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Sheldon Halpern and the Right of Publicity

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Sheldon Halpern and the Right of Publicity

MARSHALL LEAFFER*

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I. INTRODUCTION

I met Sheldon Halpern several decades ago when he decided to leave corporate practice and become a full-time teacher. I was immediately impressed by the warmth of his personality and his intense interest in intellectual property law. From that time on, we never lost contact. Halpern was one of those people who “knew no strangers” and was blessed with so many friendships both in the United States and abroad. I immediately knew he would be a credit to our teaching profession, and my guess was right on. Halpern had a distinguished career as a teacher and a scholar. He organized several outstanding conferences, which he orchestrated with panache—Halpern at his generous, outgoing best.

Although we never served on the same faculty, we kept in touch regularly and we always picked up where we left off. He was family. I used to kid him by saying that he reminded me of my Uncle Manny from the Bronx. We always had things to talk about, whether we were discussing law or life or anything else. We sometimes disagreed on some legal issues, but it was always fun to see Halpern trying to set you straight. One issue of continuous debate was about the right of publicity, a subject on which Halpern was a recognized expert. So, in this remembrance of my dear friend, I would like to single out one of Halpern’s contributions to the literature, his justification of the right of publicity, which he called the “associative value of personality.”¹

Halpern’s espousal of the right of publicity differed from his colleagues in the field who have largely disdained this newest right in the domain of

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¹ See generally Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986) [hereinafter Halpern, *Publicity*]; Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853 (1995) [hereinafter Halpern, *Associative Value*].

intellectual property.² For the most part, IP scholars in the academy overwhelmingly take the position that we have improperly extended intellectual property rights to the detriment of the public domain and, as such, have almost uniformly expressed a disdain for the right of publicity. Professor Halpern was not of this opinion, however, finding a solid basis for this relatively new right. I found it refreshing that Halpern took a position contrary to so many of his colleagues in presenting a cogent argument in favor of the right of publicity. I have chosen this topic as a basis for my remembrance because it illustrates the way in which Halpern approached his chosen subject matter.

Before discussing Halpern's justification of publicity rights, I would like to present a brief overview of the right.

II. RIGHT OF PUBLICITY REVISITED

The "right of publicity" appeared for the first time in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*³ Judge Frank explained its basis as an economic rather than personal right:

We think that, in addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph . . . [and] to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross"

This right might be called a "right of publicity."⁴

The right of publicity quickly became a "formalized property right," distinct from the right of privacy, that enjoys "all the attributes of property," which includes transferability of the right.⁵ In the years after *Haelan*, the right of publicity has "taken hold" in a spectacular manner and is now established by statute or common law in most states.⁶ In its various state-law iterations, the right of publicity has taken shape into an almost boundless, descendible, and assignable property right.⁷ The problem is that the subject matter of the right and its transferability differs appreciably between states.⁸ Periodically,

²For a comprehensive polemic criticizing the right of publicity, see generally Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125 (1993).

³*Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (concerning the use of baseball player images on cards).

⁴*Id.*

⁵Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1360 (2007).

⁶*Id.*

⁷*Id.*

⁸*Id.*

the notion of a harmonized federal law of the right has been debated, but so far, no unifying federal statute has emerged.⁹

Since its advent in U.S. law in 1953, the contours of the right of publicity have grown to embrace not only name and likeness, but also anything roughly relating to identity.¹⁰

These new identifiers comprise of objects associated with the celebrity's fame such as a racecar driver's car,¹¹ a football player's nickname (Crazylegs),¹² a catch phrase identified with a talk show host (Here's Johnny),¹³ a distinctive voice (Bette Midler),¹⁴ the likeness of a television personality (Vanna White),¹⁵ and a pitcher's stance (Don Newcombe)¹⁶ to list a few examples.¹⁷

But why extend the right of publicity to encompass such tenuous attributes of identity such as nicknames, objects, and catchphrases? The search for a rationale for a right to publicity runs the gamut from natural law to various instrumentalist, incentive-based justifications.¹⁸ In my view, these attempts to validate the right of publicity are largely unpersuasive, whether based on Lockean labor theory and various concepts of human dignity or more instrumentalist justifications, like those supporting copyright or patent law to encourage the investment in the development of persona or to properly allocate scarce resources.¹⁹

III. SHELDON HALPERN AND ASSOCIATIVE VALUE OF PERSONALITY

Unlike some of his colleagues in academia, Halpern never took a reflex reaction against a robust regime of intellectual property rights. As for the right of publicity, a body of law disdained by his contemporaries, he took a characteristically pragmatic justification for this right, which he termed the "associative value of personality."²⁰ His concept of associative value, which he argues is the essential basis for the right of publicity, relates to the realities of the marketplace and the role that celebrities play in selling goods or

⁹ *Id.* at 1360–61.

¹⁰ *Id.* at 1362.

¹¹ *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974).

¹² *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 130–31 (Wis. 1979) (referencing "Crazylegs" Elroy Hirsch, a football star).

¹³ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983) (referencing "Here's Johnny" Johnny Carson, a television host).

¹⁴ *Midler v. Ford Motor Co.*, 849 F.2d 460, 461, 463–64 (9th Cir. 1988).

¹⁵ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993).

¹⁶ *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692–93 (9th Cir. 1998).

¹⁷ Leaffer, *supra* note 5, at 1362.

¹⁸ *See, e.g.*, Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 35–40 (1997) (discussing a few of the different rationales for the right to privacy).

¹⁹ *See generally* Leaffer, *supra* note 5.

²⁰ *See generally* Halpern, *Publicity*, *supra* note 1; Halpern, *Associative Value*, *supra* note 1.

services.²¹ When a company desires to promote a product, it will often turn to the use of celebrities, paying substantially for the privilege. Thus, the sale of an individual's persona to promote commercial products has developed into "big business."²² The right of publicity gives legal recognition to the value that celebrities provide to the promotion of goods and services. As Halpern put it:

The phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value—an economic impact—upon the marketability of a product. As the Third Circuit . . . observed, "[a] famous individual's name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation." Whatever the social merit of commercialization of personality or the morality of commercializing one's identity, the economic reality persists.²³

Halpern discounted the critics of the right who questioned its moral or economic soundness, and whether the right encourages individual creativity. To him, all this was beside the point:

At bottom lies unhappiness with the reality of celebrity value, the "commodification" of personality. For many, a certain moral repugnance attaches to the commercialization of fame. As a purely personal matter, I suppose I would be happier intellectually in a society that did not endow fame with an economic value apart from the activity that creates the notoriety. But my personal aversion to market reality does not change that reality nor should it serve as a basis for devaluing a legal construct that recognizes that reality.²⁴

In effect, whatever its conceptual underpinnings, the reality of associative value is an unavoidable and omnipresent fact of our commercial lives.

Thus, when the courts deal with the right of publicity, they do not *create* the value; rather, as a matter of policy, the courts determine the extent to which one must compensate the person who has generated the economic value for use of the persona and the limits of the celebrity's control over the exploitation of his or her personality.²⁵

Halpern also took a realistic position concerning the extension of the right of publicity beyond mere name or likeness. In his view, it should not be important how a defendant appropriates the plaintiff's identity, but whether the defendant actually did so.²⁶ He would point to *Motschenbacher*, *Carson*, and

²¹ See Halpern, *Associative Value*, *supra* note 1, at 856–69.

²² *Id.* at 856.

²³ *Id.* at 857 (second alteration in original) (footnotes omitted) (quoting *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994)).

²⁴ *Id.* at 870–71 (footnote omitted).

²⁵ *Id.* at 858.

²⁶ *Id.* at 860–63.

Midler, cases that demonstrate the impracticality of extending the right of publicity to a bright-line list enumerating the specific means of appropriating identity.²⁷ After all, for some people, other indicia of persona may encompass traits, characteristics, mannerisms, or even paraphernalia unique to that person.²⁸ Thus, a rule that would limit the right of publicity to specific methods of appropriation, such as name or likeness, would undermine, even eviscerate, the associative value of personality. Of course, Halpern was not arguing that all identifiers used by third parties should constitute actionable appropriation. Those identifiers that merit protection must unambiguously identify the person so that their use would enable “the defendant to appropriate the commercial value of the person’s identity.”²⁹

Halpern made the point that the associative value basis for the right of publicity applies only to cases of commercial exploitation. Thus, the right of publicity does not ordinarily encompass “the use of a person’s identity in news reporting, commentary, entertainment, or in [sic] works of fiction or nonfiction or in advertising that is incidental to such uses.”³⁰ The “newsworthy, entertainment, critical, satirical, or parodic uses” are privileged because they go past the unadorned act of appropriation.³¹

IV. CONCLUSION

In revisiting Halpern’s 1995 article, I am particularly impressed by his common sense, pragmatic approach to the right of publicity. This was his attitude about the many other legal issues in our chosen field. Sometimes I disagreed with Halpern on certain issues, and he was persistent in trying to convince me that I was wrong. I will miss those exchanges. In my discussions with Halpern through the years, I have taken a less than enthusiastic view concerning the right of publicity. In my view, the right of publicity was born out of expediency, and has evolved in an explosive if not haphazard manner, leaving it to the courts and commentators to provide a sound justification for the right. The literature is voluminous, and I have yet to encounter totally persuasive justification for this all-inclusive right for the misappropriation of persona. On review of the literature, I am more convinced than ever that whatever interests the publicity right serves, trademark law, unfair competition law, and the growing law of false endorsement under section 43(a) of the Lanham Act can satisfy those interests.³² Despite my somewhat jaundiced

²⁷ See cases cited *supra* notes 11, 13–14.

²⁸ Halpern, *Associate Value*, *supra* note 1, at 860.

²⁹ *Id.* at 863 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (AM. LAW INST. 1995)).

³⁰ *Id.* at 868 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47).

³¹ *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 638 (9th Cir. 1982); see also *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989); Halpern, *Associative Value*, *supra* note 1, at 868.

³² See generally Leaffer, *supra* note 5.

view about the right of publicity, I believe that Halpern's rationale for this controversial right is based on a sound ethical principal. Simply put, one who has created celebrity value should be the one to benefit from it, rather than a free rider who uses it and dissipates its value to obtain a commercial advantage.