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# Incidental Intellectual Property

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By Brian L. Frye

As Mark Twain apocryphally observed, "History doesn't repeat itself, but it often rhymes."[1] The history of the right of publicity reflects a common intellectual property rhyme. Much like copyright, the right of publicity is an incidental intellectual property right that emerged out of regulation. Over time, the property right gradually detached itself from the regulation and evolved into an independent legal doctrine.

Copyright emerged from the efforts of the Stationers' Company to preserve its members' monopoly on the publication of works of authorship. Similarly, it can be argued the right of publicity emerged from the efforts of bubblegum companies to preserve their monopoly on the publication of baseball cards. In both situations, those efforts to preserve a monopoly resulted in the incidental creation of an intellectual property right.

## A Potted History of Copyright

Today, we take copyright more or less for granted. Modern copyright gives authors certain property rights in their works of authorship. And most people assume that authors are entitled to some kind of copyright protection, even if they differ about its legitimate justification, scope and duration.[2]

But that wasn't always the case. Copyright hasn't always existed and didn't always belong to authors. Before the invention of the printing press in the 15th century, copyright was irrelevant, because copying a work of authorship was expensive, so copies were rare. While governments censored certain works of authorship, they largely ignored the reproduction of uncensored works.[3]

The introduction of movable type in 1450 changed everything. Suddenly, printers could reproduce works of authorship relatively inexpensively, and copies of works of authorship became increasingly common. Initially, governments continued to focus on censorship, prohibiting the publication of immoral and seditious works. [4] But in 1557, publishers created "copyright" by persuading Parliament to charter the Stationers' Company and give its members a monopoly over censorship and publication. And in 1662, Parliament extended that "copyright" monopoly by passing the Licensing of the Press Act.[5]

The Licensing Act was unpopular, and in 1694, Parliament refused to renew it, ending the monopoly.[6] But in 1710, publishers convinced Parliament to pass the Statute of Anne, which purported to benefit authors by giving them an alienable exclusive right to reproduce copies of their works of authorship.[7] In fact, the Statute of Anne was intended to revive the Stationers' Company's monopoly by enabling publishers to purchase that exclusive right. But in the process, it inadvertently created the first modern copyright by transforming works of authorship into a form of intangible property. Gradually, copyright divorced itself from the regulatory monopoly it was intended to protect, and evolved into an independent intellectual property right, with an anti-monopoly justification.[8]

## The Right to Privacy and the Right of Publicity

Similarly, the "right of publicity," which gives people a property right in their name and likeness, grew out of the "right to privacy," which gives people an inalienable "right to be let alone." The right to privacy enables people to prohibit certain uses of their name and likeness by creating an action in tort for invasion of privacy. But it creates a personal right, not a property right, because it cannot be transferred and terminates at death.

By contrast, the right of publicity gives people alienable exclusive rights in the use of their name and likeness. The right of publicity typically enables people to prohibit the commercial use of their name and likeness without permission. And it creates a property right, because it can be transferred, in whole or in part, and may not terminate at death.[9]

## The Origins of the Right to Privacy

Today, many question the influence and relevance of law review articles,[10] but the right to privacy was created out of whole cloth in one of the most influential law review articles ever written.[11] In 1890, Samuel Warren and Louis Brandeis published an article titled "The Right to Privacy" in the Harvard Law Review.[12] At the time, the common law recognized causes of action in tort for slander and libel, or the dissemination of false statements that harm a person's reputation.[13] But Warren and Brandeis observed that true statements can also cause harm when they improperly intrude into a person's private life, and they argued that the common law should recognize a cause of action in tort for invasion of privacy in order to prevent those harms.[14] They characterized the "right to privacy" as "the right to be let alone," and explained:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from

> being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.[15]

While Warren and Brandeis did not invent the concept of a "right to privacy," or even coin the phrase, they showed how it was consistent with existing common law doctrines.[16] In 1908, the Supreme Court of Georgia became the first state supreme court to recognize a common law right to privacy, and many others soon followed.[17] And when state supreme courts declined to recognize a common law right to privacy, state legislatures often created a statutory right.

For example, in 1902, a teenage girl named Abigail M. Roberson sued the Rochester Folding Box Co. and the Franklin Mills Co. for using a lithograph of her likeness to advertise Franklin Mills Flour.[18] The New York Court of Appeals dismissed the lawsuit, holding that the common law did not create a "right of privacy," but observing that the legislature "could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent."[19] In response, the New York Legislature enacted the New York Privacy Law of 1903, which provided that the commercial use of a person's name or likeness without their written consent was both a misdemeanor and a tort.[20]

However, some courts held that the common law right to privacy only prohibits the improper public disclosure of private facts, and therefore does not necessarily prohibit the commercial use of a person's name or likeness without permission.[21] And most courts held that the right to privacy is an inalienable personal right, not an assignable property right.[22] As a consequence, the recognition of the right to privacy provided only a qualified right to control the use of a person's name and likeness.

## A Potted History of Baseball Cards

Baseball originated in English bat-and-ball games dating from time immemorial. The first known reference to "base-ball" appeared in 1744, but the term referred to a congeries of bat-and-ball games until the mid-19th century. In 1845, Alexander Cartwright of New York's Knickerbocker Club created modern baseball by codifying the "Knickerbocker Rules," and within a decade baseball became the most popular sport in America.[23]

Proto-baseball cards appeared soon after modern baseball became a popular sport, in the form of "cartes de visite" and "trade cards." Cartes de visite are small photographs mounted on cardboard. They were invented in 1854, and became wildly popular in the United States during the Civil War, because they provided an inexpensive way for soldiers and their families to exchange photographs. But photographers also sold commercial cartes de visite featuring assorted celebrities, including baseball players.

Trade cards are cardstock cards with an image printed on one side and text printed on the other, used by businesses to advertise their products and services. In the late 1860s, as baseball became a professional sport, businesses began using images of baseball players and teams on their trade cards.

In the early 1870s, tobacco companies started using cardstock to reinforce paper cigarette packages. At first, these "cigarette cards" were blank, but in 1875, the Allen & Ginter tobacco company of Richmond, Virginia started using trade cards, which did double duty as advertisements. Among other things, Allen & Ginter's cigarette cards featured images of baseball players, making them the first true "baseball cards."

Cigarette cards featuring images of baseball players proved popular with children, so candy manufacturers soon began using baseball cards as promotional items. In 1888, the G&B Chewing Gum Company of New York included baseball cards in its packages of gum, and other candy manufacturers sporadically followed suit. Between 1908 and 1915, the American Caramel Company of Philadelphia issued several sets of baseball cards that it sold with caramel. In 1909, the John H. Dockman & Sons Company issued a set of baseball cards that it sold with gum. And in 1914 and 1915, Reuck Bros. & Eckstein of Brooklyn and Chicago, the owner of Cracker Jack, issued unusually large sets of cards, and included one card in each box.[24]

## Early Baseball Cards and the Right to Privacy

These early baseball cards predated the creation of the right to privacy, and were often created without the permission or knowledge of the baseball players they featured. But as courts increasingly recognized a common law right to privacy and legislatures began to create statutory rights to privacy, companies started to ask baseball players for permission to use their names and likenesses on baseball cards.

For example, between 1909 and 1911, the American Tobacco Company ("ATC") of Durham, North Carolina issued the so-called "T206" series of cigarette cards featuring 524 different baseball subjects, primarily baseball players.[25] ATC hired sports journalists to offer baseball players $10 for permission to use their names and likenesses on its cigarette cards. While North Carolina courts did not recognize a right to privacy at that time, ATC distributed its cigarettes nationally, and presumably sought explicit permission in order to avoid liability in other states, including New York.[26]

At some point, Pittsburgh Pirates shortstop Johannes Peter "Honus" Wagner either refused or rescinded permission to use his name and likeness on cigarette cards, because he "did not care to have his picture in a package of cigarettes," and returned his $10 fee to ATC.[27] While ATC immediately stopped issuing Honus Wagner cards, it had already released about 200. As a consequence of Wagner's belated withdrawal of permission to use his name and likeness, the T206 Honus Wagner card is quite rare, and is currently the most valuable baseball card in the world, selling for as much as $2.7 million.[28]

## Modern Baseball Cards

After the First World War, tobacco companies gradually stopped issuing cigarette cards, but candy and gum manufacturers continued to issue sets of baseball cards. Between 1921 and 1927, the American Caramel Company of Philadelphia issued three sets of baseball cards. But baseball cards soon became associated with gum. In 1933, five bubblegum companies issued sets of baseball cards of varying sizes: The Delong Company of Chicago issued a 24-card set; George C. Miller & Company of Boston issued a 32-card set; the Orbit Gum Co. of Chicago issued a 60-card set; the World Wide Gum Company of Montreal issued a 94-card set; and the Goudey Gum Company of Boston issued a 239-card set.[29]

Miller, Delong, and Orbit did not continue making baseball cards. But in 1934, the National Chicle Company of Chicago entered the market, issued a 24-card "Diamond Stars" set and an 80-card "Batter Up" set. Goudey, World Wide, and National Chicle issued an assortment of sets of baseball cards in 1935 and 1936. But World Wide and National Chicle stopped making baseball cards in 1937, leaving only Goudey.[30]

Goudey briefly dominated the baseball card business, but in 1939, Gum, Inc. of Philadelphia entered the market, issuing a 161-card set. Goudey and Gum competed with each other until 1941, issuing multiple sets of baseball cards.

## Modern Baseball Cards & the Right to Privacy

Before the Second World War, the baseball card industry operated largely informally. There were few legal disputes between baseball players and the baseball card companies that used their names and likenesses, possibly because the players had little or no legal leverage. For example, in 1941, St. Louis Cardinals first baseman John Robert "Johnny" Mize sued Gum in for using his name and likeness without permission in its "Double Play" set of baseball cards, but lost.[31]

During the Second World War, the production of baseball cards stopped, due to wartime rationing of raw materials. After the Second World War, the popularity of baseball skyrocketed, and in 1948, the Bowman Gum Company (formerly Gum, Inc.) and the Leaf Gum Company of Chicago both issued sets of baseball cards.

Bowman signed 106 baseball players to exclusive contracts and issued a set of 48 black and white baseball cards. In exchange for "the 'exclusive right to print, publish, exhibit, display and sell' the ballplayer's photograph together with his name, signature or facsimile thereof" in connection with the sale of chewing gum, the player received $10, plus an additional $90 "if he was a member of a major league baseball club for the first 31 days after the opening of the official baseball season.[32]

By contrast, Leaf signed baseball players to non-exclusive contracts, and issued a set of 98 color baseball cards. At least 24 of the cards in the Leaf set depicted baseball players who had exclusive contracts with Bowman. Bowman sued Leaf, alleging that Leaf had improperly interfered with its exclusive contracts, and the parties quickly settled, with Leaf agreeing not to issue any baseball cards until 1951.[33]

As Bowman continued to sign more baseball players to exclusive contracts and started issuing larger sets of baseball cards, its profits quickly increased.[34] And competitors took notice. In 1951, the Topps Chewing Gum Company of Brooklyn, New York entered the baseball card business, signing contracts with baseball players and issuing a 104 card set of baseball cards, packaged with a caramel candy. In response, Bowman signed its baseball players to new exclusive contracts that covered both chewing gum and "confections."

## Baseball Cards & the Creation of the Right of Publicity

In 1952, Bowman was purchased by Haelan Laboratories, Inc., and Topps issued a 407 card set of baseball cards, packaged with chewing gum. Hundreds of the baseball players depicted in the Topps set had signed exclusive contracts with Haelan. So Haelan sued Topps in the United States District Court for the Eastern District of New York, alleging unfair competition, trademark infringement, and interference with contractual relations. Topps responded that Haelan failed to state a claim because under New York law the "statutory right of privacy is personal, not assignable."[35] In other words, Topps argued that the baseball players could waive their right to privacy, but could not assign it in an exclusive contract. The district court agreed with Topps and dismissed Haelan's complaint, and Haelan appealed.

The Second Circuit reversed, holding that Haelan's exclusive contracts with baseball players provided not only a release from liability for invasion of the right to privacy, but also a promise not to provide a release to anyone else. And the Second Circuit held that Topps tortiously interfered with Haelan's exclusive contracts by inducing baseball players to breach their promise not to provide a release from liability to anyone other than Haelan.[36] But the Second Circuit also held that people possess an assignable "right of publicity":

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[37]

As a result, the Second Circuit effectively created a new kind of intellectual property, the "right of publicity," which gives people an alienable right in the commercial use of their name and likeness. After *Haelan*, not only could people prevent the commercial use of their name and likeness without their permission, but also they could transfer the right to control the commercial use of their name and likeness to someone else.[38]

Ironically, *Haelan* was a pyrrhic victory. The Second Circuit remanded the case to the district court, where it became clear that Haelan had failed to sign exclusive contracts with enough players to monopolize the baseball card business, and had bungled the renewal of many of its contracts.[39] As a consequence, both Haelan and Topps continued to issue baseball cards. In late 1953, Connelly Containers, Inc. acquired Haelan in a merger. And on January 20, 1956, Topps bought Haelan's baseball card and bubble gum business for $200,000, and became the dominant manufacturer of baseball cards.

**The Baseball Card Monopoly**

Topps wasn't satisfied with dominance, it wanted a monopoly. After purchasing Haelan, it signed exclusive contracts with as many major and minor league baseball players as possible, and focused on signing minor league players before they made the majors. The Topps form contract "guaranteed the player a lump-sum payment of $125 for each season in which either his picture was used or the player was an active member of a major league club" and "ran until Topps had made five years of payments to the individual player."[40] Within a few years, Topps signed exclusive contracts with almost every professional baseball player.

In 1965, the Federal Trade Commission filed an antitrust action against Topps, alleging that it had monopolized the baseball card business by forming exclusive contracts with about 414 of 421 major league baseball players, and "practically all minor league players having a major league potential."[41] While the hearing examiner ruled against Topps, the Commission reversed, primarily because the Topps contracts were limited to baseball cards sold alone or in connection with gum and candy, so competitors could sell baseball cards in connection with other products. But the Commission also observed that the FTC could not interfere with the ability of baseball players to alienate their right of publicity.[42] After the FTC decision, Topps bought out Fleer, its only remaining competitor, and consolidated its control of the baseball card business.[43]

In 1966, the Major League Baseball Players Association hired Marvin Miller as its Executive Director. Miller created a group licensing program, under which players authorized the Players Association to negotiate group licenses of their right of publicity, but retained the right to negotiate individual licenses. It avoided conflict with Topps' exclusive contracts by explicitly excluding publicity rights that players had already conveyed. As a consequence, the Players Association could not negotiate group licenses for baseball cards sold alone, or in connection with gum or candy. The first group license authorized Coca-Cola to put pictures of baseball players on the underside of bottle caps. It was quite successful, and the Players Association soon negotiated group licenses with many other companies.[44]

The Players Association also focused on increasing compensation under Topps' exclusive contracts with individual baseball players. Miller persuaded players not to renew their exclusive contracts with Topps, which eventually enabled him to renegotiate the terms of Topps' contracts. On November 18, 1968, Topps formed a new agreement with the Players Association that "increased the players' lump sum license payments from $125 to $250 per year" and provided each player "a pro rata share of 8% of Topps' sales up to four million dollars and 10% of Topps' sales over four million."[45]

In 1974, Fleer decided to re-enter the baseball card business, but quickly ran afoul of Topps and the Players Association. Fleer tried to obtain a group license to sell large (5"x7") patches and cards, but after consulting with Topps, the Players Association refused. Fleer responded by filing an antitrust action against Topps and the Players Association in the United States District Court for the Eastern District of Pennsylvania.[46]

The district court found that Topps and the Players Association had conspired to monopolize the baseball card business. It observed that Fleer effectively could not obtain individual licenses to sell baseball cards alone or with gum or candy, because Topps had exclusive contracts with substantially all professional baseball players, and that it could not obtain a group license to sell baseball cards with other products, because the Players Association refused to negotiate one. As a result, Topps and the Players Association exercised monopoly power over the baseball card business. The district court awarded only nominal damages to Fleer, but enjoined Topps from forming or enforcing exclusive contracts with baseball players, and ordered the Players Association to grant at least one group license to sell baseball cards.[47]

Pursuant to the district court's order, the Players Association granted Fleer a non-exclusive group license to sell baseball cards, which Fleer immediately used.[48] Both Topps and Fleer appealed to the United States Court of Appeals for the Third Circuit. Topps appealed the judgment, and Fleer sought an expanded injunction banning Topps from the baseball card business for one year and forcing Topps to obtain group licenses through the Players Association, rather than exclusive contracts with individual baseball players. The Third Circuit reversed the district court, holding that neither Topps' exclusive contracts nor the Players Association's group licenses were unreasonable restraints of trade, and that Fleer had failed to prove that Topps and the Players Association actually exercised monopoly power, because competitors could negotiate their own exclusive contracts with individual baseball players.[49]

## The Rise and Demise of the Reserve Clause

The Players Association not only helped baseball players claim a larger percentage of the value of their right of publicity, but also helped them claim a larger percentage of the value of their labor. The first labor union representing baseball players was the Brotherhood of Professional Base Ball Players, formed in 1885. It was followed by the Players' Protective Association in 1900, the Fraternity of Professional Baseball Players of America in 1912 and the American Baseball Guild in 1946. The prime target of all of those unions was the hated "reserve clause," a part of every player's contract that gave the team a unilateral option to renegotiate and assign the contract. Any player who breached the reserve clause was blacklisted. As a consequence, players were bound to their team, unless they obtained an unconditional release.[50]

Despite the rather dubious legality of the reserve clause, the Supreme Court repeatedly held that it did not violate the Sherman Act, on increasingly implausible grounds. In 1915, the owner of the Baltimore Terrapins filed an antitrust action against the National League and American League, alleging that they violated the Sherman Act by conspiring to destroy the former Federal League, but the Court held that professional baseball was exempt from federal regulation under the Sherman Act because it was not "interstate commerce."[51] In 1950, George Earl Toolson filed an antitrust action against the New York Yankees, alleging that the reserve clause was an improper restraint of trade under the Sherman Act, but the Court reaffirmed its holding that professional baseball was exempt from the Sherman Act, essentially based on reliance.[52] And in 1970, Curtis Charles Flood, filed an antitrust action against Major League Baseball Commissioner Bowie Kuhn, alleging that the reserve clause violated the Sherman Act and comparing it to slavery. While the Court finally acknowledged that professional baseball was indeed interstate commerce, it nevertheless held that baseball was exempt from federal regulation under the Sherman Act, based on the principle of *stare decisis*.[53]

But the reserve clause was already on its way out. In 1968, the Players Association had negotiated the first-ever collective bargaining agreement in professional sports, which increased the minimum salary from $6,000 to $10,000, among other things. In 1970, it negotiated the right for players to arbitrate grievances. In 1972, the players went on strike and forced the owners to accept binding arbitration. And in 1975, Dave McNally and Andy Messersmith challenged the perpetual reserve clause in binding arbitration and prevailed. When the arbitrator's decision was affirmed by the federal courts, the reserve clause was no more.[54] Suddenly, professional baseball players could become free agents and negotiate their salaries independently.

## Conclusion

The Stationers' Company convinced Parliament to create "modern copyright" in order to preserve its monopoly on the publication of works of authorship, but inadvertently created a new intellectual property right with an independent, anti-monopoly justification. Likewise, Warren and Brandeis created the "right to privacy" in order to enable people to protect their right to be let alone, but inadvertently enabled the creation of the "right of publicity," a property right that enables celebrities to do precisely the opposite.

The Stationers' Company initially used copyright to protect its members' monopoly on the publication of works of authorship, and Haelan and Topps use the right of publicity to protect their monopoly over the publication of baseball cards. But just as authors eventually reclaimed copyright for themselves, so too did baseball players eventually reclaim the right of publicity

## Endnotes

[1] But see Mark Twain & Charles Dudley Warner, The Gilded Age: A Tale of To-Day (1874) ("History never repeats itself, but the Kaleidoscopic combinations of the pictured present often seem to be constructed out of the broken fragments of antique legends.").

[2] See generally, Peter S. Menell, Intellectual Property: General Theories, Encyclopedia of Law & Economics: Volume II (Boudewijn Bouckaert and Gerrit de Geest eds. 2000) (providing a taxonomy of theories of copyright protection).

[3] See, e.g., 2 Hen. IV c.15 (1401) (prohibiting, inter alia, the publication of heretical books).

[4] See, e.g., 26 Henry VIII c. 13 (1538) (prohibiting, inter alia, treason "by words in writing").

[5] 14 Car. II. c. 33 (1662). See generally David Harvey, Law and the Regulation of Communications Technologies: The Printing Press and the Law 1475 - 1641, Australian and New Zealand Law & History Society E Journal 160-211 (2005).

[6] See John Milton, Areopagitica; A speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England (1644) (objecting to censorship and the monopoly on printing).

[7] 8 Ann. c. 21 (1710).

[8] See generally Craig P. Joyce & L . Ray Patterson, Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the US Constitution, 52 Emory L.J. 909 (2004).

[9] See generally, Jennifer E. Rothman, Rothman's Roadmap to the Right of Publicity, at http://www.rightofpublicityroadmap.com/. But see Jennifer E. Rothman, The Inalienable Right of Publicity, 101 Geo. L.J. 185, 186 (2012) (arguing that some aspects of personality are not and should not be alienable).

[10] See, e.g., Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, available at http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts at approx. 30:40 (June 25, 2011) ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."). But cf. Ross Davies, In Search of Helpful Legal Scholarship, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 1, 1 n.3 (2012) (noting the absence of such a work) and Orin S. Kerr, The Influence of Immanuel Kant of Evidentiary Approaches in 18th-Century Bulgaria, 18 Green Bag 2d 251 (2015), at http://www.greenbag.org/v18n3/v18n3_articles_Kerr.pdf

[11] See, e.g., Melville B. Nimmer, The Right of Publicity, 19 Law and Contemporary Problems 203, 213 (1954) ("Louis Brandeis and Samuel Warren in their essay 'The Right to Privacy' produced what is perhaps the most famous and certainly the most influential law review article ever written.").

[12] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 205, 207, 211 (1890). The Harvard Law Review published its first issue on April 15, 1887. Louis Brandeis, a recent graduate of Harvard Law School, was an adviser to and benefactor of the Law Review. See Erwin N. Griswold, The Harvard Law Review — Glimpses of Its History as Seen by an Aficionado, in HARVARD LAW REVIEW: CENTENNIAL ALBUM I (1987), at http://harvardlawreview.org/1987/01/glimpses-of-its-history-as-seen-by-an-aficionado/.

[13] The tort of slander applies to oral statements and the tort of libel applies to written statements.

[14] Interestingly, Charles Colman has recently suggested that the impetus for the article was Samuel Warren's concern for protecting the privacy of his gay younger brother Edward "Ned" Warren. Charles E. Colman, About Ned, 129 Harv. L. Rev. F. 128 (2016).

[15] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214–15 (1890).

[16] Dorothy J. Glancy, The Invention of the Right to Privacy, 21 Ariz. L. Rev. 1, 2-3 (1979).

[17] See, e.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[18] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545 (1902).

[19] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545 (1902).

[20] 1903 N.Y. Laws 308 (codified at N.Y. Civ. Rights Law §§ 50, 51 (2016)).

[21] See Melville B. Nimmer, The Right of Publicity, 19 Law and Contemporary Problems 203, 204-06 (1954).

[22] See Melville B. Nimmer, The Right of Publicity, 19 Law and Contemporary Problems 203, 209-10 (1954) (citing O'Brien v. Pabst Sales, 124 F.2d 167 (5th Cir. 1941), among other cases).

[23] See generally Francis C. Richter, Richter's History and Records of Base Ball: The American Nation's Chief Sport (1914). Cf. The Common Law Origins of the Infield Fly Rule, 123 U. Pa. L. Rev. 1474 (1975).

[24] J. Gordon Hylton, Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelen Laboratories v. Topps Chewing Gum, 12 Marq. Sports L. Rev. 273 (2001).

[25] The series was named "T206" in 1939 by baseball card collector Jefferson Burdick. See Scot A. Reader, Inside T206: A Collector's Guide to the Classic Baseball Card Set, at http://www.oldcardboard.com/t/t206/insidet206-centennial-edition.pdf

[26] The North Carolina Supreme Court did not recognize a right of privacy under North Carolina law until 1938. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55, 64 (1938).

[27] Ralph S. Davis, "Wagner A Wonder: One Player In Game Who Is Not Money Mad," The Sporting News, October 12, 1912. It is unclear whether Wagner refused his permission to use his name and likeness because he disapproved of cigarettes or because he wanted a larger fee. While Wagner had previously appeared in other tobacco advertisements, including a 1909 cigarette advertisement, one of his teammates claimed that he would not license his name and likeness to cigarette companies:

*Wagner's only bad habit is his love of chewing tobacco, but he detests cigarettes, and does not smoke in any form. I have seen him refuse several checks of $1000 by cigarette companies who want to use his name.*

San Jose Mercury News, October 22, 1914. See Michael O'Keeffe & Teri Thompson, The Card: Collectors, Con Men, and the True Story of History's Most Desired Baseball Card 32-39 (2007) and Scot A. Reader, Inside T206: A Collector's Guide to the Classic Baseball Card Set, at http://www.oldcardboard.com/t/t206/insidet206-centennial-edition.pdf

[28] See generally Michael O'Keeffe & Teri Thompson, The Card: Collectors, Con Men, and the True Story of History's Most Desired Baseball Card (2007).

[29] J. Gordon Hylton, Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelen Laboratories v. Topps Chewing Gum, 12 Marq. Sports L. Rev. 273 (2001).

[30] J. Gordon Hylton, Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelen Laboratories v. Topps Chewing Gum, 12 Marq. Sports L. Rev. 273 (2001).

[31] The Mize v. Gum action was not reported. Matter of Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[32] Matter of Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[33] Matter of Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[34] Bowman issued a 240-card set in 1949, a 252-card set in 1950, and a 324-card set in 1951, reaching almost $1 million in revenue.

[35] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953). See generally J. Gordon Hylton, Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum, 12 Marq. Sports L. Rev. 273 (2001).

[36] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

[37] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

[38] The Supreme Court eventually ratified the Second Circuit's recognition of the right of publicity in Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977), holding that the First Amendment did not preclude Hugo Zacchini's right of publicity action against a television station that broadcast his entire "human cannonball" act without permission.

[39] Haelan Labs. Inc v. Topps Chewing Gum Co, 112 F. Supp. 904 (E.D.N.Y. 1953). Specifically, Haelan inadvertently terminated many contracts by revising

them to cover both gum and confections, thereby enabling Topps to establish priority.

[40] Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 142 (3d Cir. 1981).

[41] Matter of Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[42] Matter of Topps Chewing Gum, Inc., 67 F.T.C. 744 (1965).

[43] Topps paid $395,000 for all of Fleer’s contracts with baseball players. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 142 (3d Cir. 1981).

[44] Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 143 (3d Cir. 1981).

[45] Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 144 (3d Cir. 1981).

[46] Fleer Corp. v. Topps Chewing Gum, Inc., 501 F. Supp. 485 (E.D. Pa. 1980), rev'd, 658 F.2d 139 (3d Cir. 1981).

[47] Fleer Corp. v. Topps Chewing Gum, Inc., 501 F. Supp. 485 (E.D. Pa. 1980), rev'd, 658 F.2d 139 (3d Cir. 1981).

[48] Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1061 (Del. 1988).

[49] Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 146 (3d Cir. 1981). Topps filed an unjust enrichment action against Fleer in Delaware state court, seeking Fleer’s net profits from the sale of baseball cards under the district court’s order, and eventually prevailed. Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1062 (Del. 1988).

[50] See generally Richard B. Blackwell, Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism, 12 Wm. & Mary L. Rev. 859 (1971).

[51] Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922);

[52] Toolson v. New York Yankees, 346 U.S. 356 (1953).

[53] Flood v. Kuhn, 407 U.S. 258 (1972). Justice Blackmun’s majority opinion in Flood is notorious not only for its unconvincing rationale, but also for its seven-page paean to the history of baseball.

[54] Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 261 (W.D. Mo. 1976) aff'd, 532 F.2d 615 (8th Cir. 1976).


## About the Author

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