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# REGULATING PUBLICITY: DOES ELVIS WANT PRIVACY?

*Larry Moore**

## INTRODUCTION

Publicity is one of the newest rights of the twentieth century.[1] It gives a person who has achieved celebrity status or fame the right to market this accomplishment by controlling and licensing the use of his or her image, likeness, or name.[2]

Publicity developed out of the right of privacy which was itself conceived in the twentieth century.[3] Specifically, as privacy developed, legal scholars and some courts also identified and defined the existence of another related area of protected interests.[4] This related area was later called publicity, and a debate began as to whether publicity constituted a totally separate right from that of privacy.[5]

Throughout its short history, the development of publicity, as a right and as a concept, has been intertwined with the development of privacy rights.[6] Consequently, publicity has alternately been treated as a legitimate offspring of privacy, or as a problematic stepchild.[7] In far too many cases, however, publicity has not been accorded the full independence that its economic worth so demands.[8] In some states, the owner of the publicity right has limited power to exercise the right or to prohibit its unauthorized use by others.[9] In other states, the celebrity

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1. *See* State *ex rel.* Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89, 94 (Tenn. Co. App. 1987) [hereinafter "*Crowell*"].

2. *Id.*

3. *Id.* One commentator explained that publicity was "carved out of the general right of privacy . . . like Eve from Adam's rib." J. Thomas McCarthy, *The Rights of Publicity and Privacy*, 203 (19-92).

4. *Crowell*, 733 S.W.2d at 94.

5. *Id.*

6. Richard E. Fikes, *The Right of Publicity: a descendible and inheritable property right*, 14 CUMB. L. REV. 347 (1984). Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?* 10 CARDOZO ARTS & ENT. L.J. 365 (1992).

7. Fikes, *supra* note 6, at 351-2.

8. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1200 (1986). *See also* Seth E. Bloom, *Preventing the Misappropriation of Identity: Beyond the "Right of Publicity"*, 13 HASTINGS COMM. & ENT. L.J. 489 (1991); Kathleen Birkel Dangelo, *How Much of You do You Really Own? A Property Right in Identity*, 37 CLEV. ST. L. REV. 499 (1989); J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).

9. *See, e.g.*, MASS. GEN. L. ch. 214, § 3A (limiting the right of publicity); UTAH CODE ANN.



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has a right to publicity, but the right is personal and therefore not descendible to the celebrity's estate.[10]

Several states, either by statute or by common law, have recognized that the right of publicity exists, that it is property, and that it is subject to the same rules of transfer and descent as other property.[11] A few other states severely limit the right of publicity, holding it to be little more than a part of the privacy right and therefore a personal right which terminates at death.[12] Finally, some states have not recognized the existence of a publicity right.[13]

This article looks at some of the problems caused by the confusing state of publicity law and suggests possible federal legislation which would, at a minimum, recognize the existence of a right of publicity and treat it as any other intellectual property. While this author is against the trend toward proposing a federal law for every conceivable problem, the right of publicity is a classic example of a valid interstate commerce concern worthy of unitary federal protection.

Today's modern media has made it possible for a person, such as Elvis Presley or Michael Jackson, to have his name, face, and personal mannerisms known and recognized in literally every hamlet or hut in the world. The good will connected with this recognition can generate customers willing to buy an item just because such a celebrity's picture or name is on it.[14] Without a right to control the commercial use of personal images, items with a celebrity's name or likeness can be sold at any time, by any person, anywhere in the nation without the permission of the celebrity, or the celebrity's estate. In states where there is a very limited right of publicity, the celebrity or his estate could be barred in some instances from exercising control over the use of the celebrity's image.[15] Thus, the celebrity can be prevented from claiming any part of the profit made by a stranger who contributed nothing to the creation of the image and who is not an heir or assign to the image.[16]

In the modern world, celebrity images originate in one state, such as Tennessee, California or New York, and then are transmitted to all the others via movies, television, radio, records, or video tapes. It is this interstate broadcast of celebrity images that make publicity rights a reasonable candidate for nationwide legislation.[17]

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§ 45-3 (1953) (limiting the right of publicity).

10. *See, e.g.,* Sinker v. Goldsmith, 623 F. Supp. 727 (D. Ariz. 1985).

11. *See, e.g.,* TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108; CAL. CIV. CODE § 990(b), (c), (h); *See also* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

12. Frederick Kessler, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute,* 15 FORDHAM URB. L.J. 951, 956 (1987).

13. *Id. See* appendix A & B for a current comparison of state publicity and privacy law.

14. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights,* 81 CAL. L. REV. 127, 128 (1993).

15. Note that in New York, under the state privacy statute there is only limited protection of publicity rights.

16. Halpern, *supra* note 8, at 1236.

17. Leslie Kane, *Posthumous Right of Publicity: Jurisdictional Conflict and a Proposal for Solu-*

In this sense, publicity, like an invention, an artistic creation, or computer software, is an expression of intangible property that can easily be transferred, duplicated, or utilized by others. Generally, intangible property with such characteristics are protected by federal patent and copyright statutes.[18] In making the case for federal legislation, this article analyzes the current regulation of publicity with an emphasis on the difficulties that states have had in distinguishing publicity from privacy. Section I will examine the development of the right of privacy and the birth of the right of publicity. Section II will trace the development of publicity through the courts and legislatures of four representative states which have a major interest in such a right: New York, with Broadway actors, artists, writers, and other celebrities; California, with Hollywood and movie stars; Tennessee, with music stars and Elvis, who is certainly the "king" of publicity rights lawsuits; and Georgia, whose recognition of common law rights of both privacy and publicity, may be viewed as a model for other states that have not yet confronted either issue. Finally, this article concludes with a proposal for a Model Publicity Statute.

## I. From Privacy to Publicity

### A. *The Right of Privacy*

The right of privacy is a concept that has matured with the modern industrial state.[19]Its birth in America did not arise out of litigation but, rather, arose from an 1890 law review article by Samuel Warren and Louis Brandeis.[20] Warren and Brandeis derived the concept of a right of privacy from the English case, *Albert v. Strange*.[21] They borrowed the term "privacy" to describe their concern with media's intrusion into the affairs of private citizens.[22] Essentially, the article defended the individual's "right to be let alone."[23]

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*tion*, 24 SANTA CLARA L. REV. 111, 133 (1989).

18. *See* Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*; Patent Act of 1952, 35 U.S.C. § 101 *et seq.* (1995); Lanham Act, 15 U.S.C. § 1051 *et seq.*

19. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Dean Prosser has suggested that Warren may have been inspired to expand the right of privacy because of the press' excessive prying into his private affairs. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 423 (1960).

20. Prosser, *supra* note 19 at 383.

21. 1 McN. & G. 23.43 (1849). In *Strange*, Prince Albert sued to prevent the defendants from publishing copies or descriptions of etchings which he and Queen Victoria had drawn for their own entertainment. In ruling for the plaintiff, the presiding judge, Lord Cottenham, used the term "privacy" in determining the right being invaded. One wonders how far this right would have progressed had a matter arose not involving the "king" and queen of England.

22. The private citizen in this case was Warren's wife, a wealthy Boston socialite. Her fashionable parties were covered in salacious fashion by the Boston papers. To battle this outrage, Warren joined with his former law partner and Harvard law classmate, Brandeis, to voice a personal protest against what they considered to be a new means of intruding into the life of a citizen and informing the whole community of even minute and insignificant private activities. *See* MASON & LOUIS D. BRANDEIS, A FREE MAN'S LIFE (1946).

23. Warren & Brandeis, *supra* note 19, at 193; *see also* Halpern, *supra* note 8.

Warren and Brandeis saw the right of privacy as a natural development, evolving as a logical application of common law principles to new developments.[24] They concluded that common law was initially created to protect property and life from physical injury.[25] Warren and Brandeis then noted that as legal systems began to recognize the spiritual nature of human beings, the common law expanded to include that protection of intangible possessions and non-physical injuries through laws such as assault, nuisance, libel and slander.[26]

The authors recognized that new inventions and business methods of the age were capable of recording or photographing the most private acts and then circulating those images to every part of the community.[27] In this regard Warren and Brandeis criticized the press for making an industry out of gossip, which, in earlier times, had simply been a hobby for the idle and the vicious.[28] The authors contended that the "gossip industry" destroyed people's concern for things of real importance to the community in an attempt to satisfy the prurient interest of the public.[29] Upon this basis, Warren and Brandeis examined the common law to see if it afforded protection to those individuals "victimized" by new technologies.[30]

In pursuing their research, the authors noted that "[t]he common law secure[d] to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[31] By way of analogy, they looked at the protection provided by common law copyright and determined that private thoughts and actions were entitled to some similar protection.[32] They also found that privacy rights had been recognized in both England[33] and France.[34] The authors then stated what they believed the law should be; suggested the penalties for its violations; and outlined limitations to the right.[35]

From the beginning, privacy owed its growth and development more to the

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24. Warren & Brandeis, *supra* note 19, at 193.

25. *Id.*

26. *Id.* at 193-94.

27. *Id.* at 195.

28. *Id.*

29. *Id.* For a fuller exegesis on the media's gradual shift in focus towards the private lives of famous people, *see* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights,* 81 CAL. L. REV. 127 (1990). Explaining the rather late birth of the right of privacy, Professor Madow notes that it was not until the twentieth century that commercial advertisers began to exploit vigorously the images of famous individuals. *See also* Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Rights of Publicity,* 96 HARV. L. REV. 1703, 1713 (1983) ("[N]othing in our experience before the early 1900's . . . made such a right necessary.")

30. Warren & Brandeis, *supra* note 19, at 197.

31. *Id.* at 198.

32. *Id.* at 200.

33. *Id.* at 208.

34. *Id.* at 214.

35. *Id.* at 214-20.

battle of legal scholars than to the courts.[36] Indeed, after the article by Warren and Brandeis, Herbert Spencer Hadley wrote an article, also entitled *The Right to Privacy*, in which he attacked the doctrine set forth by Warren and Brandeis.[37] Oddly, Hadley's article has received little of the fame of the Warren and Brandeis article, and is seldom cited, notwithstanding the fact that it provided almost all of the arguments used by the early courts in opposing the development of the privacy concept.[38]

Hadley's thesis was that equity jurisdiction, as developed in the English common law system, is based upon the concept of property.[39] That is, equity was developed to prevent real and identifiable damage to tangible property.[40] Without such damage, or threatened damage, equity was powerless to act.[41] Since privacy dealt with mere feelings, it was a vaguely-defined, personal matter and not a matter of property.[42] Therefore, not only was there no equity jurisdiction, but there was no rational basis for any jurisdiction.[43]

The foregoing criticism was echoed later by the highest courts in at least two states.[44] However, not all states rejected the privacy right. Rather, with Georgia in the lead, the concept of privacy was soon adopted by other states around the country and slowly became a part of many state's common law.[45]

Though state courts began to accept the right of privacy, the shaping of the right was still left to legal scholars who attempted to define the limits of this new legal concept. The next attempt at a broad based definition of privacy was offered by Roscoe Pound.[46] Pound explained and then expanded the scope of privacy by showing that it was part of the broader concept of personalty that dated back to the Greeks and Romans.[47]

Pound attempted to construct a framework for understanding privacy which

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36. Kessler, *supra* note 12, at 953; *see also* Kane, *supra* note 17, at 112-13.

37. Herbert Spencer Hadley, *The Right of Privacy*, 3 NEW ENG. L. REV. 1 (1894).

38. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556 (1902).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. New York's Court of Appeals rejected the right in *Roberson*, 171 N.Y. 538 (1902), and was followed later by Rhode Island which rejected the right in Henry v. Cherry, 73 A. 87 (R.I. 1909).

45. Pavesich v. New England Life Ins., 50 S.E. 68 (Ga. 1905), became the lead case and was nationally cited as authority for the principal that the right of privacy could be found in the common law.

New York initially lead the way in upholding right of privacy cases. *See* Schuyler v. Curtis, 15 N.Y.S. 787 (Sup. Ct. 1891) (*citing* Manola v. Stevens, (N.Y. Sup. Ct. June 1890) (unreported)); Mackenzie v. Soden Mineral Springs Co., 18 N.Y.S. 240 (Sup. Ct. 1891); Marks v. Jaffa, 26 N.Y.S. 908 (Sup. Ct. 1893). *See also* Corliss v. E.W. Walker Co. 64 Fed. 280 (Mass. Cir. 1894).

Early cases accepting the principle were Kunz v. Allen, 172 P. 532 (Kan. 1918); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. Ct. App. 1909); Itzkovitch v. Whitaker, 39 So. 499 (La. Sup. Ct. 1905); Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911); Vanderbilt v. Mitchell 67 A. 97 (N.J. Sup. Ct. 1907); Edison v. Edison Polyform Co. 67 A. 392 (N.J. Ch. 1907).

46. Roscoe Pound, *Interests of Personalty*, 28 HARV. L. REV. 343 (1915).

47. *Id.*

would provide a foundation for subsequent judicial decisions.[48] This approach, however, was not a great success. In the final analysis, Pound's attempt to equate actual physical intrusion with an invasion of privacy proved far too esoteric and philosophical to be of use in solving practical difficulties.[49] Pound's approach also came dangerously close to the complaint raised by Hadley, that is, taking vague concepts and transforming them into rights, which would so cloud the concept of property that it would "banish from our laws that certainty and definiteness on which are built the property rights of the people."[50] For all of the foregoing reasons, Professor Pound's article, though logically cogent and forceful, was seldom cited as a source during the development of the right to privacy.

The next major step in the analysis of the right to privacy came in 1960 with William Prosser's Article entitled *Privacy*.[51] Prior to this article, much of the confusion between the right of privacy and publicity was due to the fact that, conceptually, privacy had not developed beyond the general theory created by Warren and Brandeis almost seventy years earlier.[52] Specifically, almost no attention had been paid to possible subcategories or classes that might have existed within the right of privacy.[53] All of this was changed by Prosser.

Prosser identified privacy as being composed of four separate groups of rights: (1) intrusion, i.e. the unreasonable and offensive interference with the solitude or seclusion of another; (2) public disclosure of private facts, i.e. the publication of private, truthful information about another that gives offensive publicity to this information;[54] (3) false light, i.e. the presentation of information to the general public in such a manner as to convey a false and offensive impression of the individual;[55] and (4) appropriation, i.e. the use of another person's name or likeness for one's own benefit.[56]

Here, in something of a backward step in the development of publicity, Prosser held that publicity was merely a part of privacy.[57] Specifically, he stated that publicity came under the heading of appropriation.[58] This categorization put Prosser at odds with Melville Nimmer who, six years earlier, had written a major article on publicity, classifying it as a totally separate right.[59] In retrospect, it seems as though Prosser did not totally disagree with Nimmer. For Prosser readily admitted that publicity was not only quite unlike the other three rights,[60] but was also different from a pure case of appropriation.[61] By way of illustration, a

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48. *Id.* at 346.
49. *Id.* at 348.
50. Hadley, *supra* note 37, at 21.
51. Prosser, *supra* note 19, at 386-88.
52. *Id.* at 389-92.
53. *Id.*
54. *Id.* at 392-98.
55. *Id.* at 398.
56. *Id.* at 402.
57. *Id.* at 406-07.
58. *Id.*
59. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).
60. Prosser, *supra* note 19, at 406-07.
61. *Id.* Prosser states that "[i]t seems sufficiently evident that appropriation is quite a different

normal case of appropriation might arise where a picture of an unknown person is used in an advertisement without the person's knowledge or consent. Appropriation would be invoked if the picture had no inherent value in itself, and if the unknown individual's privacy were damaged by the unwarranted public display. The foregoing compares to a publicity case in which the scenario is the same, except that the picture used is that of a well known person. In the later situation, the picture has an independent value because the individual's personal fame existed before its use in the advertisement.[62]

Notwithstanding his recognition that publicity was unique even as an act of appropriation, Prosser did not want to become embroiled in the "property" versus "feelings" debate regarding the interest which publicity protects. Specifically Prosser stated that "[i]t seems quite pointless to dispute over whether such a right is to be classified as property."[63] Instead, he took a neutral position as to the essence of this entity since under his analysis, it was to be protected as property anyway, i.e. "[The] interest protected is not so much a mental as a proprietary one."[64] In the end, this helped very little in maturing the concept of a right of publicity.

### *B. The Right of Publicity*

The distinction that Prosser attempted to avoid is especially vital because there is a major legal distinction between the way personal rights and property rights are treated under the law. Personal rights are not transferable or descendible upon death, whereas property rights are.[65] That is, feelings exist, but their value is to the person experiencing the feelings, all of which terminate upon death.[66] On the other hand property, even intellectual property, has a discrete existence and value that is separate from its owner[67] and is subject to sale, lease, or assignment, either by the owner while living, or by the owner's estate after death.[68] In this case, publicity, is more like property than privacy in that it is capable of existing separately from its owner and can potentially generate income even after the celebrity has died.[69]

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matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one . . . . It seems quite pointless to dispute over whether such a right is to be classified as 'property' (citation omitted). Its proprietary nature is clearly indicated by a decision of the Second Circuit that an exclusive license has what has been called a 'right of publicity.'"

62. *Id.*

63. *Id.*

64. *Id.* That is, if publicity is property, then it is different from privacy and is entitled to the same protection as other property. On the other hand, if publicity is feeling, then it is a part of privacy and an injury to it could only be redressed if the individual's privacy is violated.

65. J. Graham Matherne, *Descendibility of Publicity Rights in Tennessee*, 53 TENN. L. REV. 753, 762-63 (1986).

66. McCarthy, *supra* note 3.

67. *Id.*

68. Nimmer, *supra* note 59, at 209.

69. J. Steven Gingman, *A Descendible Right of Publicity: Has the Time Finally Come for a Na-*

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 5, Iss. 1 [2016], Art. 2



Thus, the debate concerning the nature of publicity is more than an academic argument among legal scholars. The manner in which this issue is resolved can, and will, have great economic impact on celebrities as well as their estates.[70]

In the commentaries, publicity was first separated from the concept of privacy and given its most definitive scholarly development by Professor Melville Nimmer in his article, *The Right to Publicity.*[71] This article was published in 1954, shortly after the term "publicity" was first used by a court to define the issues before it.[72] In arguing that publicity was a concept separate and distinct from privacy, Nimmer showed the logical inconsistencies of trying to enforce a right of publicity under a privacy statute.[73] He noted that the concept of celebrity, which means that the person is widely known by the general public, is not consistent with the concept of privacy where it is used to protect a person unknown to the general public from being unwarrantly placed in the public eye.[74] The traditional law of privacy, designed to insulate the individual from the scrutiny of the general public, was not a mechanism to protect an individual who had intentionally thrust himself before the public.[75] Under principles of privacy, one could not shed the cloak of privacy and then bring a legal action because the public knew about the person.[76] Indeed, according to Nimmer, in most cases celebrities do not want to be shielded from the public.[77] They just do not want their name or image to be used publicly for commercial purposes without their consent and/or renumeration.[78]

Nimmer explained that the rigidity of privacy law failed to distinguish between these two classes of plaintiffs. The first is the traditional seeker of privacy, one whose only desire is to lead a private life, free from unwanted interference or probing.[79] The second are those who put themselves in the spotlight for any purpose including wealth or fame.[80] The later people are the ones with a need to have their names and likenesses guarded from commercial exploitation.[81]

Nimmer further reasoned that just as the Warren and Brandeis article developed privacy in response to modern newspaper practices which invaded personal

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*tional Standard?* 17 PEPP. L. REV. 933 (1990). The Elvis Presley estate went from $4.9 million at death to $75 million with gross income of $15 million per year aided in a large part to the sale of his publicity rights. *See* Matherne, *supra* note 65, at 759-60, for an extended discussion of the public policy reasons supporting descendibility of rights, including the belief that a person who creates something of value should have the right to leave it to the objects of their bounty and not to commercial exploiters.

70. *Id.*

71. Nimmer, *supra* note 59.

72. Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

73. Nimmer, *supra* note 59, at 204-06.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 203-204.

80. *Id.*

81. *Id.*

areas of the individual's private life, new developments in media technology required new rights to protect individuals from the wrongful use of their public fame.[82] Thus advanced media methods have created a new area of commercial interest called publicity and this area should be afforded the same legal protection as any other item of commercial property.[83]

Nimmer went on to consider other forms of possible redress for use in publicity cases, but found them to be lacking as well. Nimmer concluded that laws against unfair competition, including the Lanham Act, which address unfair competition would be inadequate in most cases because the plaintiff celebrity is not typically in competition with the defendant.[84] A claim for palming-off would also be of no use in the majority of cases because the defendant would have no interest in imputing that he or she is connected with the celebrity, that is, the publicity value could be used without the necessity of claiming to be the celebrity which is the basis for this remedy.[85]

Contract theory, on the other hand, would be inadequate because it would only apply to parties to the contract,[86] and most defendants would not be parties to any contract with the celebrity.[87] Defamation would fail if a claim made about a celebrity was truthful.[88]

Nimmer concluded his review of alternative remedies for protecting a celebrity's image with the statement that "[t]he nature of the inadequacy of the traditional legal theories dictates in large measure the substance of the right of publicity."[89] Because of this, he held that publicity should be recognized as a property, not a personal, right. This conclusion was based on the fact that publicity can have great value and is achieved in many cases only after a person has "expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence . . . that every person is entitled to the fruit of his labors . . . ."[90]

## II. A Selective Look at State Approaches to Publicity Rights

In order to better understand the uncertainty which the current state of publicity law has created, not only for the celebrities, but for scholars and the courts, this part examines four representative states, New York, California, Tennessee, and Georgia, to see how the publicity right has been addressed or resolved.[91]

82. *Id.*
83. *Id.*
84. *Id.* at 210-11.
85. *Id.* at 212-13.
86. *Id.* at 214-15.
87. *Id.*
88. *Id.* at 215.
89. *Id.* at 216.
90. *Id.* *See* Madow, *supra* note 29. *But see* White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993) (Kozinski J., dissenting).
91. By Professor McCarthy's account, the common law of fourteen states has not recognized the existence of a right of publicity. Four of these states have enacted statutory provisions guaranteeing

The courts of three of these jurisdictions with arguably the greatest possible interest in a descendible right of publicity, i.e., New York,[92] California, and Tennessee have, at various times, rejected the notion that publicity was a common law proposition.[93]

### A. *New York*

Many states first defined and then accepted some concept of privacy as a right before developing the concept of publicity.[94] However, the State of New York has taken a more convoluted path in this area than others as seen in the various decisions of the New York courts on the subject.

The first reported case to deal with the subject of privacy was the 1891 case of *Schuyler v. Curtis*.[95] At issue was whether the right of publicity existed and whether it was descendible.[96] Ultimately, the trial court, with little analysis, answered both questions affirmatively.[97]

In *Schuyler*, a women's group planned to erect statues in the state of New York of two women heroes of the time, Mrs. Schuyler, a well known philanthropist, and Susan B. Anthony, a well known reformer, after first exhibiting the statues at the Chicago World's Fair.[98] Mrs. Schuyler's estate sued to enjoin the project.[99] The defendants argued that to block this venture would lead to other estates barring the erection of statutes to such individuals as Lincoln and Washington.[100] The trial court, quoting liberally from the Warren and Brandeis article,[101] ruled that Mrs. Schuyler was not a public figure but was a private person who had always avoided publicity.[102] The court indicated that she would

this right. Further, nine additional states, one of which is New York, have privacy statutes which may be considered misnomers because they also protect the economic interests of celebrities in controlling the use of their identities. *See* McCarthy, *supra* note 3, at § 6.6.1 [B].

92. Note from the following analysis that New York did not so much as deny the right altogether so much as to hold that whatever right there may exist was preempted by statute.

93. *See also* Halpern, *supra* note 8, at 1234.

94. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905); *see also* Melvin v. Reid, 112 Cal. App. 285 (1931).

95. 15 N.Y.S. 787 (Sup. Ct. 1891). The right had also been upheld in the earlier unreported cases of Manola v. Stevens, (N.Y. Sup. Ct. 1890); *see also* Mackenzie v. Soden Mineral Springs Co., 18 N.Y.S. 240 (Sup. Ct. 1891); Marks v. Jaffa, 26 N.Y.S. 908 (Super. Ct. 1893).

It appeared at this point that the right was secured in the State of New York.

96. *Schuyler*, 15 N.Y.S. at 788. Among the commentators, the question of descendibility of the right of publicity continues to provide fertile ground for debate. *Compare* Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981) (arguing for the continuance of descendibility) *with* Todd F. Simon, *Right of Publicity Reified: Fame as a Business Asset*, 30 N.Y.L SCH. L. REV. 699 (1985) (opposing descendibility).

97. *Schuyler*, 15 N.Y.S. at 788.

98. *Id.* at 787.

99. *Id.*

100. *Id.* at 788.

101. Warren & Brandeis, *supra* note 19.

102. *Schuyler*, 15 N.Y.S. at 788-89.

have had the right to block the erection of the statue were she still alive.[103] This early decision did not consider whether a finding of privacy, which protects one's feelings, could create a cause of action which survived death or could be enforced by a third party. Instead, without further analysis, the court concluded that this right passed to Schuyler's estate at her death.[104]

Three years later another trial court arrived at the opposite conclusion. In *Murray v. Gast Lithographic and Engraving Co.*,[105] a father sued the defendant for injunctive relief and damages for the unauthorized publication of a picture taken of his infant daughter.[106] The photo had been taken for private family reasons, but was somehow obtained by the defendant who displayed it widely.[107] In rejecting the plaintiff's claim, the court first addressed the issue that was ignored in *Schuyler* that is whether one had standing to assert the privacy right of another.[108] The court held that the plaintiff could not assert his daughter's right.[109] In doing so, the court ignored the fact that not only was the plaintiff a parent suing for the publication of private family pictures, but was suing for a minor child for whom he had the right to bring a suit for any breach of a duty under tort law. The court went on to hold that the purpose of law was to protect the person and purse, but not feelings.[110] It stated that in the case of a moral wrong, it would be crude and indelicate to give money as compensation.[111]

In *Roberson v. Rochester Folding Box Co.*,[112] a divided court decided one of the most unpopular, though still influential, cases in New York privacy law.[113] The court held that there was no remedy for a violation of privacy because no such right existed in the common law of the state.[114] Here, the defendant obtained a private picture of the plaintiff and used it to produce 25,000 posters that were circulated around the nation to advertise defendant's baking flour.[115] The court held that, rather than sue, the plaintiff should be flattered that the defendant thought her pretty enough to have her picture placed on posters which were hung throughout the country.[116] It then refused to recognize that a right of privacy existed in the common law, and denied recovery.[117]

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103. *Id.*
104. *Id.* One also feels that the conservative family would have been mortified to see their ancestor within a mile of the radical Anthony, even in death.
105. 28 N.Y.S. 271 (1894).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 271.
111. *Id.* at 272.
112. 171 N.Y. 538 (1902).
113. *Id.*
114. *Id.* at 556.
115. *Id.* at 542.
116. *Id.*
117. *Id.*

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 5, Iss. 1 [2016], Art. 2



This decision so outraged public opinion that in defense, one of the Justices who signed the majority opinion, wrote a law review article to justify the decision.[118] Justice Denis O'Brien argued that the court's decision had been misunderstood.[119] He began his article with a page and a half of quotes from the newspaper attacking the decision.[120] O'Brien then digressed to a discussion of the *Dred Scott* case, which he defended as another misunderstood but proper decision.[121] He rejected the notion that the plaintiff has a property right in her image which could be protected by the court,[122] and because he found that there was no property involved, he concluded that her prayer for an injunction could not succeed. Furthermore, because the plaintiff did not sue for damages, Justice O'Brien concluded that no other remedy was possible and that there were no criminal sanctions for such activities.[123] Additionally, he stated that an injunction was not proper since the defendant had already made and distributed the posters.[124] Finally, the Justice said that the press was responsible for killing an earlier bill which would have applied in such a situation, and that it was up to the legislature to develop such a right.[125]

The justice concluded by stating that it would have been coarse and degrading to apply to a woman's beauty the same rules applicable to chattels and land.[126] "The right of privacy in such cases, if it exists at all, is something that can not be regulated by law."[127] This case ruling on the common law has not been overturned and haunts New York law today.

The legislative reaction was swift. In response to the outrage described by Justice O'Brien in his article,[128] the legislature, at the next session, passed a law that was narrowly based upon the facts of *Roberson*, and the remedies suggested by O'Brien in his article.[129] The statute provided for damages, injunctive relief, and criminal penalties for the unauthorized use of a person's name, picture, or image for advertising or trade purposes.[130] As this law was specifically drafted to fit the facts of *Roberson* which was a privacy case, the elements of publicity were not a consideration. However, later courts, as we shall see, used this statute to give relief to individuals whose claims were essentially based upon publicity claims.

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118. Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).
119. *Id.* at 438.
120. *Id.* at 437-38.
121. *Id.* at 438-39.
122. *Id.* at 439.
123. *Id.* at 441-42.
124. *Id.*
125. *Id.* at 444-45.
126. *Id.* at 439.
127. *Id.* at 444.
128. *Id.* at 437-38. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992) (right of privacy designed to protect the right to control the commercial value of one's name or image for purposes of advertising or trade).
129. O'Brien, *supra* note 118, at 437-38.
130. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 1994).

One of the first cases tried under this structure was *Binns v. VitaGraph.*[131] Here the plaintiff was a telegraph operator on a ship that became involved in a wreck on the high seas.[132] Binns telegraphed for help, and became the first person to use the "wireless" in such an emergency and in the process, saved hundreds of lives.[133] Vitagraph studio, one of the leading silent movie companies of the day, not only made a movie about his involvement in this incident, but went on to make a series of movies using his character in other fictitious adventures.[134] The court, in ruling for the plaintiff, held that his name and likeness, represented by an actor, were used without his permission for business in violation of the statute and awarded him damages.[135]

The *Binns* holding was followed in *Loftus v. Greenwich Lithographing Co.,*[136] which in essence was a right of publicity case decided under privacy law.[137] In *Loftus,* the defendant created a poster based upon the picture of a particular "Ziegfeld Girl" who was a well-known entertainer.[138] The poster was published in a number of magazines.[139] The court noted that the "rose" outfit worn by the character in the poster was so unique to the plaintiff that all who saw the picture thought that it was she.[140] The court held that the publication constituted a use of the plaintiff's image and was a violation of her privacy under the statute.[141] The contradiction between holding a public celebrity to be a private person in a matter of their public life was not addressed in *Loftus.* Thus began a judicial practice in the state which looked to the privacy statute to resolve matters that were based upon publicity.

Building upon certain constitutional restrictions first outlined by Warren and Brandeis,[142] New York recognized some fundamental limitations to the enforcement of the privacy right. In *Booth v. Curtis Publishing Co.,*[143] the court ruled

131. 103 N.E. 1108 (N.Y. Ct. App. 1913).

132. *Id.*

133. *Id.*

134. *Id.* Though the plaintiff alleged that the pictures subjected him to public ridicule, the court deemed this assertion to be immaterial because the cause of action was not for libel. Because the claim was brought under the Civil Rights Law, the plaintiff needed only to show that this image was used without his permission for commercial purposes to prove his claim.

135. *Id.* at 1101.

136. 182 N.Y.S. 428 (App. Div. 1920).

137. *Id.*

138. *Id.* at 429-30.

139. *Id.*

140. *Id.*

141. *Id.* at 431-32.

142. That is, if the individual was one for whom there was a legitimate public interest, and if because of this interest, articles, movies or books were written about that person based upon real or fictional events, the work may be allowed under the first amendment to the United States Constitution. This public character of the individual's actions was recognized as early as the Warren article which analyzed the details of such an exception. *See* Warren and Brandeis, *supra* note 19, at 214.

143. 223 N.Y.S.2d 737 (App. Div. 1962), *aff'd,* 182 N.E.2d 812 (N.Y. Ct. App. 1962); *see also* Namath v. Sports Ill., 371 N.Y.S.2d 10 (App. Div. 1975), *aff'd,* 352 N.E.2d 584 (N.Y. Ct. App. 1976).

that the first amendment right of freedom of the press limited the right of privacy where the plaintiff appeared in a picture taken and used as part of a valid news story.[144] The plaintiff, a well known actress, was photographed at a summer resort as part of a news story about that resort which was to run in the defendant's Holiday magazine.[145] Subsequently, a portion of the article with the plaintiff's picture was used in a series of advertisements in the defendant's magazine as well as in several other periodicals.[146] The plaintiff sued on grounds that she never gave permission to have her photo used in advertisements in the defendant's publication. She alleged that this was a violation of the New York statute.[147]

The New York Court of Appeals rejected the defendant's argument that the plaintiff did not have a right of privacy.[148] However, the court found that this right did not protect her from a true and fair representation in the news[149] and that her photo was not used as an endorsement of the product.[150] Again as in *Loftus,* the right of publicity was not explicitly raised even though the plaintiff was a well known figure and her image was used as a sales tool of the defendant. The New York court thus continued to adhere to the principle called a privacy interest, a doctrine less familiar than that of publicity.

In *Schumann v. Lowe's Inc.,*[151] the plaintiffs, four great grandchildren of the famous classical music composer Robert Schumann, sued the defendant for damages and injunctive relief because of a motion picture about the composer which indicated that insanity ran in the family.[152] The court found that the privacy right could only be enforced by the living for their own protection.[153] Moreover, the Court held that, even if privacy was property which could descend to heirs, the plaintiffs did not show that they were the direct heirs of the deceased.[154] The court also noted that it had not been shown that the composer's privacy rights had not been assigned by earlier heirs to someone else.[155] Be-

144. *Booth,* 223 N.Y.S.2d 737.
145. *Id.* at 740-41.
146. *Id.*
147. *Id.*
148. *Id.* at 745.
149. *Id.*
150. *Id.* at 744. *See also* Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978). Here a movie based upon the life of Agatha Christie was allowed; *see also* Frosh v. Grosset, 427 N.Y.S.2d 828 (App. Div. 1980). In this case, the plaintiff was the estate of Marilyn Monroe which sued Norman Mailer over a book about the deceased. In both cases the claims were denied on the grounds of freedom of expression. *Compare* Wojtowicx v. Delacorte Press, 374 N.E.2d 129 (N.Y. Ct. App. 1978) (ruling that while the plaintiff believed that the supposedly fictitious books and movies were about them, there was no relief as their name, portrait or picture was not used as required by statute).
151. 135 N.Y.2d 361, 369 (Sup. Ct. 1954).
152. *Id.*
153. *Id.* at 366.
154. *Id.* at 368-69.
155. *Id.*

cause of these obstacles, the Court dismissed the suit.[156]

As time and technology progressed, as increasingly large number of New York celebrities found themselves suing under the privacy statute to recover for right of publicity violations. This was because the legal fiction of using privacy laws to resolve publicity cases had become a celebrity's only recourse. The use of this fiction was promoted by the New York legislature's refusal to pass a formal law creating a right of publicity.[157]

However, this fiction was not always followed and some later courts refused to enforce a claim where the individual was considered to be a public figure. In *Miller v. Madison Square Garden Corp.*, the plaintiff, Bronco Charlie, a well known entertainer, found that his picture had been used on the program for the six day bicycle races.[158] The plaintiff sued to collect the estimated promotional value for the use of his image, but the jury found that there was nothing humiliating about the use of this picture and that he was already well known to the public, and therefore there was no substantial injury to his privacy.[159] The jury proceeded to award the plaintiff nominal damages of six cents.[160]

In *Gautier v. Pro-Football, Inc.*, the plaintiff, an animal trainer who performed during halftime at a professional football game, sued because television showed parts of his act though his contract specifically forbade such a showing.[161] The court ruled that he was not covered under the statute because he could hardly claim that his right of privacy was infringed as he agreed to perform before 35,000 people.[162] The difficulties which arose in those cases was because the right of privacy statute was designed to guard only those who had voluntarily put themselves before the public. In cases such as *Gautier*, plaintiffs confronted a statute which offered little remedy against commercial exploiters.

A positive advance in the development in the law was made when the right of publicity was named, defined, and assigned an independent existence in *Haelan*

156. *Id.*

157. Kessler, *supra* note 12, at 975-76.

Two bills died in the New York legislature in 1994 alone. Assembly Bill 681 died in the Government Operations Committee. Senate Bill 3469 died in the Senate Codes Committee. However, four bills have currently been filed for 1995. Assembly Bill 3194 is pending in the Government Operations Committee. Assembly Bill 3661 also pending in the Government Operations Committee. Senate Bill 155 is pending in the Senate Codes Committee. Senate Bill 2316 is also pending in the Senate Codes Committee.

158. 28 N.Y.S.2d 811 (Sup. Ct. 1941).

159. *Id.*

160. *Id.*

161. 107 N.E.2d 485, 489 (N.Y. 1952).

162. *Id.; see also* Man v. Warner Bros. Inc., 317 F. Supp. 50 (S.D.N.Y. 1970). The court held that the plaintiff, shown in the movie *Woodstock*, had no privacy claim as he agreed to play before 400,000 people. *But see* Brinkley v. Casablancas 438 N.Y.S.2d 1004 (App. Div. 1981). Here a model agreed to allow photos of herself to be shot for a poster. She later performed on television in the same outfit and poses of the poster. She sued the poster company and won injunctive relief under the privacy statute, because the pose used, though almost identical to those of the television show, was not specifically the one approved by the plaintiff.

*Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[163] a landmark decision by the Second Circuit.[164] In *Haelan,* the court was asked to interpret the New York privacy statute so as to determine the right of a baseball player to sell his image to two separate baseball card companies.[165] After entering into a contract with one baseball card company, the player later entered into a contract with another.[166] The first company, Haelan Laboratories, sued the second company, Topps Chewing Gum, for inducing a breach of contract.[167] Topps defended on the grounds that they had committed no actionable wrong. They held that the contract between the ballplayer and the plaintiff was no more than a release of liability as required by the statute, since without a release, the ballplayer could have sued the plaintiff if they had publicly used his photo.[168] The defendant further argued that under the statute, the right of privacy was personal, and thus was not assignable.[169] Therefore, the plaintiff could not use Topps because it was impossible for the plaintiff to own or to enforce the player's right of privacy.[170]

Recognizing the potential for absurd results under the defendant's interpretation of the New York right to privacy law, the federal court held that the state law recognized that an individual had another common law interest in addition to his statutory right of privacy:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth . . . This right might be called a "right of publicity." . . . [171]

The court distinguished publicity from the statutory right of privacy which it held could only be measured by its effect on the feelings of its owner and therefore could not be enforced by anyone else, since it was not felt by anyone else.[172] The *Haelan* court concluded that it could and would enforce a claim for a violation of publicity rights.[173]

The *Haelan* rule, that the right of publicity was enforceable, was followed in *Price v. Roach.*[174] *Price* not only held that each member of the comedy team of

163. 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953).
164. *Id.* at 868.
165. *Id.* at 867.
166. *Id.*
167. *Id.*
168. *Id.* (*citing* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992)).
169. *Id.*
170. *Id.* at 868.
171. *Id.*
172. *Id.* at 868.
173. *Id.*
174. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); *see also* Southeast Bank,

Laurel and Hardy had a right of publicity in his name and image, but also that this right was descendible.[175] The rule was expanded in a case involving the Marx brothers which held that, in addition to a right of publicity in their own image, they had also a right in any character that they created.[176] Indeed, from this point, the courts went on to protect celebrities not only from those who would trade on their image or picture, but also from individuals who looked like[177] or sounded like[178] a famous person.

Despite the excellent reasoning of the *Haelan* decision and its widespread usage as a reference source of the right of publicity, the New York state courts, subsequently in the case of *Stephano v. News Group Publication, Inc.*,[179] denied the existence of an independent common-law right of publicity and steadfastly maintained that all remedies must be sought under the statutory right to privacy.[180] Here, a model had his picture taken as part of a paid photo session. Later, one of the photos was used as part of a magazine article on clothing styles and prices without the plaintiff's permission. The publisher claimed that the photo was not used for trade or advertising purposed but was instead used to illustrate a newsworthy fashion event of trend.[181] The court ruled that this was news and came under the newsworthy exception which had been established in the *Booth* case to protect newspapers, books and movies.[182] The plaintiff was thus denied recovery.

In its reasoning, the New York Court of Appeals denied that the plaintiff could plead a right of publicity in New York outside the privacy statute.[183] The court reasoned that the statute applied to any use of a person's picture or portrait for advertising or trade purposes when the defendant has not obtained the per-

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N.A. v. Lawrence, 483 N.Y.S.2d 218 (App. Div. 1984), *rev'd on other grounds*, 489 N.E.2d 744 (N.Y. 1985).

175. *Price*, 400 F. Supp. at 844.

176. Groucho Marx Prods., Inc. v. Day and Night Co., 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982). *Contra* Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661 (App. Div. 1977). This rule protecting any unique character developed by the star, was not extended to an individual's familiar gestures or style.

But, note that other states have gone much farther. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) where the court expanded publicity rights to include a phrase made popular by the plaintiff; Motschenbacher v. R.J. Reynolds, 498 F.2d 821 (9th Cir. 1974) where the right was expanded to include objects which clearly identified the plaintiff.

*But see* Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973). Actress Shirley Booth, again suing for the use of her image, sued the defendant because they used a cartoon character, which was also the basis for the character in her television show, in a commercial. The court held here that she had no rights in a copyrighted character created by someone else.

177. Onassis v. Christian Dior-New York, 472 N.Y.S.2d 254 (Sup. Ct. 1984); *see also* Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985). Here the court would have allowed a look-alike to be used when the advertisement clearly identified the lookalike an impersonator.

178. Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962).

179. 474 N.E.2d 580 (N.Y. Ct. App. 1984).

180. *Id.*

181. *Id.*

182. *Id.* at 586.

183. *Id.* at 584.

son's consent to do so.[184] It stated that

> "Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity."[185]

This ruling which negates the existence of an independent right of publicity leaves this area of law for the state of New York in a nebulous condition.

### B. *CALIFORNIA*

The law of privacy and publicity in California developed along smoother, if not more rational, lines. The first case to bring the question of the right of privacy before the California Court was *Melvin v. Reid*[186] or the case of the "red kimono." The court here avoided the controversy caused in New York with its *Roberson* decision. Indeed, the court appeared to go out of its way to uphold privacy in a case in which the facts would suggest that this right plainly was not applicable.[187]

As a young prostitute, the plaintiff had been charged with murder and was acquitted in a highly publicized trial. Seven years later, after she had reformed herself and married well, a movie was made about the incident which included the use of her maiden name.[188] Citing the Warren article,[189] the court did not consider the fact that the case had been a matter of public record; that it had been decided only seven years earlier and was within the memory of most adults; and that it had been a highly publicized and newsworthy event. Instead of weighing those factors, the *Melvin* court concluded that the right of privacy existed in California and ruled that the publication of these facts was a violation of the plaintiff's rights.[190]

Later, in *Fairfield v. American Photo Copy Co.*,[191] another California court held that the plaintiff's right of privacy was violated. Here the defendant used the plaintiff's name on a list of satisfied copy machine customers when in fact, the plaintiff had not been satisfied and had returned his machine.[192] The appellate court found that the trial court erred when it did not allow the plaintiff to show that his right of privacy had been violated.[193] Specifically, the trial court had prohibited the plaintiff from testifying that, as an attorney, his feelings had been injured when other attorneys saw the advertisement and called to inquire

184. *Id.*
185. *Id.*
186. 291 P. 91 (Cal. 1931).
187. *Id.*
188. *Id.* at 92.
189. *Id.* at 92-93.
190. *Id.* at 96.
191. 291 P.2d 194 (Cal. Dist. Ct. App. 1955).
192. *Id.* at 196.
193. *Id.* at 200.

about the use of his name in the advertisement, or called to ridicule him.[194]

In *Gill v. Curtis*,[195] the California Supreme Court held that a magazine which published a picture of a couple taken in a public place, violated their privacy when the picture was linked to an article on promiscuous sex.[196] The picture showed a young couple sitting on stools in an ice cream parlor.[197] The man's arm was around the young woman as the couple sat cheek to cheek.[198] Under the picture was a caption that said "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."[199] The accompanying article said that such attraction was 100% sexual, that it was wrong, and that marriage based upon such an attraction would end in divorce.[200]

In reality, the couple was a well known married couple who owned the ice cream parlor and was photographed in their own place of business.[201] The picture was taken and published without their permission, and the accompanying article has absolutely nothing to do with them.[202] In addressing the defendants argument that the publication was protected by the first amendment's freedom of the press argument, the court held that while the first amendment was an important consideration, it had to be balanced against the rights of the plaintiffs.[203] Here, the court found that there was no need to present any picture at all with the article since it added nothing to the information being given.[204] On the other hand, the court concluded that real damage was done to the plaintiffs in having been portrayed in this manner.[205] The court held that the law favored the plaintiffs in this case because there was evidence that their feelings were genuinely injured and, therefore, the plaintiffs were entitled to damages.[206] Ironically, the plaintiffs never alleged that their right of privacy had been violated, but the court found that the facts alleged by the plaintiffs were sufficient to establish such a violation.[207]

One year after *Gill v. Curtis*, the same couple was again in court with an identical claim against another publication in *Gill v. Hearst Pub. Co.* .[208] However, in this case, the court placed a limit on how far it would go in balancing privacy against first amendment privileges, and began an initial discussion of the

194. *Id.*
195. 239 P.2d 630 (Cal. 1952).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 631.
202. *Id.* at 631-32.
203. *Id.* at 633-34.
204. *Id.* at 634.
205. *Id.*
206. *Id.* at 635-36.
207. *Id.*
208. 253 P.2d 441 (Cal. 1953).

right of publicity.[209] Here, the photograph at issue in *Gill v. Curtis* was republished by another magazine.[210] Again, the Gills did not know that it was to be published in the defendant's magazine.[211] It was printed without story or comment as an example of this well known couple's affection for each other.[212] Here the court ruled that the press had the freedom to run a non-shocking picture of the plaintiffs as part of the public's interest in them as celebrities.[213] Unlike the previous case, the court did not find the picture to be associated with an uncomplimentary article which held them up to ridicule.[214] Further, the court ruled that there could be no privacy in actions which are made public.[215] The court found that the couple was hugging in public, even though this was their place of business, and this could be photographed and reproduced for anyone to see who had an interest in this couple as celebrities.[216] Hence, the court ruled that they were not entitled to damages.[217]

The California courts spoke to celebrities again in *Cohen v. Marx*.[218] Here, the court said that by voluntarily entering the public domain through a trade or profession, celebrities are exposing themselves to jibes and negative comments.[219] The court recognized that the first amendment allowed jokes and comments to be made about public figures, and that such statements would not be prohibited by the right of privacy laws.[220]

In *James v. Screen Gems, Inc.*,[221] the court limited the use of privacy rights to its owner. The plaintiff, widow of Jesse James, Jr. sued the defendant for what she deemed an inaccurate movie about her deceased husband.[222] Specifically, she asserted that the movie cast him in an unfavorable light because of his infamous father.[223] She further claimed that this caused her to become the target of harassment and abuse.[224]

Here the elements of a right to publicity were mingled with the elements of

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209. *Id.*
210. *Id.* at 444.
211. *Id.*
212. *Id.* at 442.
213. *Id.* at 442-43.
214. *Id.* at 445.
215. *Id.* at 444 (*citing* Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1953)).
216. *Id.*
217. *Id.* Under the First Amendment, it is this privilege of the press to photograph and publish pictures of celebrities in public, which has led to the pursuit of celebrities by photographers now associated with scandal sheet newspapers; *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Time, Inc. v. Hill, 385 U.S. 374 (1967); *see also* New York Times v. Sullivan, 376 U.S. 254 (1964).
218. 211 P.2d 320, 321 (Cal. Ct. App. 1949). In *Cohen*, Groucho Marx told a joke about one of the well known boxers of the day.
219. *Id.*
220. *Id.*
221. 344 P.2d 799 (Cal. Dist. Ct. App. 1959).
222. *Id.* at 799-800.
223. *Id.*
224. *Id.* at 800.

the right of privacy. However, as the right of publicity had not been developed in the state, the plaintiff styled it as one of privacy.[225] The court held that one cannot assert the privacy rights of another and ruled against her.[226] The court found that the plaintiff was not mentioned in the movie, and therefore had no standing to bring a cause of action because her privacy had not been invaded.[227]

Under the developing law at the time, it might have been argued that her husband was a celebrity and any commercial value in his name belonged to him and became hers through heirship. This argument would give her a cause of action even though she was not mentioned in the work. However, she would still have had to overcome a first amendment problem if the court found that her husband was a newsworthy or historical subject.

California first addressed the issue of publicity in *Lugosi v. Universal Pictures*.[228] The plaintiffs were the widow and son of movie actor Bela Lugosi.-[229] They sued the movie company for which Lugosi worked, to prevent it from selling and marketing Count Dracula products made popular by the actor.[230] The court of appeals in reversing a judgment for the plaintiff in the trial court, found that the right of publicity existed, but then proceeded to develop a bad rule of descendibility which was then used to deny the plaintiffs' judgment.[231] That is, the court looked at whether the deceased had marketed his image while alive and found that he had not.[232] The court then ruled that if the right was not exercised during the life of the celebrity, then it did not survive death and could not be descendible.[233] This rule with its limitations was followed in the Rudolph Valentino case.[234]

The court chose to follow Prosser in holding that it was pointless to decide whether the right was personal or property.[235] In blurring this distinction, the court made the exercise of the right, rather than its value, the test in these cases. A better test would have been to determine if the name or image had financial value at death.[236] Any such value would then be property of the heirs.

In California, the common law development of the right of privacy and the right of publicity proceeded along a much more orderly line than in New York. The California courts in the cases analyzed above firmly asserted the existence of the right of privacy and subsequently recognized a limited existence of the

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225. *Id.* at 801.
226. *Id.*
227. *Id.*
228. 603 P.2d 425 (Cal. 1979).
229. *Id.*
230. *Id.*
231. *Id.* at 430-31.
232. *Id.*
233. *Id.*
234. Gugliemi v. Spelling-Goldberg Prod., 603 P.2d 454 (Cal. 1979).
235. *Lugosi*, 603 P.2d at 430-31.
236. *Id.* at 434. Note that the dissent in this case gives one of the best judicial analysis of the right ever and is the direction that subsequent California statutes seemed to follow.

right of publicity. The clear distinction between the two rights emerged when it became obvious that the issues presented in some cases had more to do with individuals profiting from use of celebrity images for commercial reasons than in the exposure of private citizens to unwanted and unwarranted public attention.

Unfortunately, however, the foregoing cases created another problem. By allowing an heir to inherit and utilize the right of publicity as property only if exercised during the life of the celebrity, the courts created an unreasonable distinction between two classes of heirs. No such rule applies to any other type of property and is akin to holding that a child could only inherit a car from a parent if the parent had driven that car during his or her lifetime.[237]

To resolve the problem of descendibility in the area of the right of publicity, the California legislature in 1984 passed a law specifically aimed at curing the problems created by the court opinions which had allowed the right to descend only when exercised during the celebrity's life and which in essence codifies the dissent in *Lugosi*.[238] This statute defined and codified the elements of publicity, that is, a personality's name, voice, signature, photograph, and likeness.[239] It declared them to be property and transferable.[240] It also allows descendants the right to inherit and own the right of publicity for fifty (50) years after the death of the celebrity.[241] This later provision accomplishes two things. It gives the descendants of the celebrity an opportunity to benefit from the commercial value of their ancestor's image. Then it allows the community to erect statues and engage in other uses which societies have traditionally done in honor of past celebrities and heroes.[242] California also provides by statute, criminal sanctions for violation of these rights.[243] This law is simple and well crafted and compliments the rulings of the California court.

### C. *TENNESSEE*

While many states have reached the issue of publicity by first working through the legal concept of privacy, Tennessee case law skipped privacy law development altogether. Instead, Tennessee moved straight to the consideration of the right of publicity. As with New York, the initial rulings of the court at both the state and federal level gave contradictory rulings as to the right's existence and inheritability.

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237. This is to be distinguished from other intellectual properties which are covered by patent and trademarks. For in these cases, unless the property is registered for the world to see, there may be no way to know who created the work and thus there may be no proof upon which the heirs could even connect themselves to be property so as to make a claim. However, if a person such as Elvis Presley creates an image known the world over, no one could fail to connect that image to his daughter Lisa Marie.

238. CAL. CIV. CODE § 990(b), (c), (h) (West 1993).

239. § 990 (b), (c), (h).

240. § 990 (b), (c), (h).

241. § 990 (a).

242. § 990 (h).

243. CAL. CIV. CODE § 3344.

*Memphis Development Foundation v. Factors Etc., Inc.,*[244] the first of the many Elvis Presley cases, was also the first Tennessee case to deal with the question of a celebrity's right to his or her own image.[245] Prior to *Memphis Development,* there were no reported cases in Tennessee concerning either privacy or publicity.[246] Nonetheless, Tennessee did seem to accept the privacy rule as a given, especially in publicity cases.[247]

In *Memphis Development,* a non-profit organization, Memphis Development Foundation, (hereinafter "Foundation") planned to erect a statue of Elvis Presley in Memphis, Tennessee.[248] In order to raise the necessary funds for this statue, the organization planned to sell miniature statues of Elvis.[249] To secure the rights to engage in this project, the Foundation sued Factors Etc., an organization which had contracted with the Presley estate for the exclusive right to market and use the publicity rights of the deceased entertainer which included his name, picture, and image.[250] In response, Factors counterclaimed for an injunction against any use of the deceased's name or image.[251]

In a well reasoned decision, the United States District Court, held that the right of privacy and the right of publicity existed and that they were descendible.[252] The court then enjoined the Foundation from any use of the Presley image without permission from Factors.[253]

On appeal, the Sixth Circuit's summary opinion equated publicity to reputation which is a privacy, rather than a property concept.[254] On that basis, it re-

244. 441 F. Supp. 1323 (W.D. Tenn. 1977) *rev'd on appeal,* 616 F.2d 956 (6th Cir. 1980).

245. *Id.* A line of "Factors" cases decided by New York district courts attempted though incorrectly to interpret Tennessee law which added nothing to the study of publicity but bewilderment. *See* Memphis Dev. Foundation v. Factors, 616 F.2d 956 (6th Cir. 1980) [hereinafter "*Memphis Development II*"]; Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977); Lancaster v. Factors, 9 Media L. Rep. 1109 (Tenn. Ch. 1982); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981); Factors Etc., Inc. v. Pro Arts, Inc. 701 F.2d 11 (2d Cir. 1983); Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1981); Factors Etc., Inc. v. Pro Arts, Inc., 541 F. Supp. 231 (S.D.N.Y. 1982); Factors Etc., Inc. v. Pro Arts, Inc., 562 F. Supp. 304 (S.D.N.Y. 1983).

246. *Memphis Dev.,* 441 F. Supp. at 1325.

247. *See also* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

In Tennessee the right to privacy cases had been developed as subsidiary findings, if not dictum in other cases. A good example of this is seen in the *Davis* case. At issue in this case was what to do with seven frozen pre-embryos. The Tennessee Supreme Court considered ethics, contract law, bailment, and domestic law as possible sources for the solution to this problem. Without any preliminary analysis or even mention, the court unexpectedly announced that the right of privacy of both parties had to be considered and weighed so as to determine who should prevail.

Ultimately, the court found that the ex-wife did not want the pre-embryos for her own use but for donation purposes. In such a case, the ex-husband's privacy interest in not being involuntarily made a parent outweighed the ex-wife's interest and the court gave judgment to him.

248. *Memphis Dev.,* 441 F. Supp. at 1324.

249. *Id.* at 1325.

250. *Id.* at 1324-25.

251. *Id.*

252. *Id.* at 1330.

253. *Id.* at 1331.

254. *Memphis Development II,* 616 F.2d 956, 959 (6th Cir. 1980).

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 5, Iss. 1 [2016], Art. 2



versed the district court's decision and held that while there was a right of publicity in Tennessee, it was a personal right and therefore was not inheritable or devisable.[255]

At the state level, the decisions on publicity were equally in conflict. In one of two relevant chancery court rulings, *Commerce Union Bank v. Coors*[256] held that the right of publicity existed.[257] In *Coors*, a beer company as part of a collage of images of Tennessee lifestyles, used the likeness of country music great Lester Flatt on a poster.[258] In rejecting the defendant's motion to dismiss, the court exhibited an understanding of the conceptual problems before it by defining and then distinguishing the difference between privacy and publicity.[259] The court then decided that the right of publicity existed in Tennessee, that it was property, and therefore survived death and was descendible.[260] As part of its analysis, the court found that the deceased had entered into a contract to sell his image while alive through a series of ads and promotions for the Martha White Flour company.[261]

However, in another of the Elvis disputes, *Lancaster v. Factors*, a different chancery court ruled in a summary opinion that the right of publicity was not descendible.[262] Here the court traced the source of the right of the Factors company to market Presley's right of publicity.[263] It found that when Presley was alive, he had executed an exclusive contract for the use of his image to Boxcar Enterprises.[264] Upon his death, Boxcar transferred these rights to Factors. The plaintiff, who had initially contracted with Factors and paid all proper fees, then sued for recision of the contract on the grounds that the right was not descendible and therefore there was no consideration on the part of the defendant.[265] The only issue before the court was whether the right was descendible.[266] The court, concerned with problems such as how long the right would last after death, and how this would affect news reports, ruled that the right was not descendible.[267]

With the Tennessee trial courts issuing contradictory decisions, the Tennessee Court of Appeals attempted to resolve the conflict. In deciding the appeal from the *Commerce Union Bank v. Coors*,[268] the court confused privacy and publicity. In a muddled analysis, the Court of Appeals reversed the better reasoned

255. *Id.* at 960. *But see* Elvis Presley Enters. v. Elvisly Yours, Inc., 936 F.2d 889 (6th Cir. 1991).
256. 7 Med. L. Rptr. (BNA) (Tenn. Ch. Ct. 1981).
257. *Id.*
258. *Id.* at 2205.
259. *Id.*
260. *Id.* at 2205-06.
261. *Id.*
262. Lancaster v. Factors, 9 Med. L. Rptr. (BNA) 1109 (1982).
263. *Id.* at 1109-10.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. 9 Tenn. Atty. Memo 32-1 (1984).

chancery court decision and held that the right of publicity did not survive death in Tennessee.[269]

After this case, Tennessee passed the Protection of Personal Rights Statute which gave every individual a property right in the use of their name, photograph, or likeness in any medium and in any manner.[270] The statute made the right descendible, allowed the right to be freely assigned and licensed[271] and allowed a minimum of ten years after the death for the heirs or estate to exercise or capitalize upon their right before it entered the public domain.[272] Further, the statute prohibited others from commercially using this right without the permission of the individual or their estate.[273]

Subsequently, in another Elvis case, the Tennessee Court of Appeals partially reversed the ruling of *Coors* and criticized the Sixth Circuit's decision in *Factors*, holding that the right of publicity did exist in the common law of the state.[274] This decision, in addition to the statute, provides the same treatment to the right of publicity as that given to other forms of intangible property in Tennessee and gives the law the same basic structure as that of California.

### D. GEORGIA

In *Pavesich v. New England Life Ins.*,[275] Georgia, through its Supreme Court was the first state to recognize a common law right to privacy. This case has become the landmark in support of the principle that the right existed in common law.[276] *Pavesich* was decided a year after the New York courts rejected the right in *Roberson*. Not only did the court analyze and define the right of privacy, but it gave an early and insightful analysis into the nature of publicity.[277]

The court outlined the distinctions between the two concepts and held that different rules would apply to an individual, who is a private citizen than to one known in the public forum.[278] In *Pavesich*, the plaintiff's picture, taken by a photographer for private purposes, was used without permission as part of a newspaper advertisement for the defendant's insurance company.[279] After noting that the plaintiff was a private citizen and not a public figure, the court reviewed the short history of the right of privacy and strongly criticized the *Rober-*

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269. *Id.*

270. TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (1984).

271. § 47-25-1103.

272. § 47-25-1104.

273. § 47-25-1105. The heirs have the sole right to use the publicity rights during the first ten years following death. After this initial period, there is a two year grace period during which the estate can still claim the right by using it, if it is not then being used by someone else. If used by the heirs during this period, the right appears to belong permanently to the estate. If not, the right enters the public domain.

274. State *ex rel.* Elvis Presley v. Crowell, 733 S.W.2d 89, 95 (Tenn. App. 1987).

275. 50 S.E. 68 (Ga. 1905).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 68-69.

*son* decision.[280] It held that the right of privacy existed as part of the Georgia common law.[281]

Later, in *Bazemore v. Savannah Hospital*,[282] the court granted a limited extension of the right of privacy to third parties.[283] Here, the plaintiff's child was born with its heart outside its body.[284] After an unsuccessful operation, the infant died.[285] The hospital then permitted a photographer to take a picture of the nude body which was subsequently sold to the local press which ran the story.[286] The court rejected the defendant's argument that the right to privacy was personal and belonged to the child and therefore expired upon its death.[287] Instead, the court held that the right of privacy in question was that of the parents.[288] It found that the cause of action had not occurred during the life of the child, but had only arisen upon the child's death.[289] The injured parties in this case were the parents.[290]

The Georgia courts as early as *Pavesich* were able to distinguish the different interest and rights involved in private matters and in the unauthorized use of celebrity images. In *Cabaniss v. Hipsley*,[291] Georgia became one of the first states to recognize, by common law, the existence of a right of publicity. In this case, a strip tease dancer sent a picture to her agent to publicize an appearance in Atlanta.[292] The defendant magazine was accused of improperly obtaining the picture and publishing an ad for several weeks saying that the plaintiff would appear at another club in which she had no connection.[293] The case was submitted to the jury as a violation of the plaintiff's right of privacy.[294] The jury found for the plaintiff and the defendants appealed.[295]

In reviewing the case, the Georgia Court of Appeals closely analyzed the nature of the right of privacy[296] and reversed that part of the lower court decision based upon an invasion of privacy.[297] It found that the plaintiff was a celebrity and that the photograph was not a private picture but was in fact a publicity shot made for the public.[298] The court held that under these facts, one could

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280. *Id.* at 77.
281. *Id.* at 79.
282. 155 S.E. 194 (Ga. 1930).
283. *Id.*
284. *Id.* at 195.
285. *Id.*
286. *Id.*
287. *Id.* at 197.
288. *Id.*
289. *Id.*
290. *Id.*
291. 151 S.E.2d 496 (Ga. Ct. App. 1966).
292. *Id.* at 498-99.
293. *Id.*
294. *Id.* at 499-500.
295. *Id.*
296. *Id.*
297. *Id.* at 506-07.
298. *Id.*

not make a claim under the right of publicity.[299]

The Georgia Court of Appeals reaffirmed this foregoing principal in *McQueen v. Wilson.*[300] The court, in a case involving as actress, made famous in the movie "Gone with the Wind," ruled that the right of publicity was a property right.[301] Here the plaintiff allowed pictures and a taped movie to be made with the condition that they were not to be used commercially without the plaintiff's permission.[302] Later, a third party obtained the materials and made postcards, movies and a souvenir booklet featuring the plaintiff without her permission and without payment.[303] The court rejected the plaintiff's privacy claim,[304] but ruled that she did have a right to market her own image and that she had a property right in her image.[305] Note, however, that although this court described the principle in detail, it did not use the term "right of publicity" although the term had been used in the earlier *Cabaniss* case.[306]

In *Martin Luther King Jr. v. American Heritage Products,*[307] the Eleventh Circuit Court of Appeals was asked to decide a Georgia case that involved the use of the image of Martin Luther King.[308] Rather than rule on the question of publicity rights under Georgia law, this federal court certified the relevant questions to the Georgia Supreme Court so the federal decision would be based upon the ultimate state law.[309] Three questions were certified to the Georgia Supreme Court: [1] does the right of publicity exist as a right independent of the right of privacy; [2] does the right survive the death of the owner; and [3] does the right have to be exploited during life to be descendible?[310] In response, the Georgia Supreme Court held [1] that publicity was a discrete right separate from privacy, [2] that it was descendible, [3] and that it did not have to be exploited during life to descend.[311] The Georgia decision was then incorporated and made the decision of the Eleventh Circuit.[312]

In *King* the plaintiff brought suit to stop the defendant from selling unlicensed busts of the deceased civil rights leader.[313] The defendant argued that King's right to his image terminated upon death.[314] After considering the development of the right of publicity in the state, the Georgia court restated its earlier position

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299. *Id.*

300. 161 S.E.2d 63 (Ga. Ct. App.), *rev'd on other grounds,* 162 S.E.2d 313 (Ga.), *vacated,* 162 S.E.2d 704 (Ga. Ct. App. 1968).

301. *Id.* at 66.

302. *Id.* at 64-65.

303. *Id.*

304. *Id.* at 65.

305. *Id.* at 66.

306. Cabaniss v. Hipsley, 151 S.E.2d 496, 506-07 (Ga. Ct. App. 1966).

307. 694 F.2d 674 (11th Cir. 1983) (per curiam).

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 675.

314. *Id.* at 676.

on the issue and held that the right of publicity existed in Georgia.[315] The court defined the right as property and therefore descendible.[316] Further, the court noted that, as property, there was no need for the right to have been exploited during the life of the deceased in order to survive.[317]

In five cases, and without the aid of statutes at both the state and federal level, Georgia managed to avoid all of the complexity of New York, and much of the prestatutory confusion of Tennessee and California. Indeed on the issues of privacy, and then publicity, Georgia was the first state to find a common law basis for the existence of these rights.[318] As a result, the Georgia Courts have been the most enlightening example for other states in their discussion of these issues.

## CONCLUSION

The right of publicity is a relatively new concept and, as such, it is still trying to find its own identity in the law and in the courts. Publicity rights were born out of the right of privacy, and the state of Georgia seems to be one of the few states that has smoothly incorporated broad rights in both interests into its law. Tennessee and California represent states that have done so aided by statutes.[319]

Surprisingly, while New York was the first state to identify and analyze the right of privacy, and then to identify and distinguish the right of publicity, the state only provides publicity the narrowly defined protection of the privacy statute which was established in response to the facts of the *Roberson* case. As a result publicity has developed in a tentative manner, because it does not have a separated existence from the right of privacy.[320]

The history of publicity rights further reflects the types of problems which celebrities, and especially their estates, may encounter in attempting to protect and utilize their right of publicity in many of the other states which have yet to formally recognize publicity rights. In a society dominated by mass media, publicity can no longer be described as a local issue. Today's media not only creates nationally known celebrities, but creates a national market for celebrity imag-

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315. *Id.* at 679.

316. *Id.* at 682.

317. *Id.* at 683.

318. Note that Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), which first identified and applied the concept of the right of publicity, was a federal case, ostensively interpreting New York law. However, New York's highest court subsequently rejected this decision as not the state law. Oddly then, the greatest landmark case in the area of publicity law is not authority in the state in which it was decided. *See infra* note 320.

319. Thirteen states have so far enacted publicity statutes. *See* Appendix B.

320. Stephano v. News Group Publications, 474 N.E.2d 580 (N.Y. 1984) (rejecting a separate common law right of publicity and declaring publicity to be an aspect of the right of privacy statute).

These cases were superseded by *Stephano*: Gautier v. Pro-Football, 107 N.E.2d 485 (N.Y. 1952); Namath v. Sports Illustrated, 371 N.Y.S.2d 10 (App. Div. 1975); Booth v. Curtis Publishing, 223 N.Y.S.2D 737 (App. Div.), *aff'd*, 182 N.E.2d 812 (N.Y. 1962); Miller v. Madison Square Garden, 28 N.Y.S.2d 811 (Sup. Ct. 1941).

es.[321]

Yet even more statutory clarification at the state level, leaves numerous legal hazards which may hamper the proper utilization of this market by celebrities or their estates. The *Schumann*[322] case referred to earlier is an excellent example of the problems possible in attempting to enforce a cause of action for a violation of a state right of publicity in an interstate system where each state, not only has the right to regulate the use of this property, but has the right to decide if the property actually exists which is unique to this type of property.[323]

In *Schumann* the plaintiffs plead sixty one causes of action for each of the states, the District of Columbia, other countries of the Americas and one each for the other continents. One should note that this case, though brought under privacy rights, involved the publicity right of composer Robert Schumann.[324] The New York court then had to refer to the common law of the state of Connecticut which was found to be the governing law in this case.[325] It then concluded that the Connecticut common law was the same as New York's since, New York's common law did not recognize the right of privacy as a result of the *Roberson* case, the court then ruled that the rights did not exist in the common law of Connecticut.[326] The court then identified sixteen states whose law was identical to the law of Connecticut and then dismissed claims for the same reasons.[327]

In thirty other states and the British Isles, the New York court found that the rights only applied to living persons and therefore were not inheritable.[328] In the remaining states where the right existed and was inheritable, the court held that the plaintiffs could not show that they were direct heirs of the deceased, nor that the composer's privacy rights had not been assigned by earlier heirs to someone else.[329]

The *Schumann* court also held that the plaintiffs did not prove a cause of action under the laws of Canada, Mexico, Central America, the West Indies, Europe, Japan, Asia, Africa, and Australia.[330] The court rejected the claims for all common law nations for the same reasons it rejected the claims of all common law states, i.e. that it would be the same as New York which did not recognize the claim.[331] In theory, some variation of this complicated method would have to be used anytime a celebrity wished to attempt to enforce nationally their right of publicity with the results likely to change from state to state depending upon whether its common law recognized the right or based it upon privacy.[332]

321. *See* Madow, *supra* note 14.
322. Schumann v. Lowes, 135 N.Y.S.2d 361, 369 (Sup. Ct. N.Y. 1954).
323. *Id.* at 364.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at 366-67.
329. *Id.* at 368-69.
330. *Id.*
331. *Id.* at 365-66.
332. This would not appear to be a problem as the law of the state where the celebrity was domi-

In light of all this, this paper proposes that Congress pass a law to protect this property as it has done for intellectual properties. It has become almost a ritual of modern America to propose a federal statute under the interstate commerce clause[333] for every conceivable social, political, or personal problem, even when that problem is not a legitimate area of interstate commerce. The area of publicity rights, however, is a legitimate area for interstate federal regulation. The value created in a person's image is as real as any property, good will, copyright or trademark, and should be entitled to the same level of protection without requiring the owner to go through the complicated process indicated in the *Schumann* case.[334]

Any such law would not have to be a complicated or elaborate matter.[335]

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ciled should control. Here, New York interpreted the Connecticut law in a manner which denied the claim. However, under the same facts, Connecticut or anyone of the other common law states or countries could have decided *contra*. Also, courts have sometimes misinterpreted the law of the domicile. *See* Factors Etc., Inc. v. ProArts, Inc., 579 F.2d 215, 221 (2nd Cir. 1978), which found that publicity rights existed in the State of Tennessee at a time in which it did not.

333. U.S. CONST. art I, § 8.

334. *See, e.g.*, Douglass v. Hustler Magazine Inc., 769 F.2d 1128, 1138 (7th Cir. 1985) ("the right to prevent others from using one's name or picture for commercial purposes without consent"); McCarthy, *supra* note 3, at vii ("the inherent right of every human being to control the use of his or her identity"); Nimmer, *supra* note 59, at 216 ("the right of each person to control and profit from the publicity values which he has created or purchased").

335. Model Publicity Statute

1. Purpose- The purpose of this statute is to protect the interest in the commercial value which a natural person may have created in their name, image, picture, voice, character or any likeness in the interstate commerce of this nation.

2. Right of Publicity- Any natural person who has established in their name, image, picture, voice or character a fame or noteworthiness as a result of their activity, profession or occupation that is more than local in nature, shall have the exclusive right to license, assign or devise this fame which shall be termed a right of publicity.

3. Property Right- every individual shall have a property right in their right of publicity. This right shall be transferrable, assignable, and descendible. It will not be necessary that this right be exercised during the life of its owner to preserve descent.

4. Unauthorized Use- No person shall have the right to use the right of publicity of another without the expressed consent of that person or their designated representative or heir.

5. Remedies- Any party injured by a violation of this right shall be entitled to compensatory damages, exemplary damages, and injunctive relief.

6. Duration of Right- No action shall be brought under this section for the use of a deceased person's right of publicity after the expiration of 50 years from the death of the deceased.

7. Exemptions-

(A) It shall not be a violation of this statute to use the image of a person in connection with any news, public affair, or historical account unless the use is so consistent as to appear to be an endorsement or it is proven that the use of the person's name, photograph, or other likeness was so directly connected with the commercial sponsorship as to constitute an unauthorized use.

(B) It shall not be a violation of this statute if the use is part of a reasonable advertisement of a newspaper, news program, media activity, or historical account, unless the use is so consistent as to appear to be an endorsement or it is proven that the use of the person's name, photograph, or other likeness was so directly connected with the commercial sponsorship as to constitute an unauthorized use.

(C) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including but not limited to newspapers, magazines, radio and television stations, bill-

The statute would merely have to declare [1] that the value of an individual's name, image, picture, or character is property and a subject of interstate commerce; [2] that it is assignable and inheritable; [3] that it cannot be used without the permission of the owner, assigns or heirs and [4] that there be placed upon it some time limit on its usage before it is allowed to become a part of the public domain.

The right of publicity in a media age can be property of immense value. After a hundred years of haphazard, confused, and in some states, no development at all of this important new property concept, a federal statute would resolve this particular problem of interstate commerce.

By the way, I have been told by a source who has seen the King lately that he does not want privacy as that would eliminate his estate's right to profit from his image. He prefers the publicity.

## APPENDIX A

*Chart of State Privacy/Publicity Laws*

*1. Alabama*[336]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case to indicate if the right of publicity exists.

*2. Alaska*

Privacy Law- no statute and no case law to indicate if the right exists. Publicity Law- no statute and no case law to indicate if the right of publicity exists.

*3. Arizona*[337]

Privacy Law- established by common law; right is not descendible. Publicity Law- established by common law; right is not descendible.

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boards, and transit ads, who have published or disseminated any advertisement or solicitation in violation of this part, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, photograph or other likeness as prohibited by this statute.

336. Smith v. Doss, 37 So. 2d 118 (Ala. 1948) (noting that common law right of privacy exists).

337. Cluff v. Farmers Ins. Exch., 460 P.2d 666 (Ariz. Ct. App. 1969) (noting that common law right of privacy exists); Reed v. Real Detective Publishing Co., 162 P.2d 133 (Ariz. 1945) (holding that the right of privacy is "a creation of modern common law" but is not descendible because the right is a personal right and not a property right); Sinkler v. Goldsmith, 623 F. Supp. 727 (D.C. Ariz. 1985). Arizona recognizes the right of publicity. The right is not descendible.

*4. Arkansas*[338]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*5. California*[339]

Privacy Law- established by common law; established by statute. Publicity Law- established by common law; established by statute; right is descendible.

*6. Colorado*

Privacy Law- no statute and no case law to indicate if the right exists. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*7. Connecticut*[340]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*8. Delaware*[341]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*9. District of Columbia*[342]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*10. Florida*[343]

Privacy Law- established by common law; established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

338. Olan Mills v. Dodd, 353 S.W.2d 22 (Ark. 1962); Dunlap v. McCarty, 678 S.W.2d 361 (Ark. 1984) (noting that common law right of privacy exists).

339. Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931) (noting that common law right of privacy exists). The privacy law statute supplements case law. The publicity law statute supersedes case law.

340. Korn v. Rennison, 156 A.2d 476 (Conn. Super. Ct. 1959) (noting that common law right of privacy exists).

341. Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963) (noting that common law right of privacy exists).

342. Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985) (noting that common law right of privacy exists).

343. Cason v. Baskin, 20 So. 2d 243 (Fla. 1944) (noting that common law right of privacy exists). The privacy statute supplements case law. The publicity statute supersedes case law.

*11. Georgia*[344]

Privacy Law- established by common law; right is descendible. Publicity Law- established by common law; right is descendible.

*12. Hawaii*[345]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*13. Idaho*[346]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*14. Illinois*[347]

Privacy Law- established by common law; right is not descendible. Publicity Law- established by common law; descendibility unknown.

*15. Indiana*[348]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*16. Iowa*[349]

Privacy Law- established by common law; right is descendible. Publicity Law- no statute or case law to indicate if the right of publicity exists.

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344. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (noting that common law right of privacy exists); Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930) (recognizing that the right is descendible); Martin Luther King, Jr. Center for Social Change v. American Heritage Prods., 694 F.2d 674 (11th Cir. 1983). Georgia recognizes the right of publicity. It also holds the right is descendible.

345. Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Haw. 1968) (noting that common law right of privacy exists).

346. Baker v. Burlington N., Inc., 587 P.2d 829 (Idaho 1978) (noting that common law right of privacy exists).

347. Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. Ct. 1952) (noting that common law right of privacy exists); Maritote v. Desilu Prods., Inc., 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (recognizing that the right is not descendible); Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201 (N.D. Ill. 1981). Illinois recognizes the right of publicity. The right is transferable.

348. Patton v. Jacobs, 78 N.E.2d 789 (Ind. App. 1948) (noting that common law right of privacy exists).

349. Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762 (Iowa 1956) (noting that common law right of privacy exists). This case also appears to provide for limited descendibility, though no violation of the petitioner's right to privacy occurred because the event reported was newsworthy. *Id.*

*17. Kansas*[350]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*18. Kentucky*[351]

Privacy Law- established by common law; established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

*19. Louisiana*[352]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*20. Maine*[353]

Privacy Law- established by common law; right is not descendible. Publicity Law- established by common law; descendibility unknown.

*21. Maryland*[354]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*22. Massachusetts*[355]

Privacy Law- established by statute; right is not descendible. Publicity Law- established by statute; descendibility unknown.

*23. Michigan*[356]

350. Kunz v. Allen, 172 P. 532 (Kan. 1918); Rinsley v. Frydman, 559 P.2d 334 (Kan. 1977) (noting that common law right of privacy exists).

351. Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909) (noting that common law right of privacy exists). The statute supplements case law.

352. Itzkovitch v. Whitaker, 39 So. 499 (La. 1905), Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. Ct. App. 1956) (noting that common law right of privacy exists).

353. Estate of Berthiaume v. Pratt, 365 A.2d 792, 794 (Me. 1976) (noting that common law right of privacy exists and is descendible under statute; right of publicity recognized); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (noting that right of privacy is purely personal and thus the action is limited to the living person directly involved).

354. Beane v. McMullen, 291 A.2d 37, 44 (Md. 1972) (noting that common law right of privacy exists).

355. The Massachusetts statute protects the right of privacy called appropriation that is the person's name, portrait or picture. This does provide some limited protection of publicity rights, but it is yet to be seen if this will be interpreted as complete recognition of the right of publicity.

356. Pallas v. Crowley, Milner & Co., 33 N.W.2d 911, 913 (Mich. 1948) (noting that common law right of privacy exists); Fry v. Ionia Sentinel-Standard, 300 N.W.2d 687 (Mich. Ct. App. 1980) (recognizing that the right is not descendible).

Privacy Law- established by common law; right is not descendible. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*24. Minnesota*[357]

Privacy Law- rejects the right. Publicity Law- established by common law.

*25. Mississippi*[358]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*26. Missouri*[359]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*27. Montana*[360]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*28. Nebraska*[361]

Privacy Law- established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

*29. Nevada*[362]

Privacy Law- established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

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357. Markgraf v. Douglas Corp., 468 N.W.2d 80, 83 (Minn. 1991). The Minnesota courts have specifically rejected a common law right of privacy and no statute provides for such a right. Uhlaender v. Hendricksen, 316 F. Supp. 1277 (D. Minn. 1970). Minnesota recognizes the right of publicity.

358. Young v. Jackson, 572 So. 2d 378 (Miss. 1990) (noting that common law right of privacy exists).

359. Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911) (noting that common law right of privacy exists).

360. Sistok v. Northwestern Tel. Sys., Inc., 615 P.2d 176, 182 (Mont. 1980) (noting that common law right of privacy exists).

361. Statute supersedes case law. The Nebraska statutes protects the right of privacy called appropriation, that is the person's name, portrait or picture. This does provide some limited protection of publicity rights, but it is yet to be seen if this will be interpreted as complete recognition of the right of publicity.

362. Though the Nevada statute specifically refers to the right of publicity, it defines it in such a manner as to include appropriation which is a privacy right. It does this by protecting all natural persons which would include non-celebrities.

*30. New Hampshire*

Privacy Law- no statute and no case law to indicate if the right exists. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*31. New Jersey*[363]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*32. New Mexico*[364]

Privacy Law- established by common law; right is not descendible. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*33. New York*[365]

Privacy Law- established by statute; descendibility unknown. Publicity Law- established by statute; descendibility unknown.

*34. North Carolina*[366]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*35. North Dakota*

Privacy Law- no statute and no case law to indicate if the right exists. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*36. Ohio*[367]

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363. Vanderbilt v. Mitchell, 67 A. 97 (N.J. 1907), Frey v. Dixon, 58 A.2d 86 (N.J. Ch. 1948) (noting that common law right of privacy exists); The Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981). New Jersey recognizes the right of publicity. It also holds that the right is descendible.

364. Blount v. T D Publishing Corp., 423 P.2d 421 (N.M. 1966) (noting that common law right of privacy exists); Bitsie v. Walston, 515 P.2d 659 (N.M. Ct. App.) (recognizing that the right is not descendible).

365. Statute supersedes case law. The New York statute protects the right of privacy called appropriation, that is the person's name, portrait or picture. This does provide some limited protection of publicity rights, but it is yet to be seen if this will be interpreted as complete recognition of the right of publicity.

366. Brown v. Boney, 255 S.E.2d 784 (N.C. Ct. App. 1979) (noting that common law right of privacy exists).

367. Young v. That Was the Week that Was, 423 F.2d 265 (6th Cir. 1970) (A common law right of privacy exists in Ohio. However, this case rules that the right does not survive.); Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977). Ohio recognizes that a right of publicity exists. However, this case rules that the right is personal and not property and therefore does not survive. *See also* Reeves v. United Artist, 572 F. Supp. 1231 (N.D. Ohio 1983).

Privacy Law- established by common law; right is not descendible. Publicity Law- established by common law; right is not descendible.

*37. Oklahoma*[368]

Privacy Law- established by common law; established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

*38. Oregon*[369]

Privacy Law- established by common law; descendibility unknown. Publicity Law- established by common law; descendibility unknown.

*39. Pennsylvania*[370]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*40. Rhode Island*[371]

Privacy Law- established by statute; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*41. South Carolina*[372]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*42. South Dakota*[373]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

368. Munley v. ISC Fin. Hounse Inc., 584 P.2d 1336 (Okla. 1978) (noting that common law right of privacy exists). Here, the privacy statute supplements the case law. The publicity statute supersedes the case law.

369. McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975) (noting that common law right of privacy exists); Anderson v. Fisher Broadcasting Co., 712 P.2d 803 (Or. 1986) (Oregon recognizes the right of publicity).

370. Marks v. Bell Tel. Co., 331 A.2d 424, 430 (Pa. 1975) (noting that common law right of privacy exists). Aquino v. Bulletin Co., 154 A.2d 422 (Pa. Super. Ct. 1959).

371. Statute supersedes case law.

372. Meetze v. Associated Press, 95 S.E.2d 606 (S.C. 1956) (noting that common law right of privacy exists).

373. Truxes v. KenCo Enter., 119 N.W.2d 914 (S.D. 1963) (noting that common law right of privacy exists).

*43. Tennessee*[374]

Privacy Law- established by common law; established by statute; right is descendible. Publicity Law- established by common law; established by statute; right is descendible.

*44. Texas*[375]

Privacy Law- established by common law; established by statute; right is descendible. Publicity Law- established by statute; right is descendible.

*45. Utah*[376]

Privacy Law- established by common law; established by statute; descendibility unknown. Publicity Law- established by statute; descendibility unknown.

*46. Vermont*[377]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*47. Virginia*[378]

Privacy Law- established by statute; right is not descendible. Publicity Law- established by statute; descendibility unknown.

*48. Washington*[379]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

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374. State ex rel., Elvis Presley v. Cromwell, 733 S.W.2d 89 (Tenn. 1987) (noting that common law right of privacy exists). Privacy statute supplements case law. Publicity statute supersedes case law.

375. Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973); National Bonding Agency v. Demeson, 648 S.W.2d 748 (Tex. Ct. App. 1983) (noting that common law right of privacy exists); National Bank of Commerce v. Shaklee, 503 F. Supp. 533 (W.D. Tex. 1980) (recognizing that the right is descendible). Statute supplements case law.

376. Donahue v. Warner Bros. Picture Distrib. Corp., 272 P.2d 177 (Utah 1953) (noting that common law right of privacy exists). Privacy statute supplements case law. Publicity statute supersedes case law.

377. Staruski v. Continental Telephone Co., 581 A.2d 266 (Vt. 1990) (noting that common law right of privacy exists).

378. Statute supersedes case law.

379. Lewis v. Physicians & Dentist Credit Bureau, 177 P.2d 896 (Wash. 1947) (noting that common law right of privacy exists).

*49. West Virginia*[380]

Privacy Law- established by common law; descendibility unknown. Publicity Law- no statute or case law to indicate if the right of publicity exists.

*50. Wisconsin*

Privacy Law- established by statute; right is not descendible.[381] Publicity Law[382]- established by common law; descendibility unknown.

*51. Wyoming*

Privacy Law- no statute and no case law to indicate if the right exists. Publicity Law- no statute or case law to indicate if the right of publicity exists.

## APPENDIX B

*Current State Statutes with Some Major Features*

*1. California*[383]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 50 years; Remedies- actual damages, exemplary damages, minimum damages, attorney fees, costs.

*Florida*[384]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 40 years; Remedies- actual damages, exemplary damages, injunctive relief.

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380. Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958) (noting that common law right of privacy exists).

381. Statute supersedes case law. In § 895.50(a)(b), Wisconsin specifically states that it is to protect the name, portrait, or picture of living persons.

382. Hirch v. S.C. Johnson and Son, 280 N.W.2d 129 (Wis. 1979) (Wisconsin recognizes the right of publicity).

383. CAL. CIV. CODE § 990 (West 1982). This statute was specifically drafted to make publicity and privacy rights descendible. The state common law protects both rights of the living, while providing only limited descendibility for certain publicity rights.

384. FLA. STAT. ANN. § 540.08 (West 1988).

*Kentucky*[385]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 50 years; Remedies- actual damages, exemplary damages, minimum damages, attorney fees, costs.

*Massachusetts*[386]

Privacy- yes; Publicity- yes; Assignable- there is no provision for assignability; Descendible- there is no provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, treble damages.

*Nebraska*[387]

Privacy- yes; Publicity- no[388]; Assignable- there is a provision for assignability[389]; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages.

*Nevada*[390]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 50 years; Remedies- actual damages, exemplary damages, minimum damages, injunctive relief.

*New York*[391]

Privacy- yes; Publicity- no; Assignable- there is no provision for assignability; Descendible- there is no provision for descendibility; Limitation period for the

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385. KY. REV. STAT. ANN. § 391.170 (Michie/Robbs-Merrill 1984). This statute may create a bit of confusion in that it is styled to protect public figures, however in section (1) it gives every person without distinction a property right in their own name and likeness. However, in section (2) it specifically refers to public figures in granting a fifty (50) year use period after the person's death.

386. MASS. ANN. LAWS ch. 214 § 3A (Law Co-op. 1986).

387. NEB. REV. STAT. §§ 20-201 to 20-211 (1943).

388. While the statute refers only to the right of privacy, § 20-202 does protect the individual from appropriation which has often been used as a substitute for the right of publicity.

389. Privacy rights in general are denied descendibility, however, in § 20-208, the area of privacy known as appropriation and which is often used as a substitute for publicity rights are exempted from this general denial and are deemed to survive death.

390. NEV. REV. STAT. ANN. §§ 598.980 - 598.988 (Michie 1986). This is a publicity statute. However, in § 598.982 it gives the protection to any living person regardless of their status as celebrities which in effect protects the individuals right of privacy known as appropriation.

391. N.Y. CIV. RIGHTS LAW §§ 50 - 51 (Consol. 1992). The New York statute specifically refers to the privacy rights of living persons which leaves the existence a separate right of publicity, and its descendibility in limbo.

exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, exemplary damages, injunctive relief, criminal sanctions.

*Oklahoma*[392]

Privacy- yes; Publicity- no[393]; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, injunctive relief, punitive damages, criminal sanctions.

*Rhode Island*[394]

Privacy- yes; Publicity- yes[395]; Assignable- there is no provision for assignability; Descendible- there is no provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, attorneys fees, injunctive relief, treble damages.

*Tennessee*[396]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- no limit if used within 12 years; Remedies- actual damages, injunctive relief.

*Texas*[397]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 50 years; Remedies- actual damages, exemplary damages, minimum damages, attorney fees, costs.

*Utah*[398]

Privacy- yes; Publicity- yes; Assignable- there is no provision for assignability; Descendible- there is no provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, exemplary damages, injunctive relief, attorney fees, costs.

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392. OKLA. STAT. ANN. tit. 21 § 839 (West 1983).

393. While the statute refers only to the right of privacy, § 839.1 does protect the individual from appropriation which has often been used as a substitute for the right of publicity.

394. 1980 R. I. PUB. LAWS 9-1-28.

395. While the statute refers only to the right of privacy, § 9-1-28.1(a)(2) does protect the individual from appropriation which has often been used as a substitute for the right of publicity.

396. TENN. CODE ANN. § 47-25 (1988).

397. TEX. PROP. CODE ANN. § 26 (West 1985).

398. UTAH CODE ANN. § 45-3 (1988). This is a very limited statute which covers generally the right of privacy and publicity, but limits the scope of this statute to cases in which the use of the person, their name or likeness constitutes an endorsement of some subject matter.

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 5, Iss. 1 [2016], Art. 2



*Virginia*[399]

Privacy- yes; Publicity- yes; Assignable- there is a provision for assignability; Descendible- there is a provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- 20 years; Remedies- actual damages, exemplary damages, injunctive relief, criminal sanctions.

*Wisconsin*[400]

Privacy- yes; Publicity- no; Assignable- there is no provision for assignability; Descendible- there is no provision for descendibility; Limitation period for the exclusive use of rights after death by the heirs or assign- none; Remedies- actual damages, exemplary damages, injunctive relief, attorney fees, costs.

399. VA. CODE ANN. § 8.01-40 (Michie 1986).

400. WIS. STAT. ANN. § 895.50 (West 1983). The Wisconsin statute limits relief to living persons.