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The Right of Publicity: Privacy Reimagined for a Public World, by Jennifer E. Rothman

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Abstract

In The Right of Publicity, Professor Jennifer E. Rothman of Loyola Law School offers an in-depth genealogy of the right of publicity, while navigating through scholarly narratives surrounding its origin. The book contests the current body of literature, which situates the origin of the right of publicity in privacy law. Instead of conceptualizing the right of publicity as another form of intellectual property right, the work traces the right of publicity law to (re-) articulate it as a personal right. Stemming from the author's expertise in intellectual property law and the right of publicity, this book challenges readers to consider the implications of interpreting the right of publicity as a transferrable property right. The author masterfully parses through and critiques the current understandings of the right of publicity to offer an alternative model to be implemented in publicity law.

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Book Review

The Right of Publicity: Privacy Reimagined for a Public World, by Jennifer E. Rothman[1]

ALEXIS EUN YOUNG CHOI[2]

In *The Right of Publicity*, Professor Jennifer E. Rothman of Loyola Law School offers an in-depth genealogy of the right of publicity, while navigating through scholarly narratives surrounding its origin. The book contests the current body of literature, which situates the origin of the right of publicity in privacy law. Instead of conceptualizing the right of publicity as another form of intellectual property right, the work traces the right of publicity law to (re-) articulate it as a personal right. Stemming from the author's expertise in intellectual property law and the right of publicity, this book challenges readers to consider the implications of interpreting the right of publicity as a transferrable property right. The author masterfully parses through and critiques the current understandings of the right of publicity to offer an alternative model to be implemented in publicity law.

THE RIGHT OF PUBLICITY offers an in-depth genealogy of the right of publicity, while navigating through historical and current scholarly narratives surrounding its origins. Written by Jennifer E. Rothman, Professor of Law at Loyola Law School, the book successfully revises the history of rights of publicity. It contributes to the current body of literature, which recognizes the origin of the right of publicity in privacy law.[3] Instead of conceptualizing the right of publicity as another form of

1. (Harvard University Press, 2018).
2. JD Candidate 2020, Osgoode Hall Law School.
3. See generally Daniel Nemet-Nejat, "Hey, That's My Persona!: Exploring the Right of Publicity for Blogs and Online Social Networks" (2009) 33 Colum J L & Arts 113; Andrew Beckerman-Rodau, "Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition, and Trademark Law" (2013) 23 Fordham IP Media & Ent LJ 132; Ashley Messenger, "Rethinking the Right of Publicity in the Context of Social Media" (2018) 24 Widener L Rev 259.

intellectual property right, the work traces the right of publicity law in order to articulate it as a personal right. Embodying the author's expertise in intellectual property law, this book challenges us to consider the implications of interpreting the right of publicity as a transferrable property right. Rothman's main objective is to parse through and to critique the current understandings of the right of publicity. The author then offers an alternative model that can be implemented in publicity law.

Rothman carefully re-builds the creation story of the right of publicity over three parts and eight chapters. The first two parts cover the historical background of publicity law. In part one, entitled "The Big Bang," Rothman credits the rise of technology and advertisements in the late 1800s as giving birth to the right of privacy cases, with claims based on the "right to be let alone."[4] Her analysis notes the biases of the courts towards recognizing economic losses instead of emotional damages in privacy claims. The author then contests the convention that the *Haelan Labratories v Topps Chewing Gum*[5] case first coined the term "right of publicity" and argues against the divergence between the right of privacy and the right of publicity. By challenging the well-accepted notion of *Haelan Labratories* as the genesis of the right of publicity in legal scholarship, Rothman uncovers the fictitiousness of this bifurcation between the right of privacy and the right of publicity. She critically traces case law that is often cited as highlighting the difference between publicity law and privacy law. The book criticizes the common understanding that the "new" invention of the right of publicity expanded legal protection to include public figures' claims based on economic harms from their identities being commercialized without consent. Instead, the author asserts that privacy and publicity law, in reality, functioned in the same way.

Part two continues to build a different chronology by placing the beginning of the right of publicity in the 1970s, instead of the 1950s as the majority of legal scholarship on the right of publicity tends to do.[6] However, Rothman is not the only one who deviates from the commonly accepted history; other scholars have

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4. Rothman, *supra* note 1 at 5.
5. 202 F (2d) 866, 868 (2d Cir 1953) [*Haelan Labratories*].
6. See generally Joseph R Gordin, "The Right of Publicity: A Doctrinal Innovation" (1953) 62 Yale LJ 1123; S Michael Kernan, "Privacy in Social Media: The Right of Publicity" (2012) 34 Hastings Comm & Ent LJ 363; Stephanie J Beach, "Fact & Fiction: Amending Right of Publicity Statutes to Include Life Story and Fictional Character Rights" (2017) 42 Seton Hall Legis J 131; Marshall Leaffer, "The Right of Publicity: A Comparative Perspective" (2007) 70 Alb L Rev 1357; Francesca M Montalvo, "Refashioning the Right of Publicity: Protecting the Right to Use Your Name After Selling a Personal Name Trademark" (2013) 31 Cardozo Arts & Ent LJ 893.

offered alternative timelines, which do not designate the beginning of the right of publicity in the 1950s.[7] Notably, Rothman's account of the right of publicity is particularly illuminating, because it departs from employing the right of publicity as an independent property right similar to intellectual property rights, such as patent and copyright laws. For instance, her exploration of the concept of a post-mortem right of publicity—dead people having independent property rights to their names—is illustrated through her close review of foundational cases, such as *Zacchini v Scripps-Howard Broadcasting Co.*[8] This exploration of why the right of publicity came to be conceptualized as a transferable property right is nuanced and insightful. However, chapter four unexpectedly includes the author's speculations on why certain works had such influence on the narrative of the right of publicity in the way that they did. For example, Rothman hypothesizes that Melville B. Nimmer, who wrote one of the well-known articles that argued for the transferable right of publicity,[9] was most likely motivated in writing about the right of publicity by his interest in pursuing his academic career. Despite these brief out-of-place musings, the chapter maintains its focus on helping the reader understand the inconsistencies between US states, in the ways in which the right of publicity is conceptualized, through case studies. This analysis aptly reveals the difficulty for both courts and lawyers to confidently define the boundaries of the right of publicity. Part two concludes with a crucial review of the justifications for the right of publicity, which is foundational to Rothman's alternative conceptualization of the right of publicity. This continues to build on the theme of articulating the scope and the purpose of the right of publicity as a personal right of the everyday person.

Rothman then shifts into critically examining and arguing against the transferability of the right of publicity, by reviewing the implications of voluntary and involuntary transfers of the publicity right. She asserts that this misconceptualization of the right of publicity, as a transferable property right, allows others (who she terms the "publicity-holder" as opposed to the "identity-holder") to have control over someone's identity.[10] Importantly, she expands this control over personal identity to include control over the person his or herself, which further creates undue restrictions on the identity-holder's "right

7. See generally Eric E Johnson, "Disentangling the Right of Publicity" (2017) 111 Nw UL Rev 891; Wee Jin Yeo, "Disciplining the Right of Publicity's Nebulous First Amendment Defense with Teachings from Trademark Law" (2016) 34 Cardozo Arts & Ent LJ 401.
8. 433 US 562 (1977).
9. "The Right of Publicity" (1954) 19 L & Contemp Probs 203.
10. See Rothman, *supra* note 1 at 126.

to liberty, freedom of speech, and freedom of association."[11] Rothman emphasizes that the right of publicity should not be disentangled from the identity holder and supports that the right of publicity should be "viewed as a fundamental right" which is inalienable.[12] The overarching argument against transferring the publicity right from the identity-holder gains momentum and the chapter concludes with the author's call for legislative action to limit transferability and for the courts to ensure that the rights remain personal to the identity-holder.

In the last part, "Dark Matter," Rothman fully lays out her criticisms against articulating the right of publicity through transferability. She states that the right of publicity "encompasses rights far beyond the mere collection of income and entitlement to the economic value that flows from uses of a person's identity."[13] She reminds readers that the "dignitary and liberty-based justification are central to the [publicity] right's existence"[14] and further broadens the scope and the use of the right of publicity. Again, she prescribes a legislative remedy to limit transferability of one's publicity right and to make explicit the rights as personal to the identity-holder.[15] Contributing to the wider scholarly conversation surrounding the right of publicity, the chapter on the First Amendment teases out the book's reasoning against placing the right of publicity in the intellectual property rights category. Rothman further confronts the ways in which the United States Supreme Court has favoured copyright holders in right of publicity cases and weaves in her commentary on the sites of conflict between intellectual property and constitutional rights. Connecting back to the earlier investigation regarding the right of publicity for public figures and celebrities, chapter seven critiques this legal distinction in the application of publicity law. Although the notion of extending the right of publicity to non-public figures beyond celebrities is shared by others, this conclusion is often rooted in recognizing the commercial value of one's identity and not necessarily in the liberty-based justification.[16] Furthermore, Rothman does not simply leave the argument there, but builds on it by offering solutions to dealing with cases where the right of publicity and free speech appears to be in opposition.

The epilogue, "The Big Crunch," suggests a re-formation of the right of publicity universe; this prescriptive model of how the right of publicity should

11. *Ibid* at 128.
12. *Ibid* at 129.
13. *Ibid* at 126.
14. *Ibid* at 127.
15. *Ibid* at 137.
16. See *e.g.* Andrew T Coyle, "Finding a Better Analogy for the Right of Publicity" (2012) 77 Brook L Rev 1133.

be understood is one of the strengths of this book. Rothman does not cut the analysis short with her comprehensive and critical review of the right of publicity and its historical manifestations, but instead offers a well-articulated reconceptualization of the right of publicity. The author outlines detailed ways in which the courts can deal with the right of publicity cases and contemplates how the alternative model may function in the context of our current world of social media. The use of social media and its platforms poses a unique question for Rothman, as it is our right of publicity, our control over our own identities, and by extension, our liberty, that is at stake. Notably, it is unclear what issues will arise when these suggestions are implemented and the book does not delve too deeply into this. In fairness, many theoretical proposals often cannot predict with surgical precision how the model will manifest and what issues will arise in real life. Despite this uncertainty, which afflicts many theoretical proposals, Rothman's book is a valuable attempt in setting out the scope of the publicity right in our current legal and scholarly terrain.

Although the right of publicity manifests differently in Canada as privacy legislation and the tort of appropriation of personality, Rothman's re-imagining of the right of publicity may be helpful in comparing the differences among Canadian provinces and between the United States and Canada. In addition to Quebec, which is Canada's sole civil law jurisdiction, four of the common law provinces in Canada, British Columbia, Manitoba, Newfoundland, and Saskatchewan,[17] have privacy legislation that provide a cause of action against unauthorized appropriation of personality.[18] The tort of appropriation of personality is the "unauthorized use of an individual's persona … includ[ing] a person's physical appearance (portrayed in a photograph or other visual representation), name, or voice."[19] Even among these provinces, there are differences in how the tort of appropriation of personality is dealt with in statute. Unlike the other aforementioned provinces, the Privacy Acts of British Columbia, Newfoundland, and Saskatchewan explicitly state that the right of action for appropriation of personality is extinguished upon death.[20] Ontario has a common law tort of appropriation of personality. Interestingly, this means that protecting privacy interests under the principles of the *Canadian Charter of Rights and Freedoms* may be considered in the Canadian "right of publicity" cases. Despite the diverse

17. See Amy M Conroy, "Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?" (2012) 1 Western J Leg Stud 1.
18. *Ibid* at 1.
19. *Ibid*.
20. *Ibid* at 6.

approaches to the "right of publicity" in Canada, Rothman's engagement with right of publicity issues is invaluable, as there are many commonalities between US jurisprudence and Canadian appropriation of personality cases.[21] It is also insightful to consider what the author's proposal of expanding the right of publicity as a fundamental right may look like by observing the common law tort of appropriation of personality cases in Ontario.

In conclusion, *The Right of Publicity* offers a comprehensive review of the clashing histories of the right of publicity, including a survey of relevant cases paired with social artefacts of our cultural history. The use of memorabilia and cultural references gives texture to the author's narrative of the right of publicity. Rothman's success in making this book accessible to readers, particularly to those who are not familiar with the right of publicity or privacy law, is due to her use of historical and modern case studies that attempt to untangle the histories of the right of publicity. This opens up the book to the general public who may be interested in this topic. More importantly, Rothman not only challenges the existing definitions of the rights of publicity, but also proposes an alternative model of how it should be applied in a coherent and logical style. It is a daunting feat to take on the challenge of parsing through current narratives, which are taken for granted by both legal scholarship and the courts, to create something new. However, *The Right of Publicity* thoughtfully considers the past, present, and future of the right of publicity. Rothman's alternative creation story of the right of publicity universe is done in a digestible and accessible way, even for readers who are not familiar with this right and its complex entanglements with privacy and intellectual property law.

21. See Robert G Howell, "Publicity Rights in the Common Law Provinces of Canada" (1998) 18 Loy LA Ent LR 487.