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Einstein's Hair

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BOOK NOTES

EINSTEIN'S HAIR

JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA: THE RIGHT OF PUBLICITY (UNITED STATES) AND PORTRAIT LAW (NETHERLANDS) BALANCED WITH FREEDOM OF SPEECH AND FREE TRADE PRINCIPLES. The Hague: Kluwer Law International, 1996. xliii + 490.

*Reviewed by Jonathan A. Franklin**

In an era of satellite television broadcasting and globally accessible web sites, with more and more images, names, and voices of celebrities and other individuals crossing borders and continents instantaneously, this volume could not have come at a better time. Written by a Dutch attorney, this book addresses the major issues in the areas of privacy,¹ publicity,² passing off,³ and portrait rights.⁴ After exploring the roots of rights of publicity and reviewing the current state of Dutch and U.S. law, Pinckaers crafts a proposal for an internationally adoptable intellectual property right in persona. This commercial edition of Pinckaers' doctoral thesis includes objective (Part I) and subjective (Part II) sections, followed by an extended discussion of how the proposed property right in persona could be integrated into disparate legal systems.

Pinckaers begins Part I by describing how nine legal systems deal with publicity rights. He next summarizes and critiques the laws of the United States and the Netherlands that protect publicity and portrait rights. Part I is exhaustive in its exploration of the diverse rationales behind the laws and legal systems of different countries.

Pinckaers describes the origin of the Dutch "portrait right" as an early twentieth century creation that emerged from the sense that there should be limits on the use of one's portrait. The Dutch portrait right is

* Reference Librarian, University of Michigan Law School. M.Lib., University of Washington (1994); J.D., Stanford Law School (1993); B.A., Stanford University (1988).

1. A privacy interest is the "legal protection against unauthorized advertising or other forms of commercial use of a person's picture." JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 4 (1996).

2. The right of publicity is "a commercial tort which protects against (mis)appropriation of the commercial value of another's identity." *Id.* at 15.

3. Passing off refers to "[p]assing off one's product as the product of another competitor." *Id.* at 5 n.16.

4. Portrait right means that if a "portrait is made on order by or on behalf of the person portrayed, the author is not entitled to make it public without the consent of the person portrayed." *Id.* at 13 n.59.

limited to depictions of the individual's face, and has been expanded to cover both portraits ordered and not ordered by the individual.⁵ Pinckaers also covers other Dutch laws that protect name, voice, and other indicia of persona. In assessing the Dutch portrait right and related laws, Pinckaers finds it lacking in sufficient protection of celebrity indicia beyond image and name rights.⁶

In exploring the law of the United States, Pinckaers focuses on the right of publicity, defined as the idea that "a man has a right in the publicity value of his photograph."⁷ Since *Haelan Lab. v. Topps Chewing Gum*, the first U.S. case to recognize a financial interest in the right of publicity, more than a quarter of the states have adopted a statutory right of publicity.⁸ A quarter more of the states, however, still have the common law right of publicity leaving half the states without any right of publicity.⁹ In contrast to the narrow scope of Dutch law, Pinckaers critiques the tort based, economically oriented U.S. law because it requires a proof of commercial damage. He believes that publicity should be framed as a right, rather than a tort, and thereby should focus less on the damages and more on the right to license or withhold use of indicia of persona.¹⁰ Under Pinckaers' proposal, individuals without commercial value in their persona could still have right of publicity claims.¹¹

In one of the most interesting sections, section 7, Pinckaers explores various rationales for a right of publicity, and the historical basis for distinguishing it from the right of privacy. He believes that everyone, including both celebrities and those who are not famous, should have autonomy in determining how his or her image, name, and other indicia will be commercially used. Ideologically, Pinckaers feels that this protection should exist as a property right, because such a right is morally correct as an extension of a fundamental belief in human dignity. He also believes that such a right would permit "an efficient allocation and use of valuable identities."¹² However, Pinckaers would not protect the depiction of body parts or other physical features that do not indicate the identity of the person.¹³ The right of privacy as a property right also results in the more frequent granting of injunctive relief in cases where the

5. See *id.* at 132.

6. See *id.* at 129, 424.

7. *Id.* at 28 (citing *Haelan Lab. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953)). *Haelan* involved two rival chewing gum manufacturers who were arguing over exclusive rights to use the image of a professional baseball player to promote their product. *Id.*

8. See PINCKAERS, *supra* note 1, at 28 n.45.

9. See *id.* at 28 n.44.

10. See *id.* at 279-80.

11. See *id.* at 426.

12. *Id.* at 425.

13. See *id.* at 269.

plaintiff's right of publicity has been violated, as well as allowing transferability of persona rights.¹⁴

Pinckaers is strongly influenced by the work of Thomas McCarthy, who was a member of his doctoral panel. Pinckaers adopts many of the perspectives set forth in McCarthy's *The Rights of Publicity and Privacy*.¹⁵ He notes that McCarthy's recent revisions have acknowledged that "likely damage" should be sufficient to make a right of publicity claim, in effect moving towards a more property-oriented analysis.

Pinckaers also addresses the Restatement (Third) of Unfair Competition of 1995,¹⁶ in which McCarthy had an advisory role. Pinckaers critiques the Restatement's failure to clarify the definition of commercial use¹⁷ and its permissive tort based approach. His primary complaint is that in publicity cases the court must use an ad hoc approach to determine whether a First Amendment defense should outweigh a commercial use of a person's identity, inhibiting outcome predictability. One of Pinckaers' central goals in proposing his right in persona is to distinguish commercial from non-commercial publicity claims. He believes that all non-commercial claims should be dealt with under other regimes, notably privacy laws. Although this distinction is quite useful in limiting claims to exclusively commercial cases, there will always be marginally commercial uses which will have to be evaluated on an ad hoc basis.

Pinckaers further subdivides commercial publicity claims into three categories: media, semi-media, and non-media. Media, such as television, newspapers, and books, includes a "medium of expression through which ideas and opinions are regularly disseminated or communicated."¹⁸ Most other products are non-media products, such as toys, toiletries, and clothes. Pinckaers makes a special exception for semi-media products that express ideas, such as tee-shirts, buttons, and bumper stickers.¹⁹ Pinckaers limits the applicability of his right to commercial non-media and commercial semi-media cases, believing that along with non-commercial cases, media cases should invoke a right of privacy claim as opposed to a right of publicity claim, thereby avoiding most First Amendment issues.

14. See Peter Harvey, *Publicity Right Remains a State-Law Phenomenon*, NAT'L L.J., May 12, 1997 at C43 (citing *Newcombe v. Accolade*, B.C. 164847 (L.A. County Super. Ct. filed Jan. 28, 1997)).

15. THOMAS J. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1987).

16. RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

17. See PINCKAERS, *supra* note 1, at 236. The Restatement merely defines commercial use as "use for purposes of trade" *Id.*

18. *Id.* at 340.

19. See *id.* at 344.

Pinckaers does make some very limited commercial semi-media and non-media exceptions for political speech, factual information, parody, de minimis use, and exhaustion. These proposed exceptions are all narrower than those that currently exist under U.S. law, particularly the parody exception. Furthermore, given the absolute nature of Pinckaers' proposed right, there may be cases where the First Amendment must be invoked in commercial speech cases, particularly in cases where no more than necessary is taken to make the parodic point.

Pinckaers further limits the applicability of his right in persona to cases of identity, as opposed to performances that incidentally include the performer's identity.²⁰ For example, it would protect the singer Madonna's image, but not a recording of one of her concerts. In those concerts that are not media products, much of the analysis hinges on distinguishing performance rights,²¹ from identity rights.²² By eliminating non-copyrightable performances from the scope of the proposed intellectual property right of persona, Pinckaers removes a substantial number of the non-media First Amendment related cases. Pinckaers rejects the application of a performance right of publicity in cases of imitation, instead preferring that plaintiffs rely on unfair competition or passing off claims.

The benefit of the right proposed by Pinckaers is that it is tailored to reflect his moral and economic assumptions. But within the narrowing right that Pinckaers has constructed, there are still numerous complex issues to resolve. For example, Pinckaers acknowledges that civil law European jurisdictions could more easily adopt a non-assignable right than a true intellectual property right with all the attendant economic advantages. Second, the proposed right of persona may conflict with First Amendment commercial speech doctrine.

One of the most important problems with Pinckaers' right, as defined, is that it does not address the problem of distinguishing the indicia of the character depicted from the indicia of the individual actor, celebrity or other person. Distinguishing whether the attributes belong to the character as opposed to the person playing the individual is easy in those cases where a name is used without an image or voice. The same is not true when, in the absence of an exact visual or aural likeness, the indicia might still evoke the attributes of the actor who played the character in the eyes of the jury.

20. *See id.* at 403.

21. *See id.* at 390 (citing *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977)).

22. *See, e.g., Haelan Lab. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

The *Wendt v. Host Int'l*²³ case is an example of the type of problem Pinckaers does not directly address. In this case, two actors, George Wendt and John Ratzenberger, from the hit television series *Cheers* sued a food services corporation that had licensed the *Cheers* name and characters for use in a bar, but had not licensed the individual actors who played those characters. The bar included animatronic robots that, although had different names but still roughly resembled the characters, Norm and Cliff, played by the actors. The two actors sued the bar, raising a right of publicity claim. The case, which has been remanded to the District Court, hinges on whether robots incorporate sufficient indicia of the actors' personas that they can prevail in a right of publicity claim.

The indicia of an individual, such as an image, name, or voice, can be inherently personal, whether depicting that individual or a look-alike or sound-alike. However, in specific contexts, more general similarities, such as general body-type or voice-type, may evoke the indicia of the character portrayed and also the actor who played the role. In such cases, Pinckaers' right would protect the individual, even when what is really being evoked is a character in a television show or movie who was played by the individual. Such a right could chill the licensing for commercial non-media products in which the character is not easily distinguished from the individual playing the character because it would require licensing both the character and the individual.

Even in commercial non-media identity cases, there is an open question as to whether individuals should be protected beyond false endorsement cases. If an indicia of persona is used without any suggestion of endorsement, the individual has not been injured. In such cases, products should be free to draw on the shared popular culture. Many scholars focus on the role of intellectual property law in the incentive to create, but these laws are also intended to benefit the public. In the case of the proposed persona right, the individual benefits from his or her fame or notoriety without contributing popular culture icons to the public domain in a commercial context.

Much of Pinckaers' persuasiveness comes from his narrowly drawn right, which excludes media products, non-commercial uses, and performances. Once the right is sufficiently limited, the property framework suggested by Pinckaers makes sense because it permits more frequent injunctive relief than the existing tort based system. However,

23. *Wendt v. Host Int'l*, 125 F.3d 806 (9th Cir. 1997). This case can be distinguished from the other cases in which actors are defending a right of publicity for a character they played, because in this case the actors did not share the same name as the characters, no other actors played the part, and the characters existed in no other widely distributed format. *Id.*

depending on how a court defines "commercial," this right could easily lead to a world where fear of litigation inhibits advertisers from drawing on popular culture to spread their messages. Such a limitation "impoverishes the public domain to the detriment of future creators and the public at large."²⁴ Regardless of this potential problem, this work contributes substantially to the literature by advocating a particular position and reconciling it with a range of legal systems. Furthermore, it addresses many subissues and alternate perspectives over the course of its almost five hundred pages. It is exhaustive within its stated scope and skillfully ties together a vast number of cases, statutes, and secondary sources. The objective sections describing the law will quickly become outdated as new cases are decided and legislatures redraft statutes, but the author's opinions will remain a valid and potentially influential perspective for the foreseeable future.

24. *White v. Samsung*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting) (objecting to denial of rehearing in case in which Samsung was found to have appropriated Vanna White's identity in a television advertisement by using a robot dressed in a wig, gown, and jewelry reminiscent of her hair and dress).