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The Right of Publicity: Commercial Exploitation of the Associative Value of Personality

Sheldon W. Halpern

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The Right of Publicity: Commercial Exploitation of the Associative Value of Personality

*Sheldon W. Halpern**

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I. INTRODUCTION

"In the future everyone will be world-famous for fifteen minutes."

For more than thirty years, dispute and confusion have marked the emergence and development of the so-called "right of publicity,"² a right that is concerned with the use of attributes of a generally identifiable person to enhance the commercial value of an enterprise.³ A dense, complex array of cases, accompanied by

1. Andy Warhol, *quoted in* J. BARTLETT, *FAMILIAR QUOTATIONS* 908 (15th ed. 1980).

2. The Court of Appeals for the Second Circuit apparently invented the phrase in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), in an effort to distinguish the right of exclusive control over the commercial exploitation of personality from the "right of privacy." The "right of publicity" is not the most felicitous of phrases and, in the light of history, appears to miss the nature of the protected interest. Because it has come to be a readily accepted shorthand for the complex personality interest in economic exploitation, however, this Article will continue the conventional usage.

3. The right of publicity has been defined as "the right of a celebrity to control and profit from the use of his name and likeness." Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453 (1981). Sims' is but one of many definitions and, with its limitation to the specific attributes of "name and likeness," appears unnecessarily restrictive. See *infra* notes 261-65 and accompanying text. "There is obvious difficulty in defining a 'right of publicity' for public personages." *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973). See Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 *CORNELL L. REV.* 673, 675 (1981) ("[T]he definition of the right of publicity remains unclear; its theory is still evolving and its limits are uncertain.").

The right of publicity has been defined with surprising consistency by courts and commentators; it is generally conceived as comprising a person's right in the use of his name, likeness, activities, or personal characteristics. This amicable unanimity in defining the right is somewhat illusory, however, for there is considerable disagreement about what the definition means. To begin with, there is no consistent test for determining how far the right of publicity extends. The language of some courts would suggest that virtually any recognizable attribute would be protected. But a number of other decisions have refused to extend the right of publicity nearly as far. As a result, the extent to which a person's attributes are protected by the right of publicity remains unclear.

Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577, 1589-90 (1979) (footnotes omitted).

In this article, the right of publicity is considered peculiarly celebrity based, arising only in the case of an individual who has attained some degree of notoriety or fame. See, e.g., *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 141, 296 S.E. 2d 697, 702 (1982). Although commentators disagree over whether "celebrity" is a necessary element of the cause of action or relates only to the

and analyzed in an even denser array of commentary, has been the vehicle for adumbrating the emergent right.

Battle lines are drawn over whether the creature emerging from the fermenting ooze of modern mass communications is a species of "property"⁴ or a purely personal "privacy" interest.⁵ Everywhere one finds the bodies of tortured analogies:⁶ Is the chimera more like copyright?⁷ Should it be in the "trademark" or "service mark" bestiary?⁸ Do we perhaps have simply another version of the old torts of misappropriation and unfair competition?⁹ There is general agreement only about the genesis of this "haystack in a hurricane."¹⁰ The right of publicity as currently understood was born out of the determination of the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹¹ that a celebrity has a right to damages and other relief for the unauthorized commercial appropriation of the celebrity's persona and that such a right is independent of a common-law or statutory right of

extent of damages sustained, in practice the debate is academic. See Frazer, *Appropriation of Personality—A New Tort?*, 99 LAW Q. REV. 281, 308 (1983); Hoffman, *The Right of Publicity—Heir's Right, Advertisers' Windfall, or Courts' Nightmare?*, 31 DE PAUL L. REV. 1, 5 (1981); Sims, *supra*, at 473. *But cf.*, Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 554-55 (1960); Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C.D. L. REV. 191, 202-03 (1983) (advocating recognition of a "universal" right of publicity); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954); Pilpel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC'Y 249, 255-56 (1980); Shipley, *supra*, at 723-24 n.325.

4. See, e.g., Rader, "The Right of Publicity"—A New Dimension, 61 J. PAT. OFF. SOC'Y. 228, 233 (1979); see *infra* notes 46-48, 232 and accompanying text.

5. See *Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983), *aff'd.*, 765 F.2d 79 (6th Cir. 1985); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); see *infra* notes 107-14 and accompanying text.

6. For a thorough discussion of the analogic inflation, see Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMP. L.Q. 977 (1982).

7. See, e.g., Zaccbini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Note, *The Right of Publicity, Section 43(a) of the Lanham Act and Copyright Preemption: Preventing the Unauthorized Commercial Exploitation of Uncopyrighted Works of Art*, CARDOZO ARTS & ENT. L.J. 265 (1983); Comment, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CALIF. L. REV. 786 (1982).

8. See, e.g., Cifelli & McMurray, *The Right of Publicity—A Trademark Model for its Temporal Scope*, 66 J. PAT. OFF. SOC'Y. 455 (1984); Heneghan & Wamsley, *The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen*, 14 PAC. L.J. 181 (1983); Winner, *Right of Identity: Right of Publicity and Protection for a Trademark's "Persona"*, 71 TRADEMARK REP. 193 (1981); Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567 (1983).

9. See Ausness, *supra* note 6, at 983-87; see also *infra* notes 243-53 and accompanying text.

10. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 418, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

11. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

privacy.

Haelan and its progeny in the federal courts in New York¹² have been the principal support for the doctrine that the right of publicity protects a distinct economic interest in personality and that while it may have cognates, it is an unique common-law right different from those to which it might be analogized. The doctrine, predicated on a federal court's interpretation of New York law, has not been confined to New York; the *Haelan* formulation of the right of publicity generally has been accepted,¹³ and, in the course of the period of more than thirty years since *Haelan* was decided, the doctrine has become more sophisticated. In December 1984, however, the New York Court of Appeals announced in *Stephano v. News Group Publication, Inc.*¹⁴ that the federal courts have not accurately interpreted New York law and that in New York, where the right presumably was born, there is no common-law "right of publicity."

The development of the right of publicity since *Haelan* certainly has been chaotic. Nevertheless, until *Stephano* an underlying consistency had moved the law toward greater consonance with the commercial and social reality of the interests involved in the commercialization of the intangible, evanescent persona. The effect of the New York "reversal" of *Haelan* on the movement cannot be determined yet. The doctrine on which the movement of the law had been based is sound; the interest that the right of publicity embraces is unique and deserves common-law recognition predicated upon the interest's unique nature.

The interest, a function of the societal recognition that commercial value may be associated with the persona of celebrity, should serve as the primary tool for shaping the form and content of the right. Policy determinations, balancing that individual interest against other, more general, public interests, may then serve to set the boundaries of protectability.

12. See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), cert. denied, 105 S. Ct. 2114 (1985); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Bi-Rite Enterprises, Inc., v. Button Master*, 555 F. Supp. 1188 (S.D.N.Y. 1983); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975).

13. See *infra* notes 36-44, 54-61 and accompanying text.

14. 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984). See *infra* notes 62-64 and accompanying text.

II. KNOTS: THE PRIVACY LINKAGE

The *Haelan* decision in 1953 recognized the independent right of publicity by differentiating that right from the already existing right of privacy.¹⁵ The association of the distinctly economic interest in personality with the privacy interest in solitude, the right to be free from public exposure, has been the source of much confusion.¹⁶ The process by which the right of publicity came to be linked to the right of privacy is more fortuitous than inevitable, more paradoxical than logical. If we are to understand this strange creature, a brief look at its putative forebear is in order. Consideration of the right of privacy must begin with the *Pavesich*¹⁷ and *Roberson*¹⁸ cases, in each of which a vendor used a photograph of a theretofore private person to advertise its product.

In *Pavesich* an insurance company used a photograph of the plaintiff in an advertisement for its life insurance. Building on what has become one of the most influential law review articles ever published, Warren's and Brandeis' "The Right of Privacy,"¹⁹ the Georgia Supreme Court found a common-law right of redress for nondefamatory, but unconsented to, exposure of the plaintiff's likeness. The court sought to redress an injury to the plaintiff's feelings attendant to the breach of his solitude.²⁰

15. Kwall, *supra* note 3, at 196-97; see *infra* notes 36-37 and accompanying text.

16. Ausness, *supra* note 6, at 981-83; Frazer, *supra* note 3, at 295-99; Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 784 (1980); Sims, *supra* note 3, at 464-65; Shipley, *supra* note 3, at 681-82.

17. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

18. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

19. 4 HARV. L. REV. 193 (1890). "It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384 (1960). It has been suggested that Warren and Brandeis, "in the process of searching for [a common law right of privacy] succeeded in inventing it." Felcher & Rubin, *supra* note 3, at 1581. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 81-82 (W. Va. 1984).

20.

The knowledge that one's features and form are being used for such a purpose and displayed in such places as such advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and, as long as the advertiser uses him for these purposes, he can not be otherwise than conscious of the fact that he is, for the time being, under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.

So thoroughly satisfied are we that the law recognizes . . . the right of privacy, and that the publication of one's picture without his consent by another as an advertisement . . . is an invasion of this right, that we venture to predict that the day will come

Earlier, the New York Court of Appeals had not been persuaded by Warren and Brandeis. That court rejected the idea that there existed a common-law right independent of defamation that would give Ms. Roberson a claim based upon the injury to her feelings that resulted from her face appearing on posters advertising flour.²¹ The New York legislature responded immediately and created a statutory right — entitled “the right of privacy” — to injunctive relief and damages for the unauthorized use of a living person’s name or likeness “for advertising purposes or for the purposes of trade.”²²

Both the common-law and the statutory recognition of the right of privacy were predicated upon the interest of an individual in the exclusive nature of his personality. Whether phrased in terms of the right “to be let alone”²³ or freedom from exposure,²⁴ the right of privacy was the vehicle for the protection of an internal interest, the feelings of one who involuntarily has been publicly “used.”²⁵ As noted in *Bi-Rite Enterprises, Inc. v. Button Master*,²⁶ “Relief is available under the applicable privacy law only for acts

when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability

Pavesich v. New England Life Ins. Co., 122 Ga. 190, 220, 50 S.E. 68, 80-81 (1905). See Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978):

The view in *Pavesich* is that the plaintiff in fact owns his name and his portrait, and their use by another constitutes but a refined form of theft The sentiments in *Pavesich* may not have the elegance of economic theory, but they do have a kind of intuitive solidity which may be worth even more. The opinion has the universal appeal to which ordinary people, and ordinary judges, can instantly respond.

Id. at 462-63 (footnotes omitted).

21.

An examination of the authorities leads us to the conclusion that the so-called “right of privacy” has not as yet found an abiding place in our jurisprudence, and . . . the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902).

22. N.Y. CIV. RIGHTS LAW, §§ 50, 51 (McKinney 1976 & Supp. 1986).

23. Prosser, *supra* note 19, at 389 (1960) (quoting COOLEY, TORTS 29 (2d ed. 1888)).

24. Ausness, *supra* note 6, at 981.

25. *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 86, 291 P.2d 194, 197 (1955) (“The gist of the cause of action in a privacy case is . . . a direct wrong of a personal character resulting in injury to the feelings The injury is mental and subjective.”); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959) (“The primary purpose of this legislation was to protect the sentiments, thoughts and feelings of an individual.”); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 (W. Va. 1984) (“The right has primarily served to prevent the emotional harm which results from the unauthorized use of an individual’s name or likeness to promote a particular product or service.”); see Ausness, *supra* note 6, at 981; Gordon, *supra* note 3, at 554-55; Pilpel, *supra* note 3, at 256; Sims, *supra* note 3, at 464-65.

26. 555 F. Supp. 1188 (S.D.N.Y. 1983).

that invade plaintiffs' privacy and consequently bruise their feelings [I]ts primary purpose, like that of common law privacy, is to protect the feelings and privacy of the 'little man.'"²⁷ Because the interest involved is the subjective, emotional harm flowing from exposure, a plaintiff might maintain an action even when no one but the plaintiff and plaintiff's closest family could identify the appropriated "likeness" as that of the plaintiff.²⁸

As an historical phenomenon, the right of privacy was born and developed at a time when celebrity was not itself a commodity capable of widespread exploitation.²⁹ Indeed, lending one's name for commercial purposes could be seen as demeaning. As recently as 1962, the First Circuit held that imitation of the voice of a well-known entertainer in a television commercial could itself constitute defamation because the imitation created the inference that the entertainer had "stooped to perform below his class."³⁰

In a societal context in which unauthorized commercial appropriation of a personality is seen as an invasion, causing shame, discomfort, or irritation, rather than economic loss, it is not unreasonable for such an appropriation to be considered part of the "privacy" interest.³¹ That context gave rise to Dean Prosser's much quoted and discussed quadruped: the model of the "privacy" tort as encompassing four distinct variants of personality invasion, one of which is the "[a]ppropriation, for the defendant's advantage, of

27. *Id.* at 1198; *c.f.* *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

28. *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984). In *Cohen*, the defendant had used in an advertisement a photograph, taken without consent, of the plaintiff and her young daughter wading nude in a stream; the view is from the rear and side and the faces are not visible. Only the plaintiff and her husband could identify the forms as those of the plaintiff and her daughter. In the plaintiff's right of privacy action, the court denied summary judgment for the defendant.

29. *Gordon, supra* note 3, at 554-55 ("The innovators of the privacy doctrine could not have foreseen the advent of radio, television and motion pictures, and the concomitant scope and variety of commercial exploitations of names, likenesses and personalities of individuals." (footnote omitted)).

30. *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 258 (1st Cir. 1962): *Cf.* *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973) (another voice imitation case, in which the passage of ten years caused the court to note that "[A] star performer's endorsement of a commercial product is a common occurrence and does not indicate either a diminution of professional reputation nor [sic] a loss of professional talent . . .").

31.

The reason the "appropriation of name or likeness" tort came to be associated with privacy, and not considered a kind of theft of property . . . is that at the end of the last century the use of someone's name or likeness in commercial enterprises might have subjected that person to strong social censure.

Huff, *supra* note 16, at 785.

the plaintiff's name or likeness."³² Although Prosser denominates the operative act "appropriation," in the context of "privacy" the wrong is more in the nature of an assault on the person rather than a theft.³³

Consequently, several decisions concluded that a celebrity, particularly one who has sought to capitalize on his notoriety, cannot claim that an unauthorized commercialization of his identity has injured his feelings. The celebrity effectively has waived his right of privacy and can have no relief under a "privacy" umbrella.³⁴ If one considers the right of publicity simply as the "ap-

32. See Prosser, *supra* note 19, at 389, in which he categorizes the aspects of invasion of the right of privacy: "(1) Intrusion upon the plaintiff's seclusion or solitude . . . (2) Public disclosure of embarrassing private facts . . . (3) Publicity which places the plaintiff in a false light . . . (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

Although the Prosser model has been embodied in the *Second Restatement of Torts*, of which Dean Prosser was the Reporter, RESTATEMENT (SECOND) OF TORTS § 652A (1977), there has been considerable debate over both his approach and the underlying Warren — Brandeis exposition. See, e.g., Bloustein, *Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429 (1978); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

33. See *supra* note 25.

34. "[The individual] plaintiffs' claims fail under this standard, for as public figures, with their likenesses, names and images already in the public domain, they have waived their rights to claim intrusions into their common law privacy rights . . . Moreover, they cannot demonstrate harm to their feelings justifying legal action." *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (citations omitted); see *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983); *O'Brien v. Papst Sales Co.*, 124 F.2d 167, 169 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942); Ausness *supra* note 6, at 981 ("Celebrities and entertainers who have actively sought publicity cannot honestly claim to be offended by public exposure alone" (citing cases limiting or denying recovery)); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973):

The nature of the injury to self-esteem caused by advertising is elusive. . . . The peculiar nature of advertising, rather than the mere fact of publicity, must cause whatever injury occurs So far no scientist has offered evidence that people generally experience displeasure, anger, shock, or hatred when their name or picture appears in an advertisement without their consent. Nor has any court so precisely identified the nature of their injury. Nonetheless . . . some sort of compensable injury to sensibilities occurs, as a matter of law, if not as a datum of science

Whatever the precise nature of the injury, the general theory of invasion of privacy adequately protects the interests of private individuals and of many celebrities in many cases. Courts, however, have sometimes had great difficulty referring to a celebrity's right to privacy to award damages in advertising cases

In reality the injury to sensibilities concept does not normally meaningfully apply when a person routinely permits advertising uses of his name or picture. Any anger or

propriation" leg of the privacy tort, protecting against an assault on personality that creates injury to feelings, the logical result must be the denial of any celebrity's claim that his name or likeness has been appropriated commercially. Either the jurisdiction recognizes the right of privacy with its concomitant celebrity waiver, or it does not recognize the right of privacy and consequently refuses to recognize what it views as a derivative of that right.³⁵ For the most part, however, courts either have avoided following this logic to its conclusion or have abandoned the privacy trap altogether, carving out a different interest and a different set of criteria with respect to the unsanctioned commercial exploitation of a celebrity's personality.

A. *The Independent Right: Haelan and its Progeny*

In 1953 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*³⁶ presented both the necessity and opportunity to recognize a right distinct from the right of privacy. In *Haelan* a baseball player had granted the plaintiff the exclusive right to use the player's name and likeness on cards distributed with the plaintiff's bubble gum. The ballplayer then granted similar rights to the de-

outrage that he might feel hardly flows from the shock of confronting his likeness in an advertisement. *Rather, his injury takes the form of diminished income. The harm resides not in the use of his likeness but in the user's failure to pay.* *Id.* at 640-41 (emphasis added). See Nimmer, *supra* note 3, at 204-06.

35. *Carson v. National Bank of Commerce Trust and Sav.*, 501 F.2d 1082 (8th Cir. 1974).

[T]he Court believes that whether the right . . . is denominated [the] right to privacy [or the] "right to publicity" . . . it stems from Court recognition that an individual has the right to control the use of his own name and image and the publication of information about himself. If that right is conceded, several distinct causes of action may arise from it, depending upon the particular conditions [citing Prosser] . . . All these actions stem from the initial recognition of a right to control the use of one's own name and image, which the Nebraska Supreme Court explicitly rejected . . . Plaintiff's characterization of his action as one seeking damages for "misappropriation" cannot serve as a means to escape the rule . . .

Id. at 1084-85 (citations omitted). Nebraska has since recognized the right of privacy by statute, NEB. REV. STAT. §§ 20-201 to -211 (1983), and it now appears that every state recognizes some form of privacy action. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 82 (W. Va. 1984); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 540 (1976) ("Courts persist in confusing the right of publicity with the right of privacy and deny relief for invasion of the right of publicity in cases in which relief for invasion of the right of privacy is barred."). *But cf.*, *House v. Sports Films & Talents, Inc.*, 351 N.W.2d 684 (Minn. Ct. App. 1984) (recognizing a right of publicity notwithstanding nonrecognition of the right of privacy). See *infra* notes 57-58 and accompanying text.

36. 202 F.2d 866 (2nd Cir.), *cert. denied*, 346 U.S. 816 (1953).

fendant, who argued that whatever rights the plaintiff had were purely personal privacy rights derived from New York's privacy statute, so that notwithstanding the terms of the plaintiff's contract with the ballplayer, the ballplayer had conveyed to the plaintiff nothing more than a release or nonexclusive license to use the player's name and likeness.

Judge Frank, writing for the majority, held that the New York privacy statute did not limit the plaintiff's rights; that New York law recognized an independent, common-law right protecting economic interests rather than the personal, emotional interests contemplated by the right of privacy; and that such a right, by its nature, must be exclusively assignable.

We think that, in addition to and independent of that right of privacy (which in New York derives from statute) [and which is "personal and non-assignable"], 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"

This right might be called a "right of publicity." For it is common knowledge that many prominent persons . . . , far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

We think the New York decisions recognize such a right.³⁷

With this succinct analysis, unencumbered by glosses on the right of privacy, Judge Frank enunciated a right flowing from the economic value of celebrity. He recognized an interest, distinct from privacy, that deserved distinct protection, even though the operative act invading that interest — publication for commercial purposes — is the same act that might invade the interest protected by the right of privacy.

Shortly after the *Haelan* decision, Professor Nimmer sought to define the "new" right.³⁸ Seeing *Haelan* as predicated upon the separation of the celebrity's economic right from "privacy" considerations,³⁹ he detailed the inadequacy of the right of privacy⁴⁰ and other existing models.⁴¹ The privacy concept, he noted,

37. 202 F.2d at 868.

38. Nimmer, *supra* note 3.

39. Nimmer, however, noted the caveat—a prophecy realized some thirty years later—that *Haelan* might not be an accurate statement of New York law. *Id.* at 222.

40. *Id.* at 204-07.

41. *Id.* at 210-15.

is not adequate to meet the demands of the second half of the twentieth century. . . . With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century.⁴²

Nimmer's concern, like Judge Frank's, was not with the new right's label, but with the conceptual foundation of the legal rights attendant to the emerging interest. Later cases and commentators were left to embellish and complicate a rather simple proposition.

The courts generally have been willing to recognize a distinct commercial exploitation interest, but only after ritually loosening it from its privacy mooring or other, more traditional berths. Thus, shortly after *Haelan*, the Third Circuit, after noting the various legal characterizations of the exploitation interest, concluded that an average person's privacy interest and a professional performer's "property right . . . to the product of his services" were polar extremes on the same spectrum. Nonetheless, the court found that the extremes should be distinguished and treated differently.⁴³

*Uhlaender v. Henricksen*⁴⁴ is exemplary of judicial treatment of the right. In *Uhlaender* the federal district court in Minnesota could not treat the commercial exploitation of baseball players with Judge Frank's simple clarity, but first had to comb through the underbrush of privacy and "misappropriation." The court noted the importance of distinguishing the two concepts and eventually concluded that a "celebrity has a legitimate proprietary interest in his public personality."⁴⁵ To a great extent, the lever of "property right," abjured by the *Haelan* court,⁴⁶ became the tool for prying the new right away from privacy and the source for what may well have been pointless dispute.⁴⁷ Court after court, faced with a "right of publicity" claim, has compulsively recited the litany of the four-pronged privacy right before separating the fourth prong, a celebrity's proprietary, nonprivacy interest.⁴⁸

42. *Id.* at 203-04.

43. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485-87 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

44. 316 F. Supp. 1277 (D. Minn. 1970).

45. *Id.* at 1282 (emphasis added).

46. "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." *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

47. See *infra* notes 107-12 and accompanying text.

48. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983):

With respect to "appropriation" of a celebrity's persona, Dean Prosser's extraordinary effort to articulate and codify the right of privacy has become a straw man, to be raised, analyzed, distinguished, and dismissed. That confusion has been rampant in this area is apparent from the cases themselves;⁴⁹ to attribute the confusion to the Prosser analysis⁵⁰ is an oversimplification, if not churlish.⁵¹ Commercialization of personality only recently has invaded our daily lives. Courts, not surprisingly, examined early claims for economic injury from unwanted publicity in the light of societal attitudes associating that publicity with the emotional distress flowing from violation of the right of privacy.⁵² Unfortunately, in the current societal context in which commercialization of celebrity is commonplace, the Prosser analysis "does not explain *why* appropriation of personality may be described as an aspect of the invasion of privacy."⁵³

Some courts have sought expressly to divorce publicity from privacy. In *Motschenbacher v. R.J. Reynolds Tobacco Co.*⁵⁴ the court eschewed the customary merger and separation of the two interests and recognized the right of a celebrity or public person to recover for the unauthorized commercial use of his persona irre-

The confusion in this area of the law requires a brief analysis of the relationship between these two rights.

In an influential article, Dean Prosser delineated four distinct types of the right of privacy [The] fourth type has become known as the "right of publicity"

His first three types of the right of privacy generally protect the right "to be let alone," while the right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity Thus, the right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.

Id. at 834 (citations omitted). *But cf.*, *Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082 (8th Cir. 1974); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *Brinkley v. Casablancas*, 80 A.D.2d 428, 436-37, 438 N.Y.S.2d 1004, 1010 (App. Div. 1981).

49. *See, e.g.*, *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 n.2 (D. Minn. 1970) (repeating and noting the persistence of the "haystack in a hurricane" image of *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956)).

50. "Dean Prosser's analysis has been a source of some confusion in the law." *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983); *see Sims, supra* note 3 at 464-65; Note, *supra* note 35 at 531.

51. Kwall, *supra* note 3, observed that "a careful reading of Prosser's article suggests that had the right of publicity been an established legal doctrine at the time of his writing, he might have been inclined to separate the appropriation tort from the other privacy torts." *Id.* at 193 (footnote omitted).

52. *See supra* notes 29-31 and accompanying text.

53. Frazer, *supra* note 3, at 296.

54. 498 F.2d 821 (9th Cir. 1974).

spective of the label attached to that right.⁵⁵ In 1983 the Sixth Circuit reviewed the privacy model, but upheld the celebrity's right of publicity claim notwithstanding the court's finding that neither the celebrity's name nor his likeness had been appropriated.

The district court dismissed appellants' claim based on the right of publicity because appellee does not use Carson's name or likeness We believe that . . . the district court's conception of the right of publicity is too narrow [A] celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used.⁵⁶

A recent Minnesota decision,⁵⁷ noting that the state did not recognize a right of privacy, nevertheless held that a celebrity is entitled to bring an action for unauthorized appropriation of his persona because a "celebrity's property interest in his name and likeness is unique."⁵⁸

B. *Retying the Knot*: *Stephano v. News Group Publications, Inc.*

In general, the post-*Haelan* cases and commentary consistently evidenced a movement toward recognition of the independent right. In New York, despite some intimation that *Haelan* and subsequent federal cases did not definitively state New York law,⁵⁹

55.

[W]e conclude that the California appellate courts would . . . afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under the rubric of "privacy," "property," or "publicity"; we only determine that they would recognize such an interest and protect it.

Id. at 825-26.

56. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (citations and emphasis omitted); *see Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1984):

[The] "right of privacy" is not to be confused with the "right of publicity" first recognized in *Haelan* . . . , which remedies the unjust enrichment caused by an unauthorized exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money and effort The right of privacy protects individual personality and feelings, the right of publicity protects the commercial value of a name or likeness.

Id. at 85 n.6 (citations omitted).

57. *House v. Sports Films & Talents, Inc.*, 351 N.W.2d 684 (Minn. App. 1984).

58. *Id.* at 685 (quoting *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970)).

59. *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (App. Div. 1981): New York courts have never explicitly recognized a non-statutory right of publicity

Irrespective of whether a separate and distinct common law right of publicity exists in this State, we believe that the so-called right of publicity is subsumed in

the *Haelan* doctrine appeared firmly established,⁶⁰ and it was "assumed that the New York courts would recognize such a common law right independent of that protected by [statute]."⁶¹ Nevertheless, in December 1984 the New York Court of Appeals held in *Stephano v. News Group Publications, Inc.*⁶² that no common-law right of publicity exists in New York:

[T]he statute [Civil Rights Law, Sections 50 and 51] applies to any use of a person's picture or portrait for advertising or trade purposes [T]he statute parallels the common law right of privacy which generally provides remedies for any commercialization of the individual's personality without his consent Since the "right of publicity" is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory . . . , the plaintiff cannot claim an independent common-law right of publicity.⁶³

Stephano, of course, is too recent to allow confident prediction of its impact, but some of the construction problems flowing from its rejection of *Haelan* are evident. The Court of Appeals itself recognized that it transformed certainty into confusion with respect to descendibility and assignability of the no longer independent right of publicity.⁶⁴ Of more immediate concern is *Stephano's* effect on cases involving appropriation of identity, even for commercial purposes, when the "identity" involved is other than the statutory requirements of "name," "portrait," and "picture."

For example, a New York court probably would agree with the Sixth Circuit's⁶⁵ determination that the phrase "Here's Johnny"

sections 50 and 51 of the Civil Rights Law [T]he statute does not distinguish between the private person for whom injured feelings may be the paramount concern and the public figure whose right of privacy is limited in any event by public interest considerations, but whose economic interests are affected by the wrongful exploitation of his or her name or likeness Both injuries are caused by the same wrong and should be redressed by the same cause of action.

Id. at 435, 439-40, 438 N.Y.S.2d at 1009, 1012 (citations omitted); see *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 825, 829 (App. Div. 1980) ("No such nonstatutory right has yet been recognized by the New York State courts"); see *Nimmer, supra* note 3, at 222.

60. See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 133-34 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220-21 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983); *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 487-88 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975).

61. *Allen v. National Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985).

62. 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984).

63. *Id.* at 183, 474 N.E.2d at 584, 485 N.Y.S.2d at 224 (footnote and citations omitted).

64. See *infra* notes 204-06 and accompanying text.

65. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

used to advertise a portable toilet did not involve an appropriation of Johnny Carson's "name," but *Stephano* appears to preclude a further finding that the undisputed appropriation of Carson's "identity" was independently actionable absent a determination of unfair competition or public confusion.⁶⁶ *Stephano* also appears to overrule New York decisions such as *Lombardo v. Doyle, Dane & Bernbach, Inc.*,⁶⁷ in which the court sustained a right of publicity claim despite a finding that the defendant appropriated neither a "name" nor any other statutorily specified attribute; the plaintiff's "identity" was embedded in a distinctive musical style. Although the New York interpretation of "portrait or picture" has been somewhat flexible,⁶⁸ the interpretation probably cannot be stretched to accommodate the variety of ways in which one might attempt to commercialize a celebrity's persona.

Stephano seems to have retied the conceptual knot between privacy and publicity, merging the quite different interests each recognizes and in the process attenuating the right of publicity. The statutory protection that New York and other "statutory" jurisdictions afford the right of privacy is quite specific. Moreover, the statutory limitations to "name, portrait, or picture" do not differ significantly from the common-law focus upon "name or likeness." In both, the more elusive concept of "identity" — the celebrity's persona — is largely ignored. In view of *Haelan's* prominence in the development of the right of publicity throughout the United States, the New York Court of Appeals' apparent rejection of the case may have ramifications far beyond New York,⁶⁹ which, as an entertainment center, has been the principal jurisdiction dealing with the right of publicity.

The consequences of recombining publicity and privacy already have been felt. In *Allen v. National Video, Inc.*,⁷⁰ decided in May 1985, a federal district court in New York was required to assess *Stephano's* effect on claims arising out of advertising tech-

66. *Id.* at 835-36; see also *infra* notes 243-53 and accompanying text.

67. 58 A.D.2d 620, 396 N.Y.S.2d 661 (App. Div. 1977).

68. See *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984).

69. It is interesting to note, and perhaps indicative of the current judicial mood, that in a recent Seventh Circuit opinion, Judge Posner makes reference to "the commercial-appropriation branch of the right of privacy — what is sometimes called the 'right of publicity.' . . . " *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986).

70. 610 F. Supp. 612 (S.D.N.Y. 1985).

niques most peculiar to the intangible value of celebrity. In *Allen* a franchisor of video cassette rental outlets pictured a Woody Allen "look-alike" in its advertisements. The defendants included the franchisor, the "look-alike," and his employer, "Ron Smith's Celebrity Look-Alikes," an agency formed specifically to capitalize on the public infatuation with celebrity. Allen sued for damages and for an injunction to end the continued impersonation by the individual "look-alike" and the employing agency. He alleged a violation of his New York statutory right to privacy, his common-law right of publicity, and his rights under section 43(a) of the Lanham Act.⁷¹

With respect to the right of publicity claim, the court held that *Stephano* means that "no separate common law cause of action to vindicate the right of publicity exists in New York . . . [and that the court must] treat plaintiff's causes of action for privacy and publicity together under the general rubric of privacy."⁷² Consequently, the defendants' patent attempts to evoke the plaintiff's identity for their commercial purposes was largely irrelevant for the merged "privacy" claim. Rather, the sole issue was whether the use of a "look-alike" in the context of the advertisement amounted to the use of Allen's "picture" under the privacy statute.⁷³ While Judge Motley chose not to resolve this question, finding that the Lanham Act claim afforded the plaintiff the injunctive relief he sought,⁷⁴ she expressed serious concern over *Stephano's* impact:

Since the New York Court of Appeals has subsumed the common law right of publicity within the relatively narrow statutory requirements of Section 51 [of the Civil Rights Law], it may fall to the state legislature to fashion a workable remedy to protect the pecuniary interests of celebrities in the market value of their identities Controlling the use of a person's "portrait or picture" may be sufficient to protect the feelings of private citizens, but a broader statute . . . might provide fuller protection for the interests threatened when a celebrity's endorsement is implied without the use of an actual "portrait or picture."⁷⁵

As Judge Motley recognized, to the extent that *Stephano* has retied the knot joining the right of publicity to the right of privacy, the law has been deprived of the benefits of a flexible common-law approach to the commercialization of identity and the "associative

71. *Id.* at 617.

72. *Id.* at 621.

73. *Id.* at 622.

74. *Id.* at 624-25; see *infra* notes 244-45 and accompanying text.

75. *Id.* at 624 n.5.

value" inherent in celebrity. The complex interests peculiar to the formerly independent right of publicity are thereby left unprotected.

III. DESCENDIBILITY: "WHO IS THE HEIR OF FAME?"

The chaotic consequences of the linkage of privacy and publicity are demonstrated most vividly in the *post mortem* "star" wars, the ghoulish pursuit of profit from the persona of a deceased celebrity. Judicial opinion and commentary alike divide over the issue of descendibility: whether a celebrity's assignees or heirs may assert the celebrity's exclusive commercial exploitation right and, if so, whether any such *post mortem* right is conditioned upon the existence and extent of the celebrity's lifetime commercial exploitation of his persona.⁷⁶ The recent focus upon the issue of descendibility has diverted attention from the issues central to the development of the right of publicity itself. There seems to have evolved an ad hoc jurisprudence of death in which the celebrity interest and the public interest become muddled rather than clarified. It is fitting that the polarity of views as to descendibility is mirrored in a polarity of central figures — Martin Luther King, Jr.,⁷⁷ and Count Dracula.⁷⁸ While Elvis Presley,⁷⁹ Laurel and

76. For representative commentary in this area, see Ausness, *supra* note 6, at 1003-10 (suggesting limiting *post mortem* actions to assignees who purchased their publicity rights during the celebrity's lifetime, thereby dealing with both the exploitation and survivability problems); Donenfeld, *Property or Other Rights in the Names, Likenesses or Personalities of Deceased Persons*, 16 BULL. COPYRIGHT Soc'y. 17 (1968); Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Gordon, *supra* note 3; Hoffman, *supra* note 3, at 44 (advocating "the fully uninhibited and unlimited descent of publicity rights"); Kwall, *supra* note 3, at 207-29 ("[A] freely descendible right of publicity for all individuals is the only approach which truly vindicates the primary interests protected by the right of publicity.") *Id.* at 228; Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (Autumn 1981); McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right*, 20 CAL. W.L. REV. 415 (1984); Sims, *supra* note 3, at 480-81 ("The relationship among survivability of publicity rights, lifetime exercise, and incremental career achievement is quite speculative The logic of the lifetime exercise requirement is sufficiently tenuous that fairness requires that any doubts be resolved in favor of the survivability of the celebrity's publicity rights for the benefit of his heirs.").

77. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

78. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

79. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert denied*, 440 U.S. 908 (1979); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981),

Hardy,⁸⁰ and the Marx Brothers⁸¹ have provided something approaching slapstick comedy and farce, Agatha Christie⁸² has created mystery, and Tennessee Williams⁸³ has provided the dramatic irony.⁸⁴

A. *Polarity and Complexity: Martin Luther King, Jr., and Dracula*

In 1982 in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,⁸⁵ the Supreme Court of Georgia, speaking again with the clarity that marked its recognition of a common-law right of privacy almost eighty years earlier in *Pavesich*,⁸⁶ found that a celebrity has the exclusive right to control the exploitation of his personality,⁸⁷ and this "right of publicity" is assignable⁸⁸ and descendible.⁸⁹ At issue was the right of Martin Luther King, Jr.'s estate and certain assignees to prevent the defendant from selling plastic busts of Dr. King. The litigation began in a federal court in Georgia,⁹⁰ but in a refreshing effort to avoid the problems created by federal court enunciation of forum state law in the absence of definitive state court holdings,⁹¹ the Eleventh Circuit certified⁹² the following questions to the Supreme Court of Georgia:

(1) Is the "right to [sic] publicity" recognized in Georgia as a right distinct

cert. denied, 456 U.S. 927 (1982).

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

81. *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

82. *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).

83. *Southeast Bank, N.A. v. Lawrence*, 104 A.D.2d 213, 483 N.Y.S.2d 218 (App. Div. 1984), *rev'd on other grounds*, 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

84. This case provides particular irony because a lower New York court rendered the decision, which enunciated a descendible common law right of publicity distinct from New York's statutory right of privacy, one week before the New York Court of Appeals announced that there is no common law right of publicity in New York, *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984); *see supra* notes 62-64 and accompanying text.

85. 250 Ga. 135, 296 S.E.2d 697 (1982).

86. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *see supra* note 20 and accompanying text.

87. 250 Ga. at 143, 296 S.E.2d at 703.

88. *Id.* at 143, 296 S.E.2d at 704.

89. *Id.* at 145, 296 S.E.2d at 705.

90. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd*, 694 F.2d 674 (11th Cir. 1983).

91. *See supra* notes 59-64, and *infra* notes 169-76 and accompanying text.

92. *See GA. CODE ANN. § 24-3902* (Harrison 1981 & Supp. 1984); *see also* *Miree v. United States*, 242 Ga. 126, 131-33, 249 S.E.2d 573, 577-78 (1978).

from the right to [sic] privacy?

(2) [D]oes the "right to [sic] publicity" survive the death of its owner? Specifically, is the right inheritable and devisable?

(3) [M]ust the owner have commercially exploited the right before it can survive his death?⁹³

Building on *Pavesich*, Georgia's highest court answered the first question affirmatively. The court concluded "that while private citizens have the right of privacy, public figures have a similar right of publicity . . ." ⁹⁴ Although the court noted the similarity of the celebrity's right of publicity⁹⁵ to the private citizen's right of privacy, the court did not then mechanically use the privacy simile, the associated Prosser analysis, and the concomitant assumption of a purely personal right⁹⁶ to dispose of the descendibility issue. Rather, the court looked at the nature of the right, the real interest being protected, in coming to an affirmative answer to the second question.⁹⁷

The court began by holding, like *Haelan*,⁹⁸ that a celebrity may assign the right of publicity during his lifetime. The court noted that "without this characteristic, full commercial exploitation of one's name and likeness is practically impossible . . . [and that] without assignability the right of publicity could hardly be called a 'right.' "⁹⁹ The court's laconic treatment of the matter of assignability should not obscure the fact that this concept is fundamental to the development of a common-law right of publicity and that right's separation from the right of privacy. Indeed, in *Haelan* it was the question of assignability that required the Second Circuit to find a right of publicity distinct from the New York statutory right of privacy.¹⁰⁰

From the base of assignability, the Georgia court focused on

93. See *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983); see 250 Ga. at 137, 296 S.E.2d at 699.

94. 250 Ga. at 143, 296 S.E.2d at 703.

95. Once again, as in *Pavesich*, the Georgia Court moved without elaboration to the heart of what should be intuitive: the right at issue is peculiar to celebrity. See Epstein, *supra* note 20; see also *supra* note 3.

96. See *supra* notes 31-34 and accompanying text.

97. 250 Ga. at 143-45, 296 S.E.2d at 704-05.

98. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

99. 250 Ga. at 143, 296 S.E.2d at 704 (citation omitted).

100. See *supra* notes 36-37 and accompanying text. The recent refusal of the New York Court of Appeals in *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984), to recognize that distinction at the very least leaves open the assignability question and the continuing utility of *Haelan*. See *supra* notes 62-64 and accompanying text.

the reality of "celebrity" — the idea that the celebrity creates economic value in his persona and that this value can produce profits for one who exploits that persona — and the correlative policy question whether the benefits that flow from celebrity should go to the advertiser, in the form of a windfall profit, or to the celebrity's heirs.¹⁰¹ Resolving the issue, the court held that "the right of publicity survives the death of its owner and is inheritable and devisable."¹⁰²

With respect to the third question, the necessity of lifetime commercial exploitation (for example, a celebrity's *inter vivos* transfer of the right to use his name or likeness¹⁰³), the court was quick to find a negative answer, determining that the celebrity need not have exploited his persona during his lifetime.¹⁰⁴ The court treated the matter as a non-issue, finding that the proposition was fundamentally absurd.

The net result [of requiring lifetime commercial exploitation] would be to say that celebrities and public figures have the right of publicity during their lifetimes (as others have the right of privacy), but only those who contract for bubble gum cards, posters and tee shirts have a descendible right of publicity upon their deaths That we should single out for protection after death those . . . who exploit their personae during life, and deny protection after death to those who enjoy public acclamation but did not exploit themselves during life, puts a premium on exploitation. Having found that there are valid reasons for recognizing the right of publicity during life, we find no reason to protect after death only those who took commercial advantage of their fame.

. . . In our view, a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.¹⁰⁵

101.

Recognition of the right of publicity rewards and thereby encourages effort and creativity. If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use. Conversely, those who would profit from the fame of a celebrity after his or her death for their own benefit and without authorization have failed to establish their claim that they should be the beneficiaries of the celebrity's death. Finally, the trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise.

250 Ga. at 145-46, 296 S.E.2d at 705.

102. *Id.* at 145, 296 S.E.2d at 705.

103. *Id.* at 146, 296 S.E.2d at 705.

104. *Id.* at 146-47, 296 S.E.2d at 705-06.

105. *Id.* at 147, 296 S.E.2d at 706 (citation and footnote omitted). The court noted the exploitation "requirement" arose out of the New York Federal District Court's dicta in *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978). 250 Ga. at 146, 296 S.E.2d at 705-06.

The intuitive, down-to-earth approach of the Georgia Supreme Court is based on the reality of the commercial value of celebrity in our society, rather than on the morality of commercializing one's name or the peculiar conceptual label attached to the activity. By analyzing and focusing on the interests involved, the court avoided the conceptual pitfalls that have characterized most attempts to define the right of publicity.¹⁰⁶

The Georgia approach may be contrasted with the gyrations of the California Supreme Court in the *Dracula* case, *Lugosi v. Universal Pictures*,¹⁰⁷ in which Bela Lugosi's heirs sought to enjoin Universal Pictures from commercially exploiting, through the grant of merchandising licenses, the Count Dracula character bearing Lugosi's likeness. In denying relief, the court's plurality opinion¹⁰⁸ relied upon Dean Prosser's four-pronged analysis of privacy with its attendant emphasis upon the personal nature of the privacy right.

The right is not assignable and . . . *there is no common law right of action for a publication concerning one who is already dead.*

. . . [W]hether or not the right sounds in tort or property, and we think with Dean Prosser that a debate over this issue is pointless, what is at stake is the question whether this right is or ought to be personal.

106. Indeed, in his special concurrence Justice Weltner opined that the court went too far conceptually in even discussing a right of publicity. For Weltner the matter was one of an obvious unjust enrichment for which there must be redress:

Each lawful restraint finds its legitimacy . . . *not* because it is laid against some immutable rule . . . but because it is perceived that it would be irresponsible to the interest of the community—to the extent of being *unconscionable*—that such conduct go unrestrained.

The doctrine of unjust enrichment finds its genesis in such a reckoning. It can be applied to just such a matter as that before us. Were we to do so, we could avoid entering the quagmire of combining considerations of "right of privacy," "right of publicity," and considerations of *inter vivos* exploitation. We would also retain our constitutional right of free speech uncluttered and uncompromised by these new impediments of indeterminate application.

250 Ga. at 152, 296 S.E.2d 709 (emphasis in original).

107. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

108. The opinion "By The Court," which essentially adopted the intermediate appellate court's opinion, *see id.* at 816, 603 P.2d at 426, 160 Cal. Rptr. at 324, was that of only three of the justices. Justice Mosk concurred on the ground that a right of publicity should not attach to an actor merely portraying a character that others created for him, as opposed to "[a]n original creation of a fictional figure played exclusively by its creator, [which] may well be protectable . . . Groucho Marx just being Groucho Marx, with his moustache, cigar, slouch and leer, cannot be exploited by others." *Id.* at 825, 603 P.2d at 432, 160 Cal. Rptr. at 332 (citation omitted); *see infra* notes 285-87 and accompanying text. Chief Justice Bird, with Justices Manuel and Tobriner, dissented. 25 Cal. 3d at 828, 603 P.2d at 434, 160 Cal. Rptr. at 332.

. . . We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime.¹⁰⁹

With its intermingled discussion of the personal nature of the right and the need for lifetime exploitation, its passing reference, without real comment,¹¹⁰ to California's privacy statute,¹¹¹ and its academically appealing lack of clarity, the *Lugosi* opinion has been the focus of extensive comment.¹¹² The opinion created confusion over just what the law in California is, particularly whether descendibility would be found with respect to commercial uses that the decedent exercised during his or her lifetime. The confusion persists notwithstanding the fact that in *Guglielmi v. Spelling-Goldberg Productions*,¹¹³ decided two days after *Lugosi*, the same court unequivocally interpreted *Lugosi* as holding that "the right of publicity . . . is not descendible and expires upon the death of the person [protected by the right]."¹¹⁴

In her dissent in *Lugosi*¹¹⁵ and her concurrence in *Guglielmi*,¹¹⁶ Chief Justice Bird sought to distinguish the right of publicity from the personal privacy right cognate and urged recognition of the peculiar economic interest involved, a recognition that *per force* would entail descendibility without the need for lifetime

109. 25 Cal. 3d at 820, 823-24, 603 P.2d at 429, 431, 160 Cal. Rptr. at 327, 329 (emphasis in original); see *supra* notes 31-32 and accompanying text.

110. 25 Cal. 3d at 819 n.6, 603 P.2d at 428 n.6, 160 Cal. Rptr. at 326 n.6.

111. CAL. CIV. CODE § 3344 (West Supp. 1986); cf. *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 416-17, 198 Cal. Rptr. 342-46 (1983) (noting that the statute "complements" rather than "codifies" the common law right of privacy).

112. See, e.g., Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987 (1981); Felcher & Ruhin, *supra* note 76; Sims, *supra* note 3; see also Kwall, *supra* note 3, at 218-21.

113. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

114. *Id.* at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353. As the Second Circuit observed: We conclude that *Lugosi* is subject to two interpretations. It may mean that California does not recognize any descendible right of publicity and that the heirs of a celebrity must rely on trademark law to protect the good will that the celebrity brought to a product during his lifetime. Alternatively, *Lugosi* might mean that, wholly apart from trademark law, California recognizes a descendible right of publicity that enables the heirs to prevent the use of a celebrity's name and likeness on any product or service the celebrity promoted by exploiting his right of publicity during his lifetime California would recognize, at most, a descendible right of publicity only in connection with particular commercial situations—products and services—that a celebrity promoted during this lifetime

Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 323 (2d Cir. 1982). Adopting the alternative construction, the Eleventh Circuit has interpreted *Lugosi* and California law as recognizing descendibility when there has been lifetime commercial exploitation. *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1543-44 (11th Cir. 1983).

115. 25 Cal. 3d at 828, 603 P.2d at 434, 160 Cal. Rptr. at 332.

116. 25 Cal. 3d at 862, 603 P.2d at 455, 160 Cal. Rptr. at 353.

exploitation.¹¹⁷ To deal with the problem of recognizing a theoretically perpetual *post mortem* right of publicity, Justice Bird, using the copyright analogy, proposed to limit the duration of the right to a period of fifty years after death.¹¹⁸

For California, legislative action has resolved some of the uncertainty engendered by *Lugosi*. California Civil Code Section 990, enacted in 1984, specifically creates "property rights" in certain aspects of a deceased personality's persona.¹¹⁹ These property rights are "freely transferable, in whole or in part, by contract or by means of trust or testamentary documents."¹²⁰ In the absence of contract or testamentary disposition, the statute limits the class of successors¹²¹ and, following Justice Bird's suggestion,¹²² provides that no successor may bring an action for a use that occurs more than fifty years after the death of the deceased celebrity.¹²³ Al-

117.

The right of publicity protects the intangible proprietary interest in the commercial value in one's identity. Like other intangible property rights, its value often cannot be reaped if the individual may not transfer all or part of that interest to another for development Since it is clear that the right of publicity is hardly viable unless assignable, I agree with the numerous authorities that have recognized the right is capable of assignment.

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

. . . .

. . . [R]equiring the exercise of the right of publicity during the person's lifetime as a condition for inheritability is not only inconsistent with the rationale underlying the right but imposes an ill-defined prerequisite on its preservation.

Lugosi v. Universal Pictures, 25 Cal. 3d at 845-46, 848, 603 P.2d at 445, 447, 160 Cal. Rptr. at 343, 345 (1979) (Bird, C.J., dissenting) (footnotes omitted) (emphasis in original).

118. *Id.* at 847, 603 P.2d at 446-47, 160 Cal. Rptr. at 344-45 (Bird, C.J., dissenting).
119.

(a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof

(b) The rights recognized under this section are property rights

CAL. CIV. CODE § 990 (West Supp. 1986).

120. *Id.* at § 990(b).

121. *Id.* at § 990(d).

122. See *supra* text accompanying note 118.

123. CAL. CIV. CODE § 990(g) (West Supp. 1986). Moreover, maintenance of an action by a successor-in-interest is conditioned upon registration with the Secretary of State of a publicly recorded "claim of the rights." *Id.*

though the statute attempts to set standards for determining whether a given use is for "advertising" purposes,¹²⁴ litigation is the inevitable consequence of making it "a question of fact whether or not the use . . . was so directly connected with . . . commercial sponsorship or with . . . paid advertising as to constitute a use for which consent is required."¹²⁵ The statute exempts advertising that is merely incidental to an otherwise permitted use¹²⁶ and uses that are "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."¹²⁷ The statute also specifically exempts literary, political, artistic, or "newsworthy" uses.¹²⁸

The California statutory approach's most interesting aspect is perhaps its recognition of celebrity value and the concomitant judicial construction problems that this recognition is likely to produce. A "deceased personality," the subject for statutory protection, is defined as "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death."¹²⁹ Although celebrity value is essential for protection, the statute makes clear that lifetime commercial exploitation of that value is not necessary.¹³⁰

The California statute undoubtedly will be the source of judi-

124. "The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required . . . solely because the material containing such use is commercially sponsored or contains paid advertising."

Id. at § 990(k).

125. *Id.*; cf. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985); *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

126. CAL. CIV. CODE § 990(n)(4) (West Supp. 1986).

127. *Id.* at § 990(j).

128.

This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

Id. at § 990(n). The statute thus would render academic such issues as were present in *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982) and *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).

129. CAL. CIV. CODE § 990(h) (West Supp. 1986).

130. *Id.*

cial emendation and general confusion.¹³¹ Indeed, the provision that the statute's "remedies . . . are cumulative and shall be in addition to any others provided for by law"¹³² raises the question whether the courts may yet fashion a "complementary" common-law remedy.¹³³ Of greater significance for the evolution of a celebrity-based right of publicity is the California legislature's choice neither to codify nor to reject that right; rather, the legislature created yet another right, vested solely in the successors of the celebrity, and left unresolved the issues surrounding the conceptual nature of the right of publicity itself.¹³⁴

California's ad hoc treatment of the right of publicity's descendibility aspect very well may retard orderly development of the law and may inflict harm that a comprehensive conceptual approach based upon the actual interests underlying the right of publicity could have avoided. California's piecemeal attack on the problem of descendibility and exploitation will make it both less necessary and more difficult for the courts and legislatures effectively to articulate the values and interests around which this area of the law must function and thus will generate the "bad law" that inevitably flows from "hard cases."

B. Contradictory Policy: The Elvis Presley Litigation

Complexity with respect to the right of publicity has not been limited to Hollywood. New York, with its theatrical, broadcasting, and advertising activities, and Tennessee, with its flourishing music centers of Nashville and Memphis, have presented the arenas for further conflict. The primary vehicle for conflict in both jurisdictions has been the massive effort to capitalize on the public infatuation with the memory of Elvis Presley.

During his lifetime, Presley assigned the exclusive right to ex-

131. For example, because the statute precisely enumerates the uses that are subject to the rights of successors of a "deceased personality" ("name, voice, signature, photograph, or likeness"), one may wonder how a California court might have dealt with *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), which involved the use of a famous race car driver's distinctive automobile design, had the appropriation occurred and the action been brought after the personality's death.

132. CAL. CIV. CODE § 990(m) (West Supp. 1986).

133. See, e.g., *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 416-17, 198 Cal. Rptr. 342, 346 (1983).

134. Thus, it is possible to have the anomalous situation in which, through a literal reading of *Lugosi* and *Guglielmi*—which emphasize the personal, privacy-based nature of the right—a court might hold that a living celebrity does not have a right of publicity that he may assign exclusively to others, but that the right of exclusive assignment would vest in his heirs.

exploit the commercial value of his personality to Boxcar Enterprises, a corporation in which he owned an interest. Shortly after Presley's death, Boxcar licensed Factors Etc., Inc. to use those rights.¹³⁵ In *Memphis Development Foundation v. Factors Etc., Inc.*¹³⁶ the Sixth Circuit, propounding Tennessee law, refused to recognize *post mortem* exclusivity in Factors. Unlike the California court, the court did not dwell on the Prosser analysis or on the question of whether the right of publicity is "property" and therefore descendible. Rather, the court dealt with the nature of fame and how societal values concerning fame may be balanced. The approach is stated in the opening words of the opinion:

This appeal raises the interesting question: Who is the heir of fame? The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality. We are called upon . . . to determine whether . . . the exclusive right to publicity survives a celebrity's death. We hold that the right is not inheritable. After death the opportunity for gain shifts to the public domain, where it is equally open to all.¹³⁷

In weighing the balance in favor of the public domain,¹³⁸ the court was moved by the ephemeral nature of fame:

Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image The intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public.¹³⁹

The court examined the policy considerations favoring descendibility,¹⁴⁰ but found that these factors were not sufficient. The court analogized the interest in fame to the interest in reputation, and concluded that the former should terminate at death just as the latter does.¹⁴¹

135. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 216-17 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

136. 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

137. 616 F.2d at 957.

138. See *Lange*, *supra* note 76.

139. 616 F.2d at 959.

140. *Id.* at 958.

141.

[T]here are strong reasons for declining to recognize the inheritability of the right. A whole set of practical problems of judicial line-drawing would raise should the court recognize such an inheritable right Fame falls in the same category as reputation; it is an attribute from which others may benefit but may not own.

The law of defamation, designed to protect against the destruction of reputation

The court was not particularly concerned with "proprietary" considerations. Therefore, whether the decedent commercially exploited his persona during his lifetime is immaterial to the determination of *post mortem* rights.¹⁴² Rather, the broader societal interest in dominion over a name that the public largely has created supports what the court deemed to be a "fair" disposition. Rejecting the monopolization of *post mortem* commercial value by a celebrity's heirs or assigns, the court concluded that "[t]he memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."¹⁴³ The Sixth Circuit — much like the Georgia court in *Martin Luther King, Jr.*,¹⁴⁴ although with a contrary result — acted intuitively. The court felt simply that something was not right about institutionalizing "fame":

Heretofore, the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual, whether famous or not. Commercialization of this virtue after death in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture.¹⁴⁵

Although the Sixth Circuit purportedly announced Tennessee law in *Memphis Development*, the situation subsequently became cloudy. In 1981 a Tennessee Chancery Court held that, the Sixth Circuit's contrary determination notwithstanding, Tennessee law does recognize a descendible right of publicity.¹⁴⁶ In a 1982 deci-

. . . , provides an analogy. There is no right of action for defamation after death

The two interests that support the inheritability of the right of publicity, namely, the "effort and creativity" and the "hopes and expectations" of the decedent, would also support an action for libel or slander for destruction of name and reputation after death. Neither of these reasons, however, is sufficient to overcome the common law policy terminating the action for defamation upon death.

Id. at 959 (citation omitted).

142. *Id.* at 960.

143. *Id.* at 960.

144. See *supra* notes 85-106 and accompanying text.

145. 616 F.2d at 959.

146. *Commerce Union Bank v. Coors of the Cumberland, Inc.*, 7 Media L. Rep. (BNA) 2204 (Tenn. Ch. Ct. 1981). The Chancellor cited with approval Judge Mansfield's dissenting opinion in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 288 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); Mansfield noted Tennessee's prominence in the music industry, and found that both precedent and policy supported a determination of descendibility:

The right of publicity should survive after death not only because it is supported by judicial precedent and property interest and fundamental fairness considerations, but also because of public policy The ability to leave a valuable property interest to one's heirs is further incentive for enterprise and creativity and deserves judicial protection.

Permitting the right of publicity to survive death should have special significance

sion involving Presley's licensee, however, a different Tennessee Chancellor followed *Memphis Development* in holding that Tennessee does *not* recognize such a descendible right.¹⁴⁷ In an effort to clarify the status of the right of publicity, Tennessee, like California,¹⁴⁸ attempted a legislative resolution in 1984.

The Tennessee statute¹⁴⁹ is entitled "The Personal Rights Protection Act of 1984."¹⁵⁰ Unlike the 1984 California statute, with which Tennessee's statute shares certain provisions,¹⁵¹ the Act is not an ad hoc solution to the conundrum of descendibility, but purports comprehensively to codify the right of publicity in Tennessee. The Tennessee statute recognizes in "[e]very individual . . . a property right in the use of his name, photograph or likeness in any medium in any manner,"¹⁵² which right is assignable, licensable, and descendible irrespective of lifetime commercial exploitation.¹⁵³ The right endures for the lifetime of the individual, for ten years after his death, and thereafter unless there shall have been no commercial exploitation of the decedent's name, photograph, or likeness for two years following the expiration of the ten year period.¹⁵⁴ Tennessee limits protection to the use of "name, photograph or likeness in any medium . . . as an item of commerce for purposes of advertising products, merchandise, goods or services, or for purposes of fundraising, solicitation of donations, purchases of products, merchandise, [and] goods or services" ¹⁵⁵ With some circularity, the statute defines "likeness" as "the use of an

in Tennessee It would be unreasonable not to protect the efforts and energies of so many Tennessee artists.

7 Media L. Rep. (BNA) at 2208 (citations omitted). The Tennessee Court of Appeals appears to have effectively reversed this determination, which was made in connection with a motion to dismiss the complaint. In 1984, at a later stage in the same proceedings, the court cited *Memphis Development* with approval and stated that "a right of publicity does not survive the death of the holder." *Commerce Union Bank v. Coors of the Cumberland*, No. 83-327-II slip op. (Tenn. Ct. App., June 20, 1984).

147. *Lancaster v. Factors Etc., Inc.*, 9 Media L. Rep. (BNA) 1109 (Tenn. Ch. Ct. 1982).

148. See *supra* note 119.

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

150. *Id.* at § 47-25-1101.

151. CAL. CIV. CODE § 990 (West Supp. 1985); see *supra* notes 119-30 and accompanying text.

152. TENN. CODE ANN. § 47-25-1103(a) (1984).

153. *Id.* at § 47-25-1103(b).

154. *Id.* at § 47-25-1104.

155. *Id.* at § 47-25-1105(a). The statute is virtually identical to the California statute in leaving as a "question of fact" whether a given use is "so directly connected with . . . commercial sponsorship or with . . . paid advertising as to constitute a use for purposes of advertising or solicitation." See § 47-25-1107(b); CAL. CIV. CODE § 990(k) (West Supp. 1986); see *supra* notes 124-25 and accompanying text.

image of an individual for commercial purposes."¹⁵⁶

In its purported comprehensiveness, its applicability to "every individual"¹⁵⁷ rather than to celebrities whose personae have "commercial value,"¹⁵⁸ and its specificity of protected uses, the Tennessee statute may in time become a limitation upon, as well as a concrete recognition of, the right of publicity.¹⁵⁹ Nevertheless, as in California, the Tennessee legislature at least has resolved for that state the issue of the right of publicity's descendibility. With "the continued growth of Nashville and Memphis as centers for the lives and activities of music industry personalities,"¹⁶⁰ Tennessee's position with respect to the right of publicity has an impact parallel to New York's and California's.

While the courts in Tennessee were grappling with claims to exclusivity asserted by Elvis Presley's *post mortem* licensee, the same issue and the same licensee were before the federal courts in New York. In *Factors Etc., Inc., v. Pro Arts, Inc.* ("*Factors I*"),¹⁶¹ Factors sought to prevent the distribution and sale of a Presley "memorial poster," and the Second Circuit was required to determine New York law with respect to the descendibility of the right of publicity. The Second Circuit, like the California court in *Lugosi*,¹⁶² began by examining the entanglement of the right of publicity with Prosser's analysis of the right of privacy.¹⁶³ The Prosser model's linkage and the model's conceptual separation of the publicity right as a "property" right had been the basis for a 1975 dis-

156. TENN. CODE ANN. § 47-25-1102(3) (1984).

157. *Id.* at § 47-25-1103(a).

158. *Cf.* CAL. CIV. CODE § 990(h) (West Supp. 1986); see *supra* notes 129-30 and accompanying text.

159. For example, it is doubtful that a television news broadcast's appropriation of an "entire act" which served to create liability in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), would be prohibited "advertising" under the Tennessee statute. Certainly the incorporation of a celebrity's distinct persona in a play, as with the Marx Brothers in *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd.*, 689 F.2d 317 (2d Cir. 1982), would not be actionable under the statute. Nor is it likely that Motschenbacher's race car, *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), or Bert Lahr's voice, *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962), would be an "image" that constitutes a "likeness" deserving relief under the Tennessee statute.

160. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 288 (2d Cir. 1981) (Mansfield, J., dissenting), *cert. denied*, 456 U.S. 927 (1982).

161. 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

162. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); see *supra* note 109 and accompanying text.

163. "[M]uch confusion shrouds the so-called right of publicity, largely because it has often been discussed under the rubric right of privacy." 579 F.2d 215 at 220.

trict court opinion in *Price v. Hal Roach Studios, Inc.*¹⁶⁴ In *Price* the court held that commercial exploitation rights to the personae of the comedic creations Laurel and Hardy were assignable and descendible.¹⁶⁵ Relying on *Haelan*¹⁶⁶ and approving the district court's language in *Price*, the *Factors I* court again "recognized that the right of publicity exists independent from the [New York] statutory right of privacy and that it can be validly transferred by its owner."¹⁶⁷ Noting that Presley had in fact exploited his commercial rights during his lifetime, the court found that the rights survived Presley's death and did not deal with the question whether the exploitation conditioned the survivability of the right.¹⁶⁸

Although the 1978 *Factors I* decision appeared to establish descendibility in New York, it did not end the Presley wars. The 1980 Sixth Circuit opinion in *Memphis Development*¹⁶⁹ caused the Second Circuit, in "*Factors II*,"¹⁷⁰ to reconsider its prior action. The *Factors II* court held that, as a matter of choice of law, a New

164. 400 F. Supp. 836 (S.D.N.Y. 1975).

165. The court in *Price* attempted to distinguish the right of publicity from the right of privacy and, with its focus on the commercial and "property" aspects of the former, found that descendibility is the logical conclusion of the analysis:

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation, on the other hand, are different in theory and in scope.

. . . .

. . . In arguing for termination of the right, defendants appear to confuse the two essentially different concepts, that is, the traditional right of privacy which clearly terminates upon death of the person asserting such a right and the right of publicity which we think does not terminate upon death.

Since the theoretical basis for the classic right of privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy is not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right . . . There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."

Id. at 843-44 (footnotes omitted).

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

167. 579 F.2d at 220-21.

168. *Id.* at 222 n.11.

169. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *see supra* notes 136-45 and accompanying text.

170. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

York court deciding the case would apply Tennessee law.¹⁷¹ The court further concluded that, absent state authority, it should treat the Sixth Circuit opinion as expounding Tennessee law and follow that opinion.¹⁷² Accordingly, the Second Circuit held that commercial exploitation rights in the Presley persona were not descendible.¹⁷³ The battle continued into 1983 as the Second Circuit¹⁷⁴ was asked to consider the impact on its *Factors II* holding of the post-*Memphis Development* contradictory Tennessee Chancery Court rulings on descendibility.¹⁷⁵ The court refused to reconsider its prior decision.¹⁷⁶

C. The New York Paradox

With respect to New York law, the tortuous road to descendibility continued after *Factors I*. In *Hicks v. Casablanca Records*,¹⁷⁷ in which Agatha Christie's estate asserted claims arising out of a purportedly fictional account of an episode in the late author's life, the federal district court followed *Factors I* in holding that "the right in the publicity value of one's name or likeness, is a valid property right which is transferable and capable of surviving the death of the owner."¹⁷⁸ The *Hicks* court further understood *Factors I* to require lifetime commercial exploitation — which the court found to have occurred — as a condition to survivability.¹⁷⁹

171. *Id.* at 281.

172. *Id.* at 281-82.

173. Judge Mansfield dissented, arguing vigorously that "the *Factors I* approach [is] the appropriate rule for Tennessee just as for New York." 652 F.2d at 288 (Mansfield, J., dissenting).

174. *Factors Etc., Inc. v. Pro Arts, Inc.* 701 F.2d 11 (2d Cir. 1983).

175. See *Commerce Union Bank v. Coors of the Cumberland*, 7 Media L. Rep. (BNA) 2204 (Tenn. Ch. Ct. 1981) (upholding descendibility); *Lancaster v. Factors Etc., Inc.*, 9 Media L. Rep. (BNA) 1109 (Tenn. Ch. Ct. 1982) (denying descendibility). The matter reached the court prior to the Tennessee Court of Appeals' effective reversal of *Coors* in 1984. See *supra* notes 146-47 and accompanying text.

176. *Factors Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11 (2d Cir. 1983). Judge Mansfield again dissented, arguing that the conflict in Tennessee "provides an additional reason for . . . following the usual practice, where we disagree with the reasoning of another circuit . . . , of deciding a case according to what we believe to be the more rational basis." *Id.* at 13. (Mansfield, J., dissenting). All told, from 1978 to 1983, the litigation between *Factors Etc.* and *Pro Arts* in the New York federal courts over the issue of descendibility consumed three Court of Appeals and four District Court opinions: 444 F. Supp. 288 (S.D.N.Y. 1977); 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); 496 F. Supp. 1090 (S.D.N.Y. 1980); 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); 541 F. Supp. 231 (S.D.N.Y. 1982); 701 F.2d 11 (2d Cir. 1983); 562 F. Supp. 304 (S.D.N.Y. 1983).

177. 464 F. Supp. 426 (S.D.N.Y. 1978).

178. *Id.* at 429.

179. *Id.* at 429-30.

The *Hicks* exploitation requirement (which the Georgia Supreme Court dismissed as dicta in *Martin Luther King, Jr.*¹⁸⁰) essentially was disregarded by the federal district court in New York in *Groucho Marx Productions, Inc. v. Day & Night Co.*¹⁸¹

Groucho Marx Productions involved an attempt by the heirs of each of the Marx Brothers to enjoin performance of a theatrical comedy whose principal device was to present a Chekhov play as it might have been performed by the Marx Brothers. The district court, relying on *Haelan*¹⁸² and *Factors I*,¹⁸³ found that New York would recognize a common-law right of publicity distinct from the state's statutory right of privacy¹⁸⁴ and found further that the publicity right survives death.¹⁸⁵ Considering the requirement of lifetime commercial exploitation, the court found that the Marx Brothers' professional performances, which had created celebrity, amounted to sufficient exploitation.¹⁸⁶ By finding satisfaction of the commercial exploitation requirement¹⁸⁷ simply in the activity creating celebrity, the court essentially eliminated the requirement in the act of recognizing it. "The court in effect, collapsed the exploitation requirement into the broader definition of celebrity sta-

180. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 146, 296 S.E.2d 697, 705-06 (1982); see *supra* note 105 and accompanying text.

181. 523 F. Supp. 485, 490-92 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

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

183. *Factors Etc., Inc., v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

184. 523 F. Supp. at 487-89.

185. *Id.* at 489-92.

186.

As a common sense matter, it must be noted that Leo [Chico] and Adolph [Harpo] Marx, no less than Julius [Groucho, who had made a lifetime transfer of his rights], earned their livelihoods by exploiting the unique characters they created [T]he Marx Brothers' fame arose as a direct result of their efforts to develop instantly recognizable and popular stage characters, having no relation to their real personalities Every appearance, contract and advertisement involving the Marx Brothers signified recognition by the performers of the commercial value of unique characters they portrayed. To suggest . . . that the right of publicity was not exploited because the Marx Brothers did not endorse dance studios, candy bars or tee shirts is wholly illogical.

Id. at 491-92.

187. Other courts had understood the requirement to mean commercial use by the celebrity *other* than the activity that made him or her famous. See, e.g., *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 146, 296 S.E.2d 697, 705 (1982).

tus."¹⁸⁸ On appeal¹⁸⁹ the Second Circuit Court of Appeals reversed the decision on the ground that a New York court would have applied California law, rather than New York law,¹⁹⁰ and that the California decisions¹⁹¹ required a determination of non-descendibility.¹⁹²

From high comedy to drama, the New York saga of descendibility was played at last before a New York appellate court in 1984 as a Tennessee Williams production, in *Southeast Bank, N.A. v. Lawrence*.¹⁹³ The plaintiff, representing the estate of Tennessee Williams, sought to enjoin the defendant, a theatre owner, from renaming his theatre the "Tennessee Williams." The plaintiff claimed that the defendant wanted "to trade . . . upon the popularity, good will and high standards of dramatic excellence created by the efforts and achievements of Tennessee Williams"¹⁹⁴ and not simply, as the defendant claimed, "to honor the memory and contributions of one of America's greatest playwrights."¹⁹⁵ To the court, the question of the right of publicity's descendibility was a "novel issue."¹⁹⁶

The court, focusing on the "property" interest, distinguished the right of publicity from the right of privacy¹⁹⁷ and found a common-law right of publicity distinct from the New York statutory

188. Note, *The Right of Publicity Revisited: Reconciling Fame, Fortune, and Constitutional Rights*, 62 B.U.L. Rev. 965, 991 (1982) (footnote omitted).

189. *Groucho Marx Prod., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982).

190. *Id.* at 320. See also *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982).

191. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

192. See *supra* notes 107-14 and accompanying text.

193. 104 A.D.2d 213, 483 N.Y.S.2d 218 (1st Dep't 1984), *rev'd on other grounds*, 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

194. *Id.* at 215, 483 N.Y.S.2d at 220.

195. *Id.*

196. *Id.* at 213, 483 N.Y.S.2d at 219.

197.

Unlike the right of privacy, which has been recognized as a personal right, in that it protects a person's "right to be let alone," the right of publicity has been recognized as a property right, in that "there is no question but that a celebrity has a legitimate proprietary interest in his public personality."

....

There can be no dispute that "Tennessee Williams" had a valuable property right in his name.

104 A.D.2d at 216, 219, 483 N.Y.S.2d at 221, 223 (quoting *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 622, 396 N.Y.S.2d 661, 663 (App. Div. 1977)) (citations and footnote omitted).

right of privacy. "[O]ur analysis of the legal authorities convinces us that there is a common-law right of publicity in New York, and, that it is a property right, and, as such is descendible."¹⁹⁸ Moreover, the court held unequivocally that descendibility of the right is not conditioned upon any form of lifetime commercial exploitation: "Although we find that Williams exploited his right of publicity when he was alive, we hold that there was no prerequisite for Williams to have exercised this right when he was alive"¹⁹⁹

In a concurring opinion Justice Sandler expressed concern over the need to rely upon an array of federal court decisions, with which he agreed on the merits,²⁰⁰ to find a New York right of publicity and over the issue of statutory preemption in New York.²⁰¹ He attempted to justify the result "on a more limited ground, although one difficult to fit into a familiar legal category It is surely an unacceptable proposition that the death of a major American dramatist should be regarded as a license to theatre owners to appropriate his name for commercial purposes by affixing it to the name of a theatre."²⁰²

Justice Sandler's concern proved to be well founded. One week after the release of the Appellate Division's opinion in *Southeast Bank*, the New York Court of Appeals held in *Stephano v. News Group Publications, Inc.*²⁰³ that New York does not recognize an independent common-law right of publicity distinct from the statutory right of privacy.²⁰⁴ *Stephano* did not involve questions of assignability or descendibility, and the court specifically noted that it

198. 104 A.D.2d at 219, 483 N.Y.S.2d at 223 (footnote omitted).

199. *Id.* at 218-19, 483 N.Y.S.2d at 222.

200. "In the absence of any authoritative New York decision clearly to the contrary, it seems to me appropriate to give persuasive weight to this carefully considered body of opinions. The basic principles set forth in them seem to me clearly sound" *Id.* at 220, 483 N.Y.S.2d at 224 (Sandler, J., concurring).

201.

The critical question before us is whether the right of publicity as it has been developed is so closely related to the right sought to be protected in sections 50 and 51 of the Civil Rights Law, that these sections should be deemed to preclude the acceptance of this separate common-law right. As to this issue, I acknowledge some uncertainty as to whether the statutory sections, which in terms prohibit the commercial or trade exploitation without consent of a person's name, picture or portrait, are correctly construed to permit a separate and distinct common-law cause of action on behalf of those whose name and picture have an established commercial value.

Id. at 220-21, 483 N.Y.S.2d at 224 (Sandler, J., concurring).

202. *Id.* at 221, 483 N.Y.S.2d at 224 (Sandler, J., concurring).

203. 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984).

204. *Id.* at 183, 474 N.E.2d at 584, 485 N.Y.S.2d at 224; see *supra* notes 62-64 and accompanying text.

"need not consider" the impact of its decision on these matters.²⁰⁵ Nevertheless, the court's refusal to find a common-law right of publicity distinct from the statutory right of privacy and the express limitation of the New York statute²⁰⁶ to living persons²⁰⁷ would appear to mandate the conclusion that in New York today the heirs or assignees of a deceased celebrity may not maintain an action for the commercial exploitation of the celebrity's name or likeness. The New York Court of Appeals could have resolved any doubt in its subsequent review of *Southeast Bank*; instead it chose to apply Florida law to reverse the Appellate Division holding of descendibility and expressly declined to "pass upon the question of whether a common law descendible right of publicity exists in [New York]."²⁰⁸

D. Descendibility in Perspective

The issue of descendibility seems to have come full circle. Until *Stephano* there appeared to be a general judicial tendency to separate the right of publicity from its privacy antecedent and to recognize the economic exploitation right as proprietary rather than personal.²⁰⁹ In this context descendibility logically and judi-

205. "In view of the fact that the plaintiff is asserting his own right of publicity we need not consider whether the statute would also control assignment, transfer or descent of publicity rights." 64 N.Y.2d at 183 n.2, 474 N.E.2d at 584 n.2, 485 N.Y.S.2d at 224 n.2.

206. N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1986).

207. See *Factors Etc., Inc., v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979).

208. *Southeast Bank v. Lawrence*, 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985) (mem.). Although the lower courts and the parties had assumed that New York law was dispositive, the Court of Appeals found Florida law to be controlling, in view of Tennessee William's status as a Florida domiciliary at his death. Florida's "descendibility" statute (FLA. STAT. ANN. § 540.08(1) (West 1972), grants rights only to a surviving spouse, surviving children, and authorized licensees.

Stephano's logic seemingly compels the conclusion of nondescendibility in New York. An alternative, albeit strained, construction is possible, however. Arguably, the New York statute preempts only a purported common-law claim precisely coextensive with the statute (i.e., a living person's claim arising out of another's unsanctioned use of the person's name, portrait or picture), but not a claim whose elements fall outside the statute. A construction that allows for the creation of a common-law right when the circumstances do not fit precisely within the statute is less probable than one that upholds statutory exclusivity for all purposes. Such a construction, however, would meet the serious problems that *Stephano* has created, see *supra* notes 64-75 and accompanying text, and still retain a common-law flexibility rather than require a precise, limiting statutory solution.

209. As an English commentator has observed: "A well developed line of cases . . . and the bulk of American literature now distinguish the appropriation of a private person's personality from that of a celebrity or public figure." Frazer, *supra* note 3, at 308. See *supra* notes 44-61 and accompanying text.

cially was compelled.²¹⁰ From the direct holdings in *Lugosi* and *Guglielmi* in California and *Memphis Development* in Tennessee and inferentially from the logic of *Stephano* in New York, however, descendibility, as a common-law proposition, appears to have been rejected judicially in the principal jurisdictions having the most concern with the celebrity-based right of publicity.²¹¹

The recent cases²¹² and the statutory responses in California²¹³ and Tennessee²¹⁴ seem to have eliminated the epicycle of "lifetime exploitation," which courts and commentators built on to the cosmology of descendibility. Commentators had suggested that *post mortem* right of publicity actions be limited to assignees who had purchased their interests during the celebrity's lifetime,²¹⁵ that a subsisting contractual arrangement specifically dealing with commercial exploitation be a condition to survivability,²¹⁶ or that evidence of the celebrity's "personal commercialization" be required before recognizing a *post mortem* right.²¹⁷ For the courts and the legislatures, however, lifetime exploitation is not now a relevant factor in determining whether the right of publicity dies with the

210. See *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975); see also *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

211. But cf. *Acme Circus Operating Co.*, 711 F.2d at 1538 in which the Court of Appeals for the Eleventh Circuit construed California law as recognizing descendibility when there has been lifetime commercial exploitation. Nevertheless, Georgia appears to be the only state whose highest court has recognized descendibility as a common-law right. See *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982). Cf. *Reeves v. United Artists*, 572 F. Supp. 1231, 1235 (N.D. Ohio 1983), aff'd. 765 F.2d 79 (6th Cir. 1985) (holding that "under Ohio law, the right of publicity, like the right of privacy, is not descendible"). Judge Posner's observation in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985), cert. denied, 106 S.Ct. 1489 (1986), that the right of publicity is "the commercial-appropriation branch of the right of privacy" may portend a similar result in the Seventh Circuit.

212. See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Company, Inc.*, 523 F. Supp. 485 (S.D.N.Y. 1981); rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982). But cf. *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983).

213. See *supra* notes 119-34 and accompanying text.

214. See *supra* notes 149-59 and accompanying text.

215. See *Ausness*, *supra* note 6, at 1009.

216. See *Felcher & Rubin*, *supra* note 76, at 1130-31.

217. See *Rader*, *supra* note 4, at 229.

celebrity.

Nor should lifetime exploitation be relevant.²¹⁸ In effect, such a requirement would serve to fragment further a juridical concept that is sorely in need of unification. There is, as the Supreme Court of Georgia noted, a patent absurdity in protecting all celebrities during their lifetimes, but, after their deaths, creating subclasses of celebrities and protecting only those who engaged in some activity other than that which initially gave rise to the right of publicity.²¹⁹ To recognize a right of publicity for a celebrity is to recognize a distinct, peculiar interest. To recognize or to refuse recognition of that right after the celebrity's death is essentially to make a policy determination, a decision as to *societal* limitation on that interest. The commercial conduct of the celebrity does not define his right of publicity, which derives from his existence as a celebrity,²²⁰ and therefore should not be part of that policy determination, which is predicated not on the interest of the celebrity, but on societal values.

A certain moral repugnance attaches to the posthumous commercialization of fame,²²¹ and a predisposition exists toward extension of the public domain.²²² In postulating the kind of society we might like — one in which fame does not have economic value apart from the activity that creates the notoriety — however, we should not blind ourselves to reality. If the sole policy considera-

218. See Kwall, *supra* note 3, at 217-26; Sims, *supra* note 3, at 480-81; Hoffman, *supra* note 3, at 44.

219. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 147, 296 S.E.2d 697, 706 (1982).

220. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973). Undoubtedly, Elvis Presley could have recovered damages from one who sold tee shirts with his picture on the front, even if Presley at that time had not entered into any commercial exploitation contracts. See *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). Similarly, an advertiser's violation of Bert Lahr's right of publicity by imitating Lahr's voice in a commercial was not dependent on Lahr's previously having made commercials. See *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962).

221. See, e.g., *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); see *supra* notes 143-45 and accompanying text.

222. See, e.g., Lange, *supra* note 76:

[T]he growth of intellectual property in recent years has been uncontrolled to the point of recklessness . . . [R]ecognition of new intellectual property interests should be offset . . . by equally deliberate recognition of individual rights in the public domain.

. . . .

. . . [In] numerous instances exclusive rights have been recognized in contenders who simply have not demonstrated a legitimate claim.

Id. at 147, 153. Lange, however, rather cavalierly dismisses the contrary judicial approach with his assertion that "[t]rial judges' opinions in matters of this sort are notoriously apt to be foolish or bourgeois or both or worse." *Id.* at 164.

tion were the public's right to benefit from that fame whose very existence comes from public participation, the right of publicity should terminate upon the death of the celebrity. The conjectural possibility that the prospect of passing subsidiary commercialization rights on to the next generation may motivate artistic creativity²²³ hardly should offset the claims of the public.

The focus on the public misconceives both the interest that the right of publicity protects and the reality of the public use. There is less to the descendibility of the right of publicity than meets the eye; the simplicity of the issue is lost in a forest of competing dogma. The real question to ask one who connects a deceased celebrity's persona with a commercial undertaking is, "Why are you doing it?" The purveyor of a Presley tee shirt is not selling tee shirts, he is selling Presley. He does it because he can make money out of the Presley persona. There is a limited market for tee shirts carrying the likeness of a Williston or a Corbin, whatever society's sartorial needs; there is a substantial market, however transitory, for a Presley, a Groucho Marx, or a Woody Allen.

In short, it is hard to find a public benefit from any commercial exploitation.²²⁴ The dispute is not between the celebrity's idle heirs and the public at large, a dispute in which strong policy considerations would favor the public. Rather, the competition is among scavengers seeking to trade on the economic value of the deceased. Perhaps any resolution of this dispute necessarily enriches one of the participants "unjustly." Logic and fairness, however, seem to compel favoring the scavenger who has some colorable connection to the deceased. If there is any public interest at all in the commercialization of fame, the interest lies in avoiding unfairness and unjust enrichment within the universe of the competing commercial interests.²²⁵ The right of publicity, therefore, must be freely descendible.²²⁶

The horrific scenario of some perpetual right under which the

223. See, e.g., *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 846-47, 603 P.2d 425, 445-46, 160 Cal. Rptr. 323, 343-44 (1979) (Bird, C.J., dissenting); *Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 145-46, 296 S.E.2d 697, 705 (1982); see also *Felcher & Rubin, supra* note 76, at 1130-31; *Kwall supra* note 3, at 212; Note, *supra* note 35, at 547.

224. *But cf. Redish, The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

225. *Cf. Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 148-52, 296 S.E.2d 697, 706-09 (1982) (Weltner, J., concurring).

226. *Id.* at 145, 296 S.E.2d at 705; *Hoffman, supra* note 3, at 44; *Kwall, supra* note 3, at 211-17, 228.

remote heirs of Dolly Madison would be double dipping into the ice cream business is largely academic.²²⁷ The courts have not hesitated to dispose of remote heirs²²⁸ or to determine the legitimacy of claims; the possibility of a lapse of the right by lack of use and similar matters are grist for the common-law mill. The appropriate question, again, is why does the user use the persona of one who is deceased? If in a given case there is enduring economic—as opposed to public—value in a use of the persona, then the heirs and assignees should have a greater claim than the stranger.²²⁹ In any event, a duration rule that recognizes that the right is linked to the continued value of the deceased's persona is more consistent with the nature of the interest than is an arbitrary cutoff period.²³⁰

It is unfortunate that the *post mortem* aspect of the right of publicity has been the focus of judicial and legislative activity for the past several years, while the right itself remains not clearly articulated. Courts', legislatures', and commentators' recent concentration on descendibility has diverted the development of the right into tortuous paths and literal dead ends that may lead to more ill-conceived legislation and further judicial conflict. The piecemeal legislative response in California²³¹ very well may be echoed by similar fragmentary legislation in New York that further impedes the orderly judicial development of the right of publicity in its entirety.

To say that the right of publicity should or should not be descendible presupposes a shared understanding of the nature and scope of the right. That understanding, rather than the peripheral question of descendibility, is the significant inquiry. Such an inquiry requires appropriate analytic tools to define the interest and to formulate a coherent policy that sets the boundaries of protectability.

227. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 847, n.31, 603 P.2d 425, 447 n.31, 160 Cal. Rptr. 323, 345 n.31 (1979) (Bird, C.J., dissenting).

228. See, e.g., *Schumann v. Loew's, Inc.*, 144 N.Y.S.2d 27 (Sup. Ct. 1955); Note, *supra* note 35, at 547-48.

229. Indeed, the Tennessee statute indirectly approaches the matter in this way by extending the duration of the right beyond the initial ten year period following death to make the right essentially coterminous with continued exploitation. TENN. CODE ANN. § 47-25-1104(b) (1984).

230. See, e.g., Kwall, *supra* note 3, at 252-53; Ropski, *Further Comments on the Development of the Right of Publicity—A Matter of Life, Death, and Sometimes the First Amendment*, 73 TRADE-MARK REP. 278, 283-84 (1984).

231. See *supra* notes 119-34 and accompanying text and text following note 134.

IV. ANALYTIC TOOLS

A. *Property and Value*

Conceptually, the effort to separate the right of publicity from its privacy mooring and the dispute as to the right's nature and extent have revolved around the issue of "property": is the right personal to an individual, an emotional extension of his personality, or does the right represent a form of property with the attributes attendant to that label?²³² Thus, if one may define the right as a property right, then one can be quite comfortable with the idea of such a right being assignable, survivable, descendible, and even taxable or capable of division in a divorce proceeding.²³³ If, rather, the right is personal and not in the nature of property, then the right clearly may be made the subject of license or waiver, but cannot have independent, exclusive, alienable, or divisible characteristics.²³⁴

Some have suggested that this debate over the right's nature is "pointless."²³⁵ Certainly the debate is circular, but that should not obscure the fact that the debate is part of an attempt to grasp something elusive that is unique to modern society. It has been said that if one's only tool is a hammer, then a nail quickly becomes the solution to every problem. The label of "property" has proven to be a useful nail, and perhaps we do our circumlocutions around the shibboleth of "property" because we at least can understand it in some other context. Now, however, we require different analytic tools and materials to build coherent structures capable of

232. See, e.g., Epstein, *supra* note 20, at 455-65; Frazer *supra* note 3, at 300-07 (discussing both classical property theory and the "property" concept applied to the right of publicity); Lange, *supra* note 76; Shipley, *supra* note 3, at 673 ("Individuals have legitimate proprietary claims to their publicity interests.").

233. Felcher & Rubin, *supra* note 3, at 1593; see Donenfeld, *supra* note 76, at 21-22; Rader, *supra* note 4, at 228-29, 234; cf. Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975) ("Many courts have recognized, as a property right, a person's use of his or her name and likeness."); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1280-83 (D. Minn. 1970); Ausness, *supra* note 6, at 977-78 ("recognition value"); see *supra* notes 161-78 and accompanying text.

234. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979); see *supra* notes 107-14 and accompanying text.

235. 25 Cal. 3d at 824-25, 603 P.2d at 431, 160 Cal. Rptr. at 329; Prosser, *supra* note 23, at 406. *But cf.* Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1540-41 (11th Cir. 1983) (noting that the distinction is significant in resolving choice of law issues). Moreover, a determination of whether the claim for violation of one's right of publicity is a personal or a property claim may be significant in determining the taxability of the judgment recovered. *Cf.* Roemer v. Commissioner, 716 F.2d 693, 700 (9th Cir. 1983) (holding defamation damages to be referable to a personal injury and therefore not taxable).

supporting the interests involved in the right of publicity and the other personality interests in our mass-communications-dominated world.

One useful tool that appears to avoid the "property" circle is the concept of "value." Relief for the celebrity whose persona has been appropriated for a commercial endorsement is supported by the proposition that the celebrity, by dint of effort or luck, has created in his or her personality a marketable economic value distinguishable from the emotional value of identity.²³⁶ The concept of value is intuitively satisfying.²³⁷ Our society does recognize that certain people, whom we call celebrities, specifically affect the marketability of goods, services, and creative works.²³⁸ The advertising agency that used a model closely resembling Jacqueline Onassis in a television advertisement associating well-known people with its client's products²³⁹ believed that Mrs. Onassis, as an identifiable person, specifically would enhance the marketability of that prod-

236. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 489 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

237.

It is not clear that traditional and current concepts of the role of property would support the idea of recognizing property in personality. Other reasons exist, however, to support an argument for giving control over the use of personality to the individual concerned A market in personalities exists and so, therefore, do market values. Frazer, *supra* note 3, at 304; see Donenfeld, *supra* note 76, at 21-22. "While not all courts agree that there is a property right attached to a right of privacy, there is a growing acceptance of the fact that a value can be given a name, or a personality." *Id.* Lange, *supra* note 76, has suggested that the use of "value" is another exercise in circularity, that there is "value" only if a court says that someone must pay for the unauthorized use:

The chief attribute of intellectual property is that apart from its recognition in law it has no existence of its own. . . . It is sometimes said that the right of publicity rests on the commercial value of the interest itself, but that explanation is nonsense without something more. A claim of this sort will have commercial value only if it also has the protection of the law. In a sense, the value of this property stems from the fact that the law recognizes it and protects it. . . . Certainly, [the recognition and protection of a right] cannot legitimately turn on anything as simple as a proposition about where the economic value of the interests reside; they reside wherever the law permits them to reside.

Id. at 147, 160, 164 (footnotes omitted). Lange ignores the economic realities of the commercial marketplace. IBM uses the Charlie Chaplin "little tramp" to enhance computer sales. IBM may pay for that use even if the law does not clearly compel it to do so, and it derives value from that use even if it does not pay for it.

238. See Gordon, *supra* note 3, at 555-57; see also *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.10 (9th Cir. 1974) ("It would be wholly unrealistic to deny that a name, likeness, or other attribute of identity can have commercial value.").

239. See *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984).

uct.²⁴⁰ Nothing fortuitous was involved here; it was a commercial, economic calculation to associate Mrs. Onassis with a product.

Should one then ask if there is "value" in Mrs. Onassis' personality? Is it merely the fact that a court chose to grant her relief that makes her personality valuable? Hardly. The advertiser had at least a colorable right to use any model it chose in an advertisement and well may have been advised that the use of a model resembling Mrs. Onassis would not subject the agency to liability. In simple terms, the agency used Mrs. Onassis' likeness precisely because the advertiser believed that associating her with the product would be good for the product's marketability. Celebrity is worth something in the marketplace.²⁴¹ Celebrity is marketable both for itself directly and for the associative spillover that follows from our interest in celebrity.

From Mrs. Onassis' viewpoint, however, the injury here may be more in the nature of an assault, an attack on her privacy interest, as the New York court held. The court declined to discuss whether she, as a person who most emphatically has not allowed direct commercial exploitation of her personality, had a right of publicity upon which the advertiser had impinged.²⁴² The defendant, however, most assuredly sought to derive economic market benefit from the calculated use of Mrs. Onassis' likeness.

B. Deception: The Lanham Act

*Allen v. National Video*²⁴³ is one court's attempt to avoid the privacy linkage and the property circle by focusing on the appropriator's act rather than the celebrity's interest using section 43(a) of the Lanham Act²⁴⁴ as a basis for affording relief to a celebrity

240. Conversely, the merchant who used Ms. Roberson's picture to advertise flour merely believed that associating its product graphically with an anonymous consumer would help sales. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). The maker of toiletries that sought nude mother and daughter forms for its advertisement was not particularly interested in Mrs. Cohen and her daughter as recognizable personalities. *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984).

241. "[T]he Court can take judicial notice that there is a fairly active market for exploitation of the faces, names and reputations of celebrities." *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973). See *Frazer, supra* note 3, at 304 ("A market in personalities exists and so, therefore, do market values."); *Shipley, supra* note 3, at 673 ("It is economic reality that pecuniary value is inherent in publicity.")

242. *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 616, 472 N.Y.S.2d 254, 263 (Sup. Ct. 1984); cf. *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973).

243. 610 F. Supp. 612 (S.D.N.Y. 1985); see *supra* notes 70-75 and accompanying text.

244. 15 U.S.C. § 1125(a) (1982). That section provides:

Any person who shall . . . use in connection with any goods or services . . . a false

whose identity has been commercially appropriated. There, noting that the Act's scope is not limited to traditional trademark or unfair competition claims, Judge Motley found that the Act extends to the protection of a celebrity's "commercial investment in the drawing power of his or her name and face in endorsing products and in marketing a career The underlying purposes of the Lanham Act . . . appear to be implicated in cases of misrepresentations regarding the endorsement of goods and services."²⁴⁵

The Lanham Act approach to the protection of a celebrity's interest in the exploitation of his or her persona represents a parallel thread in the development of the right of publicity. This approach invokes concepts of "unfair competition" to protect against an advertiser's appropriation of "good will" in the celebrity's identity and applies the trademark analogy. The focus of this approach, however, is not on the celebrity's interest in the economic value of his identity, but on the public interest in freedom from deception.²⁴⁶ Paradigmatic of unfair competition in this context is the 1928 action in which Charlie Chaplin enjoined a filmmaker from using the name "Charlie Aphn" and imitating Chaplin's distinctive "little tramp" in a motion picture.²⁴⁷ The California court emphasized that

[Charlie Chaplin's] case . . . does not depend on his right to the exclusive use of the role, garb, and mannerisms, etc.; it is based upon *fraud and deception*. The right of action in such a case arises from the *fraudulent purpose and conduct of appellant and injury caused to the plaintiff thereby, and the deception to the public*, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-marks or trade-names by plaintiff. It is plaintiff's right to be protected against those who would injure him by fraudulent means: that is, by counterfeiting his role—or, in other words, plaintiff has the right to be protected against "unfair competition in business."²⁴⁸

Although unfair competition standing alone is of limited utility as a basis for the right of publicity because the concept requires

designation of origin, or any false description or representation . . . tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Id.

245. 610 F. Supp. at 625-26.

246. As Judge Motley noted, "[a]pplication of the [Lanham] act is limited . . . to potential deception which threatens economic interests analogous to those protected by trademark law." *Id.* at 625 (citing *Ives Laboratories, Inc. v. Darby Drug Co., Inc.*, 601 F.2d 631 (2d Cir. 1979)).

247. *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

248. *Id.* at 363, 269 P. at 546.

the existence of "competition,"²⁴⁹ the confluence of the elements of deception with a celebrity's quasi-trademark interest in "good will" makes the Lanham Act an appealing tool for protection of the celebrity's identity interest.²⁵⁰ It is essential to a Lanham Act claim, however, that the particular use create a "likelihood of confusion" with respect to the source of the product or the endorsement.²⁵¹ Indeed, confusion exists about the nature and degree of "confusion" required to make out a Lanham Act claim.²⁵² Nevertheless, a Lanham Act, trademark-related, or unfair competition claim requires a "likelihood of confusion" as to some matter significant in the presentation of the goods or services.²⁵³

The Lanham Act arguably protects a celebrity against another's unauthorized exploitation of the celebrity's identity,²⁵⁴ avoids the privacy linkage, and "federalizes" a claim peculiarly related to mass communications. The "likelihood of confusion" test, with its emphasis on deception, however, deflects the Lanham Act remedy from the real interests implicated in an unauthorized appropriation of a celebrity's economically valuable identity. The test simply disregards the complexities of the associative value of a celebrity's identity. Only through a flexible common-law right of publicity can courts protect these interests.

C. Associative Value

The phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value, or economic impact, upon the marketability of a product. Whether we like commercialization of personality or not,²⁵⁵ the economic reality per-

249. See, e.g., Ausness, *supra* note 6, at 983-85; Nimmer, *supra* note 3, at 210-14.

250. "[T]he unauthorized use of a person's name or photograph in a manner that creates the false impression that the party has endorsed a product or service in interstate commerce violates the Lanham Act." *Allen v. National Video, Inc.*, 610 F. Supp. 612, 626 (S.D.N.Y. 1985).

251. *Id.* at 627-29; *Bi-Rite Enter. v. Button Master*, 555 F. Supp. 1188, 1193 (S.D.N.Y. 1983) ("[The Lanham Act] and unfair competition law in general, function primarily to protect consumers from confusion as to the source of goods in the market.").

252. *Cf. Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1012-13 (5th Cir.), cert. denied, 423 U.S. 868 (1975); *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 541-42 (W.D.Texas 1980).

253. See, e.g., *Cifelli & McMurray*, *supra* note 8; *Heneghan & Wamsley*, *supra* note 8; Note, *supra* note 8.

254. In *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985), Judge Motley suggests that a statutory approach to the problems *Stephano* presents be modeled on the Lanham Act. *Id.* at 624 n.5.

255. *Cf. Lange*, *supra* note 76. "Fame is not inconsistent with merit but neither is it evidence of merit." *Id.* at 163. "To be sure, the Marx Brothers became celebrities as most

sists. Consumers are prepared to pay for Elvis Presley tee shirts; they pay for a Presley likeness, not simply for a garment. In that sense the Presley persona's "value" is demonstrably present, irrespective of whether a court determines that the vendor must²⁵⁶ or need not²⁵⁷ pay the Presley estate.²⁵⁸ At a higher level of sophistication, when a tobacco company's advertising agency deliberately chooses to feature in a cigarette advertisement a racing car painted to resemble the car used by a well-known driver,²⁵⁹ the agency does so in the belief that the public's association of the driver with the cigarette will enhance cigarette sales.

The market place recognizes an associative economic value.²⁶⁰ The courts, when they deal with the right of publicity, do not create value. Rather, as a matter of policy, the courts determine the extent to which one must compensate the person who has generated the economic value for use of the persona and the limits of the celebrity's control over the exploitation of his or her personality.

What the courts must consider is the evocation of identity.

vaudevillians did not. But surely we are not rewarding them on that ground alone." *Id.* at 162.

256. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

257. See *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

258. Indeed, the idea that recognizability itself can enhance a sale has been brought to a metaphysical peak by the American Express advertising campaign that uses the non-recognizability of the face of a person whose name is well known as a means of associating that name with the American Express credit card.

259. See *Motschenhacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).
260.

Today, it is commonplace for individuals to promote or advertise commercial services and products or . . . even have their identities infused in the products. Individuals prominent in athletics, business, entertainment and the arts . . . are frequently involved in such enterprises. When a product's promoter determines that the commercial use of a particular person will be advantageous, the promoter is often willing to pay handsomely for the privilege. As a result, the sale of one's persona in connection with the promotion of commercial products has unquestionably become big business.

Such commercial use of an individual's identity is intended to increase the value or sales of the product by fusing the celebrity's identity with the product and thereby siphoning some of the publicity value or good will in the celebrity's persona into the product.

. . . .

. . . [T]he marketable product . . . is the ability of a person's name or likeness to attract the attention and evoke a desired response in a particular consumer audience. That response is a kind of good will or recognition value generated by that person. . . .

While this product is concededly intangible, it is not illusory.

Lugosi v. Universal Pictures, 25 Cal. 3d 813, 834-35, 603 P.2d 425, 437-38, 160 Cal. Rptr. 323, 335-36 (1979) (Bird, C.J., dissenting) (citations omitted).

Identity routinely is evoked through the use of a name or a clear likeness. Sophisticated advertising techniques, however, are not dependent upon such literal appropriation. To associate a product with the then well-known Guy Lombardo required only a particular musical arrangement in a New Year's Eve setting, and not the conductor's name or an actor who resembled him.²⁶¹ The use of a distinctively striped racing car was designed to associate an unseen and unnamed, but well-known, driver with a brand of cigarettes.²⁶² An imitation of a well-known voice, with no other identification, can be sufficient to create an association between the celebrity and a commercial product.²⁶³

In none of these cases could one truly say that the advertiser had used the "name" or "likeness" of a specific person. Nevertheless, advertisers undoubtedly use other, perhaps peripheral, attributes of celebrities commercially in order to associate advertised products with well-known people and thereby to enhance the products' marketability. Indeed, very little may be needed to create such an association. The imitation need not be a good one to evoke the celebrity's image; nor is it material whether the use is complimentary, derogatory, or neutral. The exploitation interest of celebrity—the right of publicity—transcends the literal name or likeness.²⁶⁴ The specific manner in which the advertiser evokes a particular celebrity's persona and associates that persona with a commercial enterprise should not determine the degree to which a court will protect or limit the celebrity's interest.²⁶⁵ The associative

261. See *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (App. Div. 1977).

262. See *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

263. See *Lahr v. Adell Chem. Co., Inc.*, 300 F.2d 256 (1st Cir. 1962); *Booth v. Colgate-Palmolive, Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973).

264. As the court pointed out in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983):

It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes It is not fatal to appellant's claim that appellee did not use his "name." Indeed, there would have been no violation of his right of publicity even if appellee had used his name, such as "J. William Carson Portable Toilet" or the "John William Carson Portable Toilet" or the "J.W. Carson Portable Toilet." The reason is that, though literally using appellant's "name," the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his "name."

Id. at 837.

265. "Property rights in personality are only justifiable in economic terms where they attach not to the name or image *per se*, but to the value generated by those indicia of personality. . . . The property right should . . . attach to the goodwill generated by the

value of celebrity is a subtle and sophisticated concept that is not addressed by analyses predicated either on public confusion or on specifically enumerated attributes of a persona.

In *Allen v. National Video* the court suggests that an advertiser permissibly may use a "look-alike" if a complete and sufficiently legible disclaimer of identity and endorsement accompanies the advertisement.²⁶⁶ The suggestion presupposes that the value derived from evoking the image of Woody Allen in connection with the promotion of a videotape rental business comes from a public misconception that Mr. Allen has participated in the promotion, either directly or by consenting to the impersonation.²⁶⁷ The matter is not circumscribed so easily.

Consider the Belgian surrealist artist Rene Magritte, who entitled his still life painting of a pipe resting in an ashtray, "Ceci n'est pas une pipe." Certainly, as the title makes clear, "this is not a pipe." Whatever the artist's philosophical purpose, it is nevertheless a pipe that we see, and the disclaimer serves to focus our attention on the pipe. What would be the effect in the *Allen* case of a clear notice that the person pictured in fact is not Mr. Allen and that Mr. Allen has not endorsed the advertisement or the product? Indeed, one might imagine an elaborate advertisement built around a photograph of a "look-alike" with a caption reading: "This is not Woody Allen. Woody Allen doesn't know we are running this ad, and he doesn't like our product."

There hardly could be a stronger disclaimer; there hardly could be a claim of deception or confusion. Yet can there be any doubt that the advertiser has evoked Woody Allen, *qua* celebrity, to direct attention to the ad and thereby to enhance sales? If the disclaimer is used so clearly that there is no confusion or deception, why then is the impersonation used at all? The answer goes beyond "entertainment" value. The advertiser has an opportunity for a profitable recursiveness, an effect similar to that attempted by an advertiser who, in seeking to give stature to his product, de-

personality." Frazer, *supra* note 3, at 307.

266. 610 F. Supp. at 629. In a subsequent contempt proceeding arising out of further use of the same look-alike but with a small print disclaimer, *Allen v. National Video*, No. 84-2764 (S.D.N.Y. June 26, 1986) (available on LEXIS, Genfed library, Dist file), the court determined that the defendant's advertisements violated the spirit of the order, but concluded that the advertisements were not strictly violative of the letter of the mandate. In the court's opinion, the order was inherently ambiguous. The decision does not change the court's holding that an advertiser will not violate the Lanham Act if a complete and sufficiently legible disclaimer of identity and indorsement accompanies the advertisement.

267. *Id.*

clares in the advertisement that the product is "nationally advertised." A disclaimer that eliminates confusion can itself enhance the celebrity-based nature of the advertisement; the very act of disclaiming becomes the act of appropriation.²⁶⁸

A television commercial broadcast with the 1985 U.S. Open tennis matches shows only a tennis umpire squirming in his chair, while the abrasive voice of an unseen player berates him. Is the voice an attempted imitation of John McEnroe's voice? Possibly, but it does not matter. Undoubtedly, the advertiser had evoked the identity of Mr. McEnroe, and with a degree of success that would not be diminished by a disclaimer, however prominent or detailed. The fact that neither Mr. McEnroe's name nor his picture was used would preclude him from getting relief under New York law as propounded in *Stephano*. The mere use of a whiny, complaining voice probably would be insufficient to support a finding in any jurisdiction that the advertiser had appropriated Mr. McEnroe's "likeness," and assuming the advertiser had used a sufficient disclaimer, it would be virtually impossible for Mr. McEnroe to demonstrate the "likelihood of confusion" essential to a Lanham Act claim.

This is not to suggest that John McEnroe should have a claim as a result of that commercial,²⁶⁹ but rather that the advertiser has associated Mr. McEnroe with the product just as surely as if he had been identified directly. The evocation of celebrity is itself sufficient to take advantage of the associative value, irrespective of the surrounding context. That context — a celebrity's direct endorsement or similar "voluntary" participation, or a disclaimer and negation of such participation — may affect the quantum of the associative value, but not the value's existence or the reality of the advertiser's appropriation of that value.

268. Witness the television commercial in which the legend "celebrity impersonation endorsement" is displayed prominently beneath the image of an individual talking about the product, thereby facilitating the consumer's association of the product with a public figure who might not otherwise be readily identifiable. At the logical extreme is the possibility of a commercial that impersonates no actual celebrity, but that gives the impression, by means of a "disclaimer," that an impersonation has occurred. The advertiser might accomplish his purpose simply by having the viewer concentrate on the commercial in the fruitless attempt to identify the "celebrity" ostensibly being impersonated. In that case the disembodied idea of celebrity itself provides the associative value.

269. See *infra* text following note 309.

V. OF INTERESTS AND POLICY

Although an analysis of the right of publicity based upon associative value is more satisfactory than one predicated on concepts of property, it is incomplete. The former analysis explains, for example, why an advertiser wants to associate its product with Mrs. Onassis, but the analysis neither delineates Mrs. Onassis' own interest nor distinguishes her interest from the fundamentally different interests of Woody Allen or Elvis Presley. The right of publicity has resisted satisfactory definition because the personality interest from which the right arises is so intangible and elusive. Nevertheless, society and the law successfully have rationalized personality interests in other contexts. For example, defamation has at its core the highly elusive personality interest in reputation, the esteem in which one is held by one's community, yet the law of defamation has evolved vigorously over centuries.

Similarly, many countries outside of the United States long have recognized the personality interest of artistic integrity — a creator's "moral right" to ensure the integrity, attribution, and exhibition of his or her creation.²⁷⁰ Legislatures in the United States recently have begun to recognize this interest.²⁷¹ The interest is not "property" in the sense of copyright; rather, "moral right" involves a recognition that the artist invests his work with a part of himself — his personality²⁷² — and that this personality interest is impaired when the work is not attributed to him properly or is distorted.

The creation of the right of privacy, the right to be let alone, constituted judicial recognition of the seclusionary personality interest, an interest that is distinct from reputation.²⁷³ Although the

270. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940). See Kwall, *Copyright and Moral Rights: Is an American Marriage Possible?* 38 VAND. L. REV. 1 (1985), for a recent analysis of the "moral right." In France, where the newly emergent equivalent to the right of publicity (*droit sur l'image*) similarly has been confused with a right more akin to the right of privacy (*droit a l'image*), the well-established concept of "moral right" (*droit moral*) has been suggested as a basis for distinguishing and recognizing a celebrity's independent pecuniary exploitation interest (*un droit patrimonial d'exploitation de sa propre image*). Acquarone, *L'ambiguite du droit a l'image*, 22 Recueil Dalloz 129, 132-36 (June 6, 1985).

271. N.Y. ARTS & CULTURAL AFFAIRS LAW, §§ 14.51-59 (McKinney 1984); CAL. CIV. CODE, § 987-989 (West Supp. 1982); MASS. LAWS ANN., ch. 231, § 85S (Michie/Law. Co-op. Supp.). See Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976).

272. Roeder, *supra* note 270, at 557; Kwall, *supra* note 270, at 3.

273. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 213-14, 50 S.E. 68, 78 (1905); Bloustein, *Privacy is Dear*, *supra* note 32; Prosser, *supra* note 19; see *supra* notes 17-27 and accompanying text.

same operative act — publication — may injure both reputation and privacy interests, the two interests are significantly different. The right of publicity's emergence links the operative act of publication with yet a third distinct interest.²⁷⁴

The identity of the operative act, the historical link between the right of privacy and the right of publicity,²⁷⁵ and perhaps the distaste for the phenomenon of marketable celebrity²⁷⁶ have contributed to confusion in differentiating the exploitation interest.²⁷⁷ The right of publicity nevertheless presents a truly distinct interest:

[E]xcept when it comes to fictional First Amendment commodities like novels, movies, plays and television dramas, the differences are really quite clear—the right of privacy and the right of publicity are two different and on the whole independent rights—constantly confused with each other because one—the right of privacy—is a negative, you can prevent others from using or exploiting your name and likeness in connection with commercial products or services and the other—the right of publicity—is an affirmative right which you can exercise and permit others to exercise in the realms of commerce

Clearly, trying to define the right of publicity with exactitude opens up a can of worms Certainly the courts have not succeeded in doing so. There is an interest here to be protected and it can be protected without impairing the First Amendment.²⁷⁸

The interest, a kind of “property . . . in personality,”²⁷⁹ is an individual's interest in exclusively controlling the exploitation of his or her identity's associative value. If the unauthorized evocation of an individual's identity serves to enhance the commercial value of another's enterprise, then that individual's interest has been invaded. In terms of the interest, whether the invader directly appropriates the celebrity's “name or likeness” or uses more subtle identifiers is unimportant.²⁸⁰ Similarly unimportant is whether the use purports to be authorized or is accompanied by an

274. An incidental consequence is the virtually automatic pleading of multiple claims arising from the same publication. *See, e.g.,* Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985); Lahr v. Adell Chem. Co., 300 F.2d 256, 258 (1st Cir. 1962); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978)

275. *See supra* notes 43-53 and accompanying text.

276. *See, e.g.,* Lange, *supra* note 76, at 162-63.

277. *See* Sims, *supra* note 3, at 464: “Although the celebrity's commercial interest and his emotional interest are distinguishable . . . it is often less clear whether a court granting judgment for the celebrity has responded to the privacy claim, the publicity claim, or both.” *Id.* (footnote omitted).

278. Pilpel, *supra* note 3, at 262. *See, e.g.,* Ausness, *supra* note 6, at 982. “[T]he right of privacy does not protect those economic interests covered by the right of publicity.” *Id.*

279. Frazer, *supra* note 3, at 307.

280. *See supra* notes 261-65 and accompanying text.

express disclaimer.²⁸¹

Any protection that Lanham Act section 43(a) affords to a celebrity's economic personality interest in a given case is fortuitous. The Lanham Act simply is not directed to the protection of that interest.²⁸² So, too, concepts of "privacy" and defamation, whatever their impact upon a particular appropriation of the celebrity's identity, cannot shelter the interest involved. A coherent right of publicity specifically based upon the distinct exploitation interest is prerequisite to consistent and understandable recognition and protection of that interest. The right of publicity must be seen as an independent, self-supporting right and not captive to privacy, copyright, trademark, or unfair competition analogies.²⁸³ The right must be allowed "to rest on its own bottom."²⁸⁴

Understanding and identifying the interest can help courts to define the right of publicity's boundaries. For example, the troublesome *Lugosi*²⁸⁵ and *Groucho Marx Productions*²⁸⁶ cases demonstrate the difficulties presented when a court asserts a right of publicity without clearly articulating the interests involved. Neither of these cases truly involves the interests properly comprising the right of publicity.

As Justice Mosk pointed out in *Lugosi*,²⁸⁷ the real question,

281. See *supra* notes 266-68 and accompanying text.

282. See *supra* notes 243-54 and accompanying text.

283.

The strength of an analogical approach is that once the equivalence is established, previously developed rationales and conclusions can be brought to bear on the new situation But a major difficulty with analogies, derived from precisely the same source as their strength, is that they tend to impose a mature, elaborated system on what may well be an unformulated situation. The choice of the analogy may not be fully justifiable, and the analogy's application to the situation may carry with it a misleading certainty [N]one of the analogies of privacy, defamation, or property law seems correct to apply to the publicity issue

Felcher & Rubin, *supra* note 76, at 1127-28.

284. Ausness, *supra* note 6, at 1054. As Kwall, *supra* note 3, has observed:

The right of publicity stands as an independent legal doctrine vindicating important societal interests. Although certain more established legal theories can provide an alternative basis for relief in some right of publicity cases, no other legal theory affords an equal scope of protection against unauthorized exploitation of an individual's name or likeness.

Id. at 206 (footnote omitted).

285. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

286. *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

287. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 825, 603 P.2d 425, 432, 160 Cal. Rptr. 323, 330 (1979) (Mosk, J., concurring).

irrespective of descendibility, was whether Bela Lugosi had any right of publicity with respect to the Dracula character. Did the defendant evoke the identity of Lugosi himself or of a role that the actor effectively portrayed? If the defendant invaded an interest of Lugosi, it was not an interest in Lugosi's persona; rather the defendant invaded whatever interest Lugosi may have had in a character.²⁸⁸ By his performance, Lugosi very well may have created something distinctive in that character — the "definitive" Dracula. Moreover, a persuasive argument may be made for the proposition that such a creative act deserves protection, perhaps in the nature of a copyright. Whatever the appeal of such an argument for expanding the copyright laws, the argument does not support using the right of publicity to create a protectable interest.²⁸⁹

In *Lugosi* Justice Mosk distinguished between an actor's mere portrayal of a character that someone else created and a performer's creation of an "original" character, a distinction that suggests that Julius Marx, as the "creator" of an alter ego, "Groucho Marx," would have a stronger right of publicity claim with respect to that character than Bela Lugosi had with respect to Dracula.²⁹⁰ The federal district court for the Southern District of New York upheld such a claim in *Groucho Marx Productions*.²⁹¹ There is something appealing in a decision that holds essentially that Julius, Adolph, and Leonard Marx each created personae, in the form of Groucho, Harpo, and Chico; that the defendant had appropriated these creations; and that the court would not allow the defendant to take the fruits of another's labor. Is such an act of appropriation, however, properly the subject for application of the right of publicity? Quite distinct from the question of the extent to which the individual Marx Brothers "created" the characters,²⁹² is that of the relevance of such creation to the personality interest that the right of publicity embraces.

For example, if Julius Marx had created a cartoon "Groucho," one who copied the cartoon character in the same wholesale manner that the defendant in *Groucho Marx Productions* copied the "real" Groucho clearly would be liable for copyright infringe-

288. *Id.*

289. *Id.* at 828, 603 P.2d at 434, 160 Cal. Rptr. at 332.

290. *Id.* at 825, 603 P.2d at 432, 160 Cal. Rptr. at 330. *See supra* note 108.

291. *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

292. *See Lange, supra* note 76, at 161-63.

ment.²⁹³ It may be an unfortunate omission from our copyright law that no copyright protection exists for the real character,²⁹⁴ and it even may be true that psychologically "Groucho" was a manifestation of Julius' personality. Nevertheless, to say that appropriation of the character evokes the creator's *identity* distorts the personality interest in an attempt to achieve a result that would be more appropriate, albeit probably not possible,²⁹⁵ under the copyright laws.²⁹⁶

Just as a court should not use the Lanham Act as a vehicle for vindicating the personality interest that supports the right of publicity, a court should not use the right of publicity to fill lacunae in the copyright laws, which are designed to protect a different economic interest. The law is disserved by distortion of concepts of privacy, deception, and unfair competition to achieve what is best left to an independent right of publicity;²⁹⁷ it is disserved equally by labored distortion of the right of publicity to accommodate the difficult case. The effect of these distortions is to attenuate the right, further confuse the interest to be protected, and prevent consistent development and application of sound policy that determines the appropriate scope of protection for the interest.

An interest analysis focusing on evocation of identity as an appropriation of personality would exclude from the right of publicity the copyright-related forms of appropriation and the appropria-

293. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754-55 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). See Shipley, *supra* note 3, at 700.

294. Ausness, *supra* note 6, at 1020; Shipley, *supra* note 3, at 700; Comment, *supra* note 7, at 798-802.

295. One commentator has suggested that copyright protection could have been afforded the Marx Brothers under a "derivative work" theory. Note, *supra* note 7, at 1585.

296. Similarly, some might consider it immoral for IBM to use the Charlie Chaplin "little tramp" as a significant advertising device to sell computers if IBM did not compensate Chaplin's estate for the use. The legal compulsion attendant to such moral compulsion, however, should come from the body of law—copyright—designed to protect the outwardly creative acts, and not from legal concepts related to the economic personality interest.

297. Consider Chief Justice Bird's observation in differentiating the right of publicity from the right of privacy:

The reasons for affording independent protection for the economic value in one's identity are substantial and compelling . . . I am . . . persuaded that an individual's right of publicity is entitled to the law's protection.

. . . .

. . . [T]he interest at stake in most commercial appropriation cases is ill-suited to protection under the umbrella of the right of privacy . . . [C]onforming a claim for the misappropriation of the commercial value in one's identity to the requirements of the right of privacy requires a procrustean jurisprudence.

Lugosi v. Universal Pictures, 25 Cal. 3d 813, 840, 843, 603 P.2d 425, 442, 444, 160 Cal. Rptr. 323, 340, 342 (1979) (Bird, C.J., dissenting) (footnotes and citations omitted).

tion of an artistic creation. The interest analysis would render moot the issue of whether section 301 of the Copyright Act of 1976 preempts a claim.²⁹⁸ The general policy question, however, would remain: assuming that an appropriation involves an interest properly embraced by the right of publicity, are there nevertheless reasons for immunizing the use?

When a celebrity is the subject of books, plays, or magazine and newspaper articles, the author of the particular work certainly has evoked the celebrity's persona for commercial gain. We have little difficulty in finding most such "entertainment" and "newsworthy" uses to be beyond the reach of the right of publicity.²⁹⁹ Policy, primarily first amendment policy, clearly immunizes these uses, notwithstanding their invasion of the personality interest. The right of publicity does not outweigh the value of free expression.³⁰⁰ For the most part, first amendment policy considerations have little impact on the avowedly commercial appropriation of identity.³⁰¹ The cases generally have been consistent in defining

298. See 17 U.S.C. § 301 (1977). It is generally assumed that "traditional" commercial appropriation claims are not preempted. See *Ausness*, *supra* note 6, at 1015-23. *Ausness* notes that "it is doubtful that the celebrity's identity or 'persona'—which is the essence of the right of publicity—qualifies as a 'work of authorship' within the meaning of the Copyright Act." *Id.* at 1022. See also *McLane*, *supra* note 76, at 422-25; *cf. Lange*, *supra* note 76, at 173 (arguing that the right of publicity should be protected narrowly with copyright preemption applied broadly); Note, *supra* note 7, at 1585-93; see generally, *Shipley*, *supra* note 3.

299. See, e.g., *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1982); *Ann-Margret v. High Soc. Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980); *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984); *Rosemont Enter., Inc. v. Random House, Inc.*, 58 Misc.2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969); *cf. Eastwood v. Superior Court*, 149 Cal. App.3d 409, 198 Cal. Rptr. 342 (1983).

300. See *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) ("No action under [a theory of unauthorized use of name or likeness] will lie . . . solely for publication which is protected by the First Amendment."); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860, 872, 603 P.2d 454, 461-62, 160 Cal. Rptr. 352, 359-60 (1979) (Bird, C.J., concurring); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769, 427 N.Y.S.2d 828, 829 (1st Dep't 1980) ("The protection of the right of free expression is so important that we should not extend any right of publicity . . . to give rise to a cause of action against the publication of a literary work about a deceased person."); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968); *Ausness*, *supra* note 6, at 1026-53; *Felcher & Rubin*, *supra* note 3, at 1596-99; *Kwall*, *supra* note 3, at 229-53; Note, *supra* note 35, at 551-57.

301. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). As the federal district court for the Southern District of New York observed:

As a general rule, if the defendants' works are designed primarily to promote the dissemination of thoughts, ideas or information through news or fictionalization, the right of publicity gives way to protected expression. . . . If, however, the defendants' use of the celebrity's name or likeness is largely for commercial purposes, such as the sale of merchandise, the right of publicity prevails."

the ambit of constitutionally protected dissemination of ideas. Usually it is not difficult to determine whether a given use of a celebrity's persona is a constitutionally protected publication precluding redress under the right of publicity.

Establishing policy to deal with ingenious entrepreneurs who capitalize upon the associative value of celebrity is more challenging. Imitation and impersonation, ranging from the meticulous copying of an entire performance³⁰² to the use of a "celebrity look-alike"³⁰³ in a commercial advertisement,³⁰⁴ create difficult issues. In the context of the right of publicity, resolving these issues should not depend upon a privacy-based determination of whether the user has appropriated the celebrity's "name or likeness" or any other specifically enumerated identifier.³⁰⁵ Rather, the problem involves balancing interests in order to protect the personality interest from appropriation while preserving the equally deserving areas of parody, satire, and self-conscious impersonation.³⁰⁶

The professional impersonator certainly evokes his subject's persona, but the impersonator³⁰⁷ is not so much using the celebrity's associative value as he is calling attention to his own talents as an impersonator. If a well-known impersonator were to do television commercials in which he imitated celebrities, the imitator's associative value likely would be at least as significant as that of the celebrities whom he imitated. Sound policy should protect this use. The patently exploitative "celebrity impersonation endorsement," in which an unidentified individual impersonates a well-known person, however, is not a showcase for the anonymous impersonator. Irrespective of any disclaimer or disclosure of the fact

Groucho Marx Prods., Inc. v. Day & Night Co., 523 F. Supp. 485, 492 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982) (citations omitted); see *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355-61 (D.N.J. 1981). See also *McLane*, *supra* note 76, at 425-27; *Felcher & Rubin*, *supra* note 3, at 1601-06.

302. *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

303. Impersonation may be by a "sound-alike" in the case of radio commercials.

304. *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984).

305. In *Allen v. National Video, Inc.*, 610 F. Supp. 612, 621-22 (S.D.N.Y. 1985), Judge Motley felt constrained by *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984), to confine herself to the statutory "privacy" criteria. Cf. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); see *supra* notes 54-58, 65-75, 261-65 and accompanying text.

306. See *Felcher & Rubin*, *supra* note 3, at 1605.

307. There is, of course, a difference between the casual Elvis Presley impersonator and the producer of the traveling, elaborate "Big El" show, notwithstanding that both evoke the identity of Elvis Presley. See *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

of impersonation,³⁰⁸ the endorsement's primary function is to associate the celebrity with the product and to capitalize on that association. There is little reason to shield such an appropriator from liability.³⁰⁹

Perhaps the most complex policy question arises from appropriations involving the use of subtle identifiers that, although invasive of a celebrity's interest, are so far removed from unambiguous personal identification as to justify exclusion from a workable right of publicity. For example, while we recognize that a television commercial that uses nothing more than an unseen tennis player's voice berating an umpire invades John McEnroe's personality interest just as much as an advertiser's use of Mr. McEnroe's photograph to endorse tennis shoes, does sound policy extend the right of publicity to the former use? Should every commercial use of errantly tuned saxophones playing "Auld Lang Syne" on New Year's Eve generate a claim by the Lombardo estate?³¹⁰

Although Mr. McEnroe's pugnacity and on-court vituperation may identify him (perhaps even more than his considerable skill as a tennis professional does), the public exposure of this one aspect of his personality also has served to make him epitomize the argumentative athlete. In that context, an advertiser's use of this attribute to trade on Mr. McEnroe's associative value is secondary to the advertiser's evocation of the species of athlete Mr. McEnroe has come to represent, an embodiment that Mr. McEnroe's fame and public conduct have created.³¹¹ Similarly, the Guy Lombardo-style arrangement of "Auld Lang Syne" standing alone is less evocative of Lombardo's persona than it is of the idea of a New Year's Eve celebration, a decidedly public matter. At some point some aspect of the celebrity may transcend his own persona and become evocative of some more general, if not generic concept.³¹² The issue

308. Because the relevant interest is that of the celebrity in the exclusive control of his persona's associative value rather than the general public's interest in freedom from deception, the disclaimer or disclosure is not really relevant. *See supra* notes 266-68 and accompanying text.

309. *Cf. Ausness, supra* note 6, at 992. "The [impersonator] is not merely appropriating an idea, but he is also trying to evoke the plaintiff's identity. In effect, he attempts to capitalize on the good-will and public interest in the plaintiff." *Id.*

310. *Cf. Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977).

311. As Mr. McEnroe recently said in a different context, "[b]eing a celebrity like I am is like being raped You can't do anything about it." *New York Times*, Nov. 27, 1985, at 24, col. 1 (Nat'l. Ed.).

312. The world has long since forgotten the Norwegian Vidkun Quisling, but our language has absorbed the word "quisling"; the individual came to embody the concept.

thus may be not whether use of the identifier evokes the celebrity, but whether the particular use of the persona evokes a broader concept that is properly a part of the public domain and therefore not within the right of publicity.

VI. CONCLUSION

The right of publicity has grown out of the commercial reality of celebrities' associative value. The interest that the right protects is different from the interests embraced by concepts of privacy or copyright or the various other legal categories to which the right of publicity has been analogized. An interest analysis supports the independent right of publicity and subsumes the much litigated issue of descendibility. That analysis comprehends the varied ways in which a celebrity's persona may be evoked for commercial purposes. With commercial personality interest as the focus, the right of publicity may be bounded intelligently, and policy determinations balancing that individual interest with public interests can be made consistently and based soundly.

