In looking at the foundational basis for the legal and commercial right of publicity, one has to look at its genesis and growth based on a three-part foundation: (1) the legal right of publicity; (2) the historical overview of celebrity status, celebrity culture, and the history of celebrities, not only in our society but earlier societies; (3) the origin and concept of rights of privacy. These three things, then taken together, will lead us into our discussion of the right of publicity.

I. A Brief Legal History

A. Rights of Privacy

This section serves as the briefest possible overview of rights of privacy. It is provided simply to establish where the right of publicity has sprung from. The right of privacy can best be defined as the right of persons to be left to themselves and not to be bothered by others. In law, it is a relatively new concept, although the right of privacy was very well known and heatedly discussed on both sides of the Atlantic going back to the early days of the American frontier. No court in the United States or the United Kingdom had ever expressly passed a law that recognized the existence of the right of privacy, although there were decisions prior to 1890 that seemed to have dealt with aspects of privacy in many forms without specifically addressing the “right of privacy.” In 1890 Boston attorney Samuel Warren and future Supreme Court justice Louis Brandeis published a
Right of Publicity: Analysis, Valuation, and Current Legal Status

review of earlier privacy cases, concluding that they were really based upon a broader principle, which was due to be recognized at some point as the right of privacy.¹

While this conclusion was initially rejected in several states, it was finally accepted in the state of New York in 1903, where the New York Civil Right Law was passed. In _Pavesich v. New England Life Insurance Co._,² decided in Georgia in 1905, the right of privacy was also accepted. Following that decision, the existence of right to privacy became officially recognized in the United States and thereafter in the great majority of the American states and jurisdictions that have subsequently looked at the question of rights of privacy.

There are several definitions, and forms of violation, of the rights of privacy—sometimes called forms of invasion. These have been developed over time in the courts. These invasions of the rights of privacy have been boiled down to a set of four general but distinctly different areas:

1. An unreasonable and continuous intrusion upon the seclusion of another person
2. The misappropriation of another person’s name or likeness
3. Unreasonable and continuous publicity given to another person’s private life
4. Publicity that unreasonably places another person in a false light before fellow citizens and the public in general

These areas all involve some form of interference or violation of the interest of an individual person in leading a reasonably expected and expectable secluded and private life, a life free from the eyes, ears, and investigative publications of others.

However, this becomes somewhat disconnected in the case of violation of privacy when the appropriation of names or likenesses occurs under the right of privacy. This last form of violation of the rights of privacy confers what is effectively a property right upon the individual. As we see to this very day in print and electronic media, invasion of rights of privacy continues in new and ingenious forms—particularly invasion of rights of privacy through new media by individuals, and through electronic and other forms of eavesdropping by governmental bodies. There have been in the last decade some very broad trends to look at, such as as-yet undefined rights of privacy related to personal data dossiers held by governmental and quasi-governmental agencies or by very large corporations including communications and Internet companies. While this book is not meant to speculate, it’s clear that the rights of privacy will be expanding—certainly not contracting—as a result of events in the current milieu surrounding “eavesdropping,” as well as personal dossier maintenance by various governmental and quasi-governmental bodies.

As with rights of publicity, rights of privacy are a constantly expanding and evolving area of the law. And as with rights of publicity, its expansion and evolution are driven by celebrities to a great extent. However, individual private citizens have as much at stake in the battle over rights of privacy as anyone does—unlike with rights of publicity,

². 69 L.R.A. 101, 50 S.E. 68 (Ga. 1905).
where the battle lines are constantly drawn and redrawn, primarily along lines in the sand scratched by celebrities and their various stakeholders.

B. Origin of Rights of Publicity

Where did the right of publicity spring from? Directly from the second right of privacy: that which prevents the misappropriation of one's name, image, or likeness. The right of publicity was essentially an outgrowth of the right of privacy in the United States. In its briefest form, the right of publicity can be defined as the right to control the use of one's identity and image, and variations of that image in commercial usage. In fact, it is often referred to as a subset of privacy rights. In broadest terms, right of publicity is an individual right (and particularly for celebrities) to control how others use their name, their image, their voice, their likeness, and even personal characteristics of that image, in any public setting. While in some jurisdictions this right applies only to commercial advertising, in others it applies to much broader applications and in general to any commercial exploitation. Right of publicity is unique also in that it has little similarity or connection to most of the parts of the family of intellectual property with which it is typically grouped.

The right of publicity falls outside the parameters of the three main areas of intellectual property (IP)—copyrights, trademarks, and patents—where most IP attorneys typically spend their time. In fact, there is not even a federal law that protects the right of publicity. Instead, it is protected by various state statutes or by common law in other states. Even then, roughly 25 percent of the states in the United States have not gotten around to recognizing right of publicity.

However, the federal courts and the vast majority of state courts agree that right of publicity is an IP right and that it is an overlooked IP right in many cases. The typical right of publicity dispute involves a manufacturer, distributor, or retailer who uses a person's image, name, likeness, or other attribute for the purpose of selling goods or services. For example, Rosa Parks stopped the band OutKast from using her name as a title to a song having nothing to do with her authorship.

Other famous celebrities, including models, have prevailed against the unauthorized use of their photographs in merchandising and advertising. Because neither trademark nor copyright law offers remedies for these sorts of violations, states right of publicity law is important. If there is a creative work involved, such as a photograph, the copyright usually does not belong to the celebrity involved and thus they can't seek justice through copyright law. Indeed what really is at issue in any case is the essence of who is depicted and what part of their identity has been used, not the copyright on the photograph or the recording.

On the other hand, trademark law holds more parallels to right of publicity. With rights of publicity the concepts of unfair competition as well as misappropriation are very similar to those as used in trademark law, as they are reflected in the Lanham Act. Just like with a trademark, right of publicity imagery can function as an assurance of quality or source of origin to a consumer—especially if a celebrity or the estate of the celebrity is maintaining good quality standards and exercises substantial management of quality and controls, and discretion in licensing of the right of publicity. In that case,
Right of Publicity: Analysis, Valuation, and Current Legal Status

then parallels to trademark law can be substantial. Finally, users of both trademark and publicity rights seek to stop others from reaping the unjust benefits of using or misappropriating the mark and publicity rights of a celebrity’s fame.

So, concluding this very brief foundational overview of right of publicity, parallels between right of publicity and trademark law will occur. However, in general, right of publicity law does stand apart from both trademark and copyright law. It is a distinct area and body of law; and is governed almost exclusively by state laws. It does have its own history and syllabus of principles, cases, history, and precedent.

Right of publicity is referred to in different terms in different countries. For example, in the United Kingdom and other commonwealth countries, the phrase used is “personality rights,” while in multiple other countries the phrase used is “persona rights.” These differences are discussed in more detail in chapter 6, which discusses international protections.

C. History and Impact of Celebrity Culture

This section describes the growth of the cult of celebrity personality at all levels in our society, including childhood stars, reality TV, talk shows, sports events, sports heroes, and quadrennial sporting events like the Olympics and the World Cup.

As embedded as the cult of personality seems today, it’s been around far longer than we think. The cult of personality that sprung up around Nero, Cleopatra, and Mark Antony was well established and in place far before that, among most Egyptian rulers and their Greek counterparts.

The cult of personality satisfies a deep need on both sides of the equation. For the personalities themselves, of course, the narcissistic tendencies in all of us are satisfied by the audience that pays consistent attention to the personality. Whether that attention is positive or negative seems to make little or no difference in today’s society. On the other side of the coin, today’s audience seeks more and more to identify with personalities, and thus creates a self-fulfilling need for more and more personalities to enter this celebrity culture.

We see this celebrity culture extend even to our political and social leaders—Bill Clinton, Sarah Palin, Pope John Paul, Queen Elizabeth II, Princess Diana, President Barack Obama, or Julian Assange of WikiLeaks. For good or bad, for better or worse, this is a pantheon of celebrities in one way or another. The value of a good name has always been recognized by persons of celebrity. In fact, Iago in Shakespeare’s Othello described the importance of the right of publicity when he talks about the importance of his good name:

Who steals my purse steals trash; ’tis something, nothing;
’Twas mine, ’tis his, and has been slave to thousands;
But he that filches from me my good name
Rob me of that which not enriches him
And makes me poor indeed.3

Modern celebrity culture is different and changing, however. Almost any public medium is useful for creating celebrities and enhancing their standing in the celebrity

3. William Shakespeare, Othello act 3, sc. 3.
culture pantheon. Originally, famous books and religious tomes of the world’s faiths established that pantheon of gods and leaders well known down to this generation, from the pharaohs of ancient Egypt through the prophet Mohammed. While celebrity culture was once restricted to high-born and well-known figures from royalty, as well as biblical, mythical, and religious personalities, it has now pervaded virtually every sector of our society today. This includes, most importantly, entertainment and sports, but also business, art, publishing, and even scientific celebrities such as Stephen Hawking. Another important trend is the growth, if not explosion, in the types and number of media available to guide the exposure and power of a celebrity.

D. Celebrity Trends

A few other broad trends are worth noting in the changing celebrity culture. The first is that celebrity status carries with it increasingly more social standing and social capital than it did 15 or 20 years ago. Secondly, celebrity status used to be heavily national or cultural, with each country having its own system of celebrities, but this is rapidly becoming far less the case, due to globalization of traditional media and social media. Today’s A-list celebrities truly are global social icons.

An unwanted side effect of this globalization and growth in popularity (or at least awareness) of celebrities in all walks of life is that the public tends to accept all forms of celebrity, good and bad. Instead of seeking virtues or talents in their celebrities, the general population seems to seek those who are most willing to push the boundaries of acceptable behavior, and those who are most aggressive in self-promotion. In some ways, fame is replaced by infamy. Culture by lack of culture.

One explanation of this, of course, is the trend to promoting all types of goods and services in our economy—rather than celebrities lending themselves to a recording or participating in a biographical or cultural event, such as a music concert, sporting event, book publication, or movie release. As more and more new products and new services are developed, from data banking and insurance services to improved cosmetic products, they’re being launched by celebrities in the constantly expanding world market. And that world market and the developers of those products constantly need more new celebrities to promote those products. Thus, the growth of the celebrity culture is self-fueled by both our world economy and our society’s need for increasing contact with celebrities of all stripes.

Thus today, we have Snooki standing next to Oprah Winfrey in a pantheon of celebrities. Khloe Kardashian next to Nicole Kidman. Lindsey Lohan next to Madonna. Mike “The Situation” Sorrentino next to Tiger Woods. Some are true celebrities. Others are famous simply for being famous. Nonetheless they are part of the celebrity pantheon, and part of the culture of celebrities that drive right of publicity activities.

E. Right of Publicity Law and Deal Making in a Growth Market

The right of publicity law is curious. It is curious in its form of law. It’s also a curious form of commerce. And together it’s a curious form of symbiosis.
• Right of publicity deals → commercial activity
• Activity → disputes
• Disputes → litigation
• Litigation → court cases
• Court cases → precedent
• Precedents → right of publicity law

Symbiosis indeed!

This book is about right of publicity—and hence, about celebrity licensing, endorsement, and promotion. But what does this mean? How big is this business or industry? In what areas does it operate? In what context does it operate? Is it just celebrity licensing? Does it also include all promotions that involve celebrities? Does it include merchandising? What about endorsements? Is it short-term deals and long-term deals?

The answer is: all of the above. Right of publicity encompasses all commercial uses. And the corollary answer is that no one knows exactly how big this business is.

So let’s start with what we do know—the measured market of “celebrity licensing.” This measured market includes some, but not all, of the activities outside of licensing such as celebrity promotions. For example, celebrity licensing includes a one-day, one-week, or one-month promotion deal between Taco Bell and 50 Cent (as we describe in chapter 3). It includes a promotion that might last two, three, four, five, six, or even 12 months between a company such as GNC and a spokesperson that it employs.

In spite of these deals being part of celebrity licensing and promotion, the dollar amounts involved don’t get reported. However, we do know something about the basic economics of celebrity licensing. EPM Communications, the publishers of the Licensing Letter, do an annual survey of activity within trademark licensing of all varieties. They measure various types of licensing, including fashion licensing, brand licensing, juvenile licensing, and art licensing. One of the categories that they measure on a regular basis is celebrity licensing.

1. Celebrity Licensing

In the last year or two, celebrity licensing has accounted for roughly 5.75 percent of all licensing activity, as measured by the Licensing Letter. In terms of retail dollars, the Licensing Letter estimates the U.S. licensing industry as having approximately $125 billion in annual royalty revenues, with celebrity licensing accounting for approximately $7 billion annually in royalty revenues.4

The next question is, What kinds of celebrity licensing are there? The Wall Street Journal once described celebrity licensing as follows: “Today’s superstar celebrities have achieved what entertainers for much of the millennium could only dream about. Indeed, thanks to their ability to sell tickets and raise television ratings, top stars now command contracts and fees that would make them more wealthy than the royal patrons who supported the entertainers of yore.”5 While this may be true in some areas

---

of celebrity licensing, it’s certainly not true in many areas, as we shall see in the cases and chapters that follow.

For clarity’s sake, celebrity licensing can involve the right of publicity, trademark, and copyright elements, or any combination thereof. Thus it’s critical to understand the difference between copyright, trademark, and right of publicity laws. The origins of trademark, copyright, and right of publicity show there are vastly different underpinnings and legal rationales for each, but all are designed to protect the various aspects of their legal rights. The most important of these, of course, is that trademark and copyright law are not designed just to protect celebrity licensing, whereas the right of publicity is basically designed exclusively for individuals in their efforts to license and extend the use of their publicity rights.

2. Types of Celebrity Right of Publicity Usage

Because celebrities—and their estates, in the case of postmortem celebrity licensing—are increasingly savvy about their rights of publicity, the types and extensions of their rights of publicity into licensing in all forms has become more complex as well as more ingenious. Manufacturers and providers of all kinds of services continuously seek more, different, and better personalities to be associated with their products. Advertisers want the draw and magnetism of a celebrity image, and consumers want to be associated with those same images and imagery. This combination of elements explains why there are so many different types of celebrity licensing, endorsement, and merchandising deals today.

Below, we take a brief paragraph each to describe ten different types of celebrity licensing. This is not an exhaustive list. Nor are the descriptions of each type meant to define, without overlap, each category. This is simply a jumping-off point for the reader to understand that celebrity licensing, merchandising, promotions, and endorsements are broad based and broadly encompassing in their range of activities.

1. **Online licensing.** Simple to understand and increasingly popular, online licensing is that activity where celebrities offer their own goods and services through various online mechanisms. These can include their own website, as well as websites as diverse as a paid platform on Google or Yahoo!, or dedicated websites run by companies devoted to online licensing. Notable licensors in this category include individuals and companies as diverse as Martha Stewart and the Disney companies.

2. **TV licensing.** QVC and Home Shopping Network are at the forefront of this effort, although with the advent of Internet television, many new competitors have sprung up. Here we find a wide range of licensors offering their goods, from Kate Spade in fashion goods to Rachael Ray in cookware.

3. **Juvenile licensing.** This is a growing phenomenon. As the age of consumers with disposable income continues to drop, we find younger and younger consumers directing the consumable dollar for purchases of licensed goods from personalities such as Justin Bieber and Taylor Swift.

4. **Services licensing.** This is one of the more interesting and diverse areas of licensing with personalities such as KISS, the band, licensing their name for
Right of Publicity: Analysis, Valuation, and Current Legal Status

wedding chapels; the Beach Boys for restaurants; and Mr. Clean, the Procter & Gamble mascot, for car washes.

5. **Life experiences from deceased personalities.** A relatively new area and one that will continue to grow, we believe. The Michael Jackson estate has licensed his name for new Cirque du Soleil shows. Similarly, Jack Daniels, which has a license from the Frank Sinatra estate, opened the Sinatra Experience in Las Vegas.

6. **Long-term promotional licensing.** This widespread phenomenon takes the form of an advertiser wishing to be associated with a particular celebrity on a long-term basis, not with a direct license but rather with a promotional tie-in. The entire Kardashian clan engages in this activity.

7. **Advertising campaign licensing.** This early form of celebrity licensing has been around for many years. Long-running examples include Andie McDowell for L’Oreal and Catherine Zeta-Jones for T-Mobile.

8. **Benefit or profit-sharing licensing.** Recently, two well-known but very different personalities have entered this arena. Drew Barrymore has recently formed a joint venture where she’s both the licensor and part owner of a cosmetics venture with Maesa. Lady Gaga also leads this trend with her Haus of Gaga creative production team, where she personally handles design of fashion and hair styles.

9. **Long-term endorsement deals.** This form of deal is found most often in the sports arena where leading sports figures such as Tiger Woods, Kobe Bryant, and Derrick Rose will endorse a sports product, be it footwear, golf equipment, or apparel, and then team up with the licensee in a five- to 15-year arrangement.

10. **Retail exclusive licensing.** Martha Stewart is the queen of this genre as she designs and sells multiple home, hearth, and design products exclusively for one retailer—originally for Knart, now for Macy’s and J.C. Penney.

In the chapters and case studies that follow, we look at examples of many of these. However, it is a growth area and industry that is constantly changing and evolving, and by the time this book comes out someone will undoubtedly come up with a new approach in this “Celebrity Rights Game.”

II. Case Studies

Here we present two brief case studies that at first appear to be very different but upon a closer read have great similarities. They each deal with the relativity of value. This concept is important when dealing with intellectual property valuations of all types—particularly with celebrity values and right of publicity valuations. In the first case, we have Rosa Parks: a person of relatively small fame in a very large country, a person who is little known outside her home country, but also a figure of modern American history and a linchpin in the civil rights movement.

In the second case we have Ronaldo of Brazil: a man who is known throughout the global sports world, certainly throughout the international futbol (soccer) world, as a leading star and an all-time world-class figure. However, the young people I met in a
small sliver of his home country never heard of Ronaldo—they referred to a man they called “Lima.” In my interviews, Lima was the only world-class athlete that they knew of. He was the single star in their pantheon.

A. Case Study: Parks v. LaFace Records

On December 1, 1955, in Montgomery, Alabama, Rosa Parks refused to move to the back of a public bus when asked to do so by a white male passenger. By virtue of this act of quiet resistance and the ensuing 381-day boycott of the bus system in Montgomery, she became one of the key catalysts for the civil rights movement, leading to sit-ins, boycotts, and demonstrations throughout the South. Parks eventually became not just a symbol of the civil rights movement but “an international symbol of freedom, humanity, dignity and strength.” Over the years she had used her fame and notoriety to promote various civil and human rights causes.

In March 1999, Parks filed suit against the rap group OutKast, claiming the group had illegally used her name as a song title. “Rosa Parks,” the first single from the 1998 album *Aquemini*, also included the following chorus, repeated approximately a dozen times throughout the song:

```
Ah ha, hush that fuss
Everybody move to the back of the bus
```

Parks, her advisors, and her legal team felt those lyrics were disrespectful to Parks as defamatory.

Parks was never contacted prior to the release of the album and granted no permission for use of her name or any reference to it in the album. In the final event, the album sold over 2 million copies, and the “Rosa Parks” single was the most successful song on that particular album. There was extensive promotion of the album, song, and the music video of the song. Her name was prominently promoted not only in the advertising, but with various promotional stickers put on the albums and used at retail outlets.

The basis of Parks’ lawsuit, which was filed in Michigan, was alleged unauthorized use of her name, which violated her right of publicity. In addition, the song defamed her character and interfered with ongoing business relationships. After moving the case to federal court, Parks filed an amended complaint that included a false advertising claim under the Lanham Act. Parks said she was offended by the use of her name in association with a song that contains “profanity, racial slurs, and derogatory language directed at women.” Upon taking the case to federal court, Parks’ motion was denied in the district court. The court first addressed Parks’ common law right of publicity claim, noting that the right of publicity protects a celebrity’s commercial interest in her identity. The court emphasized that this right protects against the unauthorized commercial exploitation of that identity in the “promotion of products,” but that it “does not authorize a celebrity to prevent the use of her name in an expressive work protected

---

Right of Publicity: Analysis, Valuation, and Current Legal Status

by the First Amendment.”8 The court continued, “More so than posters, bubble gum
cards, or some other such ‘merchandise,’ books and movies are vehicles through which
ideas and opinions are disseminated and, as such, have enjoyed certain constitutional
protections, not generally accorded ‘merchandise.”9 “Since it too is a vehicle for the
expression of ideas, music, no less than books and movies, also is protected by the First
Amendment.”10 Thus the courts rejected Parks’ arguments.

The case then went on appeal to the Sixth Circuit, which unanimously reversed the
district court on the basis that Parks’ name was being unfairly misappropriated: “Parks
has a property right in her name akin to that of a trademark holder, thus giving her the
right to maintain a false endorsement action under section 43(a)” of the Lanham Act.11

Upon hearing that the Sixth Circuit had reversed the lower court and upheld their
case, the attorneys for Rosa Parks refiled their lawsuit in August 2004, asking for $5 mil-
lion in damages against BMG, Arista Records, and LaFace Records, as the defendants.
Shortly thereafter, the parties reached a settlement.

In this small case, with sweeping historical implications for the United States and
for civil rights movements around the world, we find that the value of Rosa Parks’ right
of publicity was measured in a modest amount of dollars. However, the value of Rosa
Parks’ name and image, which is indescribably important to many people, was upheld
intact—and that value can never be measured.

B. Case Study: Relative Value—Fame
in the Amazon Jungle

In small towns, 300 and 400 kilometers upriver from Manaus, Brazil, there is no televi-
sion, no radio, no power lines, and no newspapers, and school comes to town only two
weeks a month. It is isolated beyond belief. But there is futbol!

These towns are carved out of the jungle and the children and the families who live
in them are as cut off from civilization as can be imagined. It can be a two-, three-, or
even five-day paddle to the nearest city of any size, and the outside world encroaches
once a month or so when someone from another town brings a satellite TV to hook up
to the village generator. Then the town comes to life as everyone gathers around to
watch telenovelas—and, more importantly, tape after tape of soccer matches.

The children of these villages have virtually no contact with the outside world.
They have never heard of David Beckham. They may have some vague sense of what
the World Cup is—particularly since it came to Brazil in 2014—but it has no meaning
for them, being separated from Rio and Sao Paolo by thousands and thousands of kilo-
meters. However, there is one thing they do know—that the greatest soccer player in
the world is Lima. Who is this Lima? To most of us the name isn’t familiar. To them he

---

8. Id. at 779 (quoting Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir.
1983)).
10. Id. at 780 (citing Ward v. Rock against Racism, 491 U.S. 781, 790 (1989); Hurley v.
14(2) ENT., ARTS & SPORTS L.J. (Summer 2003).
is the greatest soccer player who ever lived, and to them his right of publicity and his image are more important and more valuable than anyone else in the world. This man Lima—full name Ronaldo Luís Nazário de Lima—is known to the rest of the world as Ronaldo. He has won virtually every honor there is to win in soccer. Two World Cups. The Champions League. The Spanish Super Cup. The Golden Ball as the outstanding player in the World Cup. The UEFA Cup Winner's Cup. He is the best of the best.

He signed a $4.8 million endorsement deal, among others, with mobile provider TIM. But for our purposes here, what is the value of his rights of publicity in the Amazon jungle? Those rights are in fact priceless. Why? For two reasons. First, because to the children in those tiny villages, tucked in those little cleared squares of jungle, dotted along the shores of the Río Negro and the Río de Amazones, Lima is a hero without compare. Give them anything with Lima’s name and likeness on it and they would buy it with all the money they possess—if they had any money, which they don’t. Secondly, if there were a market for consumer goods in these villages, beyond the basic cooking oil, flour, and beer, then Lima would be the candidate to endorse those products at virtually any amount that could be afforded by the purchasers—priceless.

During his lifetime as a sports figure, Ronaldo’s right of publicity has been among the most valuable in the world. It is estimated that he earned between $100 million and $150 million from various endorsements and uses of his rights of publicity. Everything from sports equipment, of course, to food products were part of his portfolio of endorsements, some of which continue today. Today, he heads one of the largest marketing, endorsement, and rights of publicity firms, in conjunction with the global ad agency, the WPP Group.

And so the juxtaposition: priceless rights of publicity in the Brazilian jungle but no money to pay for them. But the point of this short case study is clear: when it comes to right of publicity, all rights of publicity have relative value. And Lima, or Ronaldo as he is known in the rest of the world, illustrates that.

***

In chapters 2 and 3 we take a deeper look at the legal origins of the right of publicity and right of privacy laws, the definition of what these laws are, and some of the pioneering cases that formed the basis upon which today’s activity takes place. We also look at the counterarguments for right of publicity law. Some would say that right of publicity is nothing more than a form of trademark protection and that there really is no legal framework for right of publicity protection. We look at these arguments as well as various exemptions and defenses for right of publicity violations.