to put up such roadblocks to transferability in individual cases. There should be a well-established limit on the right that precludes its transfer away from identity-holders. States should not add language to their laws, as the proposed New York bill does, that makes the right of publicity "freely transferable."⁸⁴ Advocates for such transferability may think that courts will strike down the most troubling of these transfers, but it is a dangerous business for New York to add such a broad provision, simply hoping for the best when courts review the constitutionality of such transfers down the road.

So what is SAG-AFTRA thinking? What is the advantage of having such a transferable right of publicity? For their most successful members, there may be some tax advantages to putting the property of their names and likenesses in a corporation from which all the income would flow, and be considered and taxed as capital gains. But even

⁸¹ ROTHMAN, *supra* note 1, at 118–19, 122–33.

⁸² ROTHMAN, *supra* note 1, at 117–19; *see also In re Lorraine Brooke Ass'n., Inc.*, No. 07-12641-BKC-AJC, at *1 (Bankr. S.D. Fla. July 2, 2007); *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. Oct. 31, 2006).

⁸³ *Goldman*, slip op. at 12; *see also* Rothman, *supra* note 1, 117–19, 122–24, 128–33.

⁸⁴ New York Assembly Bill No. A08155, 2017 Leg., 240th Sess. (N.Y. 2017).

without a transferable right, successful actors can set up a variety of corporate vehicles to reduce their tax burden. Nor do any tax savings compensate for the broader downsides of permitting complete alienability of a person's identity, not just for these successful performers, but for everyone.

Many of the other purported advantages of transferability simply do not stand up to scrutiny. One can have an agent, manager and publicist who help shape and monitor your public personality and professional career without them needing to own your identity. One can also make exclusive licensing deals without needing to assign one's rights—though as I have highlighted elsewhere, these deals need to be limited in scope and duration so as not to become the practical equivalent of assignments.⁸⁵ Limiting the scope of such licenses is another missed opportunity for law reform. If one is going to open up the current right of privacy in the state, the goal should be to improve it, not to make it worse.

Nor is transferability of the right of publicity for the living required to provide postmortem rights. A separate law could be drafted that provides a right to control uses of a dead person's name, likeness, and voice.

Paying Our Respect to the Living and the Dead

With regard to whether New York should offer postmortem rights, it is often said that it should do so solely because California provides a postmortem right of publicity.⁸⁶ But this is an unconvincing argument. States are solidly divided over the question, with only about half recognizing a postmortem right. And some states that do provide such a right, offer only a very narrow right (for example, limited only to deceased soldiers). The terms of postmortem rights even in states that recognize a broader right still vary widely—some states provide for a ten year duration, others thirty, and some terms are as long as one hundred years.⁸⁷

Even states that are geographically close to New York have widely differing views on the subject. Massachusetts, for example, which based its right of privacy statute on New York's, does not provide a postmortem right.⁸⁸ Connecticut does not seem to either, although one

⁸⁵ ROTHMAN, *supra* note 1, at 184; Rothman, *The Inalienable Right of Publicity*, *supra* note 72, at 234–37.

⁸⁶ See Cal. Civ. Code § 3344.1.

⁸⁷ ROTHMAN, *supra* note 1, at 87, 96–98; ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [http://perma.cc/UP7H-EQ79] (last visited May 10, 2018).

⁸⁸ *Massachusetts*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [https://perma.cc/7H9B-QADQ] (last visited May 14, 2018).

federal district court guessed that maybe the state would.⁸⁹ Similarly, New Jersey does not have a postmortem right, although several federal courts have concluded that the state would recognize such a right.⁹⁰ Such federal pronouncements are not binding, however, and similar decisions by federal courts have subsequently been rejected by state courts.⁹¹

Pennsylvania does provide a statutory postmortem right of 30 years, but only for those who died domiciled in the state, and who were actively commercializing their identities at the time of death.⁹² Moving slightly further away from New York, Delaware, Rhode Island and Vermont have not recognized a postmortem right.⁹³ So there is hardly a consensus in the Northeast on whether there should be a postmortem right in the first place. Clearly, New York is not an outlier by not providing such a right.

We therefore need to consider in the first place what justifies offering such a postmortem right in New York. If some type of right to a person's identity should survive death, then understanding *why* is essential to determine the appropriate scope and duration of that right.

Many of the top-earning celebrities are dead.⁹⁴ Is that a good thing? I don't know. I think there are good reasons to think that it is not, and that our economy should focus more on investing in the living. Why should heirs get a monetary windfall after someone dies, at the expense of the public? Any payout to heirs is unlikely to (significantly) incentivize the dead person while she is living. And you cannot reward the dead. That doesn't mean we shouldn't have a postmortem right, it just means that we should look at whether there are reasons to have such

⁸⁹ *Jim Henson Prods., Inc. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 188 (S.D.N.Y. 1994); *Connecticut*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [<https://perma.cc/8P8C-RQ73>] (last visited May 14, 2018).

⁹⁰ *See, e.g., McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994); *New Jersey*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [<https://perma.cc/MYV9-XNFS>] (last visited May 14, 2018).

⁹¹ State courts have disagreed with federal courts' interpretation of state right of publicity laws. *See, e.g., Stephano v. News Grp. Publ'ns*, 474 N.E.2d 580, 583–84 (N.Y. 1984); *see also Factors Etc. v. Pro Arts*, 201 F.2d 11, 11–13 (2d Cir. 1983) (noting the discrepancy between federal and state courts on Tennessee right of publicity law); ROTHMAN, *supra* 1, at 61–62 (discussing the *Erie* problem of federal courts leading in the creation and expansion of *state* right of publicity laws).

⁹² 42 Pa. Stat. and Cons. Stat. Ann. § 8316 (West 2002).

⁹³ For a description of each of these and other states' laws, *see* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/> [<https://perma.cc/8P8C-RQ73>] (last visited May 14, 2018).

⁹⁴ Forbes does an annual list of the top earning dead celebrities which is calculated not solely on the basis of the right of publicity, but also includes sales of real property, copyrights, and trademarks. *See, e.g., Dorothy Pomerantz, Michael Jackson Tops Forbes' List of Top-Earning Dead Celebrities with \$140 Million Haul*, FORBES (OCT. 15, 2014), <https://www.forbes.com/sites/dorothypomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities/#677b81e5e7dd> [<https://perma.cc/DFB4-PU7U>].

a right primarily on behalf of the living. Surviving relatives who were close to the deceased might be harmed by seeing a loved one crassly commercialized, spread across advertisements, reanimated on TV, plastered on billboards, or recreated for sex toys, particularly when their loss is recent.⁹⁵

Let's consider the example of the acclaimed musician and pop star Prince, who recently died without a will. His estate now is held by a number of estranged relatives with whom he apparently was not close, and had little contact.⁹⁶ Although we can no longer ask him, it might well be that Prince would have preferred that his fans be given free rein to honor him with *in memoriam* posters, buttons, and t-shirts, rather than to transfer a windfall to distant relatives simply because of a shared genetic connection. In fact, Minnesota, where Prince lived, like New York, does not have a postmortem right of publicity.⁹⁷ The state recently considered adopting such a right, but ultimately set aside the idea (at least for now). I am told the heirs and the legislators worried about the potentially staggering estate tax bill that the heirs would not be able to pay if a postmortem right of publicity was added to the estate's assets. To pay off such a bill Prince's identity would have to be fully commercialized even though neither he nor his heirs would likely want that.⁹⁸

The legislature may also have recalled that Prince was very outspoken about not wanting to be owned by anyone—particularly his record label. He had “slave” written on his cheek and changed his name to an unpronounceable symbol when Warner Brothers owned his name (for the duration of his recording contract).⁹⁹ It is unlikely that Prince would have changed his tune so that he would want to be owned in the afterlife. In light of this, those who support creating a postmortem right would be wise to consider limiting the right to instances in which the deceased actively chose with whom any such postmortem right of publicity should vest, and provide an option to terminate those rights

⁹⁵ For a more detailed discussion and analysis of potential justifications for a postmortem right of publicity, see ROTHMAN, *supra* note 1, at 98–112, 123–24; see also Jennifer E. Rothman, *The Market in Dead People*, THE VOLOKH CONSPIRACY (MAY 20, 2018 7:30 AM), <https://reason.com/volokh/2018/05/10/the-market-in-dead-people> [<https://perma.cc/9P93-ZK2W>].

⁹⁶ ROTHMAN, *supra* note 1, at 108, 123–24.

⁹⁷ *Minnesota*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law/minnesota> [<https://perma.cc/R2YA-U44W>] (last visited May 14, 2018).

⁹⁸ ROTHMAN, *supra* note 1, at 6–7, 108, 123–24. At an event held at Mitchell Hamline School of Law on October 12, 2017, several people involved in the legislative hearings and negotiations around the PRINCE Act described the estate tax as one of the primary reasons the bill was pulled; see also Jennifer E. Rothman, *Prince's Death Sends Minnesota Legislature into Overdrive*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (MAY 10, 2016 9:00 AM), <https://www.rightofpublicityroadmap.com/news-commentary/prince%E2%80%99s-death-sends-minnesota-legislature-overdrive> [<https://perma.cc/8KPM-XKVR>].

⁹⁹ ROTHMAN, *supra* note 1, at 119–120.

rather than to have them continue after death.¹⁰⁰

The law should also limit the ability for a market in dead and dying people to emerge. There is a ghoulish prospect that such a law would encourage the buying up of aging celebrities' rights, and shift wealth to corporations that have no relationship with the deceased at the expense of the broader public. Consider the pin-up model and actress Bettie Page (who died in a state with postmortem rights), whose identity is now owned by CMG Worldwide, a company that owns and manages primarily dead people. Before she died, Page assigned an agent of the company her postmortem right of publicity.¹⁰¹ The company has turned Page into one of the top earning dead people. It has developed a clothing line, and runs a Bettie Page Twitter account where "Page" tweets from beyond the grave to her 23,000 followers. CMG also authorized a line of adult sex toys using Page's name and image. Page, who later in life became a born-again Christian, may well have found such uses highly offensive.¹⁰²

Providing such a lucrative monopoly to companies is not a compelling (or even legitimate) basis for New York or any other state to add a postmortem right of publicity, and suggests that any such right should be limited to natural persons. Ideally, even the natural persons who can receive such rights should be limited to those either expressly designated by the deceased, or perhaps those provided in a list of statutory heirs in the absence of such an affirmative designation by the deceased.

The very best arguments for providing a postmortem right of publicity are to protect the dignitary and emotional interests of the close survivors, such as a child, who might not want to see her parent's image and name used on a sex toy line, particularly in the aftermath of the parent's death. This suggests not only that any postmortem right should be limited to natural persons, but also that the duration should not exceed those first heirs' lifetimes.

This survivor-based analysis also suggests that the right only makes sense if it can block commercialization. Yet, one of the main problems of creating a postmortem right of publicity is that the estate tax—if it continues to exist—forces commercialization. This is true because the tax is determined on the basis of the "highest and best use" of the property—which is interpreted as a fully commercialized use of the property that maximizes its economic value.¹⁰³ This determination

¹⁰⁰ *See id.* at 108, 119–20, 184.

¹⁰¹ *Id.* at 108–09, 213 n.31.

¹⁰² *Id.*; *see also* Bettie Page (@BettiePage), TWITTER, <https://twitter.com/BettiePage> [<https://perma.cc/9DUB-FW2G>]. Some of the collection of Bettie Page products is on display at the CMG Worldwide office in Los Angeles, CA.

¹⁰³ Examination Technique Handbook for Estate Tax Examiners, I.R.M.M.T. 4350–31, Ch. 600, *reprinted in* Michael F. Beausang Jr., *Valuation: General and Real Estate*, (BNA) Tax

dismisses the value to the survivors of *not* commercializing their loved one, and can force the very commercialization and reanimation that extending rights after death is supposed to prevent. To pay off the tax bill, heirs of those with the most valuable postmortem identities may be forced to commercialize their loved ones even if that is not what they would like to see happen.¹⁰⁴

This issue is currently being litigated by Michael Jackson's estate, which is fighting with the IRS over a \$400 million difference in the valuation of his right of publicity, and other rights related to his name and likeness in the estate's tax bill.¹⁰⁵ Robin Williams's estate tried to craft a testamentary instrument to avoid the danger of his family being forced to commercialize his name and likeness after his death just to pay a tax bill. To do so, his trust bars any commercialization for twenty-five years after his death, and vests his right of publicity in a nonprofit corporation.¹⁰⁶ If New York actually wants to help families like Robin Williams's to honor their loved ones, it would draft a bill focused on blocking commercialization, not forcing it.

When we think about postmortem rights, we also must think about what we lose by extending rights to control uses of a person's name and likeness after death. For example, the Martin Luther King Jr. estate—at least the part that owns the rights to his name and likeness—blocked the sale of statues of King that members of the public bought to celebrate the deceased civil rights hero's life, and his message of justice and equality for all.¹⁰⁷ The estate has also demanded (and received) payment for uses of his name, voice, or likeness in films, and on the national monument erected in his honor.¹⁰⁸ Despite blocking and discouraging such respectful tributes, the estate had no problem authorizing the use of

Mgmt.132-3d (1986); Jeffrey K. Eisen & Allan E. Biblin, *Estate Planning for Clients in Entertainment Business*, 33 EST. PLAN 26, 32–33 (2006); Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX. REV. 759 (1998); ROTHMAN, *supra* note 1, 123–24, 217 n.16.

¹⁰⁴ Rothman, *supra* note 1, 123–124

¹⁰⁵ *Id.*

¹⁰⁶ Amended Exhibit A to Petition for Instruction at 8, In the Matter of the Robin Williams Trust, No. 14-298367 (Cal. Super. Ct. Mar. 30, 2015) (on file with Author); ROTHMAN, *supra* note 1, at 123–124. I note that to date no one appears to have challenged the effectiveness of testamentary instruments like Williams's trust. This is not surprising given that there is not yet a final determination of whether such rights are part of the property of the estate. If such trusts become a common mechanism for avoiding estate taxes and commercialization of the deceased, such challenges will no doubt occur.

¹⁰⁷ *Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E. 2d 697 (Ga. 1982); ROTHMAN, *supra* note at 1, 5, 102, 142, 184, 220 n. 8.

¹⁰⁸ Rothman, *The Market in Dead People*, *supra* note 95; April Glaser, *Yes, the Martin Luther King Jr. Estate Approved that Ram Trucks Super Bowl Ad*, SLATE (FEB. 4, 2018 9:49 PM), <https://slate.com/business/2018/02/the-mlk-estate-approved-that-dodge-ram-super-bowl-ad.html> [<https://perma.cc/PG6L-6SN7>]; *Family of Dr. King Charged Group Building His Monument*, N.Y. TIMES, Apr. 18, 2009, at A15; Jennifer E. Rothman, *Occupy the Public Domain*, S.F. CHRONICLE (FEB. 6, 2012 4:00 AM), <https://www.sfgate.com/opinion/openforum/article/Occupy-the-public-domain-3057325.php> [<https://perma.cc/U4FG-2LRL>].

King's name, voice, and image in a 2018 Super Bowl commercial for Dodge trucks, using excerpts from his "Drum Major" speech. There was public outrage over this use, with many finding it highly offensive. Interestingly, his surviving daughter noted that neither she nor his widow (Coretta Scott King)'s foundation had anything to do with the approval process for the advertisement, and that they do not control the rights to King's name or likeness.¹⁰⁹

This sort of postmortem right makes little sense. It shuts down public discourse about public figures, without furthering the personal and dignitary interests of the surviving heirs that best justify the extension of the right after death. Such a right can also shut down our collective mourning over the death of public figures, from civil rights heroes to musicians to actors to politicians. So any postmortem right needs to have robust speech protections, including exemptions for uses of dead people's names, likenesses, voices, and other indicia of their identities in expressive works, and news reporting.¹¹⁰

The Digital Avatar Problem

With regard to the concern over the reanimation of actors' performances, that is something we can talk more about on the panel that follows this lecture, but this is an important issue that potentially threatens the livelihood of actors and other performers. However, current laws may well already address this concern. The use of a person's portrait and likeness without permission fits squarely within New York's right of privacy statute, so digital avatars already fall within the existing law, at least when used in advertising or for other "purposes of trade."¹¹¹

One of the few cases to have been brought objecting to a reanimated performance by an actor, was actually brought in California in the 1980s, long before today's technology made such uses easier and more seamless. An actor who had been replaced in the sequel to *Back to the Future* sued over the recreation of his performance. The litigation quickly settled with a large payout to the actor. The film had tried to pass off the replacement actor as the original one, and the studio realized it was on shaky ground in doing so.¹¹² Movie studios that have recreated performances recently, such as those of Carrie Fisher (before

¹⁰⁹ Rothman, *The Market in Dead People*, *supra* note 95; Glaser, *supra* note 108.

¹¹⁰ For a more detailed discussion of whether we should have postmortem rights of publicity, and how they should be designed, *see* ROTHMAN, *supra* note 1, at 98–112, 123–24, 184.

¹¹¹ N.Y. Civil Rights Law §§ 50–51. The scope of "purposes of trade" is contested. For some cases that consider that issue *see* citations *infra* note 113.

¹¹² ROTHMAN, *supra* note 1, at 176–77; Eriq Gardner, "Back to the Future II" from a Legal Perspective: Unintentionally Visionary, HOLLYWOOD REPORTER (OCT. 21, 2015 3:51 PM), <https://www.hollywoodreporter.com/thr-esq/back-future-ii-a-legal-833705> [<https://perma.cc/QT5S-YJQ3>].

her death) in the *Star Wars* franchise, have gotten permission to do so.¹¹³

Movie producers and others should not be able to recreate performances of actors and pass them off as a new and authentic performance by the actor without that actor's permission. The danger of such recreated performances is a real one. It could substitute for actors' services, and destroy their ability to make a living. This is an existential threat to the acting profession. If current laws do not provide adequate protection against the reanimation of performances or uses of digital avatars, then a limited, separate law to address that very real and legitimate concern would be appropriate. It can also be a subject of collective bargaining between the motion picture industry and SAG-AFTRA.

Concluding Thoughts

New York could make no changes to its privacy statute and be satisfied with the strong protections its law currently provides. New York has a right of publicity already. As I have shown, it is one of the very first such rights to have been adopted in the country. Citizens of the state also have access to a host of related claims that provide protection against unauthorized uses of a person's identity and performance. For example, claims for trademark infringement, false endorsement, and copyright infringement can all be brought in the state, and already provide some protections for the deceased.¹¹⁴

Although it is not necessary, some limited postmortem right focused on the personal (rather than the economic) interests of the survivors might be appropriate, particularly if limited to claims by natural persons, and if focused on blocking, rather than spurring,

¹¹³ ROTHMAN, *supra* note 1, at 175–77. Since the time of the Symposium, the New York Court of Appeals issued an opinion in *Lohan v. Take-Two Interactive Software*, 31 N.Y.3d 111 (2018). The decision suggests that avatars in video games fall within the New York privacy statutes' prohibitions. This conclusion indicates that the same would be true of digital avatars and reanimated actors in motion pictures. Some litigants have contended that the New York privacy statutes only apply to commercial speech, and not to expressive uses like video games and motion pictures, but the statutes have long been applied to such uses, at least when a court concludes that the uses are trading off the value of those depicted. *See, e.g.*, *Redmond v. Columbia Pictures*, 14 N.E.2d 636 (N.Y. 1938) (applying statute to motion picture); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913) (same); *Porco v. Lifetime Entm't Servs.*, 47 N.Y.S.3d 769 (App. Div. 2017) (applying statute to television movie); *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 536 (Sup. Ct. 1959) (applying statute to biography), vacated and remanded on other grounds, *Julian Messner, Inc. v. Spahn*, 387 U.S. 239 (1967), affirmed *Spahn v. Julian Messner, Inc.*, 233 N.E. 2d 840 (N.Y. 1967); *see also Lohan* (leaving open the determination of whether the use in the video game was for "purposes of trade," but suggesting that video games could fall within the statute); *Messenger v. Gruner & Jahr Printing & Publ'g*, 727 N.E.2d 549 (N.Y. 2000) (rejecting privacy claim based on use in magazine, but not dismissing applicability of statute to that context, citing to *Binns* and *Spahn* with approval).

¹¹⁴ ROTHMAN, *supra* note 1, at 70, 101, 104, 127, 134–35, 158, 174–75; *see also Dogan & Lemley, supra* note 53 *passim* (discussing overlapping trademark-based claims).

commercialization. Any such right, however, must have ample and explicit protections for free speech.

A separate reanimation law might also be appropriate—but may already be covered at least in part under existing law. Addressing these issues does not require turning the right of publicity in the state into something transferable that can be taken away from the very people the law seeks to protect. Nor does it require adding a broad postmortem right, if the concern is that reanimated dead actors will replace the living ones.

If the New York legislature proceeds with a major revision to its privacy laws, it should keep in mind some of the insights from this talk, and from my book. The law should expressly bar—or at the very least significantly limit—the transferability of the right of publicity. Legislators should also consider making some other changes to improve, rather than worsen matters. The legislature should consider adding broad and express exemptions to protect free speech and creative expression. Nevertheless, privacy and publicity-based claims need not be limited to commercial speech—the statute should allow actions against some exploitative noncommercial uses, such as the posting of sexually intimate images without permission (a.k.a. revenge porn), or the impersonation of others to lure dates (a.k.a. catfishing). The legislature should also consider adding statutory damages so that those without bankable personalities can still exercise control over their identities, such as to stop Facebook from using their names and likenesses on sponsored ads without permission.¹¹⁵ New York’s privacy and publicity law is not broken, and remains a robust force even in the 21st Century, just as it was in the 20th century. Any changes to the law should be done thoughtfully and carefully, taking into consideration both the reasons for making the changes, and any potential pitfalls of those changes.

¹¹⁵ ROTHMAN, *supra* note 1, at 182–85 *passim*.