

The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing Off BY DAVID TAN [New York: Cambridge University Press, 2017. xxviii + 310 pp. Hardback: US\$117.70]

Over several centuries, the rhetoric of ‘gap filling’ has often been invoked to naturalise expansions of intellectual property (“IP”) rights—copyright term extension, the patenting of life forms, trademark disparagement, and so forth. The ready pragmatism of the phrase has definite audience appeal, making big changes sound like straightforward responses to external conditions—rather than choices about how to draw the line between private ownership and public discourse. We know, however, that once filled, ‘gaps’ tend to stay filled. Retrospective debates about the wisdom of such decisions tend to be (both literally and figuratively) of merely academic interest. So what is most refreshing and commendable about Professor Tan’s *The Commercial Appropriation of Fame* is that the author’s thorough and clear-eyed review of one such gap-filling project is powerful and timely enough that it could make a practical difference. Professor Tan not only tells us all we need to know about the historical origins of legal protection for celebrity personas, but also suggests a way that the scope of such protection can be reasonably cabined, in ways that largely fulfil the public interest in access to information, in years to come. This is all the more true because in the United States (“US”) (with which Professor Tan is largely concerned), and elsewhere, the right of publicity and its cognates are largely creatures of the courts—common law improvisations which (even where they have received statutory confirmation) are still widely open to judicial interpretation.

The tone of celebratory instrumentalism that marked the birth of a new right that made up for an unfortunate omission in the existing array was well captured by the young Melville Nimmer (not yet a copyright guru or a champion of free speech). It was, he said, a fresh-minted legal “concept [that] satisfactorily meets the needs of Broadway and Hollywood in 1954” (Melville B Nimmer, “The Right of Publicity” (1954) 19 Law & Contemp Probs 203 at p 203), continuing that (Nimmer at p 204):

[T]he well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him. With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century.

It would be nice to be able to say that in the 60-odd years since, this pragmatically conceived new right, a sturdy invasive species in the IP garden, has been retrofitted with a jurisprudential backstory as impressive as the theoretical pedigree Brandeis and Warren have provided for the right of privacy. In fact, however, discourse around the right of publicity has remained rigorously practical—until now! The impressive theoretical turn of Professor Tan’s book is therefore not only welcome but also long overdue. That is not to say that Professor Tan, who approaches his subject with impressive multi-disciplinary credentials as well as special insights into

the mechanics of contemporary fame from his experience as a professional, seeks to provide a justification for the existence of the right as such. In an environment where the right of publicity (which has attained the legal establishment's ultimate stamp of legitimacy through its recognition in the US, The American Law Institute, *Restatement (Third) of Unfair Competition* (1995)) is an accomplished fact, he undertakes a far more relevant project: to articulate appropriate limits on the right in light of a broad range of theoretical approaches from the repertoire of cultural studies.

Both early and late in the volume, Professor Tan suggests that, at the outset, this gap-filling exercise may have been unnecessary—or worse. In Section 3.2, he suggests gently but powerfully that the various rationales that have been offered up, from time to time, for the right's existence are unsuitable. Moral arguments sounding 'unjust enrichment', incentive-based ones that resemble conventional accounts of the purposes of copyright, and invocations of allocative economic efficiency are sounded and persuasively dismissed as wanting. Equally damning to the case for the right of publicity is the illuminating discussion in Chapter 7 of the doctrinal road not taken—the application of long-standing prohibitions against 'passing off' to the kind of source confusion through false suggestions of endorsement or affiliation, that (in the course of his discussion) Professor Tan identifies as a matter of legitimate (if limited) regulatory concern.

How then, to make the best of what was, at the outset, an impulsive doctrinal turn with obvious and worrying implications for the meaningful scope of the cultural public domain? This has been the besetting question in the jurisprudence of the right of publicity over the past several decades, and it is in his approach to it that the originality and scope of Professor Tan's admirable project becomes clear as the volume progresses.

The task of preserving legal spaces for public discourse that involves the names, appearances, and attributes of public figures is all the more challenging because formulations of the right differ place to place within the US. Attempts to 'federalise' the right of publicity have so far failed, such that its specific contours (such as descendability and duration) are matters of state law—common law in some states, statutory enactments in others, and (at least in California) both of the above. What most of the initial proclamations have in common, however, is the fact that they are effectively silent on the extent of any limitations and exceptions to which it is subject. This has been a besetting question for the courts over the last 20 years, and the answers have, not surprisingly, been (at least superficially) as diverse as the underlying statements of entitlement. In some jurisdictions, the emphasis has been on distinguishing between regulated commercial uses and privileged non-commercial ones; in others the inquiry has focused on whether the challenged use is a core discursive one within the core protection of the *Constitution of the United States*, Amendment 1 [*First Amendment*]; and a few also have borrowed the practice of favouring 'transformative uses' over 'non-transformative' ones from contemporary 'fair use' doctrine—not surprising in light of the way *First Amendment* concerns are channelled in US copyright by fair use.

By insisting on the theoretical considerations that unite various local implementations of the right of publicity, Professor Tan cuts through this superficial confusion to reveal the common characteristics that any meaningful approach to limiting the

scope of the right of publicity—however designated or described—should incorporate. And with Professor Tan’s framework in mind, policymakers can (if they choose) rationalise and systematise approaches to limits on the scope of the right.

The key to Professor Tan’s vision is to be found in Chapter 5, “Publicity and the Appropriation of Commercial Value”, which canvasses the cultural studies literature to produce an account of “key perspectives on the semiotic nature of the celebrity sign and how cultural producers and audiences have attributed particular meanings to different types of celebrities” (at p 123), and how those meanings may represent a form of value that law may protect as “commodities possessing intrinsic economic value” (at p 124). The nature of (and limitations of) that protection—and this is the book’s crucial message—depends on whether the use under scrutiny is one that invades that value. And this is where the twin concepts of ‘associative value’ and ‘the meaning transfer effect’ come into their own. Product endorsements by well-known and admired individuals go back almost to the beginning of advertising history, but the research summarised in this chapter suggests that there are other affective dimensions to the value of celebrity personality as well—in that their use tends to enhance the “*emotional* and *social* consumption values of brands” through a transfer of positive perceptions from the famous person to the product and by extension purchaser (at p 132). The effect goes beyond what has conventionally been described as generalised ‘good will’, since it is rooted in the aspirational quality of consumers’ desire to associate themselves with the attributes of the famous person in question.

Thus, Professor Tan argues, application of the right of publicity should be limited to situations in which there is a “direct and substantial” connection between “the commercial benefit sought by the [user]... and the associative value” of the persona in question (at p 134). He suggests, in turn, that this standard effectively embraces and explains the various doctrinal formulations of exceptions to the right of publicity. Exceptions styled as accommodations to freedom of expression values can be understood, with equal explanatory force, as recognising that many discursive references to celebrities and their attributes are not aimed at appropriating associative value. Likewise, courts that employ a transformativeness standard in assessing right of publicity claims can—or should—likewise be understood as discriminating between situations in which there has been a significant transfer of associative value from the original celebrity to the interloper. The critiques of this legal transplant, as it has actually been applied to date, are well summarised by Professor Tan in Section 6.2.2.3, and his sensible suggestions for its reformation draw directly on his underlying theoretical framing.

Finally, however, for all its heroic effort and achievement in imposing a unified field theory on applications of the upstart right of publicity, Professor Tan’s study cannot help but expose the deep incoherence of the underlying concept. A few examples may suffice. By endorsing the alignment of right of publicity rules relating to privileged discursive use with the copyright doctrine of fair use, he raises the implicit question of why other limiting concepts of copyright law should not be applied by analogy. Thus, for example, US copyright rules relating to ownership make clear that in cases of substantial collaboration, all the ‘authors’ of a work should enjoy some independent agency with respect to using it (or authorising such use). Given the central insight of cultural theory into the joint roles played by celebrity and audience in constructing a persona and infusing it with value, why should an ‘exclusive’ use right (no matter how significantly qualified) be reserved to the individual bearer

of the resulting ‘fame’—especially where notoriety constructed in context of social media is concerned? Given the dynamism of the practices involved, Professor Tan’s suggestion that “participatory culture” may be “more aspirational than a reflection of reality”, and more “disruptive and uncomfortable” than “potentially liberating” seems to offer only a partial response (at p 247).

More specifically, and less speculatively, it remains to be seen how robust Professor Tan’s theoretical construct, with its focus on cultural studies accounts of the associative function of celebrity, will prove to be in technology-inflected use cases. As descriptive matter, the first half-century of experimentation with right of publicity has been dominated by cases involving rights claims by famous people. But, as a doctrinal matter, rights of publicity (unlike claims for passing off) can be invoked as readily by previously unknown individuals as by famous ones—the family photo of an adorable child adopted from an image-sharing site as the visual motif in a toy advertising campaign, or ordinary users’ headshots included without authorisation in a social media site’s promotion. Although the equitable claims for compensation in such cases seem strong, an account of the doctrine emphasising that courts should key their analysis to an intended or perceived “transfer of affective values from the celebrity” sign seems to leave the great majority of the non-famous with no obvious ground on which to stand (at p 10). Professor Tan quotes with approval the dictum with which the court in *Fraleley v Facebook Inc* 830 F Supp 2d 785 (ND Cal, 2011) at 809 seeks to square this circle: “[i]n essence, the [otherwise uncelebrated] Plaintiffs are celebrities—to their friends” and himself posits that the court was cognisant of the commercial value inherent in the identity of Facebook users generally. I would suggest, however, that another approach might be needed in these cases—lest an expanded account of the objects to which ‘associative value’ attaches should bring into doubt that concept’s continuing value as a source of general limiting principles.

These, however, are mere quibbles. *The Commercial Appropriation of Fame* reflects deep learning in both the law and cultural theory. The resulting discussion is both thoroughly grounded and informed by a wise, practical lawyer’s sensibility. Volumes that combine theoretical understanding with effective policy guidance are rare—but this is one of them. Professor Tan has produced the one indispensable volume on the right of publicity, essential for practitioners, jurists, and scholars alike. Whatever direction they take, the next developments in this particular gap-filling exercise will be crucially informed—for the better—by his insights.

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