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THE RIGHT OF PUBLICITY—HEIRS' RIGHT, ADVERTISERS' WINDFALL, OR COURTS' NIGHTMARE?

Richard B. Hoffman*

The use of celebrities' names, pictures, and other identifying characteristics in connection with the mass merchandising of consumer products and services has increased greatly in the last decade. Because a celebrity adds audience appeal to the commercial products that he or she endorses, like the presence of a much-publicized trademark, the purchasing public's desire to obtain such products is enhanced. This merchandising phenomenon, coupled with the media's increased use of the personal attributes¹ of the famous in connection with fictionalized movies and novels,² has escalated the judicial development of the right of publicity doctrine.

A review of the current cases concerning this right of recent origin³ reveals that celebrities and their heirs are no longer content to permit unauthorized commercial uses and media portrayals of their publicity rights to go unchallenged. Merchandisers and media producers, however, are no longer content with the traditional practice of obtaining consent to use a celebrity's attributes. Instead, if challenged, they attempt to justify their unauthorized uses on grounds of fair use,⁴ incidental use,⁵ first amendment

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1. As used herein, the term "attributes" refers to the distinctive, unique features belonging to or associated with a public person. See notes 12-22 and accompanying text *infra*.

2. For example, the movie and novel entitled *Agatha* concerned a fictionalized account of the factual 11 day disappearance of the late mystery novelist, Agatha Christie. *Hicks v. Casablanca Records*, 464 F. Supp. 425 (S.D.N.Y. 1978).

3. The term "right of publicity" in its currently used context was first judicially recognized in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.) (right to grant exclusive privilege of publishing ballplayers' pictures in connection with sale of commercial product recognized as "right of publicity" separate and distinct from right of privacy), *cert. denied*, 346 U.S. 816 (1953). Earlier cases having similar results, but referring only to the right of privacy, include: *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (publication of plaintiff's likeness in advertisement without his consent held to be libelous invasion of plaintiff's right to privacy); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (publication of child's picture, without consent, accompanied by a false statement in advertisement held libelous as exposing child to ridicule).

4. See note 114 and accompanying text *infra*.

5. The incidental use doctrine protects against the unauthorized use of a name or likeness that is not directly or deliberately associated with the promotion of a product or service. See, e.g., *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1342 (N.D. Ohio 1969) (reference to plaintiff's large family on a satirical television show was not unjust enrichment because it was not used to promote a product).

privileges,⁶ or as the use of material that is already in the public domain.⁷ The latter defense is especially common when deceased celebrities are involved.

Although its importance is rapidly increasing, the right of publicity has not been treated uniformly. For example, it often has been compared to and confused with the personal right of privacy. It is one thesis of this Article, therefore, that for the right of publicity to be protected effectively, it should not be viewed as a hybrid right. It cannot be a personal right as to some aspects and a property right as to others. Rather, this right must be uniformly treated as a property right. This Article also illustrates that the right of publicity, as a fully alienable property right, is fully descendible, remaining subject, however, to the same stringent first amendment strictures that apply before a celebrity's death.

To place the emerging common law right of publicity into a proper perspective, this Article defines this tort, traces its historical development including its ill-conceived connection with the right of privacy, compares the right with other similar rights, and discusses the important questions of its conflict with first amendment privileges, its property status, and the rationales for its descendibility. This Article then examines recent judicial concerns with the descent of this right and concludes with an expression of the desired scope and expansion of this right.

It should be noted that this Article does not concern itself with state privacy statutes,⁸ which provide relief from commercial appropriation of private citizens' personalities. Neither does this Article consider the average citizen who, through some singular event such as misfortune or disaster, is thrown into the public gaze,⁹ nor with those who become famous through a

6. See notes 128-37 and accompanying text *infra*.

7. It is argued that when a celebrity has been deceased for a period of such length and the heirs have waived any rights they may have such that the celebrity is said to be within the public domain, overriding free speech interests afford third parties a privilege of free exploitation. See, e.g., *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Bird, C.J., dissenting). Fifty years has been suggested as the length of time the person must be deceased before the rights are said to be in the public domain. *Id.* at 847, 603 P.2d at 447, 160 Cal. Rptr. at 344.

8. Sections 50 and 51 of the New York Civil Rights Law are representative of a misappropriation-type right of privacy that is recognized by state statute. Section 50 provides:

A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976). Section 51 provides civil relief. *Id.* § 51. Accord, CAL. CIV. CODE § 3344 (West Supp. 1981); VA. CODE § 8.01-40 (1977). See also Comment, *Commercial Appropriation of An Individual's Name, Photograph, or Likeness: A New Remedy for Californians*, 3 PAC. L.J. 651 (1972) (discussing the California privacy statute).

9. See, e.g., *Leverson v. Curtis Publishing Co.*, 192 F.2d 974, 976 (3d Cir. 1951) ("[O]ne who is the subject of a striking catastrophe is the object of legitimate public interest."). The proper course for a private individual who is plucked from an obscure station in life against his or her will should be a right of privacy action for injury to feelings due to the unauthorized

life of crime.¹⁰ Instead, it concerns the publicity rights of true public persons who seek to prevent third parties from misappropriating their identities for profit. Those individuals possess publicity values of a size and nature that require protection from misappropriation.¹¹

THE RIGHT OF PUBLICITY: THE RIGHT TO BE
FREE FROM COMMERCIAL EXPLOITATION

A public person has been defined as "a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' He is, in other words, a celebrity."¹² This definition also should include anyone who actively attempts to achieve or maintain celebrity status.¹³ A celebrity's unique "persona" is the combination of all personal attributes. Each of these distinct aspects is protectible under the right of publicity. Although not a comprehensive list,¹⁴ such aspects include a celebrity's name, nickname,¹⁵ stage

appropriation of name or likeness for commercial purposes. See notes 83-105 and accompanying text *infra*.

10. See, e.g., Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 590-93 (1960) [hereinafter cited as Gordon]. It is not socially desirable that criminals be able to acquire and protect property rights in their personal attributes or in the aspects of their crimes since their particular creative efforts do not benefit mankind. A judge-made limitation on the right of publicity to prevent criminals and their heirs from reaping any such ill-gotten gains is being developed. See, e.g., *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 285 (S.D.N.Y. 1977) ("Whatever else Al Capone was doing in life, he was not trying to create an image with widespread commercial appeal.") (citing *Maritote v. Desilu Prods.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965)). See also *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (no right of privacy attached to plaintiff's participation in a crime that attracted international publicity and was publicized by the plaintiff himself); *In re Berkowitz*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (1979) (crime victims compensation act providing for royalties from the sale of the literary rights to a convicted criminal's story be paid to court for distribution to families of victims held constitutional and not violative of criminal's right of publicity).

11. Cf. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 217 (1954) (damages celebrity may claim for publicity rights infringement will depend upon degree of fame attained) [hereinafter cited as Nimmer].

12. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 823 (4th ed. 1971) [hereinafter cited as PROSSER]. Herein, the terms "celebrity," "personality," "public person," "the famous," and "persona" will be used interchangeably.

13. The list of who qualifies as a celebrity in a right of publicity context is endless. A succinct definition by one commentator describes a celebrity as an "actor, author, artist, politician, model, athlete, musician, industrialist, executive, playboy or any other of a hundred types who wish to be in the public eye for any of a hundred reasons." Donenfeld, *Property or Others Rights in the Names, Likenesses, or Personalities of Deceased Persons*, 16 BULL. COPYRIGHT SOC'Y 17, 20 (1968).

14. One commentator has listed broader aspects of one's personality that can be misappropriated for purposes of a privacy action. Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 239 (1932), *quoted in* Gordon, *supra* note 10, at 556. Broad personality traits, however, such as physical integrity, feelings or emotion, and capacity for activity or service are not properly protectible under the right of publicity.

15. See, e.g., *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 379, 397, 280 N.W.2d 129, 137

name,¹⁶ picture,¹⁷ likeness, image, identity, act,¹⁸ traits,¹⁹ walk, habits, style, reputation,²⁰ history, statistics, facts concerning professional careers, signature,²¹ and any identifiable personal property, such as a distinctive race car.²²

The need for publicity right protection arises most commonly when a commercial advertiser uses a celebrity's name, picture, or likeness to promote a particular product or service. Such uses of publicity rights are extremely valuable to celebrities as royalties sometimes exceed \$1,000,000.²³ Thus, the licensing of one's public persona can become a very significant source of income to a celebrity and his grantees.²⁴ The extreme value placed on some public images occurs because the image the usual celebrity

(1979) (nickname "Crazylegs" was clearly identified with plaintiff and warranted protection under the right of publicity).

16. *See, e.g., Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 761 (D. Conn. 1935) (when public associated "Old Maestro" with radio broadcaster under contract to promote plaintiff's product, defendant was precluded from using slight variation of that name as tradename); *Winterland Concessions Co. v. Creative Screen Design*, 210 U.S.P.Q. 6 (BNA) (N.D. Ill. 1980) (defendants preliminarily enjoined from selling products bearing the names and symbols of various rock groups).

17. *See, e.g., Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (defendant's sale of posters portraying plaintiff without plaintiff's written consent subjects defendant to liability under statutory right of publicity).

18. *But see Carson v. Here's Johnny Portable Toilets, Inc.*, 498 F. Supp. 71, 74 (E.D. Mich. 1980) ("Here's Johnny" is not such a strong and distinctive identification of entertainer Johnny Carson that its use is foreclosed from the market place).

19. *See, e.g., Groucho Marx Prods. v. Playboy Enters.*, No. 77 Civ. 1782 (S.D.N.Y. Dec. 30, 1977) (persona of Groucho Marx described as his curly hair, moustache, eyebrows, and ever-present cigar, all unified by his zany expressions), *reh'g granted*, No. 77 Civ. 1782 (S.D.N.Y. Mar. 9, 1979).

20. *But see Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977) (the word "reputation" is not synonymous with the word "name" as used in a New York statute prohibiting the use of a living person's name for commercial purposes without written consent).

21. *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289, 292 (Tex. Civ. App. 1951) ("The use of an individual's signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of that term.').

22. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (professional race car driver whose car was used in a television commercial had cause of action for infringement of publicity rights).

23. *See, e.g., Sales v. Christy*, 168 U.S.P.Q. (BNA) 62, 63 (Patent Off. Trademark Trial and App. Bd. 1970) ("Soupy Sales" products); *Chicago Tribune*, Jan. 14, 1981, § 3, at 1, col. 1 (John Lennon memorabilia).

24. In this regard, courts have noted that even though some might prefer to avoid such activities, a celebrity's endorsement of a commercial product is a common occurrence and does not indicate either a diminution in professional reputation or a loss of professional talent. *See, e.g., Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 349 (S.D.N.Y. 1973) ("it cannot be said that performing . . . commercials would have a tendency directly to injure plaintiff in her business, profession, or trade.'). *But see Lahr v. Adell Chem. Co.*, 300 F.2d 256, 258 (1st Cir. 1962) (court recognized that certain uses of a celebrity's name may imply that he has "stooped to perform below his class").

develops has great audience appeal for commercial uses. The celebrity's attributes function as a trademark. The specific attributes draw the public's attention to any commercial products with which the celebrity is associated. Thus, the use of a celebrity's personal features, whether authorized or not, is intended to and does make a company's product or service more desirable.²⁵ Nevertheless, a celebrity's attributes have value as a commercial endorsement only because of their past public disclosure, publicity, and circulation and because the public attributes goodwill, feats of skill, or accomplishments to the personality.²⁶ Moreover, the drawing power present in a celebrity's publicity rights has been created through his own hard work and sacrifice and the relinquishment of his own privacy.²⁷ In other words, a celebrity's unique act, special recognized skill, or particular cultivated look is solely the product of his or her own labors, talents, energy, time, efforts, and expense.²⁸

A distinctive aspect of the common law right of publicity, therefore, is the judicial recognition of the actual or potential commercial value of a celebrity's personal attributes and the resultant protection of the proprietary interest in the profitability of a celebrity's public reputation.²⁹ This right can be defined as the exclusive right of commercial exploitation of a celebrity's property rights in his personal attributes.³⁰

It has been recognized that as much of the economic value inherent in a celebrity's right of publicity lies in the right of exclusive control over the use of his well known name, act, or skill as it does in the public recognition

25. See, e.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970) ("the use of the baseball players' names and statistical information is intended to and does make defendant's game more saleable to the public").

26. *Id.* at 1283.

27. See Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 646 (1973).

28. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977) (performer of "human cannonball" act brought a suit against a television station for broadcasting his entire act).

29. *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, 139-40 (S.D.N.Y. 1953) (right of publicity recognized as economic value associated with a celebrity's name and pictures).

30. The right of publicity has been defined in various ways. One court asserted that "[t]he so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities." *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979). Another court defined the right of publicity to include "the exclusive interest in the financial worth of one's personality constitut[ing] a legally protected interest." *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 226, 250 N.Y.S.2d 529, 537 (1964), *aff'd*, 23 A.D.2d 216, 260 N.Y.S.2d 451 (1965), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239 (1967) (remanded for further consideration in light of *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). One commentator has broadly defined the right of publicity to extend to "the right to recover for the misappropriation of plaintiff's interest in personal name and likeness [and] . . . to other characteristics as well." Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. REV. 1103, 1105 n.17 (1975) [hereinafter cited as *Dracula's Progeny*].

of these personal attributes.³¹ But if the celebrity cannot prevent others from capitalizing upon his identity, he will be unable to sell licenses or pursue a business utilizing his publicity rights. Any unauthorized use of a performer's publicity rights will undoubtedly disrupt his efforts to control his reputation, and may well alter his public image. In addition, an unauthorized use in one field may preclude his attempts at future authorized promotions in that or other fields.³²

In light of this valuable commercial potential in a celebrity's attributes, an unjust enrichment theory is used to protect publicity rights. The underlying rationale is that a celebrity has the sole right, subject to overriding first amendment considerations,³³ to enjoy the fruits of his own labors free from unjustified interference.³⁴ It is unjust to allow an advertiser or merchandiser to benefit from the use of a celebrity's attributes without compensating the source. Also, it is inequitable for the celebrity to be unable to control any tasteless exposure that might injure his valuable public image.³⁵ Thus, because celebrities have such unique, legitimate proprietary interests in their public personalities that require protection, courts grant them relief.³⁶

31. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977) (much of the economic value of plaintiff's human cannonball act lies in his exclusive control over publicity of the act because if the act can be seen on television the public will be less willing to pay to see it performed elsewhere).

32. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 851-54, 603 P.2d 425, 449-51, 160 Cal. Rptr. 323, 347-49 (1979) (Bird, C.J., dissenting) (criticizing the majority's decision for reversing the trial court and allowing unlimited use of a celebrity's likeness).

33. See notes 128-37 and accompanying text *infra*.

34. *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 79, 232 A.2d 458, 462 (1967) (court spoke in terms of right of privacy; however, the conduct at issue was the use of data for commercial profit and thus more appropriately characterized as an infringement of the right of publicity).

35. See Brenner, *What's in a Name and Who Owns It?*, BARRISTER, Winter 1979, at 42, 43.

36. See *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 664 (1977) (there is no doubt that celebrities have a legitimate proprietary interest in their public personalities). Relief has been granted for several forms of unauthorized use of publicity rights. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (broadcasting company videotaped and displayed performer's entire act on a newscast); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.) (television station broadcasted prize fight without one of the fighters' consent), *cert. denied*, 351 U.S. 926 (1956); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (famous writer sought to enjoin movie producers and publishers from distributing a movie and book about her life); *Groucho Marx Prods. v. Playboy Enters.*, No. 77 Civ. 1782 (S.D.N.Y. Dec. 30, 1977) (magazine used comedian's likeness in pictorial satire without his consent), *reh'g granted*, No. 77 Civ. 1782 (S.D.N.Y. Mar. 9, 1979); *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (use of celebrity's name and biographical data in selling educational career game), *aff'd as modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973); *Gautier v. Pro-Football, Inc.*, 198 Misc. 850, 99 N.Y.S.2d 812 (animal trainer's act televised at halftime of football game without approval), *aff'd*, 199 Misc. 598, 106 N.Y.S.2d 667 (1950), *rev'd*, 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Cher v. Forum Int'l*, 7 Media L. Rep. (BNA) 2593 (1981) (publication of unauthorized "exclusive interview" violation of right of publicity).

Generally, a right of publicity plaintiff must prove several elements before the courts will provide this relief. First, he must establish that his publicity rights are worth protecting. In other words, he must prove he is a true celebrity and not merely a private citizen who is complaining that his right to privacy has been invaded. As previously noted, courts have fashioned various definitions of a true celebrity, but all definitions basically focus on the protection of a celebrity's combination of unique personal attributes.³⁷

Second, the celebrity must prove that the defendant has clearly represented one of his attributes to the public. An unauthorized use of an exact likeness is not a prerequisite, but the defendant must at least use a recognizable version of the celebrity's attributes before liability will attach.³⁸

Finally, the plaintiff must prove that the unauthorized portrayal is a true commercial use that resulted in actual damages and is neither a privileged use under the first amendment³⁹ nor merely an incidental use. For example, in *Booth v. Curtis Publishing Co.*,⁴⁰ the defendant magazine, in order to attract readers in a subscription advertisement, twice used a photograph of a well known actress who had been the subject of a previous feature story. The court held that the magazine, as part of the news media, was privileged under the first amendment to use excerpts from its past editions to illustrate the quality of the magazine.⁴¹ Similarly, an unauthorized portrayal may not be actionable if it is merely incidental and not connected with the promotion of a product or service.⁴² This limitation does not, however, preclude

37. See note 30 and accompanying text *supra*.

38. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (advertisement represented race car driver's well known car); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (unauthorized printing and publication of portrait of celebrity). *But see Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (mere imitation of plaintiff's voice does not constitute use of name or likeness).

In construing §§ 50 and 51 of the New York Civil Rights Law, the New York courts have indicated that whether a public figure is recognized is not dependent on the number of people who recognize the figure. "[A]ny sufficiently clear representation of a living person is violative of the statute if it is used for commercial purposes without the subject's consent." *Groucho Marx Prods. v. Playboy Enters.*, No. 77 Civ. 1782 (S.D.N.Y. Dec. 30, 1977) (citing *Negri v. Schering Corp.*, 333 F. Supp. 101 (S.D.N.Y. 1971) and *Young v. Greneker Studios, Inc.*, 175 Misc. 1027, 26 N.Y.S.2d 357 (1941)), *reh'g granted*, No. 77 Civ. 1782 (S.D.N.Y. Mar. 9, 1977).

39. See notes 128-37 and accompanying text *infra*.

40. 15 A.D.2d 343, 223 N.Y.S.2d 737, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).

41. 15 A.D.2d at 349-50, 223 N.Y.S.2d at 743-44. See also *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975) (use of athlete's photograph merely incidental to advertising contents of magazine, especially when no endorsement by athlete indicated), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 504, 386 N.Y.S.2d 397 (1976).

42. See *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1343 (N.D. Ohio 1969) (recovery allowed only when there is some deliberate association of celebrity's name or likeness with the advertisement or promotion of a product); *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, 140 (S.D.N.Y. 1953) (the right of publicity is cognizable only when the unauthorized use of celebrity's name is connected with advertising or sale of a commodity).

an action for the appropriation of the very activity that makes the celebrity famous, such as taping an entertainer's entire performance⁴³ or recording a live performance for which he or she ordinarily gets paid. Indeed, a stronger right of publicity case can be made in those instances than for the unwarranted appropriation of the celebrity's attributes for the endorsement of a collateral commercial product.⁴⁴

Assuming the above requirements are met, the protection of the right of publicity is given a wide scope. For example, if a celebrity at one time grants permission, whether free or for a fee, for a particular use of his name or likeness, that permission has limits both in time and scope. It cannot be converted into an unpermitted use in another area. Nor can prior permission be relied upon for a use occurring years later.⁴⁵

Another example illustrating the liberal protection given publicity rights is in the area of a celebrity's biographical data. It is well recognized that the first amendment protects the biographical form of disseminating news or historical facts.⁴⁶ Thus, a celebrity having well publicized exploits and achievements has no statutory or common law right to his life story; he cannot control the exclusive commercial exploitation of his personality in biographical form, whether it is presented in a book, movie, or magazine.⁴⁷ It is quite a different case, however, when a third party uses a celebrity's name and biographical data without consent to endorse a commercial product or to accompany the article sold. Assuming the product containing the biographical information is not used to disseminate news or other legitimate public interest information, but rather is used solely to enhance a product's marketability, the courts will protect the celebrity's publicity rights.⁴⁸ The usual defense in such cases is that the celebrity's biographical information is available to the public in record books, magazines, and other periodicals. Courts are careful to instruct, however, that although such information embodying the celebrity's public personality has been voluntarily disclosed through the news media, disclosure does not extinguish the celebrity's pro-

43. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

44. See *id.* at 576.

45. *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 884 (S.D.N.Y. 1973) (magazine cannot refer to a celebrity's original permitted use as a newsworthy event and thereby convert the original permission into a perpetual license to use the celebrity as an unpaid model).

46. *Rosemont Enters., Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969). "Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where [it] conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." 58 Misc. 2d at 6, 294 N.Y.S.2d at 129.

47. See, e.g., *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980). In *Frosch*, the executor of Marilyn Monroe's estate complained that Norman Mailer's book, *Marilyn*, infringed the right of publicity of the estate. The court held that if a book is a literary work and not merely a disguised advertisement for a good or service, the right of free expression outweighs any claim of the right of publicity. *Id.* at 769, 427 N.Y.S.2d at 829.

48. See, e.g., *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 146-47, *aff'd as modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

prietary interest in his personal statistics, especially when they are used in a purely commercial context.⁴⁹

Despite the broad scope of the publicity right, the courts have declined to protect voice imitations. In general terms, this is an indirect form of misappropriation⁵⁰ concerning such things as a performer's timing, inflection, tone, singing style, and artistic sound. The majority of courts considering this question have held that, absent an identification of the celebrity by name or likeness, the imitation of his or her voice per se does not constitute unfair competition or violate one's publicity rights.⁵¹

*Booth v. Colgate-Palmolive Co.*⁵² is illustrative of this point. This case involved radio and television commercials with voice-over imitations of the plaintiff in the role of her television character Hazel. The court held that there was no violation of the plaintiff's right of publicity as the commercials in question were anonymous and did not use plaintiff's name and likeness in any way to identify her as a source of the voice of the Hazel character. In so holding, the *Booth* court reasoned that several public policy reasons dictated that voice alone cannot serve as a celebrity's "trademark" in a right of publicity sense.⁵³

49. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970). *Cf. Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967). In *Palmer*, a group of well known golfers obtained an injunction against defendant game company's sale of a parlor game that used the golfers' names and statistics. Although publishing biographical data of a celebrity is not a per se invasion of privacy, the court held that "the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does [constitute an invasion of privacy]." *Id.* at 79, 232 A.2d at 462. *See also* note 34 *supra*.

50. In contrast, an unauthorized tape recording of a celebrity's audio performance constitutes a direct form of misappropriation. *See Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (1950) (defendant recorded broadcasted performances, then produced and sold phonograph records), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

51. *See Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (singer has no property rights in her particular style of singing and imitation of that style does not give rise to a cause of action under unfair competition), *cert. denied*, 402 U.S. 906 (1971); *Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960) (no property rights exist in the so-called Glenn Miller sound created by an orchestra under his direction), *aff'd*, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1961). *See also Davis v. Trans World Airlines*, 297 F. Supp. 1145 (D.C. Cal. 1969) (imitation alone does not give rise to cause of action); *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 908 (S.D. Cal. 1950) (mere arrangement of a musical composition by entertainer who is not the author of the composition is not a cognizable property right).

52. 362 F. Supp. 343 (S.D.N.Y. 1973).

53. *Id.* at 347. The *Booth* court recognized that a right of protection against imitators would present serious supervisory problems because it would be difficult to police performances. Also, protection against imitators would impose unnecessary restraints on the potential market of such a copyright because prospective licensees would have to secure permission from various performers. Further, such a performance right would contravene constitutional policy concerning durational limits for patented and copyrighted works. The court asserted that the granting of a performance right monopoly preventing others from imitating a performer's "posture, gestures, voices, sounds, or mannerism may impede, rather than 'promote the Progress of useful Arts.'" *Id.* (quoting U.S. CONST. art. I, § 8).

However, one court has held that imitation of a celebrity's truly unique voice is protectible

Thus, it appears that when there is a recognizable imitation of a celebrity's unique voice, but this imitation is made without any accompanying identification of the celebrity's name or likeness, such as in a radio commercial, no interference with the celebrity's right of publicity exists. The holdings in *Booth* and similar cases, however, fall short of the mark. A logical distinction can be made between the unauthorized imitation of a celebrity's unique and recognizable voice used solely for commercial purposes, such as in a television advertisement, and another performer's creative imitation of that celebrity's voice in their own acts, such as in the acts of entertainer Rich Little.⁵⁴ Based on this distinction, the *Booth* court's fears would not be pertinent to voice imitations used in purely commercial settings. For example, a celebrity whose recognizable voice is imitated without authorization to sell household cleaner over the radio could prevail in a right of publicity action. Yet other performers' creative imitations of that celebrity's voice in their own performances, whether authorized or not, could not be enjoined.

In light of the foregoing, the particular personal attribute involved must not be too abstract to define or too difficult for the court to police to be protected under the right of publicity.⁵⁵

Societal Interests Served In Protecting The Right Of Publicity

Recognition and protection of the right of publicity serve several state and public interests.⁵⁶ The benefit to the public derived through entertainment is probably the most important of the state interests.⁵⁷ An enforceable right of publicity acts as an economic incentive for a celebrity to make the immense investments in time, effort, and money that are required to produce a unique performance of interest to the public.⁵⁸ Additionally, the state seeks to protect the economic value of a performer's persona so that

under unfair competition principles. *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962). Another case has indicated that re-recording a singer's songs in an intentionally degrading manner may give rise to a cause of action for violation of the singer's right to publicity. *Gee v. Columbia Broadcasting Sys.*, 471 F. Supp. 600 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979). Finally, one court has held that a musical performer, by rendering a song and giving it novel artistic value, has participated in the creation of a product in which he is entitled to a property right. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 441, 194 A. 631, 635 (1937).

54. *But see* *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). In *Russen*, the court granted a preliminary injunction that restrained an Elvis Presley impersonator from committing acts resembling or representing Elvis Presley's appearance in connection with imitations of Presley's vocal style. *Id.* at 1382-83. This case no doubt could be argued to apply to celebrity look-alike situations as well.

55. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 845 (S.D.N.Y. 1975).

56. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979). The right of publicity is supported by the public policy interests of "controlling the effect on one's reputation of commercial uses of one's personality and [preventing] unjust enrichment of those who appropriate the publicity value of another's identity." *Id.* at 391, 280 N.W.2d at 134.

57. *See* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977).

58. *Id.* at 573, 575.

he alone can enjoy the fruits of his labors.⁵⁹ By safeguarding the celebrity's proprietary interest in his publicity rights, the state helps assure that individuals will aspire to become, or remain, well known celebrities.

A third public policy consideration underlying protection of the right of publicity is the prevention of unjust enrichment by those who misappropriate the publicity value of a celebrity's identity.⁶⁰ The misappropriator should not be permitted to obtain, at no charge, that for which he would ordinarily have to pay.⁶¹ Furthermore, the state has an interest in protecting the right of publicity because the commercial use of a celebrity's name or unique characteristics affects the celebrity's reputation.⁶² This interest is especially important whether the person has never commercially exploited his publicity value⁶³ or has always attempted to cultivate a reputation as an exemplary individual.⁶⁴

A final policy consideration involves the celebrity, his heirs, and his business associates more personally than the four societal interests outlined above. Yet, this interest is also ancillary to the state's interests of encouraging the creation of unique personas and preventing unjust enrichment. This more personal interest is in the establishment of an ongoing, valuable, enforceable asset of the celebrity's publicity rights, which is the ultimate fulfillment of the celebrity's hopes and expectations. Although this interest may have only secondary importance to celebrities who are beginning their careers, it is of prime consideration to those who are extremely successful and older, or who wish to begin actively marketing their publicity rights. Furthermore, they intend to leave their publicity rights to their heirs or to the persons with whom they contract.⁶⁵ The courts have not yet found a logical reason to deny state protection of the commercial interests in a celebrity's publicity rights.

Moreover, state protection of the right of publicity does not conflict with either the United States Constitution⁶⁶ or the federal copyright laws.⁶⁷ For example, a state based right of publicity, whether protected while the per-

59. The public interest in the right to publicity "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." *Id.* at 573.

60. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 391, 280 N.W.2d 129, 134 (1979).

61. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966) (no social purpose served by allowing defendant to commercially appropriate plaintiff's likeness for free if defendant would normally have to pay).

62. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 391, 280 N.W.2d 129, 134 (1979).

63. See note 24 *supra*.

64. See *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 168-69 (5th Cir. 1942) (football player developed reputation of encouraging young people not to drink alcohol).

65. See note 157 and accompanying text *infra*.

66. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577-79 (1977) (Constitution does not prevent a state from protecting entertainers to encourage the creation and production of entertainment).

67. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (federal copyright laws do not pre-empt a state based right of publicity because the right of publicity does not interfere with the federal copyright schemes). See note 177 and accompanying text *infra*.

sonality is living or deceased, does not prevent others from benefiting under the federal patent or copyright laws.⁶⁸ Others are still free to stage their own acts and productions, create their own skills and develop their own unique personas. Likewise, advertisers and manufacturers are free to make and sell their own commercial products that are not otherwise copyrighted or patented. The only prohibition is that in so doing they cannot use a celebrity's publicity rights without proper authorization. This prohibition, however, is no greater, nor more burdensome than that placed upon one seeking to use another's well known trademark. Thus, federal law does not prevent the state from recognizing and protecting its various societal interests in granting protection to publicity rights.

Types Of Relief For Interference With The Right Of Publicity

If a celebrity's publicity rights have been violated, both injunctive relief and damages are appropriate remedies. The courts grant injunctive relief to terminate the unauthorized marketing of a celebrity's unique personal attributes.⁶⁹ In addition, injunctive relief grants the celebrity the opportunity to determine whether or how this publicity right will be marketed.⁷⁰

A celebrity also is entitled to recover damages for misappropriation of publicity rights.⁷¹ In contrast to damages awarded in privacy cases, which compensate for injury to feelings, damages in publicity cases generally compensate for the value of the appropriated publicity.⁷² Thus, a celebrity usually recovers a proportion of the profits the defendant realized. Because recovery in some instances may be limited to only nominal damages when based upon a proportion of profits, one court has held that a defendant's

68. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 849-51, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (Bird, C.J., dissenting).

69. Injunctive relief is available in right of publicity actions because "[n]othing so exclusively belongs to a man or is so personal and valuable to him as his name." *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 90, 291 P.2d 194, 199 (1955) (quoting *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 93, 229 P. 317, 319 (1924)). See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (celebrity's proprietary interest in his public personality can be protected through injunctive relief).

70. See *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). In *Russen*, the court acknowledged that in unfair competition or trademark infringement cases the public interest generally favors preliminary injunctive relief. Similarly, in a right of publicity claim, if the "moving party has demonstrated a likelihood of success [an injunction should be granted] 'because the public . . . is interested in fair competitive practices and clearly opposed to being deceived in the market place.'" *Id.* at 1382 (quoting *McNeil Labs., Inc. v. American Home Prods. Corp.*, 416 F. Supp. 804, 809 (D.N.J. 1976)). See also *Joel v. Various John Does*, 499 F. Supp. 791 (E.D. Wis. 1980) (in light of damages to rock star and his exclusive licensee, unauthorized vendors enjoined from selling Billy Joel merchandise at concert halls).

71. See *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (plaintiffs entitled to actual damages for appropriation of their property rights); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (celebrity should be able to recover the fair market value of the unauthorized use of his face, name, and likeness).

72. See generally 3 M. NIMMER, NIMMER ON COPYRIGHT § 14.02 (1981) (computation of actual damages in copyright infringement cases).

actual loss or gain on the commercial product in which a celebrity's name or likeness is improperly used is not pertinent to the *issue* of damages.⁷³ This court explained that the celebrity's actual loss of compensation is what is at issue rather than the misappropriator's possible unjust enrichment. Whether the defendant had a gain or loss, the court concluded, may be relevant only in calculating the *amount* of damage.⁷⁴

The extent of interference with a celebrity's right of publicity is not generally capable of exact measurement.⁷⁵ Several relevant factors may, however, be used to compute a celebrity's damages. First, a court can determine the fair market value of the celebrity's publicity rights.⁷⁶ The fair market value may be ascertained by considering the level of fame and esteem the celebrity has achieved or by reviewing the celebrity's prior earnings and contracts, such as for performances, endorsements, personal appearances or magazine articles.⁷⁷ The fair market value also can be determined, as done in trademark and patent cases, by using an established royalty rate from a prior license.⁷⁸ Second, a court can compare the celebrity in question to another celebrity of equal stature who is in the same general field of endeavor.⁷⁹ Finally, the court should consider that a personality had never licensed his publicity rights and, in fact, may have abhorred the thought of doing so.⁸⁰ This factor is important because the initial use of a celebrity's likeness or name may be much more valuable than the fiftieth use.

On the other hand, there are factors that tend to diminish a celebrity's recovery of damages. A court may consider that the defendant made no profit from the unauthorized use of the celebrity's name or likeness. Furthermore, if the celebrity's name or picture was only one of many, a court will consider that the celebrity has not been specifically exploited in determining damages for interference with the right of publicity.⁸¹

73. *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 321 (Pa. Ct. C.P. 1957).

74. *Id.*

75. *Id.* at 321-22. *See also* *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (courts should take judicial notice that there is active market for exploitation of celebrities' publicity rights and that experts, as in trademark infringement and unfair competition cases, can be used to value those rights).

76. *See* *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.11 (9th Cir. 1974) ("the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered").

77. *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 322 (Pa. Ct. C.P. 1957).

78. *See* *Julien v. Gomey & Andre Tractor Repairs, Inc.*, 512 F. Supp. 955 (D.C. La. 1981) (ascertaining damages for patent infringement allows patent holder to be compensated for an amount not less than a reasonable royalty).

79. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 386, 280 N.W.2d 129, 132 (1979) (evidence that the usual minimum compensation for the appropriation of an athlete's name on an unrelated product was five percent of the gross sales).

80. *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (one element of damages is whether plaintiff has sanctioned commercial use of his celebrity status).

81. *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 322 (Pa. Ct. C.P. 1957) (in determining the amount of damages courts must consider whether defendants deal exclusively with plaintiff).

Although presumably all individuals possess the right of publicity, a proper rule of damages would place a logical limitation on this right. Under this rule, the courts should require a plaintiff to meet a threshold standard of proof, similar in nature to the trademark law's doctrine of secondary meaning, in order to establish one's celebrity status and fame.⁸² For example, the name of an average citizen who is not well known does not require protection because it has no recognizable publicity value. The proprietary commercial value necessary for protection under the right of publicity is absent in such noncelebrity cases. Instead, when the name or likeness of a private citizen is misappropriated for commercial purposes, it is only that citizen's feelings that need be protected. Such protection can be adequately accomplished under a right of privacy action. Nevertheless, as will be demonstrated, a right of privacy action does not adequately protect a celebrity's publicity rights.

ANALYSIS OF OTHER COMPARABLE RIGHTS

The Right of Privacy

The right of privacy doctrine was established for the protection against injuries to one's feelings.⁸³ This right has been defined as:

the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility.⁸⁴

Professor William Prosser organized these various privacy rights into four distinct categories.⁸⁵ Prosser's categories involve a specific harm or injury to feelings from an interference with the right to be let alone. The fourth type,

82. See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978) (recognizing that former heavyweight boxing champion had achieved celebrated status); *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 760 (D. Conn. 1935) (court noted that it is often difficult to discern whether plaintiff has achieved public identification). See also Pilhel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC'Y 249, 256 (1980). In this article, the author analyzed the right of publicity's threshold requirement of establishing celebrity status. The article suggested that the court's use of the word "celebrity" in *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 n.11 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979), implied that the right of publicity does not exist from birth.

83. The right of privacy doctrine was first espoused in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The courts subsequently relied on the reasoning in this article in recognizing the right. See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (seminal case recognizing the right of privacy in which the court specifically relied on the Warren & Brandeis article).

84. *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 648, 86 N.E.2d 306, 308 (1949) (quoting Annot., 138 A.L.R. 22 (1942)) (use of plaintiff's photograph for advertising purposes without consent).

85. PROSSER, *supra* note 12, at 804. Prosser's four categories are: (1) intrusion upon plaintiff's physical solitude or seclusion; (2) public disclosure of private facts about plaintiff; (3) placement of plaintiff in a false light in the public eye; and (4) misappropriation of plaintiff's name or likeness for commercial purposes for defendant's benefit. This fourth category is

in addition to involving personal harm, can involve a pecuniary loss from an interference with a property right.⁸⁶

Each of Prosser's four privacy rights, therefore, centers on the injured feelings of the person whose private life has been invaded. Thus, the courts view any publicity about someone such as an entertainer, whose life is by plan a public book, as not offensive to one of ordinary sensibilities.⁸⁷ As a result, the right of privacy is of very limited benefit to a celebrity because his feelings cannot be injured, or his right to be let alone invaded, if he is constantly seeking the public limelight. Further, with the right of privacy the unauthorized dissemination of information is properly restricted when the information places a person in a false light before the public.⁸⁸ In contrast, the right of publicity doctrine does not prevent the dissemination of information, but rather concentrates on who has the right to do the disseminating.⁸⁹

From a first amendment standpoint, the celebrity waives his right to privacy to the extent that the reports concerning him are legitimate news or to the extent he made his life public.⁹⁰ With certain exceptions,⁹¹ his right

somewhat similar to the right of publicity. *See, e.g., National Bank of Commerce v. Shaklee Corp.*, 207 U.S.P.Q. (BNA) 1005, 1010 (W.D. Tex. 1980).

86. *See, e.g., Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280 (D. Minn. 1970) (game company's use of ballplayers' names and personal data held to be misappropriation of property despite that the data was readily available to the public).

87. The "ordinary sensibilities" test is the one most often used in right of privacy cases. *See PROSSER, supra* note 12, at 811.

88. *See, e.g., Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948) (face of honest taxi driver used with a story about the dishonest propensities of city taxi drivers); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905) (improper inclusion of plaintiff's photo in a display of convicted criminals' photos). *See generally* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) (demonstrating the overlap between the right of privacy and defamation in a false light case and suggesting that the law of privacy may eventually supplant the law of defamation).

89. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (television station did not have the right to broadcast a performer's entire circus act because dissemination of the performance affected its economic value to the performer).

90. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967) (in a privacy action against a news magazine, first amendment dictates that newsworthy plaintiff must prove reckless disregard of facts); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (in libel action brought by public official against a newspaper, plaintiff must prove defendant's knowledge that statement was false, or that it was made with reckless disregard of truth or falsity). For an interesting discussion of contemporary libel law and an alternative defense to defamation of public figures, see Carman, *Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice"*, 30 DEPAUL L. REV. 1 (1980).

91. Several aspects of a celebrity's life remain personal even though that person makes his life public and continually seeks publicity. These areas include a celebrity's deeply personal relationship with family members and his introspective thoughts and feelings. It is beyond the scope of this Article, however, to discuss the right of privacy aspects that a celebrity retains upon entering the public limelight. Neither does this Article attempt to discuss the possibility of a celebrity's use of both the right of privacy and right of publicity in pursuing unauthorized portrayals. For a detailed analysis of this possibility, see Comment, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 U.C.L.A. L. REV. 1095 (1978).

of privacy is substantially subordinated to the first amendment freedoms of press and speech.⁹²

This doctrine of limited waiver, however, is not applicable to a celebrity's publicity rights. When a celebrity's personality has commercial value, courts will give him protection against unpermitted commercial uses of his personal attributes,⁹³ even though he cannot restrict the dissemination of truly newsworthy information. For commercial purposes, the waiver and dedication of an entertainer's personality to the public domain is limited to the specific consent given.⁹⁴ The limited waiver defense, therefore, has no application to the quite different and independent right to have one's personality, even if it be that of a celebrity and thus newsworthy, free from others' commercial exploitation.⁹⁵

As other commentators have explained in greater detail,⁹⁶ a confusion of remedy arose in early cases between the two doctrines of right of privacy and right of publicity. Litigants filed suits for invasion of privacy rather than for misappropriation of personality in cases when injury to feelings had only secondary importance to the more drastic commercial appropriations of name and likeness that were present. This confusion resulted in a serious conflict in the language and results of the early opinions.⁹⁷ Primarily because of the limited waiver defense in privacy law, the effect of such mislabeled right of publicity cases was that commercial advertisers were free to seize upon a celebrity's popularity without compensation.

Other limitations on the right of privacy doctrine also exist that make this doctrine's use in commercial misappropriation cases undesirable. For example, the right of privacy is a personal right that can only be asserted by the party whose privacy has been invaded.⁹⁸ Accordingly, assignment of privacy rights is prohibited, including those rights falling under the misappropriation category.⁹⁹ Any grantee of publicity rights for use on collateral prod-

92. See *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

93. See, e.g., *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 352, 223 N.Y.S.2d 737, 745 ("[t]hat [a celebrity] may have voluntarily on occasion surrendered [her] privacy, for a price or gratuitously, does not forever forfeit for anyone's commercial profit so much of [her] privacy as [she] has not relinquished."), *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).

94. *Douglas v. Walt Disney Prods.*, No. 664-346, (Los Angeles Super. Ct. November 26, 1956).

95. See *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 223 N.Y.S.2d 737, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).

96. See, e.g., Gordon, *supra* note 10, at 554.

97. See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1942). See also Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 246 (1932) (discussion of the early cases which improperly confused the right of privacy with what is now known as the right of publicity).

98. PROSSER, *supra* note 12, at 814. See, e.g., *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958) (plaintiffs' privacy action denied because it was not of a personal nature, but rather a claim that their brother was put in a false light by a magazine article).

99. PROSSER, *supra* note 12, at 815. See, e.g., *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir. 1935) (in privacy action, only baseball players themselves could object to a manufacturer's use of their names and likenesses). It should be noted that the right of publi-

ucts¹⁰⁰ is thus precluded from asserting such rights under a privacy theory. Likewise, since the right of privacy does not generally survive a person's death, the heirs or grantees of publicity rights are without recourse to enforce such rights under a privacy theory. Finally, a person need not show economic harm to state a right of privacy claim.¹⁰¹ Since prevention of pecuniary loss is the heart of a right of publicity action, however, proof of economic loss is usually required when suing to protect publicity rights.¹⁰²

In summary, the right of privacy concerns an individual's mental suffering and seclusion, while the right of publicity concerns unauthorized commercial uses of a celebrity's attributes. A celebrity does not complain that he has become a matter of public comment or that he has been placed in a false light when there has been an unauthorized commercial use of his name and picture. Rather, he complains that others have exploited the commercial drawing power attached to his name and likeness without compensating him.¹⁰³ Thus, the critical difference between the right of privacy and the right of publicity is the nature of the interest protected and the type of injury suffered.¹⁰⁴ In fact, the right of publicity has been called the "very antithesis of the right of privacy."¹⁰⁵

Although the right to privacy doctrine is an inadequate protection of publicity rights, two other analogous legal doctrines provide limited protection. Copyright and trademark laws and unfair competition laws have been used by celebrities to protect their publicity rights with varying results.

city-type protection under § 51 of the New York Civil Rights Law is akin to Prosser's fourth right of privacy category. It is based upon the classic theoretical basis for the right of privacy of preventing injury to feelings. Thus, the New York statutory right of publicity is not assignable during one's lifetime and terminates at death. However, in *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977), the court stated in dicta that New York's common law right of publicity is under no such inhibition.

100. As used herein, the term "collateral product" is defined as a commercial consumer item, such as a poster, gameboard, automobile, or article of clothing that is advertised and sold separately from the activity, such as acting, race car driving, or playing football, by which the celebrity makes a living and gained the reputation in the first place.

101. PROSSER, *supra* note 12, at 815. See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (plaintiff need not prove special damages for libelous invasion of his right to privacy).

102. See notes 37-39 and accompanying text *supra*.

103. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 316 (Pa. Ct. C.P. 1957).

104. See *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979). As stated by that court:

[T]hat the right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts which protect primarily the mental interest in being let alone. The appropriation tort is different because it protects primarily the property interest in the publicity value of one's name.

Id. at 387, 280 N.W.2d at 132.

105. *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 316 (Pa. Ct. C.P. 1957). See also *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975) ("The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation, on the other hand, are different in theory and in scope.").

Copyright and Trademark Rights

A copyright grants a monopoly of limited duration¹⁰⁶ to the claimant to control the reproduction of an original expression or writing that has been fixed in a tangible form.¹⁰⁷ The creative expression forming the subject matter of a federal copyright must be an original, conscious undertaking.¹⁰⁸ Thus, copyright laws serve to obtain the efforts of authors for the public and to furnish an incentive to those who strive to create new expressions, artistic or otherwise.¹⁰⁹ It is deemed socially beneficial that the "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."¹¹⁰

In comparison to copyright, a celebrity's right of publicity, although sometimes the result of fortuitous circumstances, is more often the result of conscious hard work and planning amounting to purposeful creativity. Also, the interests to be served by protecting a right of publicity and assigning it a durational limit, if one is ever assigned, are similar to those of copyright.¹¹¹ In contrast to the copyright author, however, a celebrity does not create a tangible writing or thing. Rather, the "things" created are the intangible attributes¹¹² which the celebrity either has or develops and by which he or she is known. Finally, the incidental use of a celebrity's publicity rights¹¹³ or their use in a first amendment setting can be analyzed in light of the copyright fair use principles.¹¹⁴ For example, a single use of a cele-

106. Currently, a copyright claimant is allowed to control the copying of a particular expression for the stated term of the life of the author plus 50 years. 17 U.S.C. §§ 302-305 (Supp. III 1979). This durational limit is the result of Congress' balancing of two important interests. First, there is the societal interest of promoting creative efforts by awarding limited exclusive monopolies on original expressions as mandated by the constitutional copyright clause. See note 109 *infra*. Second, there are the countervailing societal interests of free speech and press guaranteed under the first amendment. See 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10 (1981). The free speech interest in copyright law is provided in part by the copyright fair use doctrine, see note 114 and accompanying text *infra*, but, ultimately the limited duration of the copyright protects that interest.

107. See 17 U.S.C. §§ 101-106 (Supp. III 1979). For creative expressions created after January 1, 1978, only federal copyrights are available because common law copyrights are no longer recognized. *Id.* § 301.

108. A patent grant, on the other hand, can be for an invention resulting from a *fortuitous* event. 35 U.S.C. § 103 (1976).

109. U.S. CONST. art. I, § 8 provides, in pertinent part: "The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times . . . the exclusive Right to . . . Writings and Discoveries." The term "writings" has been held to include "any physical rendering of the fruits of creative intellectual or aesthetic labor." *Goldstein v. California*, 412 U.S. 546, 561 (1973).

110. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

111. See notes 219 & 220 and accompanying text *infra*.

112. See notes 14-22 and accompanying text *supra*.

113. See note 42 and accompanying text *supra*.

114. The fair use doctrine, which developed originally as a judge-made rule of reason, is now embodied in 17 U.S.C. § 107 (Supp. III 1979). "[T]he fair use of copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

brity's attributes in an original statue or painting conceivably could be justified as comment under the copyright fair use doctrine. Because of these similarities, litigants have attempted to base the right of publicity upon statutory copyright. In at least one case,¹¹⁵ however, this attempt failed.

Although not specifically used as a basis for decision by any court, an alternative for protecting the right of publicity is the law of trademarks. In essence, the effect of a state's protection against misappropriation of a celebrity's name and picture is to recognize the celebrity's name as a species of trade name, and his likeness as a kind of trademark.¹¹⁶ Further, the right of publicity is akin to a commercial establishment's exclusive right to the benefits of goodwill and secondary meaning that it has managed to build up in its business.¹¹⁷ Both a celebrity's publicity rights and a business' trademark or trade name reflect the public's recognition and awareness that result from substantial publicity. Finally, another similarity of trademarks and publicity rights is that rights in each are created at essentially the same time—upon use with a trademark and upon development and use before the public with the right of publicity.

Unfair Competition

As yet a further analogy, the right of publicity has been viewed as simply the application of the doctrine of unfair competition to a particular type of property right, namely, one's publicity rights.¹¹⁸ The courts have long extended the doctrine of unfair competition beyond the concept of fraud on the public to include the misappropriation of another's benefit or property right for commercial advantage.¹¹⁹ However, an element of property must be found to exist before relief will be granted in a typical unfair competition case.¹²⁰ This property element requirement limits the use of an unfair competition theory because some courts refuse to recognize any property right in a celebrity's publicity rights. Further, many jurisdictions previously held that the absence of competition between the plaintiff and defendant presented an effective defense to an unfair competition action.¹²¹ For exam-

115. See *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 842, 846 (S.D.N.Y. 1975) (defendant failed in an attempt to claim commercial rights to the Laurel and Hardy name simply because he owned the copyright to several of their motion pictures).

116. See PROSSER, *supra* note 12, at 807.

117. *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879 (S.D.N.Y. 1973), *quoted in Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 n.4 (S.D.N.Y. 1975).

118. See, e.g., *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 320 (Pa. Ct. C.P. 1957) ("the right of publicity . . . is but another way of applying the doctrine of unfair competition").

119. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 490 (3d Cir.) (broadcasting company's unauthorized use of boxing footage held to be unfair competition), *cert. denied*, 351 U.S. 926 (1956).

120. See, e.g., *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 320 (Pa. Ct. C.P. 1957) (element of property found in the misappropriation of a famous golfer's picture).

121. For a discussion of the problems that historically plagued a right of publicity action based upon unfair competition principles, especially the competition requirement, see Nimmer, *supra* note 11, at 210.

ple, a company selling posters could not be considered in competition with the subject of its posters, such as a famous singer, baseball player, or race car driver. Also, the passing off requirement¹²² for unfair competition actions made it a difficult theory to utilize when attempting to protect publicity rights. For example, a defendant's use of a celebrity's name or likeness does not always infer the celebrity's endorsement, sponsorship, or approval of the defendant's products. Thus, in many states, an unfair competition action failed for lack of proof on this issue.¹²³

A few recent right of publicity decisions, however, have implied that relief is available under unfair competition principles.¹²⁴ In fact, one publicity rights case noted that the historically restrictive requirements of passing off and direct competition "are no longer considered to be essential elements of a cause of action for unfair competition."¹²⁵ In any event, a celebrity should be considered entitled to allege an unfair competition cause of action when the defendant's unauthorized, albeit indirect, use of his publicity rights presents a likelihood of confusion as to, or a false designation of, source, approval, sponsorship, or endorsement of the goods or services in question.¹²⁶ It must be noted, however, that such an unfair competition theory would require proof of likelihood of confusion, whereas a pure right of publicity action has no such requirement.

Thus, several rights or theories exist which are somewhat comparable to

122. The "passing off" doctrine requires "misrepresenting one's goods or services as those of another." *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 399, 280 N.W.2d 129, 138 (1979). See 1 R. CALLMANN, *LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 2.02 (L. Altman 4th rev. ed 1981).

123. See, e.g., *Bechik Prods. v. Federal Silk Mills*, 135 F. Supp. 570 (D. Md. 1955) (confusion with product not sufficient enough to meet the "passing off" requirement).

124. See, e.g., *Joel v. Various John Does*, 499 F. Supp. 791 (E.D. Wis. 1980) (despite the absence of competition between plaintiff and defendant, court held the unauthorized sale of Billy Joel T-shirts to be a violation of state and federal unfair competition statutes); *Memphis Dev. Found. v. Factors, Etc., Inc.*, 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977) ("Tennessee courts would protect and safeguard . . . the right of publicity, whether or not it would be so designated, as in the case of unfair competition . . ."), *aff'd mem.*, 578 F.2d 1381 (6th Cir. 1978), *rev'd*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 400, 280 N.W.2d 129, 138 (1979) (modern approach to the law of unfair competition is to protect "[p]roperty rights of commercial value . . . from any form of unfair invasion").

125. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 399, 280 N.W.2d 129, 138 (1979). See also 1 R. CALLMANN, *LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 2.10, at 47 (L. Altman 4th rev. ed. 1981) (trade name supported by strong secondary meaning protected from infringement even when goods involved are noncompetitive).

126. The federal statutory basis for certain types of unfair competition is 15 U.S.C. § 1125(a) (1976). Examples of right of publicity cases relying in part on this statute are *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (court enjoined the performance of an Elvis Presley imitator on the basis of both the right of publicity and unfair competition under § 1125(a)) and *Winterland Concessions Co. v. Creative Screen Design, Ltd.*, 210 U.S.P.Q. (BNA) 6 (N.D. Ill. 1980) (court enjoined the unauthorized sale of products bearing the names and symbols of various rock groups on the basis of right of publicity and unfair competition under § 1125(a)).

the right of publicity.¹²⁷ However, none are truly equivalent and most have limited application in a publicity rights setting.

FIRST AMENDMENT LIMITATIONS ON THE RIGHT OF PUBLICITY

The first amendment freedoms of speech and press ordinarily override publicity rights.¹²⁸ In considering the application and scope of the first amendment privileges, the otherwise different rights of publicity and privacy actually undergo the same scrutiny and are subject to the same policy considerations.¹²⁹ When balancing the rights of privacy and publicity against the defendant's first amendment arguments, courts follow the concept that the best social policy is that which results in the greatest good to the greatest number.¹³⁰ Thus, over the years, the courts have developed an extremely liberal interpretation of the scope of the public's legitimate interest in the dissemination of information about celebrities and other public figures.

For example, unauthorized but newsworthy disseminations about a celeb-

127. Other theories that can be compared to or pleaded in the alternative with the right of publicity are state deceptive trade act violations, *Winterland Concessions Co. v. Creative Design, Ltd.*, 210 U.S.P.Q. (BNA) 6 (N.D. Ill. 1980) (violation of Illinois Uniform Deceptive Trade Practices Act, ILL. REV. STAT. ch. 121 1/2, §§ 311-317 (1979), alleged in action to enjoin unauthorized sale of concert T-shirts); trademark dilution; common law misappropriation, *National Bank of Commerce v. Shaklee Corp.*, 207 U.S.P.Q. (BNA) 1005 (W.D. Tex. 1980) (republication of plaintiff's book with inclusion of advertisements that created impression of an endorsement held to be misappropriation of name and likeness); defamation; trade disparagement; and interference with contract.

128. In protecting first amendment privileges, courts tend to be quite liberal in determining whether unauthorized expressions about a celebrity constitute news or are used solely in a commercial context. An expression is considered newsworthy if it disseminates information of public interest, makes for informed decision making by the public, or is fair comment on the events of the day. *See, e.g., Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 448-49, 299 N.Y.S.2d 501, 506-07 (1968) (breadth of privileges under first amendment not limited to news about current events but extends to activities regarding education, history, entertainment and amusement).

129. The first amendment limitations that have been read into the New York statutory right of publicity, note 8 *supra*, provide a useful analogy. *See Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (statutory right of publicity must yield to first amendment privileges to avoid less than full exploitation of those privileges due to threat of lawsuit); *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, 138 (S.D.N.Y. 1953) (dissemination of news or reporting of matters of public interest not violative of statutory right of publicity); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 447, 299 N.Y.S.2d 501, 505 (1968) (first amendment limitations on statutory right of publicity necessary to avoid conflict with dissemination of newsworthy events). *See also Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359, 107 N.E.2d 485, 488 (1952) (the "privilege to use a person's name or photograph in portrayals of current news or past events of legitimate public or general interest does not, under the [New York] privacy statute, extend to commercializations of . . . personality through a form of treatment distinct from the dissemination of news or information").

130. *See, e.g., Donahue v. Warner Bros. Pictures Distrib.*, 2 Utah 2d 256, 264, 272 P.2d 177, 183 (1954) (social policy of greatest good for the greatest number must be considered when right to privacy conflicts with freedom of expression).

rity can occur, among other places, in newspapers, magazines, newsreels, novels, plays, movies, television shows, handbills, and posters. Although newspapers, magazines, and television usually operate to earn a profit, their profit motivation does not diminish their primary function of disseminating newsworthy information.¹³¹ Similarly, the fact movies and novels are more commonly considered vehicles of amusement does not detract from their newsworthy status.¹³² Thus, the medium used for an unauthorized portrayal of a celebrity's publicity rights is not a factor in determining whether the portrayal is privileged.

As another example, a problem area encountered in the past by the media with unauthorized portrayals about a celebrity concerned the question of fictionalization. A fictionalized portrayal is one having manufactured dialogue, imaginary incidents, manipulated chronology, nonfactual novelization, embellished facts, and distortions. In balancing the right of publicity against the first amendment in this context, the issue is whether a portrayal is factually accurate and done primarily in a newsworthy setting or is a fictionalized and sensationalized expression in which the public interest is only of secondary importance. In early decisions, courts held that the public's right to know did not extend to dramatized or fictionalized versions of the event reported. Thus, recovery for an unauthorized, substantially false, or fictionalized portrayal of a celebrity was originally allowed if the plaintiff could prove that it was substantially false and was presented with knowledge that it was false or with reckless disregard for the truth.¹³³ Purely factual treatments, however, even if subject to inadvertent or superficial inaccuracies, were privileged and did not lead to liability. The reasoning for this early rule concerning fictionalization was that news was not disseminated when a work was substantially false and the author knew of this falsity. In a right of publicity context, this meant that even though a celebrity was a public figure with little or no privacy, his personality could

131. See *Leverson v. Curtis Publishing Co.*, 192 F.2d 974, 977 (3d Cir. 1951) (even though newspaper operates for profit, its use of newsworthy material is not for commercial purposes); Gordon, *supra* note 10, at 571-82.

It should be noted, however, that not all media use of one's publicity is privileged. See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 878-79 (S.D.N.Y. 1973) (under New York law, plaintiff should be allowed to prove that a magazine had some covert agreement with an advertiser for using plaintiff's picture in an article).

132. *Donahue v. Warner Bros. Pictures Distrib.*, 2 Utah 2d 256, 264, 272 P.2d 177, 183 (1954) (movies are an effective medium for serving the important public interest in free dissemination of public information).

133. See, e.g., *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127, 233 N.E.2d 840, 842, 286 N.Y.S.2d 832, 834 (1967), *appeal dismissed*, 393 U.S. 1046 (1969). The New York Court of Appeals commented that to allow the use of such fictionalized elements in a novel "would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual's right—albeit a limited one in the case of a public figure—to be free of the commercial exploitation of his name and personality." 21 N.Y.2d at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836.

not be fictionalized and exploited for another's benefit without his consent.¹³⁴

The more recent right of publicity cases, however, have viewed fictionalized movies and books—as opposed to products such as bubble gum cards and posters—as vehicles for disseminating ideas and opinions.¹³⁵ Despite that the fictionalized portrayal was not biographical, fair comment, newsworthy, or historical, courts have considered that there are no countervailing policies to prevent protection of important free speech and press interests inherent in fictionalized movies and books, and that the right of publicity should not be used to chill or control public expression. Although the author has actually created a totally commercial product about the celebrity by developing a fictionalized portrayal, the courts have determined that a first amendment privilege still resides in that new media creation. Thus, the thrust of recent cases is that the right of publicity does not prevail in situations where the fictionalized account of a celebrity's life is depicted in such a way that it is evident to the public that the events depicted are fictitious or where there is no deliberate falsification.

On the other hand, first amendment rights do not outweigh publicity rights in purely commercial situations. Where there are no newsworthy elements present in an unauthorized use of a celebrity's publicity rights, or where the portrayal appears in a medium wholly unrelated to the dissemination of news, there is no chilling restriction placed upon free speech interests as no such interests are present.¹³⁶ In fact, the United States Supreme Court has recently implied that the states' recognition and protection of the right of publicity in purely commercial settings does not operate to infringe upon first amendment interests in promoting a free press.¹³⁷

PROPERTY STATUS OF PUBLICITY RIGHTS

In addition to federal law and constitutional considerations, another important issue bearing on the right of publicity concerns its status. The on-

134. *Groucho Marx Prods. v. Playboy Enters.*, No. 77 Civ. 1782 (S.D.N.Y. Dec. 30, 1977), *reh'g granted*, No. 77 Civ. 1782 (S.D.N.Y. Mar. 9, 1979).

135. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) (books and movies are vehicles through which ideas and opinions are disseminated). *See also* *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 866-68, 603 P.2d 454, 458-59, 160 Cal. Rptr. 352, 356-57 (1979) (*per curiam*) (Bird, C.J., concurring) (fictional movie version of actor's life entitled to first amendment freedom of expression protection). *Cf.* *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980) (reproduction of nude photograph of plaintiff in magazine sold for profit did not constitute use for advertising purposes and could not provide basis for right of publicity action); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 828, 829 (1980) (right of publicity could not give rise to cause of action against publication of book about deceased celebrity whether book was biography or fictionalized biography).

136. *See, e.g., Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 219, 50 S.E. 68, 80 (1905) (constitutional guarantees of freedom of expression do not extend to the use of one's picture purely for advertising purposes).

137. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-79 (1977).

going confusion with the right of privacy has created uncertainty as to whether publicity rights are personal or property in nature or a combination of both. As discussed later, subsidiary questions such as alienation and descent of publicity rights are more easily resolved once this basic issue is settled.

Because publicity rights flow from the development and recognition of a celebrity's personal attributes, it has been argued that the right of publicity should be treated as a truly personal right.¹³⁸ As such, the right could not be transferred or licensed during life nor could it devolve upon death.¹³⁹ The property aspect of the right of publicity, however, has long been judicially recognized.¹⁴⁰ For example, in an early unfair competition case concerning the misappropriation of the name of a popular radio announcer for advertising purposes, the court held that the celebrity's name had acquired substantial commercial value and, therefore, was considered to be property protectible by law.¹⁴¹

Indeed, early cases distinguished the right of publicity from the right of privacy because the former was deemed to be in the nature of property.¹⁴² The courts realized that the misappropriation of the right of publicity was a distinctly independent tort from invasion of the right of privacy. These courts reasoned that while Prosser's first three right of privacy categories involved a specific injury to feelings, the fourth category involved a pecuniary loss or interference with one's property.¹⁴³

138. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 820-24, 603 P.2d 425, 429-31, 160 Cal. Rptr. 323, 480-83 (1979).

In other cases, however, similar arguments by defendants have fallen on deaf ears. See, e.g., *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.) (legal interest of a person in the publication of his photograph is not, as defendant asserted, limited to the personal and non-assignable right to privacy), *cert. denied*, 346 U.S. 816 (1953); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 383, 280 N.W.2d 129, 130 (1979) (rejecting defendant's contention that the right to publicity is part and parcel of the personal right to privacy).

139. See, e.g., *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (the defendant asserted that the plaintiff, as a licensee of the personal right to publicity, had only received a covenant not to be sued, rather than a legal transfer of a property right). See also PROSSER, *supra* note 12, at 814-15.

140. See, e.g., *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (person owns an exclusive property right in his picture, exploitable for material profit); *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1911) (person's picture, as much as his name, is his own property).

141. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358, 361 (D. Mass. 1934), *aff'd as modified*, 81 F.2d 373 (1st Cir. 1936).

142. E.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 486-87 (3d Cir.) (right of privacy concerns the personal right to be let alone, while the right of a professional performer to the commercial exploitation of his services is one of property), *cert. denied*, 351 U.S. 926 (1956). See also *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (Holmes, J., dissenting) (right to privacy is distinct from right to use one's name or likeness for commercial purposes because the latter is a property right), *cert. denied*, 315 U.S. 823 (1942).

143. E.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-82 (D. Minn. 1970).

As further support for granting property status to publicity rights, one need only recall the rights and interests concomitant with property. These include the rights of acquisition, dominion, possession, use, enjoyment, exclusion, and disposition.¹⁴⁴ A property designation also gives the owner the right to contest invasions of his property. The value of property is intrinsically dependent upon the ability to control its use. Thus, the designation as property aggregates rights and interests that are capable of being indefinitely owned, of having value, and of being protected by law.

These property interests, or their equivalents, are readily identifiable in publicity rights. First, publicity rights are acquired after years of hard work, expense, and planning by the celebrity.¹⁴⁵ Second, from the moment of creation, publicity rights can be possessed by the celebrity. Third, publicity rights have a recognized commercial value for which others will pay.¹⁴⁶ Fourth, the individual attributes embodied in publicity rights, such as picture, signature, or name, can be readily separated from a celebrity for commercial purposes. Consequently, the celebrity's exclusive right to use such personal attributes can be readily transferred to third parties totally separate from the celebrity or from the activity or endeavor that created the celebrity's status.¹⁴⁷ Moreover, because publicity rights can be separated and transferred, these rights presumably can last indefinitely. Finally, as with most property rights, a celebrity can suffer pecuniary damage when his publicity rights are used without authorization.¹⁴⁸

Accordingly, a majority of courts recognize that the right of publicity constitutes property and is proprietary in nature.¹⁴⁹ In some instances,

144. See R. BROWN, *THE LAW OF PERSONAL PROPERTY* 6 (3d ed. 1975).

145. See, e.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (celebrity has a legitimate proprietary interest in his public personality because of the years of practice and competition resulting in that marketable identity); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314, 319 (Pa. Ct. C.P. 1957) (famous golfer's reputation was acquired through a tremendous amount of work, ability, and perseverance); *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 A.D. 459, 464, 7 N.Y.S.2d 845, 850 (1938) (goodwill and advertising value of plaintiff's name and entertainment structure is a property right created through expenditures of huge amounts of money, effort, and skill).

146. See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969) (sports figure has valuable property right in his name and likeness which he may sell for profit); *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.) ("property" label symbolizes that courts will enforce a claim having pecuniary worth), *cert. denied*, 346 U.S. 816 (1953); *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963) (sports figure has a valuable property right in his name and likeness and a valid claim for damages when it is misappropriated). See also *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity is purely commercial in nature).

147. See note 161 *infra*.

148. See notes 71-81 and accompanying text *supra*.

149. E.g., *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282-84 (S.D.N.Y. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975). *But cf.* *Miller v. Commissioner*, 299 F.2d 706, 708-10 (2d Cir.) (right to publicity is not a descendible property interest within the meaning of Internal Revenue Code), *cert. denied*, 370 U.S. 923 (1962).

however, a celebrity's attributes are not granted property status. For example, neither a famous bandleader's particular sound¹⁵⁰ nor a celebrity's voice¹⁵¹ have been uniformly found to constitute property. In addition, a question has arisen as to whether the publicity rights of owners of famous objects, such as buildings or animals, or a well known character developed by and associated with a celebrity, constitute property. The courts and commentators tend to think they do.¹⁵²

It is urged, however, that the right of publicity uniformly be granted property status. Designating publicity rights as property allows celebrities to protect these rights by recovering damages and obtaining injunctions for invasion of their publicity rights.¹⁵³ In addition, once it is recognized that this right is a proprietary property right, rather than a personal right, permitting publicity rights to descend will follow.

Transfer Of Publicity Rights By Descent

If a celebrity's publicity rights, which conceivably took thousands of hours and dollars to perfect and promote, are not descendible upon death, they will fall into the public domain. Because the celebrity's heirs and grantees will be unable to control commercialization of the publicity rights exclusively, these valuable rights will not inure to their benefit. The reasons that permit inter vivos transfer of publicity rights may, however, also enable courts to logically substantiate the survival and descent of publicity rights at the time of the celebrity's death. Furthermore, the descent of such rights does not conflict with any overriding public interest, such as the interest in first amendment freedoms of speech and press.

The factors that support the termination of publicity rights upon death involve the forfeiture of a recognized and valuable property right and should, therefore, be strictly analyzed and narrowly construed. In its simplest form, the descent issue involves a balancing of various societal interests. Considerations include whether permitting descent of publicity rights affects the public, whether descent hinders first amendment

150. *Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 49, 201 N.Y.S.2d 632, 634 (1960), *modified*, 13 A.D.2d 473, 214 N.Y.S.2d 645, *aff'd mem.*, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1961).

151. See notes 52 & 53 and accompanying text *supra*.

152. See, e.g., *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 A.D. 459, 464, 7 N.Y.S.2d 845, 851-52 (1938) (owner of sports arena had property right in its reputation and goodwill in unfair competition action); *Nimmer*, *supra* note 11, at 216. Compare *Groucho Marx Prods. v. Day & Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981) (Marx Brothers had property right in unique characters they created) and *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 854-55, 164 Cal. Rptr. 571, 581-82 (1980) (discussion of performer's proprietary claim to "antic chicken" routine he developed) with *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 818, 603 P.2d 425, 427, 160 Cal. Rptr. 323, 325 (1979) (Count Dracula character developed by another considered in the public domain).

153. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 869 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

freedoms, whether descent of publicity rights motivates celebrities to achieve celebrity status, and who best deserves to enjoy the fruits of a celebrity's labors.

Those wishing to defeat the survival of publicity rights urge that, like the right of privacy, the right of publicity is essentially personal in nature. Because the right to publicity concerns attributes that are personal to the celebrity and that physically cease upon the celebrity's death, the right to publicize those attributes should similarly terminate. Consequently, the personal attributes of the deceased celebrity would be placed in the public domain.¹⁵⁴

As noted herein, however, the personal nature and nonsurvival aspects of the right of privacy are simply not germane to the right of publicity.¹⁵⁵ The policy underlying the right of privacy is to prevent undue mental suffering. In contrast, the underlying reasons for protecting publicity rights are to enable the celebrity to be free from unauthorized commercialization and to prevent unjust enrichment. Although a celebrity's feelings cannot be separated from the person and, therefore, terminate at death, a celebrity's personal attributes are separable and can readily continue after his death, particularly if these attributes are connected with commercial products. The commercial value of these attributes continues and often increases after the celebrity's death. Thus, when a person dies, the underlying reasons for recognizing and protecting publicity rights remain compelling.

State Interests In Survival Of Publicity Rights

Perhaps the most important reason for permitting the descent of publicity rights is that certain societal interests would be advanced.¹⁵⁶ First, states desire personas to strive to achieve celebrity status. The public benefits from the many forms of entertainment and newsworthy events that such achievement provides. Nevertheless, the full encouragement of such creativity requires more than just state recognition and protection of publicity rights during the celebrity's lifetime. The celebrity must be assured that he is creating a valuable, proprietary property interest that will descend to his heirs or business grantees. Such assurance may cause the celebrity to strive harder to create the most unique and valuable persona that his talents and resources will permit. Any additional development of a celebrity's persona,

154. See *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 960 (6th Cir.) (publicity rights of the dead should be regarded as a "common asset" to be shared by all), *cert. denied*, 449 U.S. 953 (1980).

155. See notes 83-105 and accompanying text *supra*. See also *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (1977) (dictum) ("[w]hile a cause of action under the [privacy section of the New York] Civil Rights Law is not assignable during one's lifetime and terminates at death, the right to publicity, i.e., the property right to one's name, photograph and image, is under no such inhibition.')

156. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 839-40, 603 P.2d 425, 441-42, 160 Cal. Rptr. 323, 339-40 (Bird, C.J., dissenting).

albeit for the purpose of passing on a valuable asset to his heirs, is of benefit to the public. Furthermore, the celebrity's development of extensive publicity rights is no different than a person's development of a substantial estate. Both expect and intend to pass on substantial and valuable property interests to their heirs.¹⁵⁷ In addition, if a celebrity believes that he is not adequately providing for his heirs and business associates, he might pursue other business interests rather than strive to propel his image to the highest possible level. Thus, not only does the public's recognition of the persona subside, but artistic creativity is not encouraged or sustained.

Second, the state has an interest in allowing the celebrity to fully recognize the fruits of his efforts. To view the descent question in its proper context, it must be remembered that, ordinarily, the celebrity goes through years of hard effort to develop a marketable commodity. Only after such sacrifice, and often near the end of a celebrity's life, does a celebrity typically begin to reap his just reward. Thus, the only way that a celebrity can fully realize the economic potential of his efforts is to devise his publicity rights to those whom he wishes to benefit. Absent countervailing public interests, the question becomes whether the heirs and grantees or the public should exclusively enjoy the celebrity's valuable publicity rights after his death.

Advertisers, novelty manufacturers, and personal merchandisers, rather than individual members of the public, are particularly interested in this exclusive enjoyment. If, at a celebrity's death, such businesses are freely allowed to enjoy that which was previously obtained by paying large sums, they receive a substantial windfall. The public, however, does not substantially benefit when publicity rights fall into the public domain upon a celebrity's death. For example, during a celebrity's life, the first amendment grants to both the public and commercial enterprises the right to portray a celebrity's attributes in a newsworthy context. Regardless of whether publicity rights are permitted to survive, the public will continue to have access to newsworthy and historical information about the persona after his death.¹⁵⁸ Moreover, survival of publicity rights places potential users of these rights in the same position they are in prior to a celebrity's death. These potential users of a persona's rights still must obtain a release before they can use the persona's attributes.

157. It is for this very reason that celebrities are known to include specific bequests of their publicity rights in their wills, and to contract with others for commercialization of their publicity rights for the benefit of their heirs. See *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429-30 (S.D.N.Y. 1978); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 838-39 (S.D.N.Y. 1975).

158. See *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (court allowed publication of fictionalized account of a true incident in a deceased famous writer's life); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 868, 603 P.2d 454, 459, 160 Cal. Rptr. 352, 357 (1979) (Bird, C.J., concurring) (fictional account of portion of life of Rudolph Valentino entitled to constitutional protection); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769, 427 N.Y.S.2d 828, 829 (1980) (book concerning a deceased actress was characterized as a literary work, thus entitled to first amendment protection).

In sum, no logical reasons exist for permitting an advertiser to receive a windfall when a celebrity dies. Rather, the celebrity's heirs and grantees, because of their personal or financial interest in the celebrity's publicity rights, should be entitled to exclusive enjoyment of the financial benefits flowing from the celebrity's efforts. The heirs and grantees, rather than an unrelated commercial concern, have a greater nexus to the deceased celebrity's property rights.¹⁵⁹

JUDICIAL TREATMENT OF THE DESCENT ISSUE

The personal attributes that constitute a celebrity's right of publicity are inherently capable of being separated from their owner and placed under the exclusive use and control of another.¹⁶⁰ As the Court of Appeals for the Second Circuit stated:

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, *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.¹⁶¹

Because publicity rights can be transferred in gross during the celebrity's life as a fully alienable property right, a corollary issue has arisen as to

159. It is also unclear why the treatment of the publicity rights of a deceased personality, who leaves his publicity rights to his heirs, should be any different from that of a personality who earned fame some 20 or 30 years earlier and then faded from the public view only to have his publicity rights violated at a later date. Nevertheless, relief has been granted in the latter situation. See *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956) (television broadcast of old prize fight without fighter's consent). In either case, it is the misappropriation of a hard earned property right that must be prevented, not injury to feelings.

160. See notes 146-51 and accompanying text *supra*.

161. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). As to judicial recognition of such transfers, see *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975) (court acknowledged with approval the *Haelan Laboratories* court's recognition of exclusive rights in commercial exploitation of publicity rights), and *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (court recognized that Howard Hughes gave a valid exclusive assignment of the right to exploit his name and personality), *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

The transfer of publicity rights is treated differently than a transfer in gross of trademark rights. To prevent any confusion of the public, the elements of a business or the goodwill with which a trademark is associated must also be assigned. In connection with licensing, the exclusive licensees of publicity rights should be considered to have standing to sue for any interferences with their licensor's identity, assuming the interference falls within the scope of their license. Likewise, it may be presumed that a nonexclusive publicity right licensee, for many of the same reasons that preclude a nonexclusive trademark or patent licensee, would not have the requisite standing to sue infringers. In these instances, the celebrity should be joined as a co-plaintiff. Compare *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154 (1st Cir. 1977) (nonexclusive licensee; standing denied) with *Alfred Dunhill of London, Inc. v. Kasser Distillers Prods. Corp.*, 350 F. Supp. 1341 (E.D. Pa. 1972) (wholly owned subsidiary of trademark owner was exclusive user of trademark; standing granted), *aff'd*, 480 F.2d 917 (3d Cir. 1973).

whether those rights can descend at the time of the celebrity's death. Although publicity rights have all the essential attributes of property, including transfer to and enforcement by third parties, case law has revealed that this important question has not been treated uniformly.

Cases Allowing Descent

Until recently, few cases directly discussed the descent of the right of publicity.¹⁶² Over the last several years, however, the descent of publicity rights has been recognized.¹⁶³ This recognition has been based primarily on the proprietary property aspect of the right of publicity whereas the nonsurvival of privacy rights is based on the personal nature of that right.

A recent decision that recognized the descent of publicity rights is *Factors, Etc., Inc. v. Creative Card Co.*¹⁶⁴ In brief, the popular singer, Elvis Presley, had assigned all the rights to use his name and likeness to a corporation he formed. After Presley's death, this corporation granted an exclusive sublicense to merchandise the Elvis Presley persona to the plaintiff.¹⁶⁵ This case considered the plaintiff's attempts to enjoin the sales of souvenir posters manufactured by the defendant.

In its analysis, the *Creative Card* court reviewed Prosser's four distinct privacy actions,¹⁶⁶ noting that the basis for each action was the protection of one's right to be let alone. Yet, the court noted that Prosser's fourth category failed to recognize that misappropriation of a person's attributes has different consequences for a well known celebrity than for a private person.

162. One early case in which the misappropriation aspect—as opposed to the injury to feelings aspect—of the right of privacy was expressly considered was *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895). That case concerned the public exhibition of a statue of a deceased philanthropist. It was held that the right of privacy, as it concerned the right to prevent the public from making pictures or statues commemorative of the services of a person, did not survive after death and could not be enforced by relatives of the deceased.

Another case which indirectly touched on the descent question is *Miller v. Commissioner*, 299 F.2d 706 (2d Cir.) cert. denied, 370 U.S. 923 (1962). The court held that for income tax purposes, neither Glenn Miller nor his heirs held a property right in the story of Glenn Miller's life. However, that case was limited to the specific capital gains issue; it was not concerned with whether publicity rights, once established, could be transferred at the celebrity's death.

163. See *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) ("it seems clear . . . that [Agatha Christie's] right of publicity survived her death and was properly transferred to the plaintiffs as her heirs and assignees"); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (court recognized the publicity rights of the comedy team of Laurel and Hardy as a property right that is descendible). See also *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (1977) (descendibility of publicity rights recognized in dicta).

164. 444 F. Supp. 279 (S.D.N.Y. 1977). "It appears that a recognized property right, the 'right of publicity,' inherited in and was exercised by Elvis Presley in his lifetime, that it was assignable by him and was so assigned, that it survived his death and was capable of further assignment." *Id.* at 282.

165. *Id.* at 281.

166. See note 85 *supra*.

In those situations when a private citizen has made no attempt to commercialize his personality, courts should concentrate on emotions, feelings, and other personal aspects. In contrast, the court observed that when a celebrity's persona has become a product in and of itself through substantial commercialization, courts should consider the misappropriation of that product to be similar to unfair competition or theft of goodwill rather than to the invasion of the right to be let alone.¹⁶⁷

The court then addressed the question of whether publicity rights could descend. Relying on the reasoning established in *Price v. Hal Roach Studios, Inc.*,¹⁶⁸ the *Creative Card* court could find no public policy reasons that cut off the right of publicity at a celebrity's death. The court concluded that there was "no reason why the valuable right of publicity—clearly exercised by and financially benefiting Elvis Presley in life—should not descend at death like any other intangible property right."¹⁶⁹

The *Creative Card* court's analysis was applied in the companion case of *Factors Etc., Inc. v. Pro Arts, Inc.*¹⁷⁰ to initially enjoin the defendant from distributing its Presley posters.¹⁷¹ The Court of Appeals for the Second Circuit affirmed the district court's order, noting that the issue of duration of publicity rights was one of state law.¹⁷² The Second Circuit held that, by making a valid assignment of his publicity rights to a third party, Presley had:

carved out a separate intangible property right for himself, the right to a certain percentage of the royalties which would be realized by [Presley's exclusive licensee] upon exploitation of Presley's likeness and name. The identification of this exclusive right belonging to [Presley's exclusive licensee] as a transferable property right compels the conclusion that the right survives Presley's death. The death of Presley, who was merely the beneficiary of an income interest in [Presley's licensee's] exclusive right, should not in itself extinguish [that licensee's] property right. Instead, the income interest, continually produced from [the licensee's] exclusive right of commercial exploitation, should inure to Presley's estate at death like any other intangible property right. To hold that the right did not survive Presley's death, would be to grant competitors of [Presley's publicity right sublicensees], such as [the defendants], a windfall in the form of profits from the use of Presley's name and likeness. At the same time, the exclusive right purchased by [Presley's sublicensees] and the financial benefits accruing to the celebrity's heirs would be rendered virtually worthless.¹⁷³

167. 444 F. Supp. at 283.

168. 400 F. Supp. 836 (S.D.N.Y. 1975).

169. 444 F. Supp. at 284 (emphasis in original).

170. 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

171. 444 F. Supp. at 292.

172. 579 F.2d at 220.

173. *Id.* at 221.

After disposing of the survival question in favor of Presley's heirs and grantees, the Second Circuit also rejected the defendant's contention that its poster celebrated a newsworthy event. The court disagreed that the first amendment protected the use of the dates of Presley's birth and death along with the legend "IN MEMORY" as newsworthy information.¹⁷⁴ Following the United States Supreme Court's denial of certiorari,¹⁷⁵ the district court in *Pro Arts* granted the plaintiff's motion for a permanent injunction.¹⁷⁶ In doing so, the court rejected the contentions that cases in other jurisdictions had eliminated the precedential validity of decisions originally relied upon by the court,¹⁷⁷ that federal copyright law preempted the plaintiff's right of publicity,¹⁷⁸ and that the defendant's actions were constitutionally privileged.¹⁷⁹

174. *Id.* at 222. The defendant argued that the poster was protected as newsworthy on the basis of *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968). In *Paulsen*, a corporation was not enjoined from distributing posters of a comedian posing as a mock presidential candidate since the comedian's choice of satirizing within the political arena rendered him newsworthy under the first amendment. As noted by the district court in *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 285 n.5 (S.D.N.Y. 1977), however, "[t]he *Paulsen* case was held unique to its facts" a few years after its decision by the very court that decided it. See *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144, modified, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

175. 440 U.S. 908 (1979).

176. 496 F. Supp. 1090 (S.D.N.Y. 1980). The permanent injunction specifically prohibited the defendants from:

- (1) manufacturing, selling or distributing any and all posters, reproductions, or copies identical or similar to the "IN MEMORY" poster; (2) manufacturing, selling or distributing any other posters, reproductions, or copies containing any image, picture, or likeness of Elvis Presley; and, (3) utilizing for commercial profit in any manner or form the name, image, photograph, or likeness of Elvis Presley other than pursuant to an agreement approved by the plaintiffs.

496 F. Supp. at 1104.

177. *Id.* at 1093-94. See *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), *rev'd*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977), *aff'd*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

178. 496 F. Supp. at 1095-1100. The defendant argued that the right of publicity was preempted by federal copyright laws since the right is equivalent to the exclusive rights protected by the copyright statute and thus the right of publicity is to be governed exclusively by the copyright laws. See 17 U.S.C. §§ 102, 106, 301 (Supp. III 1979).

The district court analyzed the legislative history of the copyright statute and reasoned that since Congress intended to preserve the common law right of publicity, there was no preemption by federal copyright laws. The court further noted that "[t]he plaintiff's prior right to exploit the Presley name and image cannot be defeated by the defendants' attempt to copyright individual items." 496 F. Supp. at 1100.

179. 496 F. Supp. at 1100. The author recognizes that the *Pro Arts* case has been reversed on appeal. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1973 (1982). This reversal, however, was based on choice of law principles that had not been discussed in the prior litigation. Applying the "significant contacts" test from *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the Second Circuit concluded that Tennessee rather than New York law should have been applied. The Second Circuit then decided that deference should be given to the Sixth Circuit's decision in *Memphis Dev.*

Through the Presley cases, the Second Circuit has presented a proper analysis of the descent issue.¹⁸⁰ In summary, the courts that have recognized descent of publicity rights have 1) noted the distinctions between the right of publicity and right of privacy; 2) examined the policies for recognizing such distinctions; 3) determined that first amendment rights are not violated when a defendant is prohibited from distributing non-newsworthy items that involve a celebrity's publicity rights; 4) reasoned that the right of publicity does not conflict with federal copyright laws; and 5) concluded that the societal interests involved in encouraging the creation of unique personas were more important than allowing the defendant to obtain a windfall. In contrast to the cases discussed in the following section, the analysis in the pro-descent cases was conducted without any makeweight examination of supposed "evils" which might result if publicity rights were allowed to descend.

Cases Denying Descent

The "Fears" Approach

*Lugosi v. Universal Picturés Co.*¹⁸¹ is an example of an opinion that refused to recognize descent due to projected "fears" that would result if publicity rights were descendible. In *Lugosi*, the heirs of the actor Bela Lugosi sought injunctive relief from the unauthorized commercialization of his name and likeness in the form of the Count Dracula character. The trial

Found. v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980), in which it was held that Presley's right of publicity did not survive his death. Even though the court hinted that it would uphold descent if it had originally decided the issue under New York law, the Second Circuit believed it was compelled to follow *Memphis Development Foundation* because Tennessee is within the Sixth Circuit. 652 F.2d at 283.

It must be noted, however, that the reversal of the *Pro Arts* case has not had a significant impact on subsequent cases. New York and New Jersey still clearly view the right of publicity to be descendible. See *Groucho Marx Prods. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981) (publicity rights of Marx Brothers held to have descended to trustee under will of Harpo Marx in infringement suit against producers of musical play); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (Elvis Presley's publicity rights became part of his estate after his death). Indeed, a Tennessee court has ruled that the Sixth Circuit's opinion in *Memphis Development Foundation* was "irreconcilable with this Court's decision that the right of publicity is descendible and the majority view on this issue." *Commerce Union Bank v. Coors of the Cumberland, Inc.*, No. 81-1252-III (Tenn. Ch. October 2, 1981) (publicity rights of Lester Flatt held to have descended to executors of Flatt's estate in suit for unauthorized use of Flatt's likeness in advertisements).

180. Contrary to the *Creative Card* and *Pro Arts* decisions, there should be no requirement of active exploitation of a celebrity's persona, separate and apart from his main field of endeavors, to substantiate the valid descent of publicity rights. Rather, it should only be required that the celebrity be shown to have a more popular status than that of the average citizen, thereby giving rise to the creation of a marketable persona having commercial value. See notes 206-13 and accompanying text *infra*.

181. 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), rev'd, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977), aff'd, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

court held that Lugosi had reserved the merchandising rights in his name and likeness by not granting them in any of the movie contracts he had entered. The court determined that these reserved merchandising rights were of property nature and therefore were descendible to and protectible by Lugosi's heirs.¹⁸² The trial court clearly viewed the unauthorized use of a persona's name, likeness, or personality as an invasion of a property right that results in pecuniary loss, rather than as an invasion of the right to be let alone.¹⁸³

The trial court decision, however, was reversed.¹⁸⁴ In affirming the reversal,¹⁸⁵ the California Supreme Court ruled that for Lugosi's publicity rights to be recognized as property for descent purposes, he must have actually used his name and likeness during his life in a business venture or on goods or services. If Lugosi had used his name to "impress such business, product, or service with a secondary meaning," the court continued, his publicity rights would then be protected under unfair competition laws.¹⁸⁶ Alternatively, those rights also would be protected if Lugosi had brought suit to restrain their unauthorized use. Either course of action was a personal assertion deemed necessary for publicity rights to have property status. The mere notion to tie a celebrity's name to a business or product was not sufficient; the court required an actual application of that notion.¹⁸⁷ Indeed, the cases relied on by the trial court which found that name and likeness is a descendible property right¹⁸⁸ were distinguished by the supreme court in that the celebrities in those cases had actually assigned those rights during their lifetime. The court regarded such assignments as synonymous with the owner's personal exercise whereas the attempt by Lugosi's heirs to exploit his name was "not the exercise of that right by *the person* entitled to it."¹⁸⁹

In addition, as another example of the ongoing confusion between the right of privacy and the right of publicity, the California Supreme Court

182. 172 U.S.P.Q. (BNA) at 551.

183. *Id.*

184. 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977).

185. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

186. *Id.* at 818, 603 P.2d at 428, 160 Cal. Rptr. at 326.

187. *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326.

188. *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970). The California Supreme Court discussed three cases which it considered supportive of its non-descent rule. These cases are inapposite, however, as they are either right of privacy cases brought by the heirs of criminals or cases where no actual inheritance of publicity rights could be asserted. *Maritote v. Desilu Prods.*, 345 F.2d 418 (7th Cir.) (right of privacy action based on appropriation of Al Capone's name and personality denied), *cert. denied*, 382 U.S. 883 (1965); *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799 (1959) (right of privacy action brought by widow of Jesse James, Jr. denied); *Schumann v. Loew's, Inc.*, 135 N.Y.S.2d 361 (1954) (plaintiffs lacked standing for publicity rights action).

189. 25 Cal. 3d at 823, 603 P.2d at 431, 160 Cal. Rptr. at 329 (emphasis in original).

determined that a celebrity's "right of value"¹⁹⁰ is a personal right embraced in the law of privacy. Thus, like privacy rights, the right of value can be protected during one's life, but not after one's death. If this right was exploited during life and transformed into a separate property right, only that property right alone descends. To support its decision, the court projected "fears" that would manifest themselves if publicity rights were allowed to descend. First, the court asked whether remote descendants should be allowed to obtain damages for unauthorized commercial uses of the names of their distinguished ancestors. It also questioned whether publicity rights have an ultimate duration and, if so, whether courts are the proper body to determine that duration.¹⁹¹

The descent of publicity rights also was viewed unfavorably in *Memphis Development Foundation v. Factors, Etc., Inc.*¹⁹² This case involved a declaratory judgment action brought by a nonprofit foundation that wished to sell miniature statues of Elvis Presley to fund the building of a commemorative Presley statue. The district court recognized that publicity rights, primarily because of their inherent property aspects, were separate and distinct from privacy rights.¹⁹³ Noting an absence of Tennessee decisions in this area, the lower court reasoned that other well reasoned cases would most likely protect Presley's publicity rights under unfair competition, unjust enrichment, or misappropriation of goodwill theories. In granting the injunction, the court concluded that relevant authority had determined that the right of publicity should be inheritable and assignable, especially when these rights are commercially exploited during the celebrity's life.¹⁹⁴

190. The right of value discussed by the court includes the celebrity's personal decisions to exploit name and likeness, to capitalize upon personality, and to transfer the value thereof into a commercial venture. *Id.* at 822, 603 P.2d at 430, 160 Cal. Rptr. at 328. See also PROSSER, *supra* note 12, at 807.

191. 25 Cal. 3d at 822, 603 P.2d at 430, 160 Cal. Rptr. at 328. Chief Justice Bird, joined by two colleagues, filed a lengthy dissent. The dissenting justices outlined the substantial differences between personal rights under privacy law and commercial rights of a pecuniary nature under publicity law. They concluded that the right of publicity should be descendible, stating that:

The right is capable of assignment. It is equally clear that the right may be passed to one's heirs or beneficiaries upon the individual's death. In considering the question of the right's descendibility, it must be remembered that what is at issue is the *proprietary* interest in the value of one's name and likeness in commercial enterprises, not a personal right like the right of privacy.

Id. at 845-46, 603 P.2d at 445, 160 Cal. Rptr. at 343 (Bird, C.J., dissenting) (emphasis in original). The dissenters also believed that the right of publicity need not be exercised during life to be descendible. They did conclude, however, that the encouragement of creativity does not require perpetual protection of publicity rights. In the absence of legislative durational guidelines, they determined that, as a policy decision, the protection of a celebrity's publicity rights for 50 years after his death was sufficient. *Id.* at 846-48, 603 P.2d at 446-47, 160 Cal. Rptr. at 344-45.

192. 441 F. Supp. 1323 (W.D. Tenn. 1977), *aff'd men.*, 578 F.2d 1381 (6th Cir. 1978), *rev'd*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

193. 441 F. Supp. at 1330.

194. *Id.*

The Court of Appeals for the Sixth Circuit affirmed the trial court's issuance of an injunction.¹⁹⁵ On the appeal of the trial court's order granting Factor's motion for summary judgment, however, the Sixth Circuit reversed and ruled that publicity rights do not descend, even when the persona, while living, exploited those rights, through contractual agreements.¹⁹⁶ The Sixth Circuit noted only two of the many societal interests in recognizing a post-mortem right of publicity—the encouragement of creativity and the expectation of creating a valuable capital asset.¹⁹⁷ Yet, the court asserted that the personal desire to achieve success, bring happiness to others, and reap financial rewards were the main reasons that inspire persons to become celebrities. The desire to commercialize their fame for the benefit of their heirs or to pursue additional creative endeavors, the court observed, were substantially weaker motivating factors.¹⁹⁸ Finally, the appellate court noted what it deemed to be strong reasons for not recognizing descent:

A whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right. How long would the "property" interest last? In perpetuity? For a term of years? Is the right of publicity taxable? At what point does the right collide with the right of free expression guaranteed by the first amendment? Does the right apply to elected officials and military heroes whose fame was gained on the public payroll, as well as to movie stars, singers and athletes? Does the right cover posters or engraved likenesses of, for example, Farah Fawcett Majors or Mahatma Gandhi, kitchen utensils ("Revere Ware"), insurance ("John Hancock"), electric utilities ("Edison"), a football stadium ("RFK"), a pastry ("Napoleon"), or the innumerable urban subdivisions and apartment complexes named after famous people?¹⁹⁹

Critique of the "Fears" Approach

The reasoning in both *Lugosi* and *Memphis Development Foundation* for prohibiting survival of publicity rights does not withstand proper analysis. Property principles should govern the duration of the right of publicity.²⁰⁰ Accordingly, the right of publicity should continue indefinitely or, at the minimum, until abandoned through nonuse. In either case, the right remains subject to first amendment rights.

The death of the celebrity does not extinguish the reasons for establishing a proprietary property interest in the right of publicity. Because personal attributes can be separated from the celebrity and are transferable during life in the form of publicity rights, the attributes remain equally separable after his death. Similarly, the value of a deceased celebrity's publicity rights

195. 578 F.2d 1381 (6th Cir. 1978).

196. 616 F.2d 956, 958 (6th Cir. 1980).

197. *Id.* The court made no mention, however, of other important societal interests that could be vindicated by permitting survival of publicity rights. See text accompanying notes 156-59 *supra*.

198. 616 F.2d at 959.

199. *Id.*

200. See notes 138-53 and accompanying text *supra*.

usually continues after his death. In fact, the possibility of increased exposure after death, through either licensed commercializations or privileged newsworthy disseminations, may substantially increase the fame, public recognition, and awareness of the persona. Thus, because of the value and capability of continued separate existence, the publicity rights of a deceased celebrity do, can, and should continue.

Furthermore, descent of publicity rights will not hamper the public's quest for or supply of information concerning a celebrity. The public will continue to be able to admire the celebrity and to receive privileged newsworthy information about him through the media. The public will be unable to purchase or manufacture commercial products only of a non-newsworthy nature. But even this minimal limitation might be removed if the celebrity's heirs or grantees authorize the use of the celebrity's persona. The protection of publicity rights after death against unauthorized interference with these rights does not conflict with the first amendment. The two interests are mutually exclusive in this context. The use of a celebrity's picture and name on merchandise, such as on a child's lunchbox, does not deprive the public of newsworthy information or impair informed decision making. Society's paramount interest in the free dissemination of ideas and newsworthy information will continue under first amendment principles despite recognition of the descent of publicity rights.

In addition, the descent issue is unaffected by the determination of whether publicity rights are taxable. If the heirs or grantees must pay taxes, the taxes will be passed on to the grantees or ultimately to the consumers in the form of higher royalties resulting in higher sales prices. The few tax cases that have addressed the issue, however, have decided that the right of publicity is not property within the narrow definitions of the tax laws.²⁰¹ Sale of publicity rights, therefore, is not considered to be a sale of a capital asset.

The Sixth Circuit's dicta in *Memphis Development Foundation* obfuscated the descent issue in its discussion of whether elected officials, military heroes, and public employees who gain fame are entitled to exclusive publicity rights.²⁰² The real issue is whether such people can develop protectible publicity rights rather than whether these publicity rights, once developed, can descend at death. If such persons are entitled to protectible publicity rights during life, and the few cases in this area indicate they are,²⁰³ their rights should descend as any other celebrity's. Their status as public employees does not change the nature of their publicity rights. In

201. *E.g.*, *Miller v. Commissioner*, 299 F.2d 706, 709 (2d Cir.), *cert. denied*, 370 U.S. 923 (1962); *Runyon v. United States*, 281 F.2d 590, 592 (5th Cir. 1960).

202. See text accompanying note 199 *supra*.

203. *E.g.*, *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949). In *Continental Optical*, a member of an Army optical unit in World War II whose picture was circulated by the Army for the war effort, was granted relief on an appropriation of property rights claim against unauthorized use of his likeness for commercial purposes.

any event, such hypothetical fact situations should be tried when actually before a court, not when anticipated.

As to the Sixth Circuit's concern over purely commercial uses of publicity rights, such as souvenir posters, there is no question that such rights should prevail, even after a celebrity's death. Further, single uses of publicity rights for commemorative statues, engraved likenesses, or public structures named after the famous are either for the public interest or are newsworthy statements. In such public interest cases, a celebrity's right of publicity must properly yield to the first amendment.²⁰⁴

Finally, it is highly questionable that an existing use of the publicity rights of famous persons, who are long since deceased, could now be enjoined. Generally, the heirs involved have abandoned any claims to their distant relatives' publicity rights by allowing uses of their relatives' names or likeness to go unchallenged.²⁰⁵ A completely different rule should apply, however, when considering the publicity rights of recently deceased celebrities. Because abandonment has presumably not yet occurred, the heirs or grantees should be able to prevent any unauthorized, purely commercial use.

The Sixth Circuit's opinion in *Memphis Development Foundation* and the California Supreme Court's opinion in *Lugosi* display a lack of understanding of the underlying societal interests involved in recognizing and protecting the right of publicity and of the distinction between the right of publicity and the right of privacy and the property nature of publicity rights. The opinions confuse the commercial use of publicity rights on consumer products with the public's perception of celebrity's attributes and fame. These decisions further fail to recognize that the public's thirst for information concerning the celebrity will continue to be supplied by privileged media disseminations regardless of whether publicity rights survive.

REQUIREMENT OF EXPLOITATION DURING LIFE

In addition to the "fears" approach, another method of limiting the descendability of publicity rights has been to first consider whether the celebrity personally used, exercised, or licensed his publicity rights during his life.²⁰⁶ Those proposing this threshold question have explained that the

204. See notes 128-37 and accompanying text *supra*.

205. Cf. Sobel, *Count Dracula and the Right of Publicity*, 47 L.A. BAR ASS'N BULL. 373, 403-04 (1972) (heirs of Abraham Lincoln or Benjamin Franklin would have no cause of action for commercial use of those names).

206. See *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) ("exploitation" by author Agatha Christie achieved through production of movies and plays based on her books); *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978) ("exploitation" by Elvis Presley through creation of independent entity to merchandise his persona), *cert. denied*, 440 U.S. 908 (1979). *But see Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (actual exploitation not necessary to protect right of publicity from use by other if celebrity established unique persona). See generally

right of publicity is only a protectible property right if the celebrity commercially exploited one of his personal attributes. Thus, these courts first determine whether there had been a personal, overt act that represented a formal acknowledgement of ownership by the celebrity. Such acknowledgements include authorization of the sale of premium merchandise, issuance of licenses for collateral products, granting of assignments to third parties, bequest of publicity rights by testamentary disposition, or initiation of suit to restrain unauthorized uses. Even the adequacy of the celebrity's exploitation has been questioned, namely, may the overt act be merely an exploitation by the celebrity in connection with the type of activity or endeavors for which he is publicly known, or must it be by means of an independent commercial commodity such as an unrelated collateral product or service.

The courts have not addressed the exploitation issue consistently. For example, in *Hicks v. Casablanca Records*,²⁰⁷ the court determined that to state a successful claim for infringement of publicity rights, the claimant must prove that the decedent celebrity recognized the commercial value of his or her name or likeness and that such recognition was manifested in an overt manner.²⁰⁸ *Hicks* held that a celebrity's transfer of publicity rights or a bequest of publicity rights by testamentary disposition was sufficient exploitation to enable those rights to survive his death. Courts and commentators that follow this collateral exploitation rule maintain that a celebrity's failure to exercise his right of publicity in a separate commercial setting prevents descent for two reasons. Such failure either operates as an abandonment of that right upon his death or prevents the value of that right to be transferred into a business venture which can then descend as property.²⁰⁹

In contrast, other courts that have considered the exploitation issue have declared that a celebrity's publicity rights are protectible when the celebrity's unique persona has been created and established through hard work, skill, and the expenditure of time and money.²¹⁰ Under this nominal exploitation theory, a right of publicity is protectible for purposes of descent if it can be shown that the celebrity established a secondary meaning and value in his unique persona for which others would pay or seek to ap-

Rader, *The "Right of Publicity"—A New Dimension*, 61 J. PAT. OFF. SOC'Y 228 (1979) (noting that although exploitation is required it has never been clearly defined).

207. 464 F. Supp. 426 (S.D.N.Y. 1978).

208. *Id.* at 429-30. Cf. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 508 F. Supp. 854 (N.D. Ga. 1981) (modest sums received in form of honorarium for use of name and likeness in literary compositions does not amount to commercial exploitation during lifetime).

209. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 821-24, 603 P.2d 425, 428, 430-31, 160 Cal. Rptr. 323, 326, 328-29 (1979).

210. See, e.g., *Groucho Marx Prods. v. Day & Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981) (no question of intent to capitalize on commercial value of artificial personalities created for entertainment purposes); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (once persona developed there is no "necessity to exercise the right of publicity during one's life in order to protect it from use by others to preserve any potential right of one's heirs").

propriate. Accordingly, actual exploitation of collateral products during the celebrity's life is not required for descent of publicity rights.

The nominal exploitation theory is more preferable than the collateral exploitation theory for several reasons. First, a celebrity may not wish to commercially exploit his publicity rights.²¹¹ For example, a celebrity may not wish to exploit his publicity rights until his reputation, name, and likeness have reached their greatest potential value. If a celebrity purposely waited to commercialize his persona on collateral products until it reached its largest potential value, but died prematurely, the prerequisite of active exploitation seems unduly harsh. Consequently, nonexercise of publicity rights should not be assumed to be a decision never to exercise those rights.²¹² Second, for various career-related or personal reasons, celebrities may not desire to capitalize commercially on their names or other personal attributes other than in their known fields of excellence.²¹³ Also, the value of a celebrity's publicity rights may be enhanced by his premature death or may not peak until after his death. The celebrity, therefore, may not have exploited his publicity rights in order to create a legacy for his or her heirs. Finally, it is illogical to disregard that the celebrity's initial development and subsequent maintenance of his unique persona before the public, in and of itself, acts as a sufficient exercise of his right of publicity for descent purposes.

Certain of the societal interests underlying the right of publicity also necessitate survival of a celebrity's publicity rights upon his death without any requirement for active exploitation during life. State protection of the right of publicity is intended to spur the creation of unique personas and also to allow the celebrity to reap the financial rewards that flow from such personas. Because the public has gained one more persona, it is irrelevant whether the celebrity has also exploited his persona on various commercial products or in other fields. The public would not be harmed by eliminating the exploitation requirement for descent of publicity rights.

The exploitation issue is merely an attempt by courts and litigants to disguise their failure to properly analyze the descent question. The exploitation issue is overworked to appear as if descent has been factually analyzed. Thus, the prerequisite of active exploitation during the celebrity's life

211. See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (persona's announced renunciation of any desire to exploit the commercial value of his own name and fame should not preclude his ability to enjoin others' unauthorized use).

212. To prove true abandonment at death, it should be required that the celebrity ceased using or benefitting from his publicity rights as well as intended to purposely give them up upon death. Thus, abandonment could not be proved where the celebrity maintained his public image and popularity until his demise. The argument that nonexercise during life effects an abandonment of publicity rights is also without merit when a comparison is made with the rules for abandonment of a trademark. See 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 17.1-.10 (1973).

213. Cf. *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967) (celebrity's decision not to commercialize his publicity rights does not justify others to commercialize them). See also note 34 *supra*.

should be eliminated when determining whether publicity rights are descendible.

LIMITS ON DESCENT OF PUBLICITY RIGHTS

Assuming the right of publicity is eventually granted property right status and allowed to descend in all jurisdictions, several limitations are present that will offset the full effects of descent, including abuse. One practical limitation is the standing of publicity right plaintiffs. When a celebrity's descendants are involved, a full proof of heirship is required and all or substantially all of the celebrity's heirs must be joined in the action.²¹⁴ This threshold standing test acts to ensure that the ownership interest in a celebrity's right of publicity is fully represented. Accordingly, this standing problem will increase in magnitude as the number of years after the persona's death increases. Thus, when remote descendants who are unable to make an authentic proof of heirship bring suits, their cases will be subject to dismissal.

As previously mentioned, the first amendment privileges of speech and press also operate as a limitation on the descent of publicity rights. Even if all descendants are found to have the requisite standing, the use of a celebrity's attributes in a truly newsworthy setting, such as a fictionalized biography, movie, or other medium conventionally used to disseminate news, will remain privileged.²¹⁵

The measure of damages will act as another limiting factor on the descent of publicity rights. The amount of damages in publicity cases is based, in part, on the value of the celebrity's attributes that have been appropriated. In those cases where a deceased celebrity's attributes have either faded substantially or have not been popularized over a long period of time, the eventual monetary recovery would be nominal. Thus, in those situations, there would be less of an incentive for descendants to file suit.

In addition, more direct limitations on descent have been suggested in the form of various durational limits.²¹⁶ The primary reason suggested for such

214. See *Schumann v. Loew's, Inc.*, 135 N.Y.S.2d 361, 369 (1954) (in claim for misappropriation of name of deceased famous composer, plaintiffs failed to show specific facts that established they presently owned the property right to that name, that the deceased did not otherwise dispose of that right in a will, or that they inherited that right under the intestate succession laws of country of deceased).

215. As noted by Professor Nimmer, "[t]here is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright," thereby requiring limited duration for such properties. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1193 (1970). Thus, since a celebrity's right of publicity always remains subject to free speech interests, see notes 128-37 and accompanying text *supra*, there are no reasons why first amendment interests should limit the duration on descent of publicity rights.

216. See, e.g., *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 847, 603 P.2d 425, 446-47, 160 Cal. Rptr. 323, 345 (1979) (Bird, C.J., dissenting) (right of publicity should be recognized dur-

limits is that in exchange for the celebrity's hard work to obtain celebrity status and the resulting benefits to society, publicity rights should last long enough to provide at least some economic protection for the celebrity's immediate family and perhaps grandchildren. This presumably holds true for the celebrity's grantees as well, as they undoubtedly would pay less for such rights if they knew that the subject matter of their purchase could evaporate without warning. Once these particular persons have reaped rewards during a limited period following the celebrity's death, the argument continues, free speech interests presumably increase to the point where they override such limited property rights. At that time, the publicity rights enter the public domain. This limited descent scheme, it is argued, would prevent a celebrity's descendants or grantees from controlling history forever.

In determining what could be the appropriate length for such a limited duration, the durational terms associated with real property, copyrights, and trademarks, have been considered. For example, one commentator reasoned that if duration is analyzed under trademark law, the right of publicity would be protected for as long as the celebrity's name or picture is attached or understood to relate to the persona himself. Thus, the right of publicity would definitely last for the celebrity's life span. Yet, because the celebrity's publicity attributes would become disembodied at death, the publicity right and its value would then enter the public domain.²¹⁷

The trademark analogy, however, has not been extended to its logical conclusion. Because they are separable and have value, publicity rights should, at the very least, survive for as long as they are associated with a commercial product, service, or business venture which the deceased celebrity's heirs or grantees have authorized.²¹⁸ Thus, it should be only at that time when the heirs or grantees have intentionally ceased use of the celebrity's attributes that the same should lose their protectible status and fall into the public domain. It is only then that publicity rights should be considered abandoned under trademark principles.

One problem with such an extended duration analogy under trademark law, however, is that it would not give a distinct legal guideline to follow in determining whether or not the publicity rights of a particular deceased personality are available for use. No certainty in publicity rights law would be possible when protectible residual rights might remain in the personality's publicity rights. Indeed, if yet another analogy were borrowed from the trademark laws, the celebrity's heirs could undertake a nominal use and sales program each year in an attempt to extend their rights. Such a "bank-

ing celebrity's life plus 50 years) (citing Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 549 (1976) (durational limit should be two generations after celebrity's death)); *Dracula's Progeny*, *supra* note 30, at 1124-28 (not arbitrary to impose 50 year absolute durational limit).

217. *Dracula's Progeny*, *supra* note 30, at 1124 n.95.

218. It should also be noted that a trademark owned by a bankrupt corporation may represent continuing goodwill even though the corporation has ceased operations and its use of the trademark. See 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 17.2, 18.1 (1973).

ing" of publicity rights would certainly frustrate any certainty in the law whatsoever. For these reasons, a trademark analogy for the descent duration issue is not sound.

It has also been suggested that since the right of publicity is most like copyright because they both spur the creation of original expressions, the durational term for copyrights can be applied to a post-mortem right of publicity. Such proponents argue that until any legislative action is taken on the descent question, a reasonable duration limit is the celebrity's life plus fifty years.²¹⁹ It must be remembered, however, that the constitutional copyright clause mandates a limited term for copyright.²²⁰ No such limitation hampers the underlying basis for recognizing and protecting the right of publicity.

Yet, none of the various proposals for arbitrarily selecting a durational limit on descent truly protect the hard-earned value that resides in a celebrity's unique persona. More importantly, none of the proposals recognize the reasons for which the right of publicity was originally created, the property nature of the right, or the state interests involved in its protection. If the right of publicity is automatically terminated at a celebrity's death, a valuable legacy is rendered valueless overnight. But the state interests in protecting the right of publicity, as well as the celebrity's separate ongoing attributes, continue after a celebrity's death. Thus, as long as one's publicity rights have audience appeal and commercial value for which someone else would pay, reasons remain to protect these rights. Further, since all members of the public will continue to have privileges under the first amendment, it cannot be seen what societal interest ever increases to the point where it outweighs the heirs' or grantees' interests in the publicity rights they own. It seems a rather harsh result tantamount to a taking of property to have the right of publicity terminate upon the death of the personality to which it attaches. Thus, as suggested by other authors, there appear to be no logical reasons why the right of publicity, as a proprietary property right, should not descend like other property, uninhibited by arbitrary limits on duration, by the illogical exploitation rule, or by anything else.²²¹

If the courts recognize such uninhibited descent of publicity rights, the state legislatures should establish a durational limit only when there appears to be an abuse of this right. Fears of the future,²²² however, should not be

219. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 846, 603 P.2d 425, 445-46, 160 Cal. Rptr. 323, 343-44 (1979) (Bird, C.J., dissenting) (50 year durational limitation in copyright statute is a reasonable time period to protect post-mortem publicity rights); *Dracula's Progeny*, *supra* note 30, at 1124-28. One author has suggested that one's name and likeness be registered with the Copyright Office in order to receive appropriate protection. Byers, *Copyright to Life: Toward Copyright Protection for Name and Likeness*, 56 CAL. ST. B.J. 52 (1981).

220. See note 109 *supra*.

221. See, e.g., Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976).

222. For example, there has long been a fear of a flood of right of publicity suits brought

used to prevent the recognition and protection of present publicity rights. Courts today have only two options when faced with the descent question: either they do not recognize descent at all, or they fully recognize it without any time limitation. If a durational limit is established by judicial fiat rather than by legislative action, the courts have usurped a legislative function.

As discussed above, however, the currently imagined fears concerning the survival of publicity rights are insignificant when compared to the invaluable loss that will be suffered by a celebrity's heirs and licensees if such rights are terminated at the celebrity's death. Now is the time for courts to recognize the fully uninhibited and unlimited descent of publicity rights. If the need ever arises, subsequent legislative action to correct problems resulting from unlimited duration is always available.²²³

CONCLUSION

The right of privacy has too long been a hindrance to the proper development of the right of publicity. The personal aspects of the right of privacy as well as its nonsurvival rule, are simply not germane to a celebrity's publicity rights. Even though developed around the personal attributes of the celebrity, the right of publicity is purely commercial and proprietary in nature. An invasion of this right causes a direct pecuniary loss, not an injury to feelings. Further, the underlying state interests involved in protecting the right of publicity continue after a celebrity's death. Finally, since the first amendment privileges of free speech and press will always dominate over the right of publicity, the descent and subsequent protection of the right of publicity will never interfere with the public's right to know. Thus, the right of publicity, as something having pecuniary value even after a celebrity's death, and which can be separated from the celebrity in both life and death, should be deemed a true property right for all purposes, including descent.

There are no valid policy reasons for preventing the full uninhibited descent of publicity rights. Neither has any reason manifested itself, as yet, to prevent the perpetual descent of the right of publicity in proper situations. If any such reason ever surfaces in practice, the legislatures, not the courts, should be the ones to establish such limits. However, for the present, the proprietary right of publicity should descend.

by the descendants of long-since deceased ancestors. See *Schumann v. Loew's, Inc.*, 144 N.Y.S.2d 27, 30 (1955). The Second Circuit, however, has recognized the descent of publicity rights since *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (1975), and the number of frivolous right of publicity suits has not been excessive in that jurisdiction.

223. If legislative action is ever deemed necessary, numerous limitations on descent are available, such as:

1. For the life of the remaining spouse and/or children;
2. A 25 year limitation on commencement of the suit;
3. Fifty years after the persona's death, as with copyrights; or
4. For the remainder of the term of any of the celebrity's licenses granted during his life, not to exceed 20 years.