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Property's End: Why Competition Policy Should Limit the Right of Publicity

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PROPERTY’S END: WHY COMPETITION POLICY SHOULD LIMIT THE RIGHT OF PUBLICITY

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INTRODUCTION

The right of publicity is an intellectual property right that empowers celebrities to prohibit the unauthorized use of their names, images, and identities. Since its inception a half century ago, the right has been an enigma. Its critics argue that “no one seems to be able to explain exactly why individuals should have this right.” Publicity rights are unnecessary to stimulate the pursuit of fame; unneeded to manage the value of publicity; and undeserved in any recognized moral sense. Yet, to the amazement of some (and the consternation of many) this ostensibly persuasive critique has had little practical impact on lawmakers. K.J. Greene summed up the current state of affairs pithily—“[t]he right of publicity . . . has a lot of analytical problems, and yet, . . . [it] has expanded faster than Steven Segal’s waistline in recent years.”

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2 The right of publicity is a property right prohibiting the appropriation of “the commercial value of a person's identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade.” Restatement (Third) of Unfair Competition § 46 (1995); see as California Civil Code section 3344 (“us[ing] another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services.”). The right is generally thought to be limited to “commercial” uses, 1 J. Thomas McCarthy, The Rights of Publicity and Privacy § 3.2 (2d ed. 2005) (explaining that “what is required is proof that the defendant intended to obtain a commercial advantage.”), though some states extend it to any advantageous use. See, e.g., Newton v. Thomason, 22 F.3d 1455, 1460 & n.4 (9th Cir. 2005); White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (defining the right as applying to “appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise” (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Ct. App. 1983))).

3 See, e.g., Mark A. Lemley & Stacy L. Dogan, What The Right of Publicity Can Learn From Trademark Law, 58 Stan. L. Rev. 1161, 1163 (2006); id. at 1190 (concluding that “a reasonable and persuasive justification for the right of publicity is sorely lacking”); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125, 134 (1993) (arguing that the right of publicity was adopted “without a systematic, theoretically persuasive case ever having been made for recognition of an independent, property-like right of publicity.”).

4 See infra Part II.A.1.

5 See infra Part II.B.2.

6 See infra Part III.A.1&B.1

7 Kevin Jerome Greene, Intellectual Property Expansion: The Good, the Bad, and Right of Publicity, 11 Chapman L. Rev. 521, 521 (2008). In 2005, right-of-publicity critic Mark McKenna wrote that the right “has expanded to allow claims against an ever-increasing range of conduct . . . And there is no end to that trend in sight; one can discern no principle in the current doctrine or its dominant theory on which any limitation might be based.” Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. Pitt. L. Rev. 225, 226-27 (2005) (citing “a long line of (often successful) attempts by celebrities to extend the claim's boundaries”); see Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 Hastings L.J. 853, 869 (1995) (citing wide academic support for right of publicity); Gil Peles, The
This article has two goals. First, it explains why the seemingly powerful prevailing critique of publicity rights has failed to influence courts and legislatures. The right’s critics claim that publicity cannot be property because the arguments used to justify actual property simply do not apply to publicity. So far, so good. But when one looks closely at any form of property—real or personal, patent or copyright—the standard justifications break down. As a result, each quiver in the right-of-publicity critic’s arsenal turns out to be just as fatal when aimed at every other form of property. This part of the article reveals the critique’s overbreadth and postulates that lawmakers are reluctant to substantially restrict the right of publicity on grounds that would also compel fundamental changes to all property rights.

Right of Publicity Gone Wild, 11 UCLA Ent. L. Rev. 301, 301 (2004) (explaining that the right of publicity “is now utilized more than ever before”).

See infra Part II.

In his seminal critique of the right of publicity, Michael Madow acknowledged that many of his arguments could be applied to property rights generally. Madow, supra note 3, at 183 & n. 278 (“it is by no means evident that anyone – carpenter or celebrity – has a natural or moral right to the full market value of the product of her labor”); id. at 196 (“Just as the carpenter does not start from scratch in building a chair, but instead draws upon a pre-existing body of techniques, tools, and craft knowledge, so it is with artists, musicians, actors, and even athletes.”); id. at 205 n. 384 (citing prior work critiquing the economic arguments in favor of all forms of private property); id. at 212 & nn. 412-13 (recognizing prior work showing that the incentive effect of weakening property rights is theoretically uncertain); id. at 220 & n. 442 (recognizing that private property is not necessary to allocates resources efficiently because any central manager could prevent wasteful use and non-legal, social factors operate to discourage waste). Madow’s followers made more effort to distinguish the right of publicity from other forms of property. See Lemley & Dogan, supra note 3, at 1188 (“Unlike copyright law – which aims to promote the production of valuable works of authorship that enhance the quality of discourse and understanding in our society – the right of publicity [by contrast] . . . does not encourage the production of any identifiable value”).

One might, of course, argue that all forms of property are invalid. Understandably, the critics have not done that. Instead, most have simply ignored the issue whether publicity rights are similar to other property rights. Those who have considered the question, however, generally acknowledge an intuitive, yet unarticulated, sense that publicity rights are valid property rights. For example, Alice Haemmerli, who has attempted to justify the right on moral grounds, has asserted that a right of publicity “resonates fairly strongly with our cultural mores.” Alice Haemmerli, Whose Who? The Case for a Kantian Right of Publicity, 49 Duke L.J. 383, 413 (1999); id. at 390 (“the Kantian emphasis on inherent human value resonates strongly with our political culture”); id. at 404 (“compensation- and commodification-based objections to the right of publicity appear to be emotional, rather than analytical”); id. at 488 (maintaining that beliefs in personal autonomy and private property underlie our culture). Similarly, Eugene Volokh, who generally shares the critics’ concerns with the right of publicity, has recognized that “[t]he notion that my name and likeness are my property seems to make sense.” Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 929 (2003). After acknowledging that one may “question whether the right of publicity truly serves any social purpose,” the California Supreme Court nevertheless concluded “that the Legislature has a rational basis for permitting celebrities . . . to control the commercial exploitation of the celebrity’s likeness.” Comedy III Productions, Inc. v. Saderup, Inc., 25 Cal. 4th 387, 400 (2001). California law is not atypical in defining “[t]he term ‘property’ [a]s sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to
Second, this article considers theories that would more effectively limit the right of publicity. It first explores the argument that free speech interests should limit publicity rights.\(^\text{11}\) This approach is doomed to fail because, as many commentators have explained, courts cannot balance the social value of particular forms of speech against publicity rights because the value of publicity is so poorly articulated.\(^\text{12}\) Even more fundamentally, the concept of balancing free speech and property interests is incoherent. Individuals have no right to use another’s property to speak. Any attempt to limit the scope of the right of publicity through the prism of the First Amendment will thus beg the question whether publicity is property. If it is, then any restraint on speech should be neither surprising nor problematic.\(^\text{13}\) If it is not, then any restraint on speech would be unacceptable. Attempting to balance speech and publicity simply restates the underlying question—whether publicity rights are property—without providing any means to answer it.

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\(^\text{11}\) See infra Part IV.A.1.

\(^\text{12}\) See, e.g., Dogan & Lemley, supra note 3, at 1162-63 (arguing that “because the right of publicity rests upon a slew of sometimes sloppy rationalizations, courts have little way of determining whether a particular speech limitation is necessary or even appropriate in order to serve the law’s normative goals. Instead, they appear to assume that the sum of a set of inadequate justifications equals far more than its parts and allow right of publicity claims to run roughshod over the speech interests of the public.”).

\(^\text{13}\) Right of publicity critics would surely object on the ground that publicity simply is not property. That fundamental question, however, is beyond the scope of this article, and indeed their critique as well. As Parts II and III show, virtually every aspect of the prevailing critique would apply to every form of property. Although the critique demonstrates powerfully that the right of publicity cannot be justified on the traditional grounds used to justify other forms of property, it fails to grapple with the reality that other forms of property also cannot be justified on those traditional grounds. This article does not take a position on whether publicity rights are true property. Rather, it pragmatically accepts that courts have treated publicity as property for 50 years and seeks a means to regulate the scope of these rights within that paradigm.
This article proposes that competition policy should delineate the scope of the right of publicity. Some judges and legal commentators write as if the limits of property are set independently of other social interests. The value of competition, they say, plays no direct role in defining the scope of property rights. Through a careful review of case and statutory law, however, this article shows that this view is mistaken. In fact, competition policy plays a critical role in defining property’s end, limiting the scope of all recognized property rights when those rights enable owners to stifle meaningful competition. The antitrust laws and competition-based regulatory programs have repeatedly required owners to share or sell all forms of property in order to ensure that consumers receive the benefits of competition. Applying this insight to the right of publicity would enable courts to narrow the scope of publicity rights whenever a celebrity’s exercise of that right would restrain competition. This approach would curb the worst abuses in the publicity rights cases without casting doubt on the legitimacy of any other property right.

Part I introduces the right of publicity and shows that its supporters rely on the standard arguments that have been thought to validate all forms of property. Parts II and III explore the prevailing critique, which posits that these standard justifications simply do not apply to

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14 The choice of the term “competition policy” rather than “antitrust” is deliberate. Competition policy is used herein to denote the full spectrum of public rules promoting marketplace competition, including, but not limited to, the antitrust laws. For a recent articulation of the concept see Herbert Hovenkamp, *Innovation & The Domain of Competition Policy*, 11 Meador Lectures: Empire, 49, 50 (2007-08). In short, some practices conflict with recognized competition policy goals even though they do not violate the specific provisions of antitrust law.

15 In a 2001 speech, Mary Azcuenaga, a former FTC Commissioner, articulated this common view: “you could actually know everything you need to know about antitrust and intellectual property by remembering” that if the IP-holder did not “somehow expand[] the scope of the intellectual property right . . . and if the intellectual property was properly obtained, then there should be no need to apply antitrust law.” Mary L. Azcuenaga, *Recent Issues in Antitrust & Intellectual Property*, 7 Boston U. J. Sci. & High Tech. Law 1, 11 (2001).


17 Id.

18 See infra Part IV.B.

19 See infra Part I.
publicity rights, and explain that this critique is humbled only by its breadth. The very analysis purporting to show that publicity rights are unjustified unwittingly demonstrates that for the same reasons all property is unjustifiable. If accepted, the critics’ analysis would logically compel both courts and legislatures to reexamine all recognized forms of property. Unless one is willing to restructure American property law from top to bottom, the prevailing critique of the right of publicity will never gain traction.

Part IV pragmatically accepts (without condoning) that the right of publicity is a valid property right, and explores whether free speech principles could be used to limit the right’s scope. It concludes that the concept of balancing speech and publicity cannot coherently limit the right of publicity.

Part V presents the article’s main normative thesis: competition policy provides a valid ground on which to distinguish the right of publicity from other forms of property when a celebrity’s exercise of the right of publicity would restrain competition. Since competition policy is a vital component in defining the limit of all forms of property, using it to restrain the scope of publicity rights would not disrupt any other branch of property law. This Part also explains how the competition policy model would (1) call for a different outcome in some of the most criticized publicity rights cases and (2) more effectively justify the decisions in areas, such as advertising, news reporting, and biography that have been relatively uncontroversial in outcome but difficult to justify in principle.20

I. THE TROUBLED YET RESILIENT RIGHT OF PUBLICITY

This Part briefly reviews the history of the right of publicity, showing that the arguments are advanced to justify the right are the same ones that have been used to justify all forms of property.

20 Id.
A. Origins of the Right of Publicity

In response to Warren and Brandeis’s call for a right to privacy, courts gradually started protecting individuals against the embarrassing or false use of their name or picture. This right extended to both celebrities and private persons, but celebrities had a difficult time showing harm from mere publication because they generally sought publicity. Furthermore, if a celebrity did prove mental anguish, damages were limited to redress for that harm rather than for expropriating the commercial value of the celebrity’s name or likeness.

In the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit first explicitly recognized a distinct property right in publicity. The trial court rejected a trading card manufacturer’s claim that it had acquired the exclusive right to publish pictures of a ballplayer. The lower court held that the right of privacy protected the player against embarrassment, but that personal right could not be transferred. Under then-existing law, a celebrity could not maximize the value of his or her persona through licensing arrangements that permitted one advertiser to sue another for improperly using the celebrity’s name or likeness. The Second Circuit reversed, recognizing a new enforceable property right in publicity. “[I]n addition to and independent of th[e] right of privacy,” Judge Frank wrote, “a man has a right in

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21 Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis were careful to advocate for tort remedies and to avoid suggesting that courts create a new property right. Their approach, however, was influenced by the notion that individuals had a right to control the use of their personality just as the creator of tangible or intangible property obtained rights over the creation. *Id.* at 206-07.

22 For an excellent summary of the development of privacy law see Dogan & Lemley, *supra* note 3, at 1167-71.

23 *Id.* at 1171.

24 *Id.*

25 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir. 1953).

26 *Id.* at 867.

27 *Id.* at 868. For cases recognizing these limits on the right to privacy see Hanna Manufacturing Co. v. Hillerich & Bradsby Co., 78 F.2d 763, 776 (5th Cir. 1935); Von Thorodorovich v. Franz Josef Beneficial Ass’n, 154 F. 911, 912 (C.C.E.D. Pa. 1907).

28 *Haelan*, 202 F.2d at 868 (expressing some reluctance to attach the “property right” label, though recognizing that any enforceable right is in fact property).
the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing
his picture.” 29 Almost immediately, commentators began to articulate theoretical justifications
for this new right, and additional courts and legislatures adopted it.

B. Theoretical Justifications for the Right of Publicity

In 1954, Melville Nimmer published an academic defense of the right of publicity. 30
From a moral perspective, he argued that a valuable persona, like other forms of property, could
be created “only after [an individual] has expended considerable time, effort, skill, and even
money.” 31 Nimmer emphasized that within the Anglo-American legal tradition, “every person is
entitled to the fruit of his labors.” 32

Like any property interest, Nimmer believed that the right of publicity has limits.
Individuals are thought to deserve their creations, he wrote, “unless there are important
countervailing public policy considerations.” 33 Where a person’s name or likeness is used to
report “news or in a manner required by the public interest,” Nimmer argued, “that person should
not be able to complain of the infringement of his right of publicity.” 34

In ensuing decades, judges and commentators sought to justify the right of publicity
through instrumental claims that had been advanced to explain other types of property. 35 Some
courts have found that the right provides incentives to create a valuable persona, just as private
property rights also provide incentives to work and innovate. 36 Society is better off, the

29 Id.
31 Id. at 216.
32 Id.
33 Id.
34 Id. at 216-17.
provide (1) incentives to create wealth and (2) a means to allocate efficiently the use of scarce resources).
argument runs, because one cannot personally capture the entire surplus from productive work and innovation; the spillover necessarily benefits the public.\textsuperscript{37}

Richard Posner, among others, also stressed that the right of publicity enables proper management of the value of celebrity to protect against wasteful dissipation through overuse.\textsuperscript{38} This theory assumes that producing too many low-value works crowds out more valuable ones. For example, Tom Waits, a popular singer, uses a very distinctive vocal style. If advertisers could copy that style at will, the public would grow tired of it, lessening the value of Waits’s own performances.\textsuperscript{39}

Most recently, scholars have offered an alternative moral justification, grounding the right of publicity in theories of autonomy and personality.\textsuperscript{40} Alice Haemmerli has argued that

\textsuperscript{37} As Richard Posner has explained: “The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self interest without benefiting others as well as himself. Since . . . the social product of the productive individual in a market economy will exceed his earnings, such an individual cannot help creating more wealth than he takes out of society.” Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103, 132 (1979)

\textsuperscript{38} Mark F. Grady, A Positive Economic Theory of the Right of Publicity, 1 UCLA Ent. L. Rev. 97, 103-04, 126 (1994) (arguing that a right of publicity is necessary to coordinate a market for a celebrity’s name and prevent rent dissipation through overuse); William M. Landes & Richard A. Posner, Indefinitely Renewable Copyright, 70 U. Chi. L. Rev. 471, 485 (2003) (claiming that a justification for the right of publicity is preventing “the premature exhaustion of the commercial value of the celebrity’s name or likeness”); Richard A. Posner, Misappropriation: A Dirge, 40 Hous. L. Rev. 621, 634 (2003) (“Posner I”) (“The rationale of the right of publicity cases lies . . . in the danger of a congestion externality if there is no control over the use of the celebrity's name or likeness in advertising and other commercial uses.”); Richard A. Posner, The Right of Privacy, 12 Ga. L. Rev. 393, 411 (1978) (“There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal . . . Furthermore, the multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero”); see Lahr v. Adell Chemical Co., 300 F.2d 256, 259 (1st Cir.1962) (explaining “that defendant's conduct saturated plaintiff's audience, curtailing his market”).

\textsuperscript{39} Haemmerli, supra note 38, at 101-02; see Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

\textsuperscript{40} Haemmerli, supra note 10, at 418; Linda J. Lacey, Of Bread and Roses and Copyrights, 1989 Duke L.J. 1532, 1541-42. Others had advanced less fully developed arguments that the right should rest on something akin to autonomy rights. In his treatise on privacy and publicity, McCarthy has stated that “the law today would be more coherent ... if it had developed such that courts would recognize a sui generis legal right labeled something like a ‘right of identity’ with damages measured by both mental distress and commercial loss.” 1 McCarthy, supra note 2, at § 1.11[C]; see also Oliver R. Goodenough, Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity, 47 S.C. L. Rev. 709, 736, 766-67 (1996); Roberta Rosenthal Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47, 70 (1994) (“Kwall I”) (“[C] onfusion might be avoided if the right of publicity were explicitly acknowledged to include emotional as well as economic harms.”); see also Kwall, supra note 10, at 158. 166; Roberta Rosenthal Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 Vand. L. Rev. 1, 5 (1985).
individuals have a property right in the use of their “objectified identity.” If society recognizes identity as something that can be bought and sold, autonomy and personality interests favor permitting “the person who is its natural source” to claim that value—not because they deserve it, but because humans have an innate right to their own identity and persona. As Roberta Kwall has emphasized, the primary concern of the law under this view is not economics but “damage to the human spirit.” Just as certain examples of personal property (such as a wedding ring) or real property (such as a family home) are important to particular individuals, one’s image or style may be critical to autonomous self-development.

Shubha Ghosh has connected these two justifications, concluding that the right of publicity protects against both (1) appropriating a celebrity’s personality for commercial purposes by revealing “the private person” to the public without consent, and (2) usurping a public person’s investment in an income generating persona. Ghosh describes these two goals as complements that “together permit the self-regulation of one’s identity” by granting rights in publicity to those who want to withhold their persona from public view for all or some purposes, and to persons who seek a return on the value of their identity.

C. Current Law

A half century after Judge Frank’s opinion in Topps, at least 28 states have recognized the right of publicity either by statute or through common law. The right has also been

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41 Haemmerli, supra note 10, at 418.
42 Id. at 418.
43 Id. at 418, 420-21, 27-28.
44 Kwall, supra note 10, at 166.
45 Haemmerli, supra note 10, at 423-25.
47 Id. at 619-20.
incorporated into the Restatement of Unfair Competition\textsuperscript{49} and recognized by the U.S. Supreme Court.\textsuperscript{50} Although state law varies,\textsuperscript{51} most recognize a broad right of publicity that is tempered by concern about free speech interests.\textsuperscript{52}

\textbf{II. A CRITIQUE OF THE INSTRUMENTAL JUSTIFICATIONS FOR PUBLICITY RIGHTS}

Commentators have presented thorough and persuasive critiques of both the incentive and the efficient management justifications for the right of publicity. Although these critics cast doubt on the wisdom of recognizing a right of publicity based on these instrumental goals, each prong of the critique can be applied with roughly equal vigor to any form of property. This overbreadth limits the effectiveness of the critique because a court or legislature adopting it would be logically required to question all types of property rights.

\textit{A. Critiquing the Incentive-based Justification of the Right of Publicity}

By rewarding hard work with a property right, individuals are presumed to be more productive and creative than they otherwise would be, thus benefiting society.\textsuperscript{53} Advocates of a strong right of publicity contend that just as property rights generally incentivize productive

\begin{footnotes}
\item[49] Restatement (Third) of Unfair Competition § 46 (1995).
\item[51] Elaborate summaries of the various tests, and sometimes outlandish results across different jurisdictions, have been presented exhaustively by others and are not be repeated here. See, e.g., Dogan & Lemley, supra note 3, at 1167-80; Volokh, supra note 10, at 904.
\item[52] See, e.g., ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 938 (6th Cir. 2003); C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007); Newton v. Thomason, 22 F.3d 1455, 1460 & n.4 (9th Cir. 2005); White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (defining the right as applying to “appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise” (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Ct. App. 1983))).
\end{footnotes}
labor, the right of publicity serves the same function with respect to celebrity. The critics of publicity rights have argued forcefully and persuasively to the contrary. Their reasoning casts significant doubt on this justification’s applicability—not only to the right of publicity but to every recognized form of private property.

1. Incentives to Generate Publicity are Unnecessary and Harmful

Right of publicity advocates believe that property rights in publicity incentivize individuals to create performances or works of art that enhance their own celebrity while benefiting society, aesthetically and perhaps economically as well. “[P]roviding legal protection for the economic value in one’s identity against unauthorized commercial exploitation,” the late-California Supreme Court Chief Justice Rose Bird wrote, “enrich[es] our society” by providing “a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition.”

In his take-no-prisoners polemic Private Ownership of Public Image: Popular Culture and Publicity Rights, Michael Madow challenged this view on three grounds. First, he argued that incentives generated by the right to publicity are unnecessary because its rewards are merely a collateral source of income for celebrities who already make outstanding livings from their

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55 Legosi, 25 Cal. 3rd at 840.

56 Madow, supra note 3. Although many commentators have criticized the right of publicity after Madow, their reasoning has not strayed significantly from his original approach. Compare Madow, supra note 3, at 136 (asserting that “[c]ontemporary proponents of the right of publicity have, in the main, exhibited surprisingly little interest in the basic question of justification.”), with Dogan & Lemley, supra note 3, at 1163 (“a review of the cases and literature reveals that no one seems to be able to explain exactly why individuals should have this right”). See also Peles, supra note 7, at 301; Volokh, supra note 10, at 904; Diane Leenheer Zimmerman, Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DePaul-LCA J. Art. & Ent. L. & Pol’y 283, 307 (2000).
primary professions.\textsuperscript{57} The high earnings of successful celebrities, Madow wrote, “suggest that even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement.”\textsuperscript{58} Judge Richard Posner agrees with Madow, adding that denying a celebrity the right “to appropriate the entire income from the franchising of his name and likeness . . . [would permit] free riding but not the type that threatens to kill the goose that lays the golden eggs, . . . it is free riding merely on ancillary products.”\textsuperscript{59} Celebrities, these commentators believe, will not cut back significantly on their productive work if publicity rights are restricted.

Second, Madow argued that the effect of limiting returns to publicity could actually increase a celebrity’s incentive to produce more of the primary goods and services from which the fame arose. This would be especially likely if a celebrity wished to maintain a particular income level and could not rely on endorsement income. If returns to publicity were reduced or eliminated, the celebrity would have to work harder in her primary endeavor in order to achieve the desired income level.\textsuperscript{60}

Third, Madow claimed that society would actually gain by reducing incentives to seek celebrity. Currently, the right of publicity inefficiently encourages individuals to waste resources in taking a very long shot at fame. The potential returns, even without a publicity right, are already so high—and the possibility of achieving them so likely to be overestimated—that the law would better serve social interests by reducing incentives to pursue fame.\textsuperscript{61}

2. \textit{Extending the Incentive Critique to Other Forms of Property}

\textsuperscript{57} \textit{Id.} at 209. At least one court has employed this analysis in denying a right of publicity claim. See ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 938 (6th Cir. 2003).
\textsuperscript{58} Madow, supra note 3, at 210; Dogan & Lemley, \textit{supra} note 3, at 1187-88; Zimmerman, \textit{supra} note 56, at 307; McKenna, \textit{supra} note 7, at 258-63.
\textsuperscript{59} Posner I, \textit{supra} note 38, at, 634.
\textsuperscript{60} Madow, \textit{supra} note 3, at 211.
\textsuperscript{61} \textit{Id.} at 216-19; Volokh, \textit{supra} note 10, at 910-11; Dogan & Lemley, \textit{supra} note 3, at 1164 (“Society doesn't need to encourage more celebrities or more marketing of celebrity image.”).
Madow’s critique applies to all forms of property, and thus if publicity rights cannot be justified on incentive grounds then neither can any other form of property.\textsuperscript{62} Madow’s critique thus faces a formidable counter-critique: why should the publicity lose its status as a property right when other forms of property have the same short-coming?

\textbf{a. The Effect of Incentives Across Property Types}

Dogan and Lemley have made the strongest case that the pursuit of celebrity (and thus publicity) is fundamentally different from the pursuit of other forms of property. They contend that the monetary rewards made possible by most property rights—such as productive labor, useful inventions, and works of art—benefit society by inspiring individuals to create more wealth than they otherwise would. By contrast, publicity rights do “not encourage the production of any identifiable value.”\textsuperscript{63} Quoting Diane Zimmerman, Dogan and Lemley argue that one can find no evidence that celebrities would “‘invest less energy and talent’ in becoming famous without a publicity right.”\textsuperscript{64}

This reasoning begs the question, what evidence establishes that individuals would work less, and create fewer inventions and works of art, if they were denied the incentives that existing property rights provide? In the same article in which Zimmerman concluded that the right of publicity was not needed to encourage the pursuit of fame, she also expressed doubt about the value of copyright. “Creative writers and scholars,” she recognized, “may be driven by internal

\textsuperscript{62} Empirical distinctions among types of property may exist, but the right-of-publicity critics fail to cite the data—or even suggest the type of data—that would be necessary to evaluate the differing effects of incentives on particular property rights.

\textsuperscript{63} Dogan & Lemley, \textit{supra} note 3, at 1188 (“Unlike copyright law – which aims to promote the production of valuable works of authorship that enhance the quality of discourse and understanding in our society – the right of publicity [by contrast]. . . does not encourage the production of any identifiable value”).

\textsuperscript{64} \textit{Id.} at 1187 (quoting Zimmerman, \textit{supra} note 56, at 307 (“[n]ot a shred of empirical data exists to show that [celebrities] would . . . invest less energy and talent” absent a publicity right); see Michael A. Carrier, \textit{Cabining Intellectual Property Through a Property Paradigm}, 54 Duke L.J. 1, 43-44 92004); Rochelle Cooper Dreyfuss, \textit{We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity}, 20 Colum.-VLA J.L. & Arts 123, 1444 (1996); Posner I, \textit{supra} note 38, at 634.
needs to express their ideas or by the hope of fame or esteem in their fields.” As a result, she concluded that “the actual effect on the level of production that results from the presence or absence of any particular protection . . . is highly speculative.” The instrumental incentive argument thus fails to support copyright in virtually the same way that it fails to support the right of publicity.

K.J. Greene has supported Zimmerman’s hypothesis with a particularly powerful example: “African-American music artists and composers who operated without creative incentives” produced some of the most entertaining and lasting music of the twentieth century. Greene contends that all of intellectual property has seen unjustified expansion in scope and power. Quoting Deborah Tussey, he argues that “[t]here has been little, if any, ‘systematic study of the effects of such [intellectual property rights] on the hundreds of [IP] industries that they are designed to encourage.’”

A similar argument applies to other property. Individuals vigorously pursue all forms of property for reasons of love, honor, respect, personal satisfaction, and subsistence in addition to

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66 Id.; see Mark Kelman, A Guide to Critical Legal Studies 22 (1987) (“To take a ready analogy from the copyright field, only a charlatan would claim to know how much more literary production we would get if novelists had to be paid by parodists of their work, or how much parody we would lose, or how to evaluate these gains and losses objectively.”).

67 Zimmerman, supra note 65, at 704-07; see Michael A. Carrier, The Propertization of Copyright, in 1 Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, 345, 345 (Peter K. Yu ed. 2007) (lamenting that copyright has expanded to such an extent that it “now resemble[s] the ‘fee simple’ ownership held by landowners”); see Shubha Ghosh, Decoding and Recoding Natural Monopoly, Deregulation, and Intellectual Property, 2008 U. Ill. L. Rev. 1125, 1131 (recognizing that “invention and creation occurs absent the grant of intellectual property”).

68 Greene, supra note 7, at 529.

69 Id. at 534-35.

the returns on their investment. The desires to be successful in one’s career, live in a comfortable house, and possess nice things are all complex desires that are only partially explained by the desire to acquire property. Even if the legal system failed to protect the returns to labor, real estate, and personal property through a private property regime, other powerful reasons to work, create and invest in property would still remain. As Mark McKenna put it “[h]ighly successful people in any field tend to be intensely competitive and strongly desire recognition among the elite in their particular field.”

Although economic incentives surely impact individual effort, the magnitude of their effect varies depending on the circumstances for all types of property. Novels would still get written without existing forms of copyright, just as individuals would still pursue fame without a right of publicity. On a theoretical level, one simply cannot conclude that the negative effect of reducing property protections on creative output would be significant, while the negative effect on the pursuit of fame more generally would be de minimis.

Measuring the empirical effects of incentives across property types may be possible but our legal system has allocated property rights without reference to this kind of data and right-of-publicity critics suggest no methods for collecting it. The incentive critique of the right of publicity necessarily, if implicitly, rests on the belief that empirical data is unnecessary. Commercial property managers, laborers, authors, and inventors earn their living directly from their activities and would, therefore, not work hard enough without the returns that strong property rights provide. Because athletes and star actors make so much money from playing sports and making movies, however, the additional income made possible by publicity rights could not possibly play a significant incentivizing role.

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72 McKenna, supra note 7, at 261.
This common sense reasoning is certainly contestable. Unlike athletes in team sports, athletes competing in individual sports tend to earn a greater percentage of their wealth from endorsements. Although top professional golfers and tennis players may earn enough prize money to keep them playing even if they made nothing from publicity, the same may not be true of, for example, Olympic athletes. And to the extent that Olympians would pursue gold equally vigorously without a right of publicity because they enjoy their sport and the chance to compete with the best athletes in the world, Phil Mickelson and Serena Williams would likely pursue excellence in golf and tennis, respectively, even if they received no money for playing (or at least much less than they actually earn). In fact, many lesser talents dedicate substantial time and money to improving their own golf and tennis games. Fanatics of these sports are indistinguishable in many ways from the authors, song writers, and basement inventors who churn out creative works and inventions with little realistic hope of ever earning a positive return. The need for incentives to create any form of property is thus uncertain.

In this respect, incentives created by the returns to publicity are not different from the rewards attributable to any other kind of property right. As an empirical matter, no one has more than a foggy notion about the comparative effects of incentives on different types of property. And gathering the relevant data may not even be possible. The incentive argument thus fails to distinguish publicity rights from other property protections. And unless right-of-publicity critics are prepared to reduce the strength of all property rights, this critique is unlikely to convince courts and legislatures to curtail the right of publicity.

b. Reducing Returns May Increase the Incentive to Work

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For example, “star tennis players and golfers earn three to five times their prize money from endorsements and other nontournament sources.” Robert H. Ruxin, An Athlete's Guide to Agents 131 (4th ed. 2003) (noting, though, that athletes in team sports earn a lower percentage of their total income from exploiting publicity rights).
Madow also demonstrated that if returns to publicity were eliminated, celebrities might actually work harder to maintain a desired income level. This phenomenon too extends to all types of property. Whether one deals with real or personal property, copyright or patent, or the right of publicity, theory alone cannot predict whether an individual’s work output will increase or decrease if returns are lowered. An individual might work less because reduced income will make leisure activities relatively more valuable, or she might work more to maintain an existing or desired standard of living. Whether Brad Pitt would make more (or fewer) movies if he did not have a right to publicity is an empirical question indistinguishable in form from the question whether Stephen King would write more (or fewer) novels if copyright law permitted additional forms of copying without compensating the author. Again, right-of-publicity critics fail to differentiate publicity from other kinds of property.

c. The Inefficient Pursuit of Property Rights

Finally, Madow argued that publicity rights create excessive incentives to seek fame. Once again, however, the same can be said of many types of property. Numerous get-rich-quick schemers waste their time pursuing an impossible dream of success and wealth. Indeed, many people pursue careers in business or law in the fruitless pursuit of high levels of income that most will never obtain. Those who have explored the issue have concluded that strong property rights are not uncontrovertibly justified for any type of property right.

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74 Madow, supra note 3, at 205 n. 384 (citing prior work critiquing the economic arguments in favor of all forms of private property); id. at 212 & nn. 412-13 (recognizing prior work showing that the incentive effect of weakening property rights is theoretically uncertain).

75 Duncan Kennedy & Frank Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711, 719 (1980) (explaining that the notion that individuals will work harder if they keep more of what they produce is a hypothesis, not an empirical truth; individuals may work even harder in a less certain environment to protect themselves if some of their property is lost through regulation).

76 Madow, supra note 3, at 216-19; Volokh, supra note 10, at 910-11; Dogan & Lemley, supra note 3, at 1164.

77 There is considerable support for the conclusion that absolute protection of property rights would be inefficient. See Anticipating the 21st Century: Competition Policy in the New High-Tech Global Marketplace, 424
Sullivan reminds us, it has long been common knowledge that over-rewarding property “can distort allocation, hurt consumers, and impede further innovation.” The possibility that publicity rights over-incentivize celebrity, again fails to distinguish them from other property. Any form of property can be subjected to the same critique.

**B. A Critique of the Allocational Defense of the Right of Publicity**

The right of publicity’s most widely accepted justification rests on the need to efficiently allocate resources to avoid devaluing publicity. In support of this view, Judge Richard Posner has argued that just as overgrazing the proverbial tragic commons would render it valueless for those raising sheep, eliminating the right to publicity would erode the value of celebrity through over-exposure. Privatizing the commons efficiently protected its value for sheep herders. By limiting the use of celebrity to the highest bidders, publicity rights also optimize the value of fame. Madow argued that this justification for publicity rights fared no better than the incentive

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Trade Reg. Rep. (CCH) ch. 6, at 6 (June 11, 1996) (quoting Joseph Stiglitz as stating, “some people jump . . . to the conclusion that the broader the patent rights are, the better it is for innovation, and that isn’t always correct, because we have an innovation system in which one innovation builds on another. . . . [T]he breadth and utilization of patent rights can . . . have adverse effects in the long run on innovation”); Ian Ayres & Paul Klemperer, *Limiting Patentees’ Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 Mich. L. Rev. 985, 987 (1999) (“Legal scholars have failed to appreciate that unconstrained monopoly pricing is not a cost-justified means of rewarding patentees. . . . [A]llowing patentees to raise price all the way to the monopoly level is a little like giving them a license to steal car radios—it produces a social cost (to car owners) far greater than the private benefit.”); Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 U. Pitt. L. Rev. 453, 460–61, 473 (2001) (suggesting that recent calls for absolute intellectual property rights effectively abandon the goal of providing incentives to innovate to improve consumer welfare in favor of “maximizing the wealth of current rights holders regardless of the effects on aggregate economic welfare”); Marina Lao, *Unilateral Refusals to Sell or License Intellectual Property and the Antitrust Duty to Deal*, 9 Cornell J.L. & Pub. Pol’y 193, 215–16 (1999) (citing studies showing that competition is more important to innovation than patent protection); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Sci. 698, 698–701 (1998) (discussing how more intellectual property rights can lead to fewer innovations).

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See, e.g., Matthews v Wozencraft, 15 F3d 432, 437-38 & n 2 (Fed Cir 1994) (“(w)ithout the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero. . . . [I]t would be overused, as each user will not consider the externality effect his use will have on others.”); Grady, *supra* note 38, at 110-26. For the classic application of the argument to property rights generally, see Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1244-45 (1968).

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See *supra* note 38.
argument. Again, his critique applies to other forms of property and therefore fails to distinguish the right of publicity.

1. Private Allocation of Publicity Does Not Increase Social Welfare

Madow presented three critiques of the allocation defense of publicity rights. First, he showed that creating a need to license the use of a celebrity’s persona may actually block efficient small-scale uses, such as the printing of small runs of t-shirts. In these types of situations, the transaction costs of obtaining numerous licenses would exceed the expected return.

Second, Madow claimed that any loss in value to a celebrity’s persona due to overexposure, is not a legitimate social concern. The number of celebrities available for advertising purposes is practically limitless. There is, therefore, no negative social impact when the value of one celebrity persona is reduced because advertisers will simply find a new one.

Third, Madow argued that unlike physical resources celebrity often becomes more valuable through exposure. Publicity, he argued, is “nonrivalrous” and cannot be “used up.” A picture of a celebrity, for example, can be distributed widely, providing equal enjoyment to all without diminishing the enjoyment of any. Conversely, once a loaf of bread is eaten no one else can enjoy it. Since enjoying a celebrity persona does not reduce its availability for others,

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81 Madow explained that efficient uses may not come about where the most efficient use of a celebrity persona would involve numerous small scale uses that could not reasonably be licensed because of transaction costs. Madow, supra note 3, at 223-24.
82 Id.
83 Madow, supra note 3, at 224; McKenna, supra note 7, at 268-75 (pointing out that the decline in value is uncertain and agreeing with Madow that any loss is not a public one).
84 Madow, supra note 3, at 221-22.
85 Dogan & Lemley, supra note 3, at 1185; Grady, supra note 38, at 99-100 (explaining the theory of public goods in the context of the right to publicity); McKenna, supra note 7, at 257, 269 (arguing that identity is non-rivalrous).
charging anything to permit the use of a celebrity’s persona would inefficiently reduce consumption.\textsuperscript{86}

2. \textit{Extending the Allocational Critique to Other Forms of Property}

Once again, Madow’s critique is powerful and persuasive, but it cannot be limited to the right of publicity. All property rights will be inefficiently exploited if the transaction costs of licensing outweigh individual returns. And efficient small-scale uses of publicity are unlikely to be substantially more prevalent than efficient small scale uses of other property rights. The transaction costs of individually licensing patents and copyrights, for example, may outweigh the benefit of individual uses just as those costs may inhibit the use of celebrity images and personas.\textsuperscript{87} Even real estate, in some cases, could be utilized most efficiently through open access. Permitting the free use of empty lots in urban areas for community farming, for example, could lead to more efficient use of vacant land, because transaction costs might otherwise discourage efficient uses.\textsuperscript{88}

Madow’s critique again extends to other forms of property. Although inventors and authors would suffer private losses if they could not maximize the price of their creations, greater use of patents and copyrights would benefit the public by stimulating improved inventions and new creative works.\textsuperscript{89} A particular invention, song, or work of fiction might lose value from

\begin{thebibliography}{9}
\bibitem{86} Grady, \textit{supra} note 38, at 99-100.
\bibitem{87} In the copyright area, this problem is partially addressed through large licensing organizations that reduce transaction costs. \textit{See} Broadcast Music Inc. v. Columbia Broadcast Systems Inc., 441 U.S. 1 (1979) (explaining copyright licensing system).
\bibitem{88} For example, a recent effort to set up an urban garden on an undeveloped strip of land in the city of San Diego, California, recently took more than two years and $45,000 in legal fees. http://www.sdcitybeat.com/cms/story/detail/the_46_000_question/7685/ (last checked 3/12/09).
\bibitem{89} Mark Lemley has persuasively demonstrated the short-comings of the allocational justification for all forms of intellectual property. “The idea of a tragedy of the information commons,” he recognizes, “is fundamentally flawed because it misunderstands the nature of information. A tragedy of the commons occurs when a finite natural resource is depleted by overuse. Information cannot be depleted, however; in economic terms, its consumption is nonrivalrous. It simply cannot be ‘used up.’ Indeed, copying information actually multiplies the available resources, not only by making a new physical copy but by spreading the idea and therefore permitting others to use and enjoy it. The result is that rather than a tragedy, an information commons is a ‘comedy’ in which everyone benefits. The

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over-exposure but there would always be additional inventions, songs and stories to take their place. Likewise with real estate, too, owners of large tracks of open land might lose some value if trespassing were permitted. But the public at large could benefit from greater access for hiking and recreational uses.\footnote{\textsuperscript{90}}

    In some cases, allocating the use of property carefully would produce efficient results but each case requires individualized empirical analysis. As Lemley writes, “[r]educing the distribution of information is a good thing if, but only if, such information is in fact overproduced or overdistributed. In other words, this justification for intellectual property depends on proof that there is in fact a tragedy of the commons in information.”\footnote{\textsuperscript{91}}

Commentators cannot definitively conclude that private property rights always yield efficient allocations of land, copyrights, and patents, but are unnecessary to the efficient use of publicity. Neither Madow nor any other publicity right critic has shown that publicity rights are significantly less likely to lead to efficient allocations of the use of celebrity personas than other forms of property.

Madow’s third argument concerning publicity’s non-rivalrous nature is as applicable to all forms of intellectual property as it is to the right of publicity, because they are all intangible.\footnote{\textsuperscript{92}}

At first glance, however, this aspect of Madow’s critique appears to distinguish the right of

\footnote{\textsuperscript{90}} Such access has been recognized in a variety of contexts. England, for example, recently enacted a right to roam that grants public access to undeveloped private land. Jerry L. Anderson, \textit{Britain’s Right to Roam: Redefining the Landowners Bundle of Sticks}, 19 Geo. Int. Env. L. Rev. 375, 375 (2007). A similar customary right, known as allemansrätten, exists in Finland, Norway, and Sweden. Id. at 404. Some American states recognize a public right to beach access over private land. Mathews v. Bay Head Imp. Ass’n, 471 A.2d 355, 365-66 (N.J. 1984) (recognizing that “private landowners may not in all instances prevent” members of the public access to the beach across their privately owned land).

\footnote{\textsuperscript{91}} Lemley, \textit{supra} note 89, at 143.

publicity from real and personal property—both of which are presumed to be consumable, rivalrous, and excludible. 93 Upon closer examination, however, one cannot neatly distinguish among different types of property based on whether enjoyment by some prevents others from also enjoying the property. From a practical perspective, physical property is often as non-rivalrous as many forms of intellectual property. Although any particular loaf of bread is consumable, so is any particular picture of a celebrity. 94 In both instances, the real issue is whether the available supply of substitutes enables most consumers to obtain all that they would reasonably demand. One person’s consumption of a loaf of bread is as irrelevant to the ability of others to acquire and enjoy bread as one person’s consumption of a picture of a celebrity is irrelevant to others’ ability to enjoy the picture. Indeed, it may be easier to create scarcity in a picture – for example, in a limited edition high quality poster – than in a loaf of bread. 95

Theoretically, distinguishing the right of publicity from other forms of property cannot rest solely on its potentially non-rivalrous nature, because in significant cases personal property may be just as non-rivalrous. 96 Distinguishing among types of property on this ground would again require empirical data demonstrating the degree to which publicity is in fact less rivalrous than other forms of property. None of the critics have gathered the data necessary to make that empirical claim or even explained how one might obtain it. As a result, the right-of-publicity critique again cannot distinguish publicity from other forms of property.

94 To be sure, intellectual property protects the concept of invention, expression, or publicity rather than particular manifestations. But as a practical matter, it is the physical manifestations that matter. The law could not prevent individuals from imagining copies of inventions, using their own photographic memories to recall copyright-protected material word-for-word, or visualizing a celebrity in ones mind. Only the physical manifestations – making, using or selling a patented invention; copying a work protected by copyright; or using celebrity identity – are, or could be, the concern of the law.
95 Conversely, the quintessential public good, air, might be quite rivalrous and excludible with respect to individuals who need supplements of oxygen to survive.
96 The law has historically viewed real property as unique and excludible. For many uses, however, the same principles apply to real property as to personal property. That is, there are sufficiently wholly acceptable substitute parcels of real property that is reasonably available for most uses.
III. A CRITIQUE OF PROPERTY’S MORAL JUSTIFICATIONS

Proponents of the right-of-publicity have advanced two moral justifications for the right—first, that a celebrity creates and thus deserves her fame, and second, that autonomous individuals should have the right to control the use of their identity. However powerful the prevailing critique of these purported justifications may be, each theory can be applied with roughly equal vigor to any form of property. The critique’s persuasiveness is, therefore, again blunted by its over-breath.

A. Critiquing the Lockean Moral Defense for the Right of Publicity

Lockean moral theory proposes that one deserves the product of one’s labor, and it has been used to justify all forms of property rights, including the right of publicity. Madow argues that Locke’s theory is inapplicable to celebrities because they do not deserve the value flowing from their fame. Famous people, he contends, are rarely solely responsible for their success, both in the sense that others help the celebrity directly and because fame is dependent on the fans whose adoration constitutes the celebrity’s fame. This reasoning once again applies to all forms of property. Artists and inventors build on what came before, and all property owners depend on social structures that create demand and facilitate markets. Without society, property would have no value. So, if a celebrity is not morally entitled to the value of fame, because others help create it, then no one is entitled to the value of any form of property.

1. Lockean Theory Fails to Justify the Right of Publicity

Proponents of the right of publicity often contend that the Lockean labor theory of property applies to publicity, because celebrities have a moral right to the wealth that they create

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97 Adam Mossoff, “What is Property? Putting the Pieces Back Together” 45 Ariz. L. Rev. 371, 382, 396 (2003); see generally John Locke, Two Treatises on Government.
in their public personas just as an artisan, author, or inventor deserves the wealth generated by
their physical creations.\footnote{Madow attacked the application of Lockean theory to publicity, arguing that fame is
often unearned. “[P]lenty of people become famous nowadays,” he maintained, “through sheer
luck, through involvement in public scandal, or through criminal or grossly immoral conduct.”\footnote{Moreover, even the most successful celebrities owe their fame to social factors over which they
have no control and to others who are instrumental in creating the value in the celebrity’s
persona. Because no celebrity is entirely self-made, they have no moral entitlement to the
value of their publicity.}

2. Can One Ever Deserve Ones Property?

Lockean theorists assume that property has an identifiable creator who deserves to
possess rights with respect to that property. But just as fame is rarely created by the celebrity
alone, individuals rarely, if ever, create anything in isolation. All property arises from the ideas
and labors of others, adding to the foundation upon which others will build.\footnote{In the mid-
nineteenth century, Joseph Story recognized that not all authors deserve property rights in their
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\footnote{See supra Part I.A. For a recent articulation of the labor theory of property as applied to intellectual
property see Mossoff, supra note 81; McFarlan v. E & K Corp., 18 U.S.P.Q.2d (BNA) 1246, 1247 (D. Minn.
1991); Carson v. Here’s Johnny Portable Toilets, Inc. 698 F.2d 831, 837 (6th Cir. 1983); Uhlender v. Henricksen,
1967); David E. Shipley, Publicity Never Dies: It Just Fades Away: The Right of Publicity and Federal Preemption,

\footnote{Madow, supra note 3, at 179, 184-96.}

\footnote{Id. at 184-200 (describing the ways in which celebrity images are not the product of labor); Dogan &
Lemley, supra note 3, at 1179 (“The personality the court assigns to the celebrity in those cases is not simply the
celebrity’s own image, but an amalgam of the contributions of writers, cinematographers, and fellow actors.”); id.
at 1180-84; McKenna, supra note 7, at 252-58, 263-68.

\footnote{John Rawls recognized that the distribution of goods depends on talents and abilities that are shaped “by
social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious
injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these
factors so arbitrary from a moral point of view.” John Rawls, A Theory of Justice 72 (1971). Even if efforts are
made to control socially contingent factors such as educational opportunity, the distribution of wealth is still “to be
determined by the natural distribution of abilities and talents. . . . [D]istributive shares are decided by the outcome of
the natural lottery; and this outcome is arbitrary from a moral perspective.” Id. at 74.}
books. He wrote that “[l]anguage is common to all” and “literary works must contain much which is old and well known, mixed up with something which perhaps is new, peculiar, and original . . . . The difficulty here is to distinguish what belongs to the exclusive labors of a single mind, from what are the common sources of the materials of the knowledge, used by all.” Just as a celebrity cannot take full credit for her fame, all creative work is constructed from the shoulders of the giants who came before.

Story, like Locke, assumed that a creator more deserving than others could, at least, sometimes be identified, even though others also contributed. But it is not so. Although individual talent is highly relevant to creativity, personal assets of any sort (and our ability to cultivate them) are, in a sense, bestowed upon us rather than self created. Some individuals are born with certain abilities that others lack. Likewise, a supportive upbringing creates certain opportunities for some people, but not others. Those who lack these opportunities are better classified as less lucky than less deserving.

Even if it were possible to identify a single potentially deserving individual, property would have no value without what the Supreme Court has referred to as an “organized

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103 2 Joseph Story, Equity Jurisprudence § 940 (8th ed. 1861). See also Emerson v Davies, 8 F Cas 615 (3 Story 768), 618-19 (.CC.D. Mass 1845):

(1)n literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout . . . Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stories of current knowledge and classical studies in their days.

104 Robert Burton, The Anatomy of Melancholy 20 (1628) (“A dwarf standing on the shoulders of a Giant may see farther than a Giant himself; I may likely add, alter, and see farther than my predecessors”); Umberto Eco, Borges and My Anxiety of Influence in On Literature 121 (2004) (recognizing “the debts [we all] owe[] to the universe of culture”).

105 The discussion in the text raises clear parallels to the philosophical debate over moral luck. Thomas Nagel set forth a taxonomy of the ways luck may impact moral judgments, including luck with respect to (1) results, (2) the circumstances in which one finds oneself, (3) the way in which one is constituted; and (4) the antecedent circumstances that are relevant to particular conduct. Thomas Nagel, Moral Luck in Mortal Questions 28 (1979); see generally Bernard Williams, Moral Luck (1981).
society” to appreciate the creation and make a market in which it can be sold. To be sure, an individual creator of something valuable may be morally entitled to some reward. But that reward need not be a property right. It could instead be what the Supreme Court has called “the privileges of living in an organized society,” and the creator’s responsibility to share the value of a creation with others can be understood “as part of the burden of common citizenship.” Whatever competing moral entitlement a particular individual may have to her creations, she cannot claim a moral right to exclude entirely and without qualification the very society that gives her property value.

Nonetheless, one can make evaluative judgments. Lazy individuals who treat their parents poorly may have less of a moral claim to the wealth they inherit than those who had little parental support through their formative years yet still became financially successful through hard work. But property rights in American society are not allocated in this way. The law does not distinguish the deserving from the undeserving on a relative scale. An inventor receives the same patent rights whether he labored for years or came upon the invention in an afternoon. With respect to all traditional forms of property, what’s mine is mine, whether I deserve it or not.

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107 Value in real estate, for example, exists only because we live together in a society whose members desire to possess it. David Westfall & David Landau, Publicity Rights as Property Rights, 23 Cardozo Arts & Ent. L.J. 71, 119 (2005) (“the critical importance of the media and the public in creating value for a celebrity's right of publicity can be taken to support the view that most of that value may be socially created, not unlike the value of a choice piece of real estate in an urban area”). More generally, Felix Cohen in a somewhat different context made plain the direct connection between society and value. He derided the notion that the law should recognize as property anything of value, explaining that “[t]he vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected.” Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum L Rev 809, 815 (1935).
110 To be clear, allowing property owners to exclude other members of society from using their property may be a wise policy decision in most cases, but it cannot be derived from Lockean moral theory.
Neither Madow nor those critics who have come after him provide a convincing basis for treating the right to publicity differently. Some celebrities, as Madow emphasizes, have fame bestowed upon them. His most evocative example is Donna Rice, who earned a Guess Jeans advertising spot as a result of her forays with the politician and then-presidential candidate Gary Hart.\footnote{Madow, supra note 3, at 179 (citing the Rice example among others).} At the other end of the spectrum, however, are entertainers, such as Bruce Springsteen\footnote{Springsteen, a successful musician for over 30 years, is well known for supporting many charitable causes, including human rights, workers rights, and local food banks in the cities in which he plays. He is also well known for refusing to permit his image or identify to be used for endorsement purposes. He humorously described his reluctance to associate his persona with products during his speech inducting U2 into the Rock and Roll Hall of Fame.} and Chuck D.,\footnote{Chuck D. was the lead rapper for the ground breaking group Public Enemy. According to K.J. Greene, who once represented the group, “Chuck D. had long vehemently denounced the sale of [40 once malt liquor] in black communities and was outraged over the use” of his voice in a malt liquor beer commercial. Greene, supra note 7, at 540-41.} who, with few advantages, have cultivated a particular persona at significant personal cost. When contrasted with Rice, Springsteen and D. are certainly more deserving of the fruits of their accomplishments, whether those fruits come as returns from music sales or publicity.

In The Path of the Law, Oliver Wendell Holmes wrote that to distinguish law from morality one must take the perspective of the “bad man” who cares nothing about moral principles.\footnote{Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897) (“A man who cares nothing for an ethical rule that is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”).} In allocating property rights, however, American society awards rights based on the prospective of the \textit{good man} who deserves his creations as much as anyone can. The law
apparently prefers to reward Rice undeservingly, rather than deprive Springsteen and D. of the power to control their publicity.\footnote{Rights are awarded whether or not they are deserved.} Although one can imagine a property rights allocation system that prioritizes the degree to which an individual deserves to be rewarded, American property law generally does not do so. The right of publicity thus cannot be distinguished from other property on the ground that it too does not limit its rewards to the deserving.

\textbf{B. Critiquing the Autonomy/Personality Defense of the Right of Publicity}

Alice Haemmerli contends that publicity rights are necessary to enable individuals to properly define (or constitute) themselves as individual human beings by exerting control over aspects of the world around them.\footnote{Identity remains something intrinsic to the individual,” she claims, “subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame.”} “Identity remains something intrinsic to the individual,” she claims, “subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame.”\footnote{She contends that a person’s identity is her own not because she has earned it, but because a just society must respect the manner in which its members define and constitute themselves.} She contends that a person’s identity is her own not because she has earned it, but because a just society must respect the manner in which its members define and constitute themselves.

Haemmerli’s defense of publicity rights has been critiqued most effectively by Dogan and Lemley. As with the earlier critiques, they effectively counter Haemmerli’s justifications for

\footnote{Moreover, that one may be morally entitled to keep what one needs to survive, or even flourish, from what he creates does not mean that a society is morally compelled to grant an individual a property right in all, or even the predominant share, of the social surplus flowing from his efforts. Thomas Grey, \textit{Property and Need: The Welfare State and Theories of Distributive Justice}, 28 Stan. L. Rev. 877, 885 (1976) (“it is often assumed that once one speaks of someone having a ‘right’ … to something one has concluded all debate on the question whether justice requires that he should receive it. But one can accept the notion that there are legitimate claims of entitlement without being driven to the position that they must be absolute. A great deal of coercive dispossession through taxation, may be permissible or even morally required in a just society.”).}


\footnote{Haemmerli, \textit{supra} note 10, at 431.}

\footnote{\textit{Id.}; see Hanoch Dagan, \textit{The Limited Autonomy of Private Law}, 56 Am. J. Comp. L. 809, 830 (2008) (explaining that “holders of constitutive resources are personally attached to their properties since and insofar as they reflect their identity, because such resources are external projections of their personality”).}
publicity rights, but they do so in a way that could also be used to critique all other forms of property.

1. Autonomy/Personality Theory Cannot Justify the Right of Publicity

Dogan and Lemley first demonstrate that the right of publicity enhances the autonomy and personality interests of one person only by harming the interests of another. Those who desire to use celebrity images on clothing and other products, for example, are expressing their own personality through the use of those images. Recognizing publicity rights thus reduces and limits the autonomy and personality rights of fans who seek to use celebrity personas just as failing to recognize publicity rights would negatively impact celebrities.119 A celebrity is not morally entitled to deny others the ability to autonomously express their own personalities simply to protect his or her own reciprocal interest. Therefore, the right of publicity cannot be justified in this way.

Second, Dogan and Lemley argue that the right of publicity is not limited to the high-minded protection of autonomy interests. Rather, it merely allocates the revenue generated by the use of a celebrity’s identity. “Even assuming that human dignity includes the right to prevent people from making true statements about you to sell a commercial product,” they contend, that such a right “fits uneasily” with current law because publicity rights are rarely used to prevent

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119 Dogan & Lemley, supra note 3, at 1182-83 (criticizing Haemmerli on the ground that in advancing the autonomy justification for the right of publicity, “she offers no reason to privilege the autonomy of the celebrity protected by the right of publicity over the autonomy of speakers such a right would curtail”); see Timothy W. Havlir, Is Fantasy Baseball Free Speech? Redefining the Balance Between the Right of Publicity and the First Amendment, 4 DePaul J. Sports L. & Contemp. Probs. 229, 239-40 (2008); cf. Friedman, supra note 116, at 168 (making similar point with respect to copyright).
undignified uses.\textsuperscript{120} “[A]lmost always,” Dogan and Lemley argue, the right of publicity is employed to “maximize[e] the celebrity’s profit.”\textsuperscript{121}

Third, they contend that autonomy advocates have failed to explain why the law should protect publicity in some situations—such as advertising and merchandising—but not others, such as news reporting, documentary films, and biographies.\textsuperscript{122} “A moral rights theory,” Dogan and Lemley argue, “needs to be able to explain not just why we grant certain rights, but also why we don’t grant others.”\textsuperscript{123} Even accepting that celebrities have a moral right to control their personas, Dogan and Lemley argue, any such right would not find support in the existing right of publicity.

2. Extending the Dogan and Lemley Critique to All Forms of Property

Each aspect of the Dogan and Lemley critique of the autonomy and personality justifications for publicity rights applies to other forms of property. Just as the right of publicity restrains the autonomy and personal development of non-celebrities, other property rights restrain the ability of non-owners to autonomously form their own personalities. To the extent that my ownership of something plays a role in constituting me, others are denied the use of that property in constituting themselves. For example, if one sibling takes an heirloom of great sentimental value from a deceased parent’s estate, other siblings are denied property that may be critical to their autonomy and personality as well. Possession of any property that truly serves to

\textsuperscript{120} Dogan & Lemley, supra note 3, at 1182.
\textsuperscript{121} Id. at 1182, 1204 (“There is simply no inherent right to be the only one to make money by trading on the value of a trademark. The law permits such “free riding” in numerous cases where the defendant benefits from proximity to the plaintiff’s mark, so long as the use does not increase consumer search costs.”).
\textsuperscript{122} For example, Haemmerli asserts that “the publicity rights conversation is [not] about . . . all uses of identity that might offend a person's autonomy as such, but – by definition – with commercial exploitation of that identity.” Haemmerli, supra note 10, at 433.
\textsuperscript{123} Dogan & Lemley, supra note 3, at 1183, 1209. They acknowledge that current law could be wrong in failing to recognize an across-the-board publicity right, id. at 1183 n.101, but they correctly point out those who seek to justify the right on autonomy grounds do not make that claim. Nimmer, who was the first to rely on Lockean moral theory, was also the first to declare that news reporting should be exempt from the right of publicity. See supra at Part I.B. Haemmerli did not question that certain uses of publicity should be exempted from the right’s scope. See Haemmerli, supra note 10, at 433.
constitute an individual is therefore unavailable for constituting others in much the same way that a celebrity’s control of her image denies fans the right to use that image in certain self-constituting ways.\textsuperscript{124}

The similarity of effect on non-owners is even clearer with other forms of intellectual property. By protecting the inventor or creator through patent and copyright, the law supports the creator’s autonomy and personality while simultaneously restricting the autonomy and personality of others who seek to invent or create in ways that would be deemed infringing or copying. In this regard, these types of property are also indistinguishable from the right of publicity.

The most powerful aspects of Dogan and Lemley’s criticism of Haemmerli’s defense of the right of publicity are that she (1) fails to account for the right’s protecting returns that are unrelated to autonomy and personality interests, and (2) permits exceptions to the protection of publicity rights in certain instances that do raise autonomy and personality concerns.

All property rights, however, are riddled with similar anomalies.\textsuperscript{125} Estates, for example, are divided among heirs based on the property’s market value. The property’s constitutive character for the particular heirs involved is a peripheral concern at best.\textsuperscript{126} And real estate ownership rights must give way to zoning regulation, aircraft over-flight, and eminent domain regardless of the impact on autonomy and personality interests.\textsuperscript{127} Personal property rights may

\textsuperscript{124} The problem may be even greater with real and personal property because only one person can practically possess a particular tangible object at a given time. Indeed, real and personal property with significant constitutive value may be among the few types of property that are truly excludable and consumable because reasonable substitutes generally do not exist. Rights of publicity may thus be distinguishable from real and personal property in this regard, but in a way that makes protection of publicity rights more appropriate, not less so.

\textsuperscript{125} Kennedy & Michelman, \textit{supra} note 75, at 717-39.


also be limited, for example, to protect endangered species of animals.\textsuperscript{128} Similarly, patents have exceptions for scientific research,\textsuperscript{129} and owners are not always entitled to enjoin infringers.\textsuperscript{130} And copyright, of course, does not prohibit fair uses.\textsuperscript{131} Moral rights grounded in autonomy or personality may be unable to explain the limits on the right of publicity, but they also fail to explain the limits on other forms of private property. Again, the critique of publicity rights is also a critique of all property rights.\textsuperscript{132}

\textbf{C. The Right of Publicity’s Lack of Pedigree}

The analysis above demonstrates that the prevailing critique extends beyond publicity rights to all property rights. Although that alone cannot justify the right of publicity, it does help explain why such an undeniably powerful critique has failed to influence courts or legislatures. Unless judges and lawmakers are prepared to contest all forms of private property, the critique’s ability to influence policy is unsurprisingly blunted.

Some critics might argue that this analysis ignores history.\textsuperscript{133} Whereas most forms of property have existed for centuries, courts did not recognize publicity rights until the mid-

\begin{itemize}
\item \textsuperscript{128} For example, commercial trade in eagle feathers has been prohibited without the paying of compensation to those who own them. Andrus v. Allard, 444 U.S. 51, 64-68 (1979); see 16 U.S.C. § 1538 (F) (prohibiting the sale or offer for sale of endangered species generally).
\item \textsuperscript{129} A long standing exception to patent law protection permits the use of patented technology for research purposes. Madey v. Duke University, 266 F. Supp.2d 420, (M.D.N.C. 2001) (explaining that “the experimental use defense remains viable and may be asserted in those cases in which the allegedly infringing use of the patent is made for experimental, non-profit purposes only”); Embrex, Inc. v. Service Engineering Corp., 216 F.3d 1343, 1349 (Fed.Cir.2000) (same); Giese v. Pierce Chemical Co., 29 F.Supp.2d 33 (D.Mass.1998) (same); see Merck KGaA v. Integra LifeSciences I, Ltd., 545 U.S. 193 (2005) (describing a special exception applicable to research designed to support a new drug application with the FDA).
\item \textsuperscript{130} eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (rejecting the rule that patent infringement should always be enjoined).
\item \textsuperscript{131} See infra Part IV.A.1.b.
\item \textsuperscript{132} Haemmerli’s autonomy theory may simply be a poor justification for property of any sort. But that is precisely the problem with each of the publicity rights critics’ arguments. They demonstrate that all purported justifications for property are, in fact, poor justifications.
\item \textsuperscript{133} Dogan & Lemley, supra note 3, at 1167 (“Before the late nineteenth century, individuals had little recourse against the use of their names or images by unauthorized parties . . . for either commercial or noncommercial purposes. It is hard to overstate the contrast between then and now. These days, virtually any profit-oriented use of a name or identity is presumed to be wrongful, with the defendant bearing the burden of establishing that its use falls within some protected exception.”).
\end{itemize}
twentieth century and broad recognition did not occur until the 1970s.\textsuperscript{134} In his 1993 article, Madow identified numerous parallels between modern publicity-rights disputes and conflicts arising prior to the development of the right of publicity that affected similar interests.\textsuperscript{135} For example, he cited the unauthorized use of Ben Franklin’s likeness on snuffboxes and other paraphernalia, contending that Eighteenth Century celebrities saw no need for publicity rights.\textsuperscript{136} This lack of pedigree might counsel in favor of demanding stronger justification for the right of publicity than for other more established property forms.

Celebrity, however, undeniably plays a greater role in modern society than it did in eras before the right of publicity emerged. Professional sports, the movie and television industries, and popular fiction either emerged or expanded exponentially during the twentieth century. As Nimmer recognized, when the right of publicity arose in the 1950s, “the needs of Broadway and Hollywood” were far different from the use of celebrity in popular cultural in earlier times.\textsuperscript{137}

In the last century, advertising’s significance to the economy has also expanded dramatically.\textsuperscript{138} Obvious examples include radio and television, which came to serve as important free sources of information and entertainment that are supported entirely through advertising. The role of advertising, however, has also expanded in print media and helped make possible the revolutionary social changes brought on by the world wide web. As the business of advertising has grown, the need for law to regulate the use of celebrity persona in the advertising context seems obvious, even if the particulars of that regulation may not be.

\textsuperscript{134} Dogan & Lemley, supra note 3, 1169-75.  
\textsuperscript{135} Madow, supra note 3, at 148-54 (citing examples dating back to the Eighteenth Century).  
\textsuperscript{136} Madow, supra note 3, at 148-54.  
\textsuperscript{138} See Madow, supra note 3, at 156-57 (describing dramatic changes in advertising in the early twentieth century).
Courts and legislatures presumably see the enhanced role of celebrity and the importance of advertising to the modern economy as justifying some form of publicity rights. Limitations on that right are certainly appropriate. But courts and legislatures will likely demand rationales that rest on more than historical parallels from times when celebrities played a far different role than they do today. Part IV addresses the shortcomings in the free speech limitation that the courts have tried to impose on the right of publicity, and Part V posits that competition policy could more rationally and effectively bound publicity rights without affecting the scope of other types of property.

IV. DISTINGUISHING THE RIGHT OF PUBLICITY FROM OTHER FORMS OF PROPERTY ON FREE SPEECH GROUNDS

Because the right of publicity limits the speech of those who seek to exploit the identity of a celebrity, some courts have cited free speech principles to limit the right of publicity’s scope.\(^{139}\) Courts have held that the right of publicity does not apply if the use of the celebrity’s

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\(^{139}\) See, e.g., ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 931 (6th Cir. 2003) (“There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”); Rogers v. Grimaldi, 875 F.2d 994, 1004 n.11 (2nd Cir. 1989) (“Commentators have also advocated limits on the right of publicity to accommodate First Amendment concerns.”); See, e.g., White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1401 n.3 (9th Cir. 2002); Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988); Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (2003) (seeking to identify the dominate purpose); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185-86 (9th Cir. 2001) (holding that the First Amendment lets magazines use celebrities’ names and likenesses in feature articles); Comedy III Productions, Inc. v. Saderup, Inc., 25 Cal. 4th 387 (2001) (seeking to determine whether the use is transformative); E.g., Valentine v. CBS, Inc., 698 F.2d 430, 433 (11th Cir. 1983); Lane v. MRA Holdings, 242 F. Supp. 3d 1205 (M.D. Fla. 2002); Tyne v. Time Warner Entm’t Co., 901 So. 2d 802 (Fla. 2005); Volokh, supra note 10, at 904 (dividing right of publicity claims into four categories “(1) “noncommercial speech” genres that right of publicity law favors, such as news, movies, and the like; (2) commercial advertisements for those noncommercial speech genres; (3) other kinds of commercial advertisements; and (4) “noncommercial speech” genres that right of publicity law disfavors, such as sculptures, prints, T-shirts, and the like.”); James M. Treece, Commercial Exploitation of Names, Likeness, and Personal Histories, 51 Tex. L. Rev. 637 (1973). Dogan and Lemley similarly recognize a distinction between merchandising, where the right of publicity applies, and “news reporting, biography, film, and certain forms of art” where it does not. Dogan & Lemley, supra note 3, at 1177. Roberta Kwall proposes accommodating the right of publicity and free speech interests by varying the available remedy. Kwall I, supra note 41, at 47.
identity is sufficiently transformative, original, and creative. Right-of-publicity claims based on the use of a celebrity’s name in a movie, novel, song, or their image in a painting have thus repeatedly been rejected. A recent case also refused on First Amendment grounds to find a right-of-publicity where major league baseball player names and statistics were used to operate a for-profit commercial fantasy baseball league. But courts have been unable to apply the approach consistently, upholding right-of-publicity claims involving the use of a celebrity’s name or likeness for advertising or sale of the celebrity’s likeness.

Commentators suggest that publicity rights have a more significant impact on speech than other property rights and that the scope of the right of publicity should therefore be narrowed to guard against excessive restraints on speech. The harshest right-of-publicity critics deride this approach as inherently unlikely to give speech rights their due.

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140 See, e.g., ETW Corp., 332 F.3d at 937-38 (refusing to enforce right of publicity because of first amendment interest); Hoffman, 255 F.3d at 1183-85; Cardtoons v. Major League Baseball Players Ass’n, 95 F.3d 959, 969 (10th Cir. 1996).
141 ETW Corp., 332 F.3d at 938
142 C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007).
143 Midler, 849 F.2d at 463.
144 Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 706 (Ga. 1982) (applying right of publicity to the sale of a bust of MLK); Comedy III, 21 P.3d at 811 (same with respect to a charcoal sketch of the Three Stooges).
145 Dogan & Lemley, supra note 3, at 1178 (describing current law as embodying “a presumption that celebrities have an absolute right to the economic value of their identity, subject only to special First Amendment concerns that will rarely apply in a merchandising case”); F. Jay Dougherty, All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art, 27 Colum. J.L. & Arts 1, 62-71 (2003-04); Volokh, supra note 10, at 905 (arguing that typical definitions of the right of publicity “can’t be accepted at face value” because it would block uses such as unauthorized biographies that have been protected by the first amendment). The Restatement limits the scope of the right of publicity, excluding at least “ordinarily” from the scope of the right “the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” Restatement (Third) of Unfair Competition § 47. Some states, by statute, adopt a similar limitation. see also, e.g., Ind. Code. Ann. § 32-36-1-1(c) (Michie 2002) (providing a similarly broad exception); Ohio Rev. Code Ann. § 2741.09 (Anderson 2000) (likewise); 42 Pa. Cons. Stat. Ann. § 8316(e) (West 1998) (likewise); Wash. Rev. Code Ann. § 63.60.070(1) (West Supp. 2003) (exempting any “matters of cultural, historical, political, religious, educational, newsworthy, or public interest”). Other states carve out a narrower exemption. Cal. Civ. Code § 3344(d) (West 1997). (in connection with any news, public affairs, or sports broadcast or account, or any political campaign”); Okla. Stat. Ann. tit. 12, § 1449(D) (West 1993) (adopting the same limited exclusion); Tenn. Code Ann. § 47-25-1107(a) (2001) (same); see also Fla. Stat. Ann. § 540.08(3)(a) (West 2002) (excluding only “bona fide news report[s] or presentation[s] having a current and legitimate public interest”); Neb. Rev. Stat. § 20-202 (1997)
This article attacks the free-speech approach from the opposite end, arguing that it fails to give property rights their due. Neither free-speech analysts, nor their traditional critics, fully confront the core question: is publicity a legitimate form of property? Critics who believe that the right of publicity is not a legitimate property interest do not understand why publicity rights should ever trump speech rights. But if one accepts publicity’s status as property—as many legislatures and courts do—then speech rights should never limit the right of publicity. After all, a homeowner is not required to make his front yard available to those who want to use it to speak. Ultimately, the free-speech approach simply begs the question whether publicity is property.

A. The Standard Critique of Free Speech Principles to Limit Publicity Rights

Many commentators have shown that attempts to identify particular instances in which a right of publicity would violate the First Amendment cannot be reconciled with free speech jurisprudence. Properly applied, they maintain, First Amendment principles do not just limit the right of publicity, they swallow it entirely. No existing First Amendment theory adequately explains why the use of a celebrity’s identity to sell automobiles, potato chips, or t-shirts violates the celebrity’s property rights, but the use of celebrity identity to sell movies, lithographs, or

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(excluding only news reports and noncommercial advertisements); cf. 765 Ill. Comp. Stat. Ann. 1075/35(b) (West 2003) (excluding a broad range of portrayals of people, but covering uses of people’s names in songs or books that are outside the scope of “portray[al], descri[ption], or impersonat[ion],” for instance as with the mention of Joe DiMaggio in Simon & Garfunkel’s Mrs. Robinson).

See infra Part IV.A.1.

Id.


Midler, 849 F.2d 460, 463 (9th Cir. 1988) (upholding right of publicity when celebrity’s singing style was used in an automobile add); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (same for a corn chip add); Comedy III, 21 P.3d at 811 (upholding right of publicity when celebrities were depicted in a charcoal drawing on a t-shirt).
comic books does not. As Shubha Ghosh states, “[t]he form of speech protected under the First Amendment in right of publicity cases is a mystery awaiting a solution.” Dogan and Lemley explain that attempts to solve that mystery “inevitably lead[] courts to engage in content-based analysis, favoring certain types of speech over others without any compelling justification.” Assuming there is a way to balance speech and property interests, judges are unqualified to do it.

B. An Alternative Critique of Free Speech Analysis

The concern that the right of publicity impinges free speech implicitly rests on the assumption that publicity rights are not property rights. If one accepts the conclusion of many legislatures and courts that publicity is property, then the concern about free speech vanishes. But a new problem emerges: why should the First Amendment limit the right of publicity at all?

The ability to speak freely is a privilege, an aspect of liberty that the government may not deny, but that it has no obligation to foster. While an individual can compel the government to ensure the ability to exercise a right, the government cannot prevent private restraints on the exercise of privileges. In contrast to speech, property ownership creates rights – an owner can

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150 ETW Corp., 332 F.3d at 938 (denying right of publicity claim when celebrity’s image was used in prints of an original painting); Rogers, 875 F.2d at 1004-05 (same where celebrity’s name was used in a movie title); Winter, 69 P.3d at 473 (same where celebrity’s identity was used in comic books).
151 Ghosh, supra note 47, at 634-35.
152 Dogan & Lemley, supra note 3, at 1219-20; id. at 1188-89.
153 Commentators have implicitly recognized this point. See Zimmerman, supra note 66, at 668-69 (“once the court has decided which label to attach to a dispute-free speech or property-the outcome is by and large determined”); Dogan & Lemley, supra note 3, at 1183 (“The labor and unjust enrichment rationales also fail to explain uses that the law treats as beyond the celebrity’s control. If a celebrity has a right to appropriate the full value of her persona and to prevent others from profiting from the use of her name, that right logically would seem to extend to control over references in the for-profit news media, documentaries, biographies, and a variety of other creative works to which the right of publicity does not extend even today. A moral rights theory needs to be able to explain not just why we grant certain rights, but also why we don’t grant others.”).
154 In a prior article, I explained Wesley Hohfeld’s seminal analysis of rights and privileges as follows:
both use property without government interference, and invoke the government’s authority to prevent others from trespassing or otherwise appropriating their property. In this sense, private property rights trump free speech privileges whenever they conflict. A property owner may exclude anyone from using his property—real, personal, or intellectual—as a figurative soapbox from which to engage in speech, regardless of the subject matter of the intended speech. This bright-line rule is applicable to all existing forms of property. The property owner’s right


Examples involving real property tend to be the richest and most prominent in the case law. These typically involve an owner of real property excluding a trespasser who wants to deliver a message—even a purely political one—from that property. See *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (explaining that “[t]here simply is no right to force speech into the home of an unwilling listener” and “we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom”). The Court has extended this principle to property used for commercial purposes, *Lloyd v. Tanner*, 407 U.S. 551, 568-69 (1972) (explaining that “this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only” and that “property [does not] lose its private character merely because the public is generally invited to use it for designated [commercial] purposes.”); as well as to government owned property not traditionally open for free speech purposes, *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (“The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.”). The only exceptions have been in situations in which the owner controls property that bears the earmarks of public property on which free speech generally is permitted, such as a company town, *Marsh v. Alabama*, 326 U.S. 501 (1946), or more controversially, a shopping center serving the purposes of a public town square, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding state law requiring shopping center owner to permit non-disruptive political speech); *Lloyd v. Tanner*, 407 U.S. 551, 567 (1972) (suggesting in dicta that free speech and property rights may be subject to balancing in shopping center context).

Examples with respect to other types of property include:

- The owner of personal property, such as a public address system, may prohibit others from using that property to advocate their cause.
- The owner of a patent on a new method of amplification can similarly refuse a license for speakers wishing to use the invention to better communicate their messages.
- A copyright protects against the copying and distribution of original creative works in tangible form, even when the copier seeks to use the work to advance core political speech.
to exclude others from using the property is unaltered by a non-owner’s desire to use the property to speak. No balancing of speech and property rights is necessary.

First Amendment commentators may counter that speech interests do play a role in defining the scope of copyright in a way that is similar to defining the scope of the right of publicity. Copyright, they may argue, limits the content that a speaker may employ, rather than the place or manner of the speech. It thus includes a unique balancing mechanism to determine whether a particular use of the content is fair. Because the right of publicity also restrains the content of speech, some claim that it too should incorporate a fair-use exception.

This purported distinction between copyright and the right of publicity, on the one hand, and other forms of property, on the other, does not withstand careful scrutiny. To the extent that copyright limits the content of speech, other forms of property do so as well. The content of the message that a speaker conveys is often as dependent on the location and manner of the speech as it is on the specific words chosen. As the Supreme Court has recognized, “[a]n espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.”

Nevertheless, prohibiting speakers from invading a homeowner’s property rights against his or her will has survived First Amendment challenge. Similarly, broadcasting support for a ballot proposition by sound truck communicates a distinctly different message than distributing handbills on the

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157 Dogan and Lemley claim that copyright doctrine has not been adequately limited by free speech concerns, Dogan & Lemley, supra note 3, at 1164 (“For better or worse, copyright laws have gotten a free ride when it comes to the First Amendment.”). This approach misconceives the distinction between property and the first amendment.

158 Risa J. Weaver, Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute, 2010 Dike Law & Tech. Rev. 1, 43-50 (urging the adoption of a fair use exception to the Right of Publicity).

159 City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (“Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. . . . A sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than . . . the same message on a bumper sticker of a passing automobile.”)

160 Cf. Frisky, 487 U.S. at 486 (upholding a ban on picketing an individual house “even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy”).
corner. Yet, courts have upheld the regulation of sound trucks because property owners have the
right to exclude speech from their property, and they may thus adopt reasonable steps to prevent
sound truck messages from invading their private space.\textsuperscript{161}

Time, place, and manner limits, of course, are not as restrictive as completely prohibiting
someone from communicating an idea. But neither copyright nor publicity rights bar all
discourse on a particular topic. Copyright cannot prevent a speaker from expressing particular
ideas; it reaches only the manner in which the copyright holder has expressed those ideas.\textsuperscript{162} Nor
can the right of publicity stop individuals from speaking about celebrities. Although the law may
block the sale of t-shirts depicting a celebrity, it does not prohibit commentary through a fanzine
or blog. Just like other property rights, publicity rights merely limit the manner in which the
speech takes place.

In some cases, the right of publicity may prevent the most effective means of
communicating a message, such as advertising or merchandising. The postcard of John Wayne
wearing lipstick is an example of a powerful message that was extinguished by the right of
publicity.\textsuperscript{163} An academic paper, however, could adequately address the same gender issues
raised by the image and even describe the offending postcard without affronting the right of
publicity. A paper would not communicate the intended message as effectively as the postcard.

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\textsuperscript{161} For this reason, the Court has rejected governmental attempts to bar particular means of communication
such as hand-billing or door-to-door solicitation while at the same time recognizing that private property owners
may prohibit precisely the same speech on their property. See Kovacs v. Cooper, 336 U.S. 77, 86 (1949) ("While
this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an
ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive
the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by
an appropriate sign "that he is unwilling to be disturbed." The Court never intimated that the visitor could insert a
foot in the door and insist on a hearing."); Frisby, 487 U.S. at 486 (listing cases invaliding ordinances against
marching, soliciting, hand-billing, but reiterating that individual property owner may prohibit the speech on or
invading his property rights).
\textsuperscript{162} Mazer v. Stein, 347 U.S., 201, 217 (1954) (explaining that "a copyright gives no exclusive right to the art
disclosed; protection is given only to the expression of the idea-not the idea itself").
\textsuperscript{163} See Madow, supra note 3, at 144.
\end{flushright}
But the Supreme Court has held only that speakers have a right to adequate means of communication, not the most effective possible means.\textsuperscript{164}

Troubling as this restraint may be for a free-speech advocate, property rights regularly curtail a speaker’s potential effectiveness. Like the John Wayne postcard image, a protest on the mayor’s lawn, a labor picket line on the grounds of a shopping mall, or a political campaign’s use of a sound truck, may all be the most effective means of communicating certain messages, but real and personal property rights allow owners to prohibit them,\textsuperscript{165} just as publicity rights enabled the owner of Wayne’s persona to block the postcard’s sale.

All types of property rights sufficiently prevent speakers from using the most effective means of communicating when the speaker exploits another’s property rights. Property, however, does not exclude particular viewpoints from the marketplace of ideas. It merely requires that such viewpoints be presented without using someone else’s property.

Speech interests thus fail to serve as a basis for distinguishing the right of publicity from other forms of property. The balancing approach never engages the real issue whether publicity rights are property rights. Because if they are, then the cases most vilified for upholding the right of publicity become simple. The speech interests of marketeers of celebrity paraphernalia become as irrelevant to publicity rights as the speech interests of a sound-truck operator broadcasting from someone’s private driveway. But those cases that truncate publicity rights on free speech grounds—including some merchandising cases as well as the news-reporting and biography decisions—then appear unjustifiable because the desire to speak does not limit the

\textsuperscript{164} \textit{Frisby}, 487 U.S. at 486 (upholding a ban on picketing an individual house); Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (holding that there is no right to a particular means of communicating if “there are ample alternative modes of communication”); \textit{Lloyd}, 407 U.S. at 567 (explaining that only “adequate alternative avenues of communication” must remain open).

\textsuperscript{165} \textit{See supra} IV.B.
scope of property rights. Existing judicial and academic literature fails to grapple with this problem.

V. DISTINGUISHING THE RIGHT OF PUBLICITY THROUGH COMPETITION POLICY

Competition policy has been used to limit the scope of all types of property. Its application in right of publicity cases, however, remains largely unexplored. This Part examines how competition policy analysis could coherently limit publicity rights.

1. Defining Competition Policy

At both the federal and state levels, American law favors competition over monopolistic ordering. “The heart of our national economic policy,” the Supreme Court has explained, is a long held faith “in the value of competition” and the belief that it constitutes “the best method of

166 Property rights that were so broad as to cut off all forms of speech would likely violate the Constitution. See Marsh v. Alabama, Marsh v. Alabama, 326 U.S. 501 (1946) (holding that the owner of an entire town could not prevent speech on what would traditionally be public property).

167 Although references to competition policy considerations in right-of-publicity case law are rare, one court cited competition concerns in holding that the right of publicity should not extend beyond the death of the celebrity. Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956, 959-60 (6th Cir. 1980), but see King v. American Heritage Products, Inc., 296 S.E.2d 697 (1982) (right of publicity is inheritable); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir.1978) (same). Judge Cornelia Kennedy also argued that competition policy is relevant to the scope of the right of publicity in her dissent in Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 840-41 (6th Cir. 1983) (Kennedy, J., dissenting) (“Protection under the right of publicity creates a common law monopoly that removes items, words and acts from the public domain.”). Her use of competition policy, however, was really just free speech analysis in disguise. She would have held that Johnny Carson’s right of publicity did not extend to the use of “Here’s Johnny” in the name of a company because doing so would “take[] this phrase away from the public domain.” Id. at 840. This point, while relevant to free speech considerations, is irrelevant from the perspective of competition policy, because a particular phrase is virtually never essential to competition concerns and certainly was not necessary for the defendant there to compete effectively in the portable toilet market. The scholarship largely ignores competition policy, though Madow makes some oblique references to it. Madow, supra note 3 at 130 (recognizing that the right of publicity permits celebrities “to capture (and monopolize)” the merchandising and advertising that uses of their personas).

168 See F.C.C. v. RCA Communications, 364 U.S. 86 (1953) (per Frankfurter, J.) (referring to the “‘national policy in favor of competition’” and concluding that “‘competition’ is in the public interest where competition is ‘reasonably feasible.’”)

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allocating resources in a free market” and will “ultimately . . . produce not only lower prices, but also better goods and services.”

The Court has also recognized, but never clearly articulated, that to achieve these goals competition is required only when rivalry will efficiently lower costs, increase quality, and stimulate efficient resource allocation. Were competition required at all times and in every dimension, chaotic uncertainty would lead to the inefficient use of resources. The law must therefore enable firms that succeed in the competitive market place to secure their gains. It does this by recognizing property rights that insulate firms from certain types of competition.

Both the general antitrust laws, and industry-specific competition-based regulatory programs are designed to balance the duty to compete and the right to property. Traditionally, competition policy regulation required natural monopoly utilities—like gas, electric, and telephone companies—to provide service at reasonable rates on non-discriminatory terms. The antitrust laws were believed to be ineffectual for industries like these that could not efficiently support more than one supplier. More recently, regulatory schemes have sought to create competition in what were once thought to be natural monopoly industries. These

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169 National Society of Professional Engineers v. U.S., 435 U.S. 679, 695 (1978); U.S. v. Topco Associates, Inc., 405 U.S. 596, 610 (1972) (describing the antitrust laws as “the Magna Carta of free enterprise as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

170 See Chicago Bd of Trade v. United States, 246 U.S. 231, 238 (1918) (explaining that the antitrust laws do not prohibit all conduct that restrains competition, because restraints in one dimension may “promote competition” in another).


172 A natural monopoly is a market that will efficiently support only one competitor. For example, electric power distribution requires the construction of an elaborate wired network. Creating duplicate networks to permit competition would inefficiently increase overall costs to consumers. Electric utilities distributing power are thus viewed as natural monopolies.

competition policy programs impose competitive duties that have been described as “more ambitious than the antitrust laws.”\textsuperscript{174}

Together, these laws constitute a broad competition policy designed to ensure that competitive threats stimulate innovation and efficient production, while permitting firms to retain sufficient profit to ensure adequate risk taking. The precise mixture of these components is neither consistent nor precisely articulated.\textsuperscript{175} As the Supreme Court has explained, “[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”\textsuperscript{176}

In established markets where the risk of loss is minimal, antitrust laws encourage copying a competitor’s products, ensuring a constant threat of direct price and quality competition. The ability to exploit a new product or service during the time that it takes competitors to market copies is thought to provide sufficient profit to stimulate efficient innovation.\textsuperscript{177}

In markets where risk is more substantial, the profits made possible simply by being the first to innovate are deemed inadequate. The law thus prohibits copying for periods of time or in particular contexts – by recognizing property rights – and thereby lessening competition in order to provide greater incentives to bear the risk of innovating. The patent system, for example, prohibits copying for twenty years, blunting the direct price competition or incremental improvements on the patented product or process that would result absent patent protection.

\textsuperscript{175} Justice Breyer articulated the relevant issues in some detail in his dissent in Verizon v. FCC, 535 U.S. 467, 549-52 (2002) (Breyer, J., concurring in part and dissenting in part) (explaining that the ability to immediately copy a competitive input would render competition impossible because there would be no way to recoup sufficient profit to justify the risk of developing new inputs); Gregory Sidak & Spulber, \textit{Deregulation and Managed Competition in Network Industries}, 15 Yale J. Reg. 117, 124-125 (1998) (“If deprived of a return to capital facilities after capital has been sunk in irreversible investments, or if faced with reduced returns to investments already made, any economically rational company will eliminate or reduce similar capital investments in the future.”).
\textsuperscript{176} California Dental Ass’n v. FTC, 526 U.S. 756, 780-81 (1999).
\textsuperscript{177} Cf. Verizon v. FCC, 535 U.S. 467, 505-06 (2002) (explaining that even where access to a competitor’s property is compelled by regulation, the delay between implementation and competitive use can be sufficient to stimulate innovation).
Nonetheless, some competitive threats remain. A patent holder continues to face the threat of a competitive innovator obtaining a patent first or developing a more efficient, non-infringing technology.\textsuperscript{178}

In other markets a single firm or a small group of large competitors dominate, and no ongoing competitive threat exists. Here, competition policy requires affirmative conduct by the dominant firms to create a sufficient competitive threat. Examples include regulatory programs that (1) stimulated competition in the market to generate electric power while continuing to regulate monopoly power distributors,\textsuperscript{179} and (2) compelled landline telephone service providers to share the last mile of wiring with competitors.\textsuperscript{180} In antitrust cases, the courts have imposed similar obligations on dominant firms.\textsuperscript{181}

2. The Interaction Between Competition Policy & Property Rights

\textsuperscript{178} Shubha Gosch has made similar arguments, though explaining the channeling of competition in a somewhat different way, in advancing his theory that intellectual property should be viewed as a form of regulation. Shubha Ghosh, Carte Blanche, Quanta, and Competition Policy, 34 J. Corp. L. 1209, 1215-16 (2009) (contending that “intellectual property and antitrust can be understood more clearly as a disagreement over what norm of competition is appropriate in the marketplace”).

\textsuperscript{179} An example of competition policy driven electric power utility regulation at the federal level is PURPA, which sought to create competition in electric power generation. 16 U.S.C. §§ 796, 824. The act’s legislative history recognized “that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.” FERC v. Mississippi, 456 U.S. 742, 750-51 (1982); 16 U.S.C. §§ 824a-3(e) (directing FERC to prescribe implementing rules).

\textsuperscript{180} The Telecommunications Act of 1996 imposed a number of specific duties on local telephone providers requiring that they permit competitors to use their assets. 47 U.S.C. § 251 (c)(2)-(6) (imposing a duty to (1) interconnect with potential competitors; (2) provide unbundled access to elements of the ILEC’s own network; (3) offer for resale at wholesale rates any service that the ILEC provides to its customers; and (4) notify other carriers of changes to the network that would affect interoperability with other networks). In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 at ¶¶ 10-11 (1996) (“mandating that the most significant economic impediments to efficient entry into the monopolized local market be removed”).

\textsuperscript{181} U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (recognizing that Microsoft could be subject to injunctive relief, but reversing and remanding the particular remedy imposed); Aspen Ski Corp. v. Aspen Highlands Ski Corp., 472 U.S. 585 (1985) (requiring ski areas to sell any mountain tickets permitting customers to ski at a competitive area).
American competition and property law are inextricably intertwined. The scope of a property right is simply the extent to which immediate competition is proscribed to make way for sufficient return needed to stimulate innovation. And the scope of a competition duty is bounded by property rights that insulate firms from particular types of competition.

This relationship between property and competition has received surprisingly little attention from academic commentators. Duncan Kennedy and Frank Michaelman’s seminal article *Are Property and Contract Efficient* is the principle exception. The authors explain that American law has never recognized absolute property rights. If it did, “[c]ompetition [would be] impossible because it presupposes two actors each of whom is privileged to inflict on the other the injury of loss of trade or of some other advantage” that reduces the value of the competitor’s property. Kennedy and Michaelman state that, under existing law, individuals have a “universal privilege to act . . . competitively . . . , despite the adverse consequences for another’s enjoyment of his things.” Furthermore, “neither competitor has a right symmetrical to this privilege, since neither can sue the other for the loss of the customer (or other advantage) that he is perfectly free to take if he can.” Competition policy thus limits property rights to the degree necessary to make socially beneficial competition possible.

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182 Kennedy & Michaelman, *supra* note 75, at 763 (explaining that a system of pure, universal private property rights would not permit injuries to property flowing from competitive activity and thus property rights necessarily must be shaped in such a way that takes account of competition policy).

183 Shubha Ghosh has explored the relationship between property rights and competition in the context of intellectual property law. Ghosh, *supra* note 178, at 1209-10 (“intellectual property doctrine is informed by norms of competition”). This article contends that this relationship extends to all forms of property.

184 *Id.* at 769.

186 *Id.* at 763.

187 It is important not to overstate this point. In many instances, limiting competition in one dimension will be socially beneficial because it increases competition in another dimension. Patent law constitutes a quintessential example. Limiting short run competition in a patented technology stimulates longer run competition to develop new and better technologies. In certain situations, however, the standard calculus may not apply. For example, when dealing with a market that is best served by a single standardized technology, granting patent holders the usual scope of property protection may not be socially beneficial. Requiring licensing on reasonable and non-discriminatory terms may, for example, better balance the property and competition policy interests.
One way of understanding the property-competition relationship is to view competition as de-propertizing certain assets in order to create a competitive threat sufficient to stimulate efficient behavior, despite reducing the value of some property.\(^{188}\) In most cases, business owners cannot prevent competitors from enticing their customers to switch suppliers.\(^{189}\) This is because American society has chosen to limit the scope of property to accommodate this form of competition. The value of an immediate competitive threat outweighs the social value of permitting a firm to lock in profits by prohibiting a competitor from enticing an existing customer to switch suppliers.

One could imagine a regime in which competition is even more highly valued. A legal system might prohibit a property owner from refusing to share an asset whenever a competitor could not readily duplicate it. In such a regime, patent protection for inventors would be narrower than under current law because patent holders would be compelled to license a patent whenever a competitive technology did not exist.\(^{190}\) Other property rights too would be narrower. For example, if Competitor A had a factory operating at less than full capacity,

\(^{188}\) The following scenario illustrates the distinction between the impact of free speech rights and competition policy on property rights. Competitors A and B compete to publish books of great social and monetary value. Competitor A owns a printing press of the finest quality, and Competitor B, who owns only a pedestrian press, needs one of very fine quality in order to create a masterwork that will better the lives of millions throughout the world. Access to Competitor A’s printing press would enable Competitor B to publish this masterwork sooner and at less expense, compensating the author more generously and resulting in a lower price to book buyers. Despite the interests of the public generally and the free speech interest of both the author and Competitor B, property law would permit Competitor A to refuse to allow Competitor B to use its printing press as long as other high quality presses are available for purchase or lease in the marketplace. Recognizing a strong right to exclude may increase Competitor B’s costs somewhat, but Competitor A has no market power. It simply allows Competitor A to capture the value of its press either by retaining it for its own future use or licensing it. If, however, Competitor A’s printing press was the only high quality press within the geographic area in which competition was feasible, competition policy might compel Competitor A to share the press with Competitor B.

\(^{189}\) See Keeble v. Hickeringill, 103 End. Rep. 1127 (Queen’s Bench 1707) for an early articulation of the principle that reducing the value of property through legitimate competition does not violate the owner’s property right. There, the plaintiff set up a duck decoy pond. The court explained reducing the value of ones property by “a violent or malicious act” – scaring away the ducks with a gun – creates a cause of action for violating the owner’s property right, “[b]ut if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff’s, and that had spoiled the custom of the plaintiff, no action would lie . . . .”. Id.

\(^{190}\) One could also imagine a legal regime in which property rights received greater protection. Patents, for example, could have 100-year terms.
Competitor A could be compelled to allow Competitor B to use the real and personal property embodied in the factory.\textsuperscript{191}

These examples illustrate that American law has adopted property rights and competition policy regimes that authorize a property owner to call upon the government to prohibit competition in some realms, but not others. A firm is guaranteed the exclusive use of its patents and real property, but not the continuity of its customer.\textsuperscript{192} Although a factory owner, for example, can seek government enforcement of her right to exclude others from using her patents or factory, competitors can develop their own patents or build new factories that devalue the original owner’s property through competition.\textsuperscript{193}

3. Competition-Property Interaction in Specific Cases

This understanding of the relationship between property and competition is controversial. The alternative views property law as entirely self-contained and self-defining. Within this paradigm, competition begins at property’s natural end. In a 2001 speech, a former commissioner on the Federal Trade Commission, Mary Azcuenaga, articulated this alternative view: “[Y]ou could actually know everything you need to know about antitrust and intellectual

\textsuperscript{191} Such a regime may not be as far-fetched as one might at first assume. The Telecommunications Act of 1996 effectively required local telephone companies to share underutilized facilities with competitors to facilitate competition. See supra note 180.

\textsuperscript{192} This approach to property may well reflect the influences of Lockean theory, but not in the way in which Locke is typically read. Those who view Locke as a property absolutist on moral grounds ignore his reference to the stream from which all can take a drink so long as sufficient water flow exists for others to partake. 2 LOCKE, supra note 97, §§ 123, 173. This passage is generally interpreted to set up a distinction between common property that is free to all and private property from which individuals can be excluded unless they pay a license fee. Cf. Zimmerman, supra note 66, at 668 (distinguishing “category[ies] of ‘free’ to ‘owned’”). But this distinction is artificial. Obtaining any form of property requires some effort, and expending that effort has an opportunity cost. So, nothing is free. There are only different prices for different pieces of property. There is no common and private. The difference is a matter of degree. Applying Locke’s drinking from the stream example to all property may mean that one can exclude others from particular property only if other reasonably comparable property is available.

\textsuperscript{193} This general balance permitting exclusive use, but not protecting value from competition, is not invariable. Some forms of competition – such as pawning off another’s goods as your own – are deemed unfair, and thus not permitted. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).
property,” she declared, “by remembering” that if the IP-holder properly obtained the right and did not improperly attempt to expand it, “then there should be no need to apply antitrust law.” ¹⁹⁴

This view, though widely held, ignores a century of case law and legislation that conclusively establish that where a property owner actually has the ability to avoid completely the competitive threats necessary to ensure efficient marketplace behavior, competition policy requires the sharing of what is ordinarily viewed as private property.¹⁹⁵ To be sure, these cases are unusual. But that is not because of some sacrosanct understanding of property’s natural scope or the moral compulsion to honor a right to exclude. Rather, these cases are uncommon precisely because property rights rarely create significant market power. And when they do, consumers usually benefit more from enforcing property rights, and thus stimulating competition to obtain those rights, than consumers would benefit from reducing property’s scope and thereby encouraging copying and incremental improvements. Strong property protection generally encourages competitors to develop new means to compete, and the threat of new and better innovations is sufficient to ensure efficient behavior. Enforcing a drug patent, for example, provides a strong incentive for other companies to patent competitive drugs, and that threat ensures that the original patent holder must continue to innovate.

¹⁹⁴ Azcuenaga, *supra* note 15, at 11. The Federal Circuit has also adopted this view, holding that “a patent owner . . . is exempt from the antitrust laws, even though [an infringement] suit may have an anticompetitive effect, unless . . . the asserted patent was obtained through knowing and willful fraud . . . [o]r he may demonstrate that the infringement suit was a mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor.” In re: Independent Service Organizations Antitrust Litigation, 203 F.3d 1322, 1326 (2000).

¹⁹⁵ The purpose of this article is to explore how competition policy may act as a limit on a particular property right, the right of publicity. It is worth noting, however, that examples exist in American law in which quasi property rights may prevent what is ordinarily viewed as legitimate competition. Cases of interference with contractual relations, *Maison Lazard Et Compagnie v. Manfra, Tordella & Brooks, Inc,* 585 F.Supp. 1286, 1290-91 (S.D.N.Y. 1984) (recognizing “an unlawful interference with a person in the performance of his contract with a third party” is “a legal wrong,” and the tort “extends to cases in which performance of the contract is rendered more difficult or a party's enjoyment of the contract's benefits is lessened by the wrongdoer's actions.”); and the prohibition of certain forms of competition in conjunction with the sale of good will even absent a covenant not to compete are two examples, *see, e.g.*, *Sager Spuck Statewide Supply Co. Inc. v. Meyer,* 710 N.Y.S.2d 429, 432 (N.Y.A.D. 2000) (recognizing the implied covenant not to impair the value of good will by directly soliciting the former customers of a business that is sold).
In the rare cases in which a property right would significantly restrain beneficial competition, however, American law bends property to the dictates of competition. The following subsections provide examples of representative situations for each type of property: real, personal, and intellectual.

a. Real Property

With respect to real property, alternative comparable property is almost always available for competitors, and thus examples of competition policy restricting real property rights are extremely rare. But they are not unheard of. Where substitute assets cannot reasonably be found, and thus the real property owner would have significant, durable market power, antitrust law has been held to create a duty to deal that reconfigures the property-competition balance to the extent necessary to allow marketplace forces to govern the provision of goods and services.

The Supreme Court first recognized that the antitrust laws can operate to limit property rights in a case involving ownership of the only means of rail access to St. Louis. Ordinarily, the Court recognized, the antitrust laws do not “destroy[] rights of property.” “[I]n ordinary circumstances,” Justice Lurton explained, “a number of independent companies might combine [to] control . . . terminals for their common but exclusive use. In such cases other companies

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196 See infra IV.B.3.a-c.
197 Pacific Bell Telephone Co. v. Linkline Communications, Inc., 129 S.Ct. 1109, 1118 (2009) (explaining that “[t]here are . . . limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability”).
198 Steven Semeraro, The Efficiency and Fairness of Enforced Sharing: An Examination of the Essence of Antitrust, 52 Kan. L. Rev. 57, 76-91 (2003). This understanding of property may have antecedents in Locke, who recognized that anyone may drink from a common stream so long as there is enough and as good for others. 2 LOCKE, supra note 97, §§ 123, 173.
199 United States v. Terminal R.R. Ass’n of St Louis, 224 U.S. 383 (1912)
200 Id. at 409.
might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals.”

But “the situation at St. Louis,” the Court recognized was “most extraordinary.” As a “result of the geographical and topographical situation,” no railroad, “as a practical matter,” could “even enter St. Louis . . . without using the facilities entirely controlled by the terminal company.”

Because the unusual circumstances made competition impossible under the general scheme of property rights, those rights had to give way, and the Court required the owners to share the terminal.

A more recent example involved the ownership of ski mountains in Aspen Colorado. Because of the geography and land use regulations, only four mountains were available for skiing. Aspen Ski Corporation, the owner of three of those four mountains, thus had what the Court assumed to be durable market power in the skiing services market. Because of that power, the antitrust laws required it to effectively share its mountains with its competitor, Aspen Highlands, forcing it to offer a ski pass that permitted skiers to enjoy either of the two competitors’ facilities.

b. Personal Property

Perhaps the most well known cases in which the courts interpreted antitrust law to require competitors to share assets involved the personal property of public utilities. During the early and mid-twentieth century, a single private telephone company, AT&T, came to own an

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201 Id. at 405.
202 Id. at 409.
203 Id. at 397.
204 Id. at 411-12.
206 Id. at 587-89.
207 Id. at 595-96.
208 Id. at 610-11 (holding that “the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival” and that it “was not motivated by efficiency concerns”).
extremely large percentage of the wiring system interconnecting telephone users. In the 1970s, competitors emerged for AT&T’s long distance transmission lines, but they could not economically duplicate the so-called last mile of wire to individual homes. Oversimplifying a bit, if AT&T were permitted to exclude all others from the use of these lines, competition in the provision of telephone service would have been impossible. AT&T could have displaced market forces and dictated the terms on which telephone service was provided. To blunt that market power, the courts interpreted antitrust law to require AT&T to interconnect with its competitors so that they could use AT&T’s last mile of wiring to compete to provide long distance service.209

A decade later, Congress enacted a new regulatory program that compelled local telephone providers to share the last mile of wiring, and any other asset that could not be readily duplicated by a competitor, to facilitate competition in local telephone service.210 Although displacing property rights to a greater extent than the antitrust laws do,211 this regulatory program nonetheless demonstrates competition policy’s role in limiting the scope of property rights in the unusual case in which those rights create market power that would harm consumers.

The Supreme Court reached a similar decision with respect to electric power transmission.212 Because more than one provider could not feasibly serve each town, meaningful competition to be the sole service provider was the only form of competition. Although municipalities were potential competitors for large electric utilities, the Court recognized that “[p]roposed municipal systems have great obstacles; they must purchase the electric power at wholesale[, and t]o do so they must have access to existing transmission lines.”213

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209 MCI v. AT&T, 708 F.2d 1081, 1146-47 (7th Cir. 1983).
210 See supra note 180.
211 In reviewing an antitrust challenge based upon a telephone company’s failure to comply with its regulatory requirements, the Supreme Court held that no antitrust duty to deal compels local telephone providers to share their assets. Verizon v. Trinko, 540 U.S. 398, 410 (2004).
213 Id. at 370.
transmission provider would be free to withhold its personal property – the transmission lines – altogether, or charge any price that it desired. Because “[t]he only ones available belong to” the large utility serving the area,\(^{214}\) and installing a second set of transmission lines would have been inefficient, the Court upheld a decree prohibiting the utility from “‘(r)efusing to sell electric power at wholesale to existing or proposed municipal electric power systems . . . in (its service area)’ and from refusing to wheel electric power over its transmission lines from other electric power lines to such cities and towns.”\(^{215}\)

Just as the right to exclude is sometimes overridden to serve competition policy interests, so is the right to sell. Companies seeking to merge are routinely required to sell certain assets in order to ensure that the merger does not lead to anticompetitive activity.\(^{216}\) In some cases, firms have also been required to divest assets as a remedy for the anticompetitive exercise of market power outside of the merger context. Most famously, the breakup of AT&T required divestiture of both local telephone providers and equipment and research companies,\(^{217}\) and the initial decree in the *Microsoft* case included a provision requiring the company to divest its applications business.\(^{218}\)

c. Intellectual Property

\(^{214}\) *Id.*

\(^{215}\) *Id.* at 375.


\(^{218}\) *U.S. v. Microsoft Corp.*, 97 F.Supp.2d 59, 64 (D.D.C. 2000) (“Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture.”). This aspect of the decree was reversed on non-substantive grounds. *U.S. v. Microsoft*, 253 F.3d 34, 107 (D.C.Cir. 2001) (vacating “the District Court's remedies decree for three reasons. First, the District Court failed to hold an evidentiary hearing despite the presence of remedies-specific factual disputes. Second, the court did not provide adequate reasons for its decreed remedies. Finally, we have drastically altered the scope of Microsoft's liability, and it is for the District Court in the first instance to determine the propriety of a specific remedy for the limited ground of liability which we have upheld.”).
Like real and personal property, intellectual property rights usually do not convey significant market power on their owners, although they do much more often than real property. For this reason, we see more explicit references to competition policy limits on the scope of intellectual property rights. This subsection provides examples, and then responds to the Federal Circuit’s apparently contrary view that the scope of property rights is entirely self-defining, uninfluenced by competition policy.

i. Patent & Copyright

Patent rights have long been riddled with limits designed to serve competitive ends. A patent owner, for example, may not use its property rights in an invention to compel a competitor to pay royalties (1) based on the sale of other products, or (2) after the expiration of the patent. Nor can the holder control the use of a patented product after it is sold. Both rules were intended to limit the ability of a patent holder to blunt competition. An exception to a patent holder’s right to exclude also applies where a competitor uses the patented technology for

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221 Indeed, the Supreme Court has made clear that “the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition.” Sears Roebuck v. Stiffel Co., 376 U.S. 225, 230-31 (1964).
222 Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135-36 (1969). For example, the patent holder may not “garner as royalties a percentage share of the licensee’s receipts from sales of other products.” Id.; U.S. v. U.S. Gypsum Co., 333 U.S. 364, 400 (1948) (“Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution.”).
223 Brulotte v. Thys Co., 379 U.S. 29, 32 (1964) (holding that requiring the payment of royalties beyond the expiration of the patent is unlawful per se).
224 Quanta Computer Inc. v. LG Electronics, 128 S. Ct. 2109 (2008); Ghosh, supra note 178, at 1233 (explaining that “[t]he first sale doctrine should not be understood as a limitation on rights, but as an essential legal doctrine for the construction of competitive markets driven by intellectual property”).
scientific research.\textsuperscript{225} This limitation too is motivated by the notion that competition in scientific research will serve the public more effectively than would a robust property right that restrained competition to advance scientific learning.

Similarly, a copyright owner cannot justify anticompetitive licensing practices on the ground that it has the unfettered right to protect its property interest.\textsuperscript{226} For example, the D.C. Circuit flatly rejected Microsoft’s argument that “if intellectual property rights have been lawfully acquired,” then “their subsequent exercise cannot give rise to antitrust liability.”\textsuperscript{227} Just as an owner is not free to “use of one's personal property, such as a baseball bat,” to inflict personal injury, the en banc court observed, a company may not use intellectual property to inflict competitive injury.\textsuperscript{228}

More generally, although patent\textsuperscript{229} and copyright\textsuperscript{230} are statutorily defined to embody a right to exclude, just like real and personal property, the Supreme Court has held that a patent or copyright holder is not, as a matter of course, entitled to enjoin infringing uses.\textsuperscript{231} If a permanent injunction would disserve the public interest, a court need not enjoin infringing activity.\textsuperscript{232} To be sure, in many cases an injunction against infringement would serve the public interest because it would enhance incentives to compete to develop better alternative technologies. But in the rare cases where competition to innovate would not be feasible or efficient, a patentee may be required to share a patented technology.

\textsuperscript{225} See supra note 129.
\textsuperscript{226} Microsoft, 253 F.3d 34, 63 (D.C.Cir. 2001); U.S. v. Loew’s, 371 U.S. 38 (1962).
\textsuperscript{227} Microsoft, 253 F.3d at 63.
\textsuperscript{228} Id.
\textsuperscript{229} The Patent Act grants to the owner “the right to exclude others from making, using, offering for sale, or selling the invention” 35 U.S.C. § 154(a), and declares that “patents shall have the attributes of personal property.” 35 U.S.C. § 241.
\textsuperscript{230} According to the Supreme Court, a copyright holder possesses “the right to exclude others from using his property.” Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
\textsuperscript{232} Id. at 391.
ii. Trademark

In defining the scope of trademark rights, the courts have also looked to competition policy. The value of trademarks, like most forms of property, is largely attributable to the hard work and investments of their owners. As a result, some courts and commentators assume that the law should reward the creator of that value by granting it exclusive control of the trademark’s use. Others, however, have argued persuasively that the interests protected by competition policy counsel strongly against exclusive control of trademarks.

For the purposes of this article, the winner of this debate is less important than that the debate occurs. In defining trademark rights, courts unquestionably consult competition policy. For example, in Societe Comptoir de L’Industrie Contonniere Etablissements Boussac v. Alexander’s Dept. Stores, Inc., the Second Circuit held that a lesser known competitor could use the valuable Christian Dior trademark to advertise that its dresses were copies of the Dior designs. In rejecting an infringement claim, the court explained that it was called upon to resolve “a conflict of values which necessarily arises in an economy characterized by

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233 See Stacey L. Dogan & Mark A. Lemley, The Merchandising Right: Fragile Theory or Fait Acoompli?, 54 Emory L.J. 461-62 (2005) (explaining but not agreeing with this view); see also Boston Professional Hockey Association v. Dallas Cap & Emblem MFG., 510 F.2d 1004, 1014 (5th Cir. 1975) (“Through extensive use, plaintiffs have acquired a property right in their marks which extends to the reproduction and sale of those marks . . . . What plaintiffs have acquired by use, the substantive law of trademarks . . . will protect against infringement. There is no overriding policy of free competition which would remove plaintiffs . . . from the protective ambit of the Lanham Act.”); id. at 1013 (holding that a disclaimer of sponsorship would be per se inadequate to avoid infringement; “[o]nly a prohibition of the unauthorized use will sufficiently remedy the wrong”).

234 Dogan & Lemley, supra note 233, at 462; R.G. Smith v. Chanel, Inc., 402 F.2d 562, 568 (9th Cir. 1968) (explaining that “[d]isapproval of” a competitor’s use of another’s trademark “may be an understandable first reaction, but this initial response to the problem has been curbed in deference to the greater public good”).

235 See, e.g., International Order of Job’s Daughters v. Lindeburg and Co., 633 F.2d 912, 919 (9th Cir. 1981) (criticizing the Fifth Circuit for “bestowing broad property rights on trademark owners” when the “a trademark owner has a property right only insofar as is necessary to prevent consumer confusion as to who produced the goods and to facilitate differentiation of the trademark’s owner’s goods”); Board of Governors of the University of North Carolina v. Helpingstine, 714 F. Supp. 167 (M.D.N.C. 1989); Supreme Assembly, Order of Rainbow Girls, 676 F.2d at 1083; University of Pittsburgh, 529 F. Supp. at 464; Medic Alert Found. v. Corel Corp., 43 F. Supp. 2d 933 (N.D. Ill. 1999); Dogan & Lemley, supra note 233, at 472-89.

236 299 F.2d 33 (2nd Cir. 1962).

237 Id. at 35.
competition and private property.”

Trademark holders, not surprisingly, sought to use trademark “to create a shield against competition.” As the Second Circuit explained, however, “[t]he interest of the consumer here in competitive prices of garments using Dior designs without deception as to origin, is at least as great as the interest of plaintiffs in monopolizing the name.”

In a similar case in the Ninth Circuit, a copycat perfume manufacturer advertised that its product smelled exactly like Chanel No. 5, thereby exploiting the considerable investment that the originator had made in that famous mark. In seeking an injunction, Chanel argued that trademark law prevented this free riding to protect the “consumer good will created through extensive, skillful, and costly advertising.” The court disagreed, explaining that trademark protection is limited to uses that mislead consumers about the source of the product “for reasons grounded in the public policy favoring a free, competitive economy.” By guarding against confusion as to the source of a good, trademark law increases consumer information and thus stimulates competition. Extending trademark law to reward the value that the mark has acquired, however, “would create serious anti-competitive consequences with little compensating public benefit.” In a legal regime that values competition, the Ninth Circuit concluded, property rights are not sufficiently robust to enable an owner “to monopolize the

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238 Id. at 37.
239 Id.
240 Id.
242 Id. at 566; id. at 568 (explaining that the plaintiff argued that a “competitor should not be permitted to take a free ride on the trademark owner's widespread goodwill and reputation”) (internal quotations omitted).
243 Id. at 566.
244 Id.; id. at 568-69 (“By taking his ‘free ride,’ the copyist, albeit unintentionally, serves an important public interest by offering comparable goods at lower prices. On the other hand, the trademark owner, perhaps equally without design, sacrifices public to personal interests by seeking immunity from the rigors of competition.”).
245 Id.
public’s desire for the unpatented product, even though [the owner itself] created that desire at
great effort and expense.”

iii. Non-statutory Intellectual Property Rights

On at least one occasion, the U.S. Supreme Court has recognized an intellectual property
right that fell outside of the traditional areas of patent, copyright, trademark, or trade secret,
and in other cases federal courts have considered, without recognizing, similar non-statutory
rights. In these cases too, the courts look to competition policy as a key ingredient in the
determining the property right’s scope.

In recognizing a limited property right in hot news, Justice Pitney for a majority of the
Supreme Court in INS v. AP emphasized that permitting a news service to compete by copying
another service’s stories and republishing them while they were still hot would be “unfair
competition in business” given the “peculiar value of news” and the importance of
newsgathering to the public. In the majority’s view, if property rights did not prohibit the
copying and republication of hot news, the cost of newsgathering would likely be “prohibitive in
comparison with the return.” This rationale fits squarely within the framework set out in this
section. That is, property rights exist to ensure sufficient return to incentivize firms to compete.

Writing in dissent, Justice Brandeis disagreed with the result, but not with the need to
balance property and competition interests. For Brandeis, “competition is not unfair in a legal

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246 Id. at 568.
248 See, e.g., National Basketball Association v. Motorola, Inc., 105 F.3d 841, 844-54 (2nd Cir. 1997); Cheney
Bros. v. Doris Silk Corp., 35 F.2d 279 (2nd Cir. 1929); and X17, Inc. v. Lavandeira, 563 F. Supp. 2nd 1102, 1105-09
(C.D. CA 2007).
249 INS, 248 U.S. at 235; id. at 240 (explaining that INS’s practice of copying AP stories for republication
“amounts to an unauthorized interference with the normal operation of complainant’s legitimate business precisely at
the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have
earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is
not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of
equity ought not to hesitate long in characterizing it as unfair competition in business.”).
250 Id. at 241.
sense, merely because the profits gained are unearned, even if made at the expense of a rival.”

Tying that Congress would create the appropriate property right if the news industry were truly threatened, he saw no need for the Court to recognize a property right in hot news.

Based on similar considerations, Judge Learned Hand adopted a very limited reading of *INS* in a subsequent case seeking property protection for popular dress designs, which like news had a relatively short period during which they were valuable. For the Second Circuit, Hand wrote that property rights should not extend beyond the actual dresses themselves “to prevent any imitation” that would effectively “set up a monopoly” over the sale of dresses with particular designs.

More recently, Judge Ralph Winter relied on competition policy to deny the National Basketball Association’s claim that it held property rights in the outcome and statistics of NBA games. For the Second Circuit, he concluded that the non-statutory property right recognized in *INS* was limited to situations in which the copier did not engage in meaningful competition with the originator. There, INS did not meaningfully compete with AP when it simply copied and republished a story. By contrast, where “one produces a product that is cheaper or otherwise superior to the other,” and because of that business acumen “prevail[s] in the marketplace,” a non-statutory property right stifling the competition would be inappropriate.

As with the discussion of trademark rights above, the point here is not that particular non-statutory rights should, or should not, exist. That courts use competition policy principles in making these decisions, however, conclusively establishes that the social benefits of competition have played a critical role in defining property’s end.

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251 *Id.* at 259 (Brandeis, J., dissenting).
252 *Id.*
253 *Cheney Bros.*, 35 F.2d at 280.
254 *Motorola, Inc.*, 105 F.3d 841, 853-54.
255 *Id.* at 854.
ii. Debunking the Federal Circuit’s Approach to the IP-Competition Policy Dividing Line

Some lower court opinions, particularly those of the Federal Circuit, could be read to hold that intellectual property rights are immune from competition-based limits. A “patent by its very nature is anticompetitive,” the Federal Circuit has explained, and thus “any adverse anticompetitive effects within the scope of the . . . patent could not be addressed by antitrust law.”\(^\text{256}\)

For the purposes of assessing the role of competition policy in shaping property rights, however, the Federal Circuit’s bark is worse than its bite. It amounts to nothing more than a declaration that an intellectual property right is not subject to antitrust challenge, except when it is – that is when the IP holder acts beyond the scope of the right. The Federal Circuit assumes that competition policy has no role in defining that scope. But the Supreme Court has never acquiesced in this truncated view of competition policy, and the high court’s decisions, both old\(^\text{257}\) and new,\(^\text{258}\) suggest that it will not do so. Even if the Supreme Court were to follow the Federal Circuit’s view of antitrust and intellectual property, however, competition policy broadly defined would remain an important factor in defining the scope of property rights.

Congress has imposed competition-based regulatory programs that reach beyond the antitrust laws on several occasions. In the Telecommunications Act,\(^\text{259}\) it required telephone companies to share the last mile of telephone lines. In the Hatch-Waxman Act,\(^\text{260}\) it limited the scope of drug patent rights and thus reduced the value of the drug companies’ intellectual

\(^{256}\) In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1333 (Fed. Cir. 2008) (emphasis added) (holding that where there are “no anti-competitive effects outside the exclusionary zone of the patent” there can be no antitrust violation); see In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187 (2nd 2006); Andrx Pharmaceuticals, Inc. v. Elan Corp., PLC, 421 F.3d 1227 (11th Cir. 2005).

\(^{257}\) Zenith Radio Corp., 395 U.S. at 135-36 (That the U.S. Supreme Court would declare during this period that “there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee”).

\(^{258}\) eBay, Inc., 547 U.S. at 391-93 (holding that infringing uses need not be enjoined in all cases).


property in order to permit competitors to seek more rapid FDA approval for generic drugs.\textsuperscript{261}

And in the Federal Pesticide Act,\textsuperscript{262} it required the first applicant for EPA approval of a pesticide to provide certain test data that was both expensive to prepare and generally protected as a trade secret.\textsuperscript{263} Effectively imposing a mandatory licensing scheme for this data, the Act required the first applicant to permit the EPA to use its data to assess competitor-submitted pesticide applications so long as the competitor fairly compensated the original applicant.\textsuperscript{264} In each case, Congress limited property rights to increase competition.\textsuperscript{265}

4. Integrating Competition Policy into Right of Publicity Analysis

Just as competition policy shapes the scope of property rights generally, it should set limits on the right of publicity. To date, however, neither courts nor commentators have explored this option for limiting the scope of publicity rights.\textsuperscript{266} This section explains how such an approach would operate.

\begin{itemize}
\item \textsuperscript{261} See id. at § 271(e)(1) (stating that “[i]t shall not be an act of infringement to make, use, offer to sell, or sell . . . a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs . . .”); see Merck KGaA, 545 U.S. at 206-07 (2005) (interpreting this provision broadly).
\item \textsuperscript{262} 7 U.S.C. §§ 136a & h.
\item \textsuperscript{264} 7 U.S.C. §§ 136a(c)(1)(D).
\item \textsuperscript{265} See, e.g., Ruckelshaus, 467 U.S. at 1015 (“Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products.”).
\item \textsuperscript{266} Dogan and Lemley argue against the right of publicity on the ground that it permits celebrities to stifle competition. Dogan & Lemley, supra note 3, at 1186-87 (describing right of publicity as “at base anti-market” and creating “a market distortion”). They argue that the right restrains competition to exploit the celebrity’s identity, contradicting the broader competition policy in favor of competition to drive producer surplus to marginal cost. Id. at 1186 n. 114; Lemley, supra note 89, at 144. Their concerns are well directed at interference with the competitive process. But their solutions seem misdirected. Because one might use a property right to stifle competition does not lead to the conclusion that there should be no property right even in cases where it could not be used to stifle competition. Competition law trumps would-be property rights, but only when they would permit the owner to exploit market power. Just as many patent holders have no market power despite the ability to restrict the use of a patented technology, most celebrities have no market power in the markets in which their identities are used. Dogan and Lemley effectively take the position that any departures from the norm of a competitive market requires a justification. But that position simply assumes that publicity is not property. Because competition policy limits the scope of property rights only when the needs of competition provide a justification for doing so.
\end{itemize}
In most situations, the right of publicity, like other property, does not empower its owner/celebrity to supplant market forces with monopolistic dictates. In those common cases, publicity rights should be as robust as other forms of property normally are. But when publicity rights would enable a celebrity to restrain competition, then those rights should be narrowed just as competition policy has led courts and legislatures to limit other property rights.

Particularly with respect to markets populated by the fans of famous celebrities, publicity rights will tend to create the power to restrain competition because there will often be no reasonable substitute for a substantial group of dedicated fan/consumers. Generally, in the intellectual property realm, restraints on competition embodying the property right are tolerated because they create incentives for competitors to develop new and improved intellectual property. The risk and expense of creativity, the theory goes, could lead to passivity if the law failed to adequately protect intellectual property. Usually, therefore, the law favors long run competition to innovate over short run price and quality competition.

By contrast, in markets geared toward the fans of popular celebrities, strengthening publicity rights is unlikely to trigger beneficial long run competition to innovate. Those who would market pictures of John Wayne wearing lipstick, for example, are unlikely to create a competitor to John Wayne’s persona if they are prohibited from marketing their product. Conversely, if publicity rights are weakened, competition to create products using John Wayne’s persona would be invigorated. The balance between short and long run competition thus tilts toward the short run in this type of publicity rights case.

Antitrust experts may object to this approach on the ground that there is unlikely to be a relevant antitrust market in goods relating to a particular celebrity. As the recently proposed new merger guidelines recognize, however, traditional notions of market definition may not
accurately identify competitive harm. Those guidelines thus explicitly recognize that markets should sometimes be defined with respect to “targeted customers.” Where a firm “could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers.” This approach is quite relevant to publicity-rights cases in which hard core fans of a celebrity constituted the targeted market that would be subject to exploitation if the celebrity is permitted to use the right of publicity to limit the sale of merchandise depicting the celebrity.

More importantly, in applying competition policy principles to right of publicity cases, courts should not view their task as assessing whether a celebrity has violated § 2 of the Sherman Act. The specific legal doctrine applicable to antitrust cases is shaped by the concern that weakening property rights and imposing a duty to deal may dampen the long run competitive instincts of dominant firms in a way that would reduce consumer welfare.

The Supreme Court has identified three ways in which this concern with aggressive antitrust enforcement manifests itself. None of them apply to the right of publicity. First, forced sharing “may lessen the incentive for the monopolist, the rival, or both to invest in” improving the existing assets in the market. Restricting the right of publicity in these circumstances, however, would be unlikely to discourage innovation by either the celebrity or the party seeking to employ the celebrity’s identity. On the contrary, it would likely spur competition to develop

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268 Id. at § 4.1.4 at 12.
269 Verizon v. Trinko, 540 U.S. 398, 409 (2004) (explaining that the line between robust competition and predatory market foreclosure is a fine one, and thus “[m]istaken inferences and the resulting false condemnations . . . [would tend to] chill the very conduct the antitrust laws are designed to protect.”); id. at 414 (identifying troublesome conduct can be quite difficult, because “the means of illicit exclusion, like the means of legitimate competition, are myriad.”); see U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) (http://www.justice.gov/atr/public/reports/236681.pdf) (last checked June 25, 2010).
270 Verizon, 540 U.S. at 409.
more popular writings and paraphernalia relating to the celebrity because more competitors could enter the market.

Second, imposing a duty to deal through an injunction would “require[] the antitrust court[] to act as [a] central planner[], identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.” In publicity rights cases, however, a court can identify when a publicity right blunts competition by simply looking for situations in which the celebrity asserts it. And no complicated judicial oversight would be required to remedy a violation. The court could simply enjoin the exercise of the right of publicity in a particular context.

Third, by forcing competitors together, property sharing could potentially “facilitate the supreme evil of antitrust: collusion.” But this concern is unlikely to arise in right-of-publicity cases. Cooperation between celebrities and those seeking to use their identity raise little competitive concern. As long as the right of publicity cannot stifle competition, entry into markets using the celebrity’s identify should be quite easy. If, for example, a celebrity and a poster distributor agreed on a supra-competitive price for a particular poster, other manufacturers could enter the market and offer lower-cost, competitive posters.

Because limiting publicity rights would not have the same detrimental effects on competition as limiting other property rights, competition policy counsels in favor of limiting publicity rights to a greater extent than antitrust law generally limits other property rights.  

271  Id.
272  Id.
273  The basis for judicially limiting publicity rights based on competition principles is beyond the scope of this article. The federal policy favoring competition provides a firm ground for interpreting the right of publicity consistently with that policy. Although states may legislate in ways that conflict with this federal policy, they may do so only when state officials actively supervise any authorized anticompetitive conduct.  

5. Applying the Competition-Policy Approach to Particular Types of Publicity Rights

Cases

Applying this competition-policy approach to right of publicity cases would 1) validate the results in a number of controversial cases; 2) compel a different result in a few; and 3) more effectively justify the decisions in areas that have been relatively uncontroversial.

a. Advertising and Corporate Identification

In the advertising cases, the courts have interpreted the right of publicity broadly.\textsuperscript{274} Under a competition policy analysis, this approach is appropriate because denying an advertiser the use of a particular celebrity’s identity has virtually no impact on competition in the provision of goods and services. If Haynes cannot use Michael Jordan in its advertisements, for example, it can hire a different celebrity or design an advertising campaign that does not reference any celebrity’s identity. Marketplace forces continue to govern competition in the sale of underwear, and no celebrity has the power to dictate market conditions. The existing blanket rule permitting celebrities to assert right-of-publicity claims when their identity is used in advertising is thus justified under the competition-policy approach.\textsuperscript{275}

Cases in which celebrity identity is used in a company name or slogan will also generally raise no competitive concerns. The Sixth Circuit thus correctly upheld Johnny Carson’s right of publicity against the use of “Here’s Johnny” to describe a line of portable toilets.\textsuperscript{276} The denial of the use of Carson’s signature slogan did not stifle competition. Many competitive options were open to the defendant that would not impinge on any celebrity’s right of publicity.

\textsuperscript{274} See, e.g., Midler, 849 F.2d at 463.

\textsuperscript{275} The competition policy approach does not resolve the difficult question of how broadly to interpret celebrity identity. See White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (holding that a robot performing a celebrity’s role on a game show may exploit the celebrity’s identity). But that issue is largely a question of fact. Does the advertisement in fact invoke some aspect of the celebrity’s identity that is recognizable and entitled to protection?

\textsuperscript{276} Carson, 698 F.2d at 836-37 (divided panel).
Unlike the advertising cases, however, a blanket rule would not be appropriate in the context of corporate names. Celebrity identity could be so central to meaningful competition in a particular field that a right-of-publicity claim should be excluded. For example, if a celebrity could use publicity rights to block the performances of an impersonator, the celebrity could significantly restrain competition from sound-alike and look-alike performers. The impersonator cases that uphold the right of publicity would thus come out differently under the competition policy approach.\textsuperscript{277} Other examples of markets in which celebrity identity in a business name may be important to competition include clubs, websites, and magazines dedicated to providing 1) information about a celebrity, 2) paraphernalia relating to the celebrity, and 3) forums for fans to air their views. If right of publicity claims could be waged against businesses providing these services, the celebrity could restrict competition in information and goods relating to that celebrity in ways that would negatively impact consumers.

\textbf{b. Newsgathering & Biography}

The courts have appropriately denied right-of-publicity claims in cases involving the reporting of news, and commentary, about celebrities\textsuperscript{278} and biographical books and movies.\textsuperscript{279} Competition in the provision of news about, or more complete biographical histories of, celebrities could not meaningfully exist if news organizations, authors, and film makers had to obtain a license before reporting about a celebrity.

One might argue that even if one celebrity exercised the right of publicity to bar reporting, news about other celebrities would still provide enough fodder for competition to go

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\item \textsuperscript{277} \textit{See, e.g.,} Presley’s Estate v. Russen, 513 F. Supp. 1339, 1360-61 (D.N.J. 1981).
\item \textsuperscript{278} \textit{Hoffman}, 255 F.3d at 1185-86 (denying right of publicity claim where a picture of Dustin Hoffman in his Tootsie costume was used in an artistically creative commentary on classic films and actors).
\item \textsuperscript{279} Spahn v. Julian Messner, Inc., 23 A.D.2d 216, 219, 260 N.Y.S.2d 451, 453 (1st Dep't 1965) (explaining that “certain privileged uses or exemptions” prevent a celebrity from enforcing a right of publicity claim, including “matters of news, history, biography, and other factual subjects of public interest despite the necessary references to the names, portraits, identities, or histories of living persons.”).
\end{itemize}
\end{footnotesize}
on. But the mere process of determining what can be reported and what cannot would seriously impact competition. Justice Holmes famously wrote that “government could hardly go on” if it had to pay for every change in value to property resulting from regulatory activity.\textsuperscript{280} The same is true of the celebrity news reporting industry. Even if most celebrities were willing to grant licenses, the transaction costs of obtaining them would be prohibitive.

With respect to biography, a licensing scheme would be more feasible, but no less stifling of competition. The potential buyers of a biography about a particular celebrity may not form a relevant market in an antitrust sense. From a broader competition policy perspective, however, permitting a publicity right to block the publication of biographies would significantly impact the ability of authors competing to publish the best account of a particular celebrity’s life. The celebrity could selectively license publicity rights to maximize return and control the content of biographies, both of which run counter to competitive principles. If marketplace forces are to govern celebrity-related news reporting and biography, publicity rights cannot exist in robust form. Again, current law – essentially a blanket rule refusing to recognize a right of publicity in news reporting and biography cases – is appropriate.\textsuperscript{281}

c. The Merchandising of Celebrity Identity

Merchandising cases have been among the most controversial right-of-publicity decisions. The following sub-sections review some of the key cases in light of the competition policy approach to limiting the right of publicity.

\textsuperscript{280} Pennsylvania Coal. Co. v. Mahon, 260 U.S. 393, 413 (1922).

\textsuperscript{281} One exception may be where a media outlet reproduces so much of a celebrity’s act that it impacts the ability of the celebrity to profitably compete. Although such situations are rare, the U.S. Supreme Court held that the right of publicity could support a damages action against a television station that broadcast a performer’s entire human cannonball act. \textit{Zacchini}, 433 U.S. at 574-75 (“Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner. Copyrights Act, 17 U.S.C.App. s 101 et seq. (1976 ed.)”).
i. Fantasy Sports Leagues

The recent fantasy baseball case is instructive. Major league baseball players asserted that their collective rights of publicity prevented companies from operating fantasy baseball leagues without a license. Operating a league requires systems to track players’ records; calculate statistics; and allocate the appropriate points to the participants. Because these tasks are labor intensive, many game players choose to purchase these services from a company that organizes leagues.

Historically, the MLB Players’ Association controlled whatever property rights the players had in their names and records for use in fantasy baseball games, licensing those rights to any company seeking to operate a fantasy league. In 2005, however, the Players’ Association licensed its rights exclusively to Advanced Media, an arm of MLB. This agreement purported to grant Advanced Media alone the right to operate a fantasy league. Advanced Media then refused to sub-license many companies that had previously operated fantasy baseball businesses.

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282 Fantasy baseball is a game in which fans select various players and earn points based on the performance of those players in actual games. CBC, 443 F. Supp.2d at 1080. The Eighth Circuit described the game as follows:

Before the commencement of the [MLB] season each spring, participants form their fantasy baseball teams by “drafting” players from various [MLB] teams. Participants compete against other fantasy baseball “owners” who have also drafted their own teams. A participant’s success and his or her team’s success, depends on the actual performance of the fantasy team’s players on their respective actual teams during the course of the [MLB] season.

CBC, 505 F.3d at 820-21.

283 Fees may be charged for the basic task of maintaining the point totals of the fantasy league participants as well as for other services such as trading players. CBC, 443 F. Supp.2d at 1080.

284 Id. The Players’ Association claimed a property interest in “the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player.” Id. at 1080-81.

285 CBC, 505 F.3d at 821 (recognizing that the agreement included some exclusions not relevant here); CBC, 443 F. Supp.2d at 1080-81.

One company that was denied a license, CDM Sports, sued seeking a declaratory judgment that MLB players had no enforceable property right entitling them to block CDM’s use of the players’ names and records in the course of providing fantasy baseball games. To many, the notion that the players have any property right in their statistics appears outlandish. But under Missouri law, which the Eighth Circuit was required to apply, the players did possess a right of publicity that on its face empowered them to prohibit the unlicensed operation of a fantasy baseball league. The court was able to hold otherwise only by claiming that the company organizing a fantasy league had a first amendment right to publish player statistics because they were “in the public domain.” The court’s analysis was illuminating in its emptiness: “it would be strange law that a person would not have a first amendment right to use information that is available to everyone.”

The Eight Circuit’s opaque decision raises more questions than it answers. If the factual material at issue was in the public domain, how could baseball players simultaneously have a property right in that material, and, assuming they had such a right vis-à-vis for-profit fantasy league providers, as the court held that they did under Missouri law, why should it matter from the perspective of free speech whether material is in the public domain? At a minimum, the decision has failed to convince some commentators.

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287 CBC, 505 F.3d at 821; CBC, 443 F. Supp.2d at 1081-82. Advanced Media and the MLB Players’ Association admitted that the players had no property rights in their records and argued that their case rested exclusively on the use of the players names in conjunction with the operation of a fantasy baseball game. Id. at 1082. The license, however, purported to include “playing records, and/or biographical data of each player,” id. at 1080-81, and of course, mere records – numbers – untethered to player names, would be of little use in running a fantasy league.

288 Id. at 823.

289 Id.

290 Id.

Applying competition policy analysis, by contrast, confirms that the Eighth Circuit reached the correct result. Recognizing a right of publicity would have created substantial market power in the players, enabling them to stifle competition in the market to provide fantasy baseball. Potential competitors literally could not operate a league without access to player names in conjunction with their statistics. The players’ property right under state law should not trump this competitive interest, because competition policy plays a role in determining the scope of property rights. Denying the applicability of the right in this context was essential to ensure that marketplace forces, rather than the monopolistic dictates of the players, continued to govern the provision of fantasy baseball leagues.

ii. Painting of a Famous Golfer

Like the Eighth Circuit in the fantasy baseball case, the Sixth Circuit followed a circuitous path in denying Tiger Woods’s assertion that his publicity rights empowered him to block the sale of a painting celebrating his win at the Masters Golf Tournament. After first holding that the right of publicity applied, the Sixth Circuit refused to enforce it because of the transformative nature of the painting and the artist’s speech interests.

Rather than enter the realm of art critics, a court applying competition policy analysis would limit itself to determining whether artists could meaningfully compete to sell sports paintings if athletes were free to assert right-of-publicity claims. If golf art buyers would substitute paintings of anyone golfing for the Woods painting, then recognizing a famous golfer’s publicity rights would not stifle competition. A painter could compete by painting fictional golfers. If instead a substantial number of consumers would only be interested in

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292 ETW Corp., 332 F.3d at 915 (divided panel)
293 Id. at 938 (“we find that Rush's work . . . does not capitalize solely on a literal depiction of Woods . . . [but rather] consists of a collage of images in addition to Woods's image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event”).
paintings featuring Tiger Woods, then Woods could distort competition by exercising a right of publicity to block the sale of particular paintings.

In antitrust cases, a relevant product market is typically defined by asking whether most consumers would switch to another product in response to a small but significant and non-transitory price increase. Given Woods’s popularity at that time, most consumers of paintings featuring him would be unlikely to switch to paintings of other golfers in response to a modest price increase. A court following the competition-policy approach would thus have reached the same result as the Sixth Circuit.

iii. Inexpensive Celebrity Paraphernalia

Among the most controversial cases are those involving relatively inexpensive clothing and trinkets. Courts upheld right-of-publicity claims in cases involving a charcoal drawing of the Three Stooges on a t-shirt and a bust of Martin Luther King on the ground that these inexpensive items did not constitute sufficiently transformative works of art to trigger first amendment protection. Under the competition policy analysis, a court would instead look to whether dealers in these types of goods could meaningfully compete if their subjects could assert publicity rights.

In the circumstances of these two cases, the outcome would likely have been different under a competition policy analysis. The Stooges are an iconic comedy team with many devoted fans, and King is a beloved historical figure. In both cases, there are likely to be many

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295 See Dogan & Lemley, supra note 3, at 1175-76 (describing merchandising cases under the right of publicity as “particularly troubling”).
298 Both of these cases also involved the controversial question whether publicity rights should be descendible. That issue is beyond the scope of this article. For an insightful treatment see generally Deven Desai, Property, Persona, and Preservation, 81 Temple L. Rev. 61 (2008).
consumers who would not accept as ready substitutes alternative paraphernalia that did not evoke the identity of the particular celebrity in question. Items involving lesser celebrities, by contrast, might have reasonable substitutes. Although competition analysis may be challenging for courts in some merchandising cases, determining whether reasonable substitutes exist for particular products in the eyes of devoted fans is much closer to the core judicial function than attempting to assess the transformative value of works of art.299

Conclusion

The broad-based challenge to the right of publicity has made little headway since Michael Madow so forcefully presented it fifteen years ago. The critique’s failure is attributable in large part to its inability to distinguish publicity from other forms of property. One cannot demonstrate that the right of publicity is an invalid property right by accusing it of the same mischief that all forms of property make.

The free speech approach to narrowing the right of publicity, although more successful in the courts, provides an inadequate basis on which to restrict publicity rights. True property rights empower their owners to prohibit speech that uses the owner’s property. Free speech analysis thus begs the ultimate question as to whether the right of publicity is a valid property right. If not, speech interests trump the celebrity’s interests. But if publicity is property, then the speech interests of exploiters of celebrity identity are irrelevant.

Competition policy, by contrast, can sensibly regulate the scope of the right of publicity. Competition to a large extent dictates property’s end. All forms of property are thus limited where they stifle marketplace forces and replace them with entrenched monopolistic ordering.

299 Cf. Douglas Lichtman, Property Rights in Emerging Platform Technologies, 29 J. LEGAL STUD. 615, 641 (2000) (“The prominence of the rule of reason . . . reflects a gradual consensus within the judiciary and also the academy that, when it comes to analyzing market structure, courts can be trusted with at least some degree of discretion.”).
And in some cases, publicity rights may be particularly likely to restrain competition. Assuming that the right of publicity is a valid property right, it should be subject to the same form of regulation as other property rights.

Although ultimately unsatisfying to those who would like to turn back the clock and eliminate the right of publicity entirely, the pragmatic approach advanced here may be the best means to convince courts and legislatures to restrict the scope of publicity rights. At least, that is, until legal theorists engage the challenging task of fully exploring more deeply the essence of the concept of property in American law and society.