In Memoriam
Professor Sheldon W. Halpern

Sheldon W. Halpern was born on December 16, 1935. He earned his B.A. from Cornell University in 1957, and earned his J.D. from Cornell Law School in 1959, graduating first in his class and as a member of the Order of the Coif. Over the course of the next twenty-five years, Halpern worked in firms rising to the level of partner in New York and Minnesota, for two publicly held corporations as vice president and general counsel, and as a consultant on firm management matters. In 1984, Halpern joined Ohio State as an associate professor. After twenty-one years of teaching at Ohio State, he entered emeritus status in 2005, became a professor at Albany Law School, and was a visiting professor across the world until 2014.

Halpern was an avid writer as seen by the many law review articles, treatises, and books he authored or co-authored throughout his life. Legal topics ranged from copyright, defamation, privacy, publicity, and contract law, and included aspects of the moral values of law. He also ran conferences on topics of interest. He was elected to The Ohio State University’s Emeritus Academy in 2014 and was also elected as a Life Member of the American Law Institute.

Halpern passed away on February 25, 2016, survived by his wife, Dorit Samuel, and daughter, Michaela Halpern. For those who knew Halpern, he was a devoted scholar and a beloved colleague.

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Bruised Soul of the Artist: A Tribute to Sheldon W. Halpern

ANITA L. ALLEN*

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I. FRIENDSHIP

The late Professor Sheldon W. Halpern was a well-known doctrinal scholar of copyright law and the law of defamation, privacy, and publicity. He was a 1959 graduate of the Cornell Law School. Professor Halpern practiced law for twenty-five years before entering the legal academy. He spent most of his career in legal education on the tenured faculty of the Moritz College of Law at The Ohio State University. I first met Professor Halpern in the early 1990s when he was tasked with writing an introduction to a symposium on privacy law to which I contributed an article that helped launch my career.1 He was supportive and open-minded about my effort to introduce feminism into the discussions of the common law privacy torts by showing that cultural values relating to the place of women in society deeply shaped the early development of state privacy law. We subsequently saw one another from time to time at meetings of the Association of American Law Schools, whose section on privacy and defamation law I once chaired.

In retirement from The Ohio State University, he moved to Philadelphia and took on a full-time position as a Distinguished Professor at Albany Law School, commuting between upstate New York and Philadelphia. Professor Halpern and I became closer colleagues when his family moved east. I grew to think of him and his wife as generous, cosmopolitan intellectuals with big personalities and warm hearts. When advanced cancer was discovered in 2015, he had already moved on from Albany Law School and was living principally in Philadelphia. Moreover, though close to eighty years old, Professor Halpern was planning a series of lectures in the United Kingdom, updating his books,

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and continuing to welcome teaching opportunities for his unflagging professional enthusiasms. He faced the bad news about his health philosophically, proud of his accomplishments, and comforted by the love of his daughter, Michaela Halpern, and wife, Dr. Dorit Samuels. The Halperns had returned to Ohio to be near old friends when Sheldon died there in early 2016.

II. CONTRIBUTION

Professor Halpern authored or co-authored several comprehensive treatises and textbooks,2 along with a great many law review articles and essays.3 He


was an elegant writer. In his work, he displayed concerns about the operation of law but also about the moral values that live within and beside the law. Indeed, one of the recurrent themes in his scholarship was the relationship between the legal and the moral. His tribute to the late legal scholar Edward Bloustein reflected Professor Halpern’s interest in normative moral fundamentals. As philosophers of privacy know, Bloustein rejected William Prosser’s influential analysis of common law privacy torts as a set of four distinct torts. Bloustein’s view was that “the tort cases involving privacy are of one piece and involve a single tort” protecting the “interest in preserving human dignity and individuality.” Praising his friend Bloustein’s philosophical contribution, Professor Halpern was moved to ask the question of whether the law is always up to the task of protecting human dignity. What is the dignity of which Professor Halpern wrote? He was referring to the familiar conception of dignity as the defining feature of rational beings with free will.

As creatures capable of reason and equipped with the freedom necessary for responsibility, human beings generally ought to be let alone to pursue their own ends. They should be treated as subjects and not as mere utilitarian objects for the purposes of others. Democratic societies are spirited by a commitment to respect human dignity by safeguarding and nurturing freedom. It is imperative, Professor Halpern exhorted in response to Bloustein, “to confront the moral issues surrounding the problem of protecting human dignity.” Invasions of privacy can leave behind a “bruised soul,” he said, but “the legal balm the bruise requires” defies configuration, particularly in our “media saturated world.” Recognizing moral values implicated by privacy rights, publicity rights, defamation, and copyright, Professor Halpern often reluctantly concluded that not everything important and of great value is amenable to legal protection. Some of the protections we ought to enjoy must derive from civility and culture, not law.

III. DIGNITY AND RIGHTS OF ARTISTS

Invasions of privacy can result in bruised souls, and so can false attributions of artwork. A recent legal contest underscores the importance of Professor Halpern’s insights and displays why a scholar of privacy, publicity, defamation, and copyright could be led to ponder the relationship between

4 See generally Halpern, Rethinking the Right of Privacy, supra note 3.
7 Halpern, Rethinking the Right of Privacy, supra note 3, at 544.
8 Id. at 549.
9 See, e.g., id. at 562–63.
moral values and legal praxis. In the unusual dispute in question, Scottish-born painter Peter Doig was accused of wrongfully denying the authenticity of a painting he insisted he did not paint, to the financial detriment of the work’s unsophisticated owner. Doig won the case against him, which commenced in 2013 and continued for three years. United States District Judge Gary Feinerman ultimately ruled that the evidence presented in a week-long trial proved “conclusively” that Doig did not paint the plaintiff owner’s painting. The case raised concerns about whether a living artist should ever be required by law to authenticate a work of art ascribed to him or her and face civil liability for denying authenticity. While victorious, Peter Doig complained that justice was “long overdue” and that the issue that “a living artist has to defend the authorship of his own work should never have come to pass.” There is a moral argument from the importance of dignity and inviolate personality that Doig is correct. Yet, other arguments press in another direction.

Western societies attribute a special status to artists. In French and other European law, this is reflected in the concept of “moral right.” The juridical concept of moral right, Professor Halpern explained, functions by “vesting in the creator rights to control . . . the creation that are independent of . . . ownership of that creation.” Grounded on the premise that the ‘artist’ is different from the rest of us, the moral right can function comfortably only in a cultural milieu that accepts and nurtures that difference,” according to Professor Halpern. In the United States, by virtue of their creativity and originality, professional fine artists are indeed widely viewed as different, the epitome of persons of moral dignity, with “individual personality.” Indeed, some of the best and most successful professional artists have these human

10 Fletcher v. Doig, 125 F. Supp. 3d 697, 701, 703, 705 (N.D. Ill. 2014) (alleging tortious interference with plaintiffs’ prospective economic advantage by interfering with the auction of a painting owned by Fletcher, and seeking declaration that Doig painted the painting); see also Fletcher v. Doig, No. 13 C 3270, 2016 WL 3940082, at *2, *5, *8 (N.D. Ill. July 21, 2016) (denying defendant artist’s motion to exclude plaintiffs’ expert witnesses, one whose report concluded that the work in dispute was clearly painted by Doig, and another whose report concluded that if authentic, the work would be valued at $6 to $8 million dollars, but no less than about $50,000); Patrick M. O’Connell, Judge Rules Famous Artist Did Not Paint Landscape at Center of Lawsuit, Ctl. Trib. (Aug. 23, 2016), http://www.chicagotribune.com/news/local/breaking/ct-peter-doig-painting-ruling-met-20160823-story.html [https://perma.cc/N8CF-G9Y7].


12 O’Connell, supra note 10 (quoting Peter Doig).

13 See generally Sheldon W. Halpern, Of Moral Right and Moral Righteousness, 1 MARQ. INTELL. PROP. L. REV. 65 (1997) (discussing whether U.S. law should fully embrace the continental moral right doctrine alone or through copyright law).

14 Id. at 65.
15 Id.
16 Id. at 82.
traits in spades. Although the American courts have not tended to embrace the idea of moral right as such, de jure American law broadly rewards and protects artistic creativity in a number of ways short of letting artists “impose a servitude on their work preventing alteration or abuse.”

The First Amendment helps to protect artistic creativity by shielding from prosecution artists who express themselves in content, ideas, and opinions that may be controversial, offensive, or intrusive. Sometimes, the creativity claims of artists are allowed to trump privacy and religious freedom claims asserted by others. The law of copyright protects artists who make certain types of work from having others reproduce that work. The law of defamation, often in combination with the law of intellectual property, helps artists fight false attribution. Patent law can protect novel and nonobvious designs, and the invention of new techniques and technologies. The law of privacy and publicity can protect against misappropriation of the attributes of personal identity—e.g., faces and voices—of performing artists and

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18 Halpern, supra note 13, at 65, 67, 78 (explaining how the moral right never unambiguously caught on in the United States).

19 Id. at 80 (quoting Henry Hansmann & Marina Santilli, Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis, 26 J. LEGAL STUD. 95, 103 (1997)). Halpern was skeptical of importing the moral right concept from European law into U.S. law given cultural differences and inexactitude in what the concept covers in the various countries that employ it. See id. at 68–80 (“Personally, I tend to lean toward the artist; my heart is with moral right. . . . I want to say ‘amen’ [to greater moral rights protection]. But I can’t.”).

20 See, e.g., Winter v. DC Comics, 69 P.3d 473, 479–80 (Cal. 2003) (holding that a comic book depiction of the plaintiffs that was “distorted for purposes of lampoon, parody, or caricature” was protected by the First Amendment).

21 See Foster v. Svenson, 7 N.Y.S.3d 96, 103–05 (App. Div. 2015) (holding that a defendant’s photographs of the inside of a neighbor’s home did not violate privacy laws, but instead were deemed to be “a work of art”).


Although American law protects the cultural specified special status and dignity of artists, it does not and cannot do so completely. The law may not always provide succor to what Professor Halpern termed the “bruised soul” of the artist and indeed can be a weapon of considerable moral injury.

To this point, the facts of the Peter Doig civil lawsuit decided in August 2016 are instructive. Robert Fletcher, a retired corrections officer residing in Ontario, and Bartlow Gallery of Chicago, Illinois sought to establish in federal court that Peter Doig painted an acrylic work Fletcher said was given to him by a teenager who spent time in Thunder Bay Correctional Centre on LSD drug charges. Fletcher claims to have mentored and assisted the teen artist, whom he asserted in the lawsuit is the now well-known Scottish-Canadian artist Peter Doig. Doig’s work commands multimillion dollar sales prices, a fact pointed out to Fletcher by a visitor to his home who noticed the painting hanging on a wall and said it was the work of a famous artist. The painting depicts a nonrealistic desert scene with cacti and a pond. It appears to typical observers to be signed “Pete Doige,” a different name than that of the artist Peter Doig.

Mr. Doig vehemently disclaimed the painting and any past association with Fletcher. Fletcher’s lawsuit sought compensatory damages, alleging that Doig and co-defendants were liable for tortious interference with Fletcher’s lawful efforts to sell the painting in an auction as a Peter Doig work, and a declaration that Doig painted Fletcher’s painting despite Doig’s denials. The suit originally named Peter Doig’s attorney and his gallery along with Doig, Fletcher v. Doig, 125 F. Supp. 3d 697, 701 (N.D. Ill. 2014).

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25 See Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (“The right of publicity has developed to protect the commercial interest of celebrities in their identities.”).
26 See Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1189 (9th Cir. 2001) (holding that an actor did not prevail in an action against a magazine that used an image from one of his popular film roles in advertising without his consent).
27 Halpern, Rethinking the Right of Privacy, supra note 3, at 549.
30 Id.
31 See id.
33 Graham Bowley, Peter Doig Says He Didn’t Paint This. Now He Has to Prove It., N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/10/arts/design/peter-doig-painting-lawsuit.html?_r=0 [https://perma.cc/MD25-JY49].
34 See id.
but the court dismissed the attorney and dealer co-defendants for lack of jurisdiction.\textsuperscript{36} The court denied Doig’s forum non conveniens motion to move the case to Canada.\textsuperscript{37} The court also denied a motion to disqualify Fletcher’s two main expert witnesses.\textsuperscript{38}

It can be demeaning for a living artist to be dragged into a legal battle where the claims at issue strike one as preposterous and the people making them and providing evidence are not, in one’s view, truly expert or objective. Why then, in a society that clearly respects artists, would a court not grant a motion to dismiss such an action at the earliest opportunity? One explanation could be that the court recognizes that disputes over authentication like this one raise the conflict Professor Halpern discussed in his work between “the ‘personality’ of the creator of a work” and the “preservation of a society’s cultural heritage.”\textsuperscript{39} An artist’s self-esteem and preferences may point to closeting the fact of authorship, while uncloseting serves the interest in a full and complete understanding of a major and influential cultural phenomenon. A “lighter” explanation may simply be that a good deal of money is at stake.\textsuperscript{40} Since Doig benefits financially from the art market, he is arguably reciprocally obligated to submit to legal regimes of tort, property, and contract that sustain it. An artist, like any other person, could have self-interested or even unlawful financial motives for not wanting the truth of authenticity to be probed. Courts may view major financial disputes relating to fine art that fail to settle and that can only be resolved by art experts as requiring full adjudication. As a consequence, what may prove to be weak claims, as well as strong ones, will potentially have a day in court, to the detriment of successful artists who must pay to defend themselves and face humiliation and inconvenience.

Fletcher and his gallery contended that Doig was not being truthful.\textsuperscript{41} (But could an artist forget a teenage work in good faith? I believe one could.) Fletcher originally raised the possibility that Doig might be ashamed of his putative juvenile delinquency,\textsuperscript{42} and might have even gone so far as to falsify documents to conceal it. Fletcher raised the further possibility that Doig might want to manipulate how the art world views his development as a painter.\textsuperscript{43} He raised the additional possibility that Doig might just want to control the market for his art work.\textsuperscript{44} To be sure, at stake was the multimillion dollar value of the

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\item\textsuperscript{36} \textit{Id.} at 701, 719. The court concluded that the fiduciary shield doctrine prevented its exercise of personal jurisdiction over the artist’s art dealer and his attorney. \textit{Id.} at 719.
\item\textsuperscript{37} \textit{Id.} at 711.
\item\textsuperscript{39} Halpern, \textit{supra} note 13, at 81.
\item\textsuperscript{40} Cf. Sheldon W. Halpern, \textit{The Commercial Appropriation of Personality}, 13 DUKE J. COMP. & INT’L L. 381, 388 (2003) (book review) (offering, “Lighten up, it’s only about money!” as an explanation in contrast to “difficult compromises between society’s interest in free expression and the individual’s interest in decency and dignity”).
\item\textsuperscript{41} Bowley, \textit{supra} note 33.
\item\textsuperscript{42} See \textit{id}.
\item\textsuperscript{43} See \textit{id}.
\item\textsuperscript{44} See \textit{id}.
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painting, if authentic, and the reputation and historical understanding of Peter Doig.45 (In the past decades, dreamy Edvard Munch-esque paintings by Doig have sold for up to $12 million.46) While Fletcher’s lines of contention are plausible in the abstract, they were not well supported by the facts presented in the August 2016 trial, whose verdict was announced a few weeks later.47

One important set of facts counting against Fletcher related to the existence of a Canadian man named Pete Doige (now deceased) whom witnesses said did paint as a youth and could have associated with Fletcher during a stint at Thunder Bay.48 Doig’s defense was to show that the provenance claimed by the painting’s owner proves it could not be his work.49 Doig and his witnesses denied that Doig ever served time in a detention facility, to start.50 The artist and witnesses gave evidence that Peter Doig could not have spent time during the era in question at Thunder Bay since he was a younger boy in school at the time the painting was allegedly made.51 They pointed out that the painting is not signed in Doig’s name and that a photo on an identification card Fletcher used to try to prove Doig’s whereabouts did not resemble Peter Doig.52 Letters between Doig and his mother from the 1970s remove doubt that he was not an inmate at Thunder Bay.53 Doig’s evidence supported a contention that Doig did not begin painting on canvas until at least 1979, years after the date of the painting attributed to him, and that he never met Mr. Fletcher.54 In announcing his verdict, Judge Gary Feinerman said “massive evidence” proved it was “impossible” for Doig to have painted Fletcher’s painting, that any similarities to Doig’s work were coincidental, and, critically, that a deceased carpenter and amateur painter named Peter Edward Doige created the work.55 By implication, it seems the court agreed with Doig that Fletcher’s experts were not believable and disinterested, even if they were minimally qualified.

IV. SECRET ART

The Doig case attracted international attention as a first-of-its-kind litigation. It raised important issues about the value North Americans place on creative personality. Not all of the issues were explicitly addressed in the lawsuit, such as whether an artist should have a per se right to keep immature

45 See O’Connell, supra note 10.
47 See supra note 11 and accompanying text.
48 See Bowley, supra note 33.
49 Id.
50 Id.
51 See O’Connell, supra note 10.
52 See id.; see also Bowley, supra note 33.
53 See Bowley, supra note 33; see also O’Connell, supra note 10.
54 See Bowley, supra note 33.
55 O’Connell, supra note 10 (quoting Feinerman, J.).
work a secret. Peter Doig’s reaction to the suit placed before the public the larger issue of whether having one’s word about authorship challenged in a lawsuit is a tolerable affront to moral personality. Doig won his suit, but lost the moral battle: artists do not have the final say concerning the authenticity of their work, courts do.

Losing the moral battle in the American context was inevitable. On one level, it seems an affront to moral personality to have one’s word about authorship challenged at all. Such a challenge diminishes the capacity to curate identities, which is a recognized dimension of personal freedom. In some domains we are able to freely curate ourselves, editing out facts and deeds at will. On social media, for example, one can leave out vast realms of one’s recent and distant past to craft a misleading persona and not be deemed dishonest. Other people have no right to know everything about us.

Traditionally and today, writers and other living artists may keep early works or records of such works under literal or virtual lock and key, incurring no disapprobation. Unless the artist is well known, if secret juvenilia or other secret art does somehow come to light, the artist may have little to fear: as a practical matter, few will care. Yet the incompetent drawings, racist musings, nude selfies, and the like of a celebrated artist will have significant monetary value and hold cultural interest. This is so true that in some contexts it could feel “wrong” for the artist to withhold the work from attribution, denying someone much-needed financial resources or social understanding. In the case of major artists whose works can be sold for large sums, secret art that escapes, so to speak, can wind out in the marketplace to the artist’s chagrin.

The direction of the law runs against the notion that a living artist should have the final word about whether or not a particular work is his or her creation. A final say would protect the artist’s interest in controlling his or her reputation and personality. Moral and policy opinion may vary, however, as to whether a living artist should be able to disclaim a creation, for example, because she believes it is a poor reflection of skill or character. An argument could be made against legal penalty for a living artist denying authorship, even falsely. I have argued elsewhere that a person, even a celebrity, can be justified in lying to protect their own privacy. If I can lie to protect my own privacy, why can’t I lie to protect my integrity as an artist? The question merits discussion beyond the scope of this writing.

Individuals legitimately claim a right to possession and sale of lawfully acquired art work—art sold or gifted to them. Not as clear is whether a right to possess and alienate artworks strictly entails a right to the artist’s honest attestation of authenticity. As stressed in Fletcher’s case against Peter Doig, however, an artist’s refusal to authenticate can greatly affect the market value of artwork. Denial of authorship can undercut the right to sell an artwork as well as the ability to sell the work.

57 O’Connell, supra note 10.
When millions of dollars are at stake, it makes the artist’s unwillingness to admit (or deny) ownership seem unfair. Consider, however, an analogy to the Fifth Amendment right against self-incrimination. Others can testify that I did such and such to my detriment, but I cannot be forced to testify that I did such and such to my detriment even though it could mean that others may face serious criminal liability. If I cannot be forced to give evidence against myself in a criminal case though others may go to prison, perhaps I cannot be forced to give evidence of my conduct as an artist where only money is at issue. The analogy is not perfect, but nor is it completely inapposite.

The Doig case now stands as precedent. United States courts have the power to declare, based on a preponderance of evidence, whether a work is the creation of the artist who denies having created it. Money and the integrity of the art market may be the main and ultimate reason courts will exercise this power. Art is a major commodity. Many artists are celebrities. As Professor Halpern has written, “Whatever the social merit of commercialization of personality and/or the morality of commercializing one’s identity, the economic reality is that, for good or ill, the phenomenon of celebrity generates value.”58 Of course, the simple assertion that something has value does not lead inexorably to the conclusion that the law must protect it, though economic value lends itself to the machinery of the common law of property, tort, and contract.

V. Bruisers and Bruised

Legal action against an artist is well-justified where greed or mischief inconsistent with a market economy and the commodity status of fine art prompts suit. Yet, an artist’s desire to avoid emotional pain could prompt his or her denial of creative authorship. To see or hear a work of which one is not proud of over and over; to be asked for comment, interpretation over and over again—that is a real bruising. It is also a bruising to have to endure for three years, as Peter Doig did, denying authorship in a lawsuit where an abundance of readily available evidence proved that someone else was the artist.59 To minimize bruising, the courts could flatly and categorically decline to hear authorship in living artist cases. Like Professor Halpern, I lean with the artist. But also like Halpern, I know the law cannot shield anyone from all injury and all of the emotional pains of the public accountability and the courtroom.

Art is a realm of commerce, and artists can be bad actors in that realm. They might unfairly refuse to settle wrongful interference cases, or unfairly seek to control the market in their work by selectively authenticating objects attributed to them, disadvantaging the unlucky holder of works without the artist’s nod. While we might wish a person to have the right to distance himself from something he has created, to the extent of denying it the stamp of

58 Halpern, supra note 40, at 382 (footnotes omitted).
59 See supra note 55 and accompanying text.
authenticity, such a right cannot be absolute in the context of the professional and commercial art world. Still, Doig’s case leads one to hope future American courts will require plaintiffs to work harder to withstand summary judgment and motions to dismiss, not turning a blind eye to readily available evidence and pressing ahead against artists in senseless litigation.

Forgery cases teach courts something about how art can be authenticated without relying upon the artist’s attestation. Science and technology can help uncover fakes, and other forms of evidence and witnesses can help establish whether or not a person could have created a work of art attributed to them. Thus, the assault on dignity and personality can be lessened where prospective plaintiffs are expected to aggressively exploit the availability of objective authentication measures. If a scientific analysis of the paint or surfaces used in the Doige painting could have established that Peter Doig was not the artist, there would have been no need to sue (and bruise) Doig (at least not for three years). Arguably, nonintrusive measures should be exhausted first before an artist is sued, despite the happenstance that the artist is alive and a market player.

Artists like Peter Doig have power and many social advantages over defendants like Fletcher. But high-income artists can be easily taken advantage of by the knowing and the naive, as indeed they take advantage of others. The legal system that defines artists as special and allows them to bruise others bruises artists, too. The career of Professor Halpern transected five decades of changing mores and technologies related to his fields of intellectual property and the dignitarian torts. Yet, his insights remain relevant, and will continue to be relevant, to how we understand the tensions between artists and their societies for many years to come.

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60 The authenticity of a painting can be assessed by examining, inter alia, the materials and paint pigments used to create it. In 2010, Wolfgang Beltracchi was arrested and jailed in Europe for forging works attributed to famous artists and earning millions of dollars in a career spanning twenty-five years. Sophie Hardach, *The Surprising Secrets of Busting Art Forgeries*, BBC (Oct. 19, 2015), http://www.bbc.com/culture/story/20151015-the-surprising-secrets-of-busting-art-forgeries [https://perma.cc/TJQ3-L6MY]. Beltracchi was detected in 2008 when it was discovered that one of his forgeries contained titanium dioxide white paint that did not exist in the early twentieth century, the supposed era of the painting he had faked. *Id.* Beltracchi went to great lengths to use materials appropriate to past eras, but slipped up and got caught. See *id*.

61 Artists can also easily take advantage of others. In a recently decided case, a fine art photographer, Arne Svenson, prevailed in an invasion of privacy and right to publicity suit brought by individuals whom Svenson photographed with a telephoto lens as they went about their business in their homes in a Manhattan condominium building with large glass windows. *See Foster v. Svenson*, 7 N.Y.S.3d 96, 98 (App. Div. 2015).

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.”

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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intellectual property. 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.* 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.”

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. 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. In its various state-law iterations, the right of publicity has taken shape into an almost boundless, descendible, and assignable property right. The problem is that the subject matter of the right and its transferability differs appreciably between states. Periodically,

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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.*
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

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9 Id. at 1360–61.
10 Id. at 1362.
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. 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.” 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.

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.

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.

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. He would point to Motschenbacher, Carson, and

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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.\textsuperscript{27} After all, for some people, other indicia of persona may encompass traits, characteristics, mannerisms, or even paraphernalia unique to that person.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{30} The “newsworthy, entertainment, critical, satirical, or parodic uses” are privileged because they go past the unadorned act of appropriation.\textsuperscript{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.\textsuperscript{32} Despite my somewhat jaundiced

\begin{itemize}
\item \textsuperscript{27}See cases cited supra notes 11, 13–14.
\item \textsuperscript{28}Halpern, \textit{Associate Value}, supra note 1, at 860.
\item \textsuperscript{29}Id. at 863 (quoting \textit{RESTATEMENT (THIRD) OF UNFAIR COMPETITION \ § 46 cmt. d (AM. LAW INST. 1995))}.
\item \textsuperscript{30}Id. at 868 (quoting \textit{RESTATEMENT (THIRD) OF UNFAIR COMPETITION \ § 47}).
\item \textsuperscript{31}Cher v. Forum Int’l, Ltd., 692 F.2d 634, 638 (9th Cir. 1982); \textit{see also} Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989); Halpern, \textit{Associate Value}, supra note 1, at 868.
\item \textsuperscript{32}See generally Leaffer, supra note 5.
\end{itemize}
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.
In Tribute of Professor Sheldon Halpern

KEN PORT*

I am honored to write an In Memoriam piece for Professor Sheldon Halpern. Shel was a mentor, a friend, a co-author, and an all-around fascinating human being.

I first met Shel at one conference or another around 1993 where we engaged in a lengthy and remarkable (as well as memorable) conversation regarding Japan. Although not a scholar of Japan or Japanese, he became fascinated by the fact that I was (or, more accurately, at that point in time, wanted to become) one. As Shel probed me on various particulars regarding Japanese law and I, as a young academic, struggled to coherently answer them, it became clear to me that it mattered not at all what our conversation was about. The fact was that Shel had found a topic of interest of which I presumably knew something, and he could learn from me. In the process of learning from me, he could become my friend.

I suspect that describes many of Shel’s interactions with people throughout his life. Shel had a remarkably inquisitive mind and enjoyed probing, questioning unstated presumptions, and pushing back, all in the flavor of good fun and good spirit.

On that day when we first met, I became acquainted with Sheldon Halpern and continued to interact with him. I was a young academic teaching copyright law. Many times, Shel answered the phone and gave me feedback on how he would teach a specific doctrine in copyright law, or answered substantive questions, or told me to be honest with people: sometimes copyright law is a labyrinth. When he suggested that he write the copyright portion of a treatise on American law and that I write the trademark portion, I, of course, jumped at the chance.1 Shel further established his passion for American copyright law when he wrote his own textbook on the subject.2 Shel had just finished the third edition of this textbook when he became ill.

In 1995, I nominated Shel to become the dean of Marquette University Law School where I was teaching at that time. Shel then became a finalist and was appreciated by the committee. Although, in the end, he was not offered the position, after all these years, I still remember his visit, his job talk, and spending extra time with him as a candidate and as a friend. Shel was appreciated because of his honesty. He clearly spoke his mind and really impressed a lot of us. As usual, Shel demonstrated his inquisitive nature, his ability to probe without offending, and his impeccable drive to improve the profession of teaching law as well as lawyering. Most specifically, I remember

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a tour of Milwaukee that I gave Shel along with another colleague by car. During the entire tour, Shel continued addressing substantive aspects of his candidacy. The tour became a far second to the conversation. It was natural for Shel to never “shut it off.”

My path crossed with Shel’s many times in the last twenty-five years. When we were not talking substance, and that was a hard thing to do, I learned that we had many things in common. For example, we have daughters who are the same age. Shel worked as a lawyer in Minnesota, where I am now teaching. I learned a lot from Shel. Maybe the most important thing is that he could be consumed with the profession of teaching copyright law and yet still be an approachable and likeable person.

Shel remained a consummate scholar of the law and the legal profession until the very end. I talked to him on the phone just a few weeks before he passed. I was just calling to see how he was doing; however, Shel wanted to talk about our treatise with Kluwer, and especially about what would happen with the ongoing project when he was gone, who would take it over, and what needed to be done.

I am very thankful that I got to know Shel. He never did “shut it off” and, for that, I am most grateful. He was my friend and colleague, and he will be missed.