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

Cambridge, Massachusetts: Harvard University Press, 2018
ISBN: 9780674980983
Price: $39.95
Page Length: 185 Pages (226 Pages with Endnotes)

Keywords: Right of Publicity, Right of Privacy, and Intellectual Property Law

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Journal of High Technology Law
Suffolk University Law School

Putting a Price Tag on Personality: Why the Right of Publicity Shifted from Tort Law to Property Law

"The right of publicity got off track when it transformed from a personal right, rooted in the individual person (the 'identity-holder'), into a powerful intellectual property right, external to the person, that can be sold to or taken by a non-identity-holding 'publicity-holder.'"[1]

Jennifer Rothman's *The Right of Publicity: Privacy Reimagined for a Public World* examines the development of the right of publicity and criticizes its shift from a privacy right to a property right. Rothman traces the right of publicity back to its roots in tort law to analyze how courts have continuously justified recognizing this right, and then juxtaposes these shifting justifications with the right of publicity's evolution from tort law to intellectual property law. In arguing that today's conception of the right of publicity as a property right is inconsistent with the principles that led to its recognition as a legally protected right, Rothman asserts that "[t]he only way forward for the right of publicity is by reclaiming its past."[2] Ultimately, Rothman proposes for the right of publicity to shift away from its recent home in intellectual property law and back to its roots in privacy law. This review hesitates to accept Rothman's proposal and will

[1] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 7 (2018).
[2] *See* ROTHMAN, *supra* note 1, at 181.

expand on the noted flaws in recognizing the right of publicity as a privacy-based tort action that necessitated its relocation to property law.

Jennifer Rothman is a Professor of Law and the Joseph Scott Fellow at Loyola Law School.[3] She teaches a range of courses on tort law and intellectual property.[4] Rothman received her J.D. from the University of California, Los Angeles, where she graduated first in her class.[5] Her other degrees include an A.B. from Princeton University and M.F.A. from the University of Southern California's School of Cinematic Arts.[6] In addition to teaching at Loyola, Rothman is a member of the American Law Institute and has previously worked as an Associate Professor of Law at Washington University, an entertainment and intellectual property litigator, and a law clerk to the Honorable Marsha S. Berzon of the U.S. Court of Appeals for the Ninth Circuit.[7]

Rothman is considered an expert on the right of publicity and has gained national recognition for her publications on intellectual property.[8] She is often invited to speak before some of the top law schools and has made appearances at institutions such as Columbia, Stanford, and Yale.[9] In addition to this book, Rothman has written various articles and essays on different areas of intellectual property.[10] Her work is regularly published by law reviews and journals, including *Cornell Law Review*, *Georgetown Law Journal*, *Virginia Law Review*,

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[3] *See About Me*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Dec. 2, 2018), *archived at* https://perma.cc/PNZ8-QSMT; *Faculty List*, LOYOLA LAW SCHOOL (Dec. 2, 2018), *archived at* https://perma.cc/P7YW-N7SN.
[4] *See Faculty List*, *supra* note 3. As of 2018, Rothman's offered courses include Trademarks and Unfair Competition, Torts, Intellectual Property Theory, and the Right of Publicity. *See id.*
[5] *See About Me*, *supra* note 3; *Faculty List*, *supra* note 3.
[6] *See Id.*
[7] *See Id.*
[8] *See Id*.
[9] *See Id*
[10] *See Faculty List*, *supra* note 3. Loyola's website lists over a dozen of Rothman's noted publications, with several that pertain specifically to the right of publicity dating back to 2002.

Harvard Journal of Law & Public Policy, and *Stanford Law & Policy Review*.[11] Additionally, Rothman has created a website (rightofpublicityroadmap.com) that hosts extensive information on the right of publicity laws among the states.[12] The website also provides direct access to news, commentary, and other resources pertaining to the right of publicity.[13] Rothman's website is regarded as the "go-to-website" for information on the right of publicity.[14]

Rothman's *The Right of Publicity: Privacy Reimagined for a Public World* is broken down into three parts that are encompassed in between an introduction chapter and an epilogue. The introduction gives a brief overview of the right's existence in state law. This chapter discusses the lack of uniformity among states' right of publicity statutes and lists several negative consequences of some of these statutes, such as suppression of free speech, forced commercialization of deceased individuals, and the potential to strip people of their identities.

The introduction is followed by Part I, titled *The Big Bang*, which offers a timeline of the development of the right of publicity and traces it back to the late 1800s in privacy-based tort law. Notably, Part I claims that the right of privacy actually emerged from cases with fact patterns that now would fall under a right of publicity action, implying that the right of publicity was recognized *before* the right of privacy. Rothman also points out how advancements in technology (mainly photography) led to more occurrences of identity misappropriation and that the emergence of mass media facilitated the creation of more valuable public personalities susceptible to such misappropriation. Part I also discusses a stretch of history when courts were hesitant to enforce a celebrity's right of publicity because of the belief that if a person intended

[11] *See About Me*, *supra* note 3; *Faculty List*, *supra* note 3.
[12] *See* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Dec. 2, 2018), *archived at* https://perma.cc/4BV5-ENW8.
[13] *See* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, *supra* note 12.
[14] *See About Me*, *supra* note 3; *Faculty List*, *supra* note 3.

to achieve celebrity status, then they essentially had waived the right to protect their name and likeness from being publicized. Rothman recognizes this as the beginning of the right of publicity's divergence from the right of privacy, as it began the argument that the right of publicity protected the economic value in a person's name rather than their wish to be kept out of the public eye. Part I then goes on to discuss how this view that the right of publicity only applied to private individuals was later abandoned, noting that today it is almost all disputes over the right of publicity involve a celebrity. After discussing the initial cases that considered whether the right of publicity was a transferable right, Part I concludes with the right of publicity being accepted in the U.S. as a transferable property-like right distinct from the right of privacy by the mid 1900s.

Part II, *The Inflationary Era*, traces how courts dealt with the right of publicity after it had already been well-established at common law and by many state statutes. In the beginning, Rothman emphasizes that the right of publicity did not truly "launch" until after it had already been formally recognized by the Supreme Court as a right held by both private individuals and public figures. Part II connects the expansion of the right of publicity with the expansion of Hollywood and Broadway, alleging that the 1950s were a time of significant change and growth in the entertainment industry which led to increasingly significant monetary value in celebrities' identities. Though implied in Part I, Part II clearly articulates the distinction between the right of publicity and the right of privacy: the former addresses economic injuries while the latter addresses dignitary and emotional injuries. Rothman actually criticizes this distinction, alleging that the right of publicity's deviation from its privacy-based foundation has made it weaker rather action than it was before. In claiming that the most compelling justifications for a right of publicity are the promotion and protection of individual dignity, personhood, and liberty (which

are all embedded in privacy law), Rothman argues that the right of publicity's transformation into a transferable property right is inconsistent with the interests that justified creating this right in the first place.

After setting up her argument in Part II that the right of publicity should be rerouted back to privacy law, Rothman moves to Part III further criticize the property-based concepts that seeped into the right of publicity. Titled *Dark Matter*, Part III focuses on Rothman's issue with the right of publicity becoming a transferable right. Rothman argues that the inseparability of a person and their identity poses an issue with allowing the right of publicity to be transferable; because the right of publicity provides control over the use of a person's identity, it consequently provides control over the person themselves. Thus, Rothman warns that allowing the transfer of a person's name and likeness significantly impairs their rights to liberty, freedom of speech, and freedom of association, which are all constitutionally protected inalienable rights. Rothman admits that transferability is a keystone regarding property rights, but raises the interesting argument that some property rights have nonetheless been made inalienable for public policy reasons. In exemplifying, Rothman points to the law's restrictions on the transferability of things such as historic buildings, human organs, voting rights, and alcohol. Her argument is that if the right of publicity is going to continue as a property right, then it at least should be subject to restrictions in order to maintain consistency with the main justifications for recognizing a right of publicity and protect the individual rather than the wealth associated with the individual.

Rothman concludes with an epilogue in which she suggests that it may be time for the enactment of a federal right of publicity in order to create uniformity among the states. She reiterates her argument that the right of publicity should not be transferable and emphasizes the need for the right of publicity to return to its roots in privacy law.

Rothman uses *The Right of Publicity: Privacy Reimagined for a Public World* to ultimately propose a merger of the right of publicity and the right of privacy, alleging that certain rights granted by property law are inappropriate when attached to a person's identity. Rothman's approach to the right of publicity is fact-based and informative in the introduction and Part I, but it shifts to persuasive once she gets deep into Part II with her argument that the right of publicity should be reformed to better reflect its privacy-based justifications. This book offers a very simplistic breakdown of the right of publicity as well as a full timeline of its development and seems to assume that the reader lacks prior knowledge of the right of publicity, thus this is a suitable read for an untargeted audience. Rothman uses cases and law review articles as the dominant sources for the history of right of publicity law, and her discussion of student-written pieces shows that she approaches these works with skepticism; she uses several to illustrate certain stances on the right of publicity that she disagrees with, noting that these views were perhaps misinformed or even flat out wrong. Overall, the structure of the book is very clear and logically organized, beginning with the background of the right of publicity and moving onto its current enforcement before concluding with her proposal for future reform.

The fact-based chapters of this book are an extremely valuable resource for the understanding of how and why the right of publicity developed. However, I disagree with Rothman's proposal for shifting the right of publicity back to privacy law. Rothman seems to focus on the initial forces that led to the emergence of a right of publicity and its intertwinement with the right of privacy, but doesn't give much credit to the forces that drove the separation between the two. Although Rothman discusses how and when the right of publicity diverged from the right of privacy, she does not necessarily emphasize *why* these changes occurred and whether or not the reasons for these changes continue to exist. The transition of the right of

publicity into a property-based right is logical and almost inevitable given the immense economic value that can be attached to a person's name or likeness. Considering how much money celebrities can make through public appearances, endorsement deals, etc., it naturally follows for laws to govern the unauthorized use of their identities. Rerouting the right of publicity back to privacy law would loosen such protection for the inherent monetary worth that is at risk of being misappropriated. The dignitary protection that Rothman credits as the underlying principle for privacy law and thus the right of publicity remain protected by tort law regardless of whether the right of publicity is regarded as a privacy right or a property right. I disagree that the principles attributable to the right of publicity's inception are contravened by the shift toward intellectual property law. When the right of publicity diverged from tort law, it did not take this dignitary protection with it. The right for a person to be "left alone" still exists in privacy law, thus, there seems to be no compelling need to reattach the right of privacy and the right of publicity. Societal developments necessitated a unique right to the economic value in a person's name or likeness, and they continue to do so. The right of publicity protects the individual's right to the monetary amount generated by use of their identity, and it has found its appropriate home in intellectual property law among the other methods of exclusive protection for intangible property.