

ARTICLES

Is Independence Day Dawning for the Right of Publicity?

Roberta Rosenthal Kwall*

INTRODUCTION

The right of publicity is a relatively new legal theory, but it is rapidly becoming a popular vehicle for famous personalities to protect themselves from unauthorized appropriation of their names and likenesses.¹ The right of publicity allows an individual to safeguard the commercial value of her name and likeness and to prevent others from exploiting them without permission. Recognition of the right of publicity requires courts to engage in the complex task of defining the scope of the right. The courts, in attempting to mold the right of publicity into a viable legal doctrine, must confront difficult questions regarding the right's function, exercise, and termination.

This Article explores several controversial issues triggered by the rec-

© 1984 by Roberta Rosenthal Kwall.

* Assistant Professor of Law, DePaul University. A.B. 1977, Brown University; J.D. 1980, University of Pennsylvania.

¹ See, e.g., *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982) (holding Cher's right of publicity misappropriated by magazine defendants when, without her consent, they used her name and likeness in advertisements for *Forum* magazine implying that she endorsed the magazine); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (Muhammad Ali's motion to preliminarily enjoin distribution of an issue of *Playgirl* Magazine containing a nude sketch of Ali granted; holding that Ali was likely to prevail on his right of publicity claim against the magazine).

The right of publicity's evolution has provided a fertile ground for legal commentators. See, e.g., Hoffman, *The Right of Publicity — Heirs' Right, Advertisers' Windfall, or Courts' Nightmare?*, 31 DE PAUL L. REV. 1 (1981); Saret & Stern, *Publicity and Privacy — Distinct Interests on the Misappropriation Continuum*, 12 LOY. U. CHI. L.J. 675 (1981); Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673 (1981).

ognition and extension of the right of publicity. This Article argues that the right of publicity should be construed expansively so that every person and her heirs and grantees can rely upon it to prevent the commercial exploitation of any personal attribute capable of public recognition. The Article also asserts that because such a broad scope of protection for the right of publicity must, at some point, clash with the right of free expression cherished by society, a doctrine must emerge which will balance both interests successfully.

Part I of this Article generally examines why the right of publicity should be accorded protection, and thus provides a framework for the subsequent parts which consider more specific applications of the right. The first part also probes the questions of who and what the right of publicity protects, and demonstrates that both celebrities and private citizens should be able to rely upon the right to prevent the appropriation of any personal attribute which triggers public recognition.

Part II discusses whether the right of publicity survives after an individual's death so that it can be exercised by that person's heirs and grantees. This question has been litigated in several federal and state courts within the past few years,² without uniform results. By advocating that the right of publicity should be inheritable in all circumstances, this Article rejects the position taken by some courts that the right can be inherited only if the principal achieved a degree of public recognition and exploited her right of publicity while alive.

Part III focuses on the tension between the right of publicity and the first amendment's guarantee of free expression. It advocates the adoption of a concept analogous to the "fair use" doctrine present in the copyright laws as a viable resolution of this problem.

I. THE RIGHT OF PUBLICITY'S ROLE IN OUR LEGAL SYSTEM

An understanding of the right of publicity's function and potential is critical to a full appreciation of its importance. This part traces the development of the right and examines the rationales justifying its existence. Subsequently, it addresses the two most fundamental questions concerning the scope of the right: 1) Who can assert the right of publicity? and 2) What attributes does it protect?

A. *The Origin and Development of the Right of Publicity*

The right of publicity is an offshoot of the venerable right of privacy. It is fitting that one commentator has dubbed the right of publicity

² See *infra* notes 82-144 and accompanying text.

“privacy’s stepchild.”³ Unfortunately for the right of publicity, it has experienced a painful and protracted puberty which is attributable, at least in part, to the well-established reputation of its awesome “parent,” the right of privacy. Although the right of publicity is more than thirty years old,⁴ courts are still struggling to establish it as an independent doctrine capable of safeguarding important societal interests distinct from those protected by its well-meaning, but sometimes misunderstood, parent.

The application of the right of publicity has created a great deal of controversy, but its genesis in the privacy doctrine is undisputed. Dean Prosser’s renowned article on privacy posited the following four distinct torts comprising the law of privacy:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.⁵

Prosser distinguished the fourth tort from the first three by noting that “[t]he interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.”⁶ In fact, 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.⁷

As early as the beginning of the twentieth century, some courts recognized the proprietary interest of an individual in her name and like-

³ Comment, *Transfer of the Right of Publicity: Dracula’s Progeny and Privacy’s Stepchild*, 22 UCLA L. REV. 1103 (1975) [hereafter Comment, *Privacy’s Stepchild*].

⁴ See *infra* note 15 and accompanying text.

⁵ Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

⁶ *Id.* at 406.

⁷ In referring to *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), Prosser observed that the proprietary nature of the interest protected by the appropriation tort is “clearly indicated by a decision . . . that an exclusive licensee has what has been called a ‘right of publicity,’ which entitles him to enjoy the use of the name or likeness by a third person.” Prosser also remarked that “[a]lthough this decision has not yet been followed, it would seem clearly to be justified.” *Id.* at 406-07.

ness when deciding invasion of privacy suits.⁸ These courts were compelled to focus on the property right of an individual in her name⁹ and likeness to counter the defendants' argument that the law does not afford relief for invasion of privacy unless such an intrusion is accompanied by injury to, or interference with, a person's property.¹⁰ Recogni-

⁸ In the landmark decision, *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), the Supreme Court of Georgia upheld the plaintiff's invasion of privacy claim against an insurance company which had utilized the plaintiff's picture, without his consent, in an advertisement for insurance. The following statement appeared below the plaintiff's picture: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." *Id.* at 192, 50 S.E. at 69. The plaintiff had neither made any such statement nor purchased a life insurance policy from the defendant. The court observed that because the "form and features of the plaintiff are his own," the defendant invaded "the rights of his person" by displaying them in public for advertising purposes. *Id.* at 217, 50 S.E. at 79.

Pavesich quoted at length the dissenting opinion in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). In that case, the majority concluded that the right of privacy does not exist, and denied recovery to the plaintiff whose picture was used by the defendant in a flour advertisement. In a vigorous dissent, Judge Gray emphasized the plaintiff's proprietary rights in her features:

I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions. . . . [I]f her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public.

Id. at 564, 64 N.E. at 450 (Gray, J., dissenting), *quoted in Pavesich*, 122 Ga. at 215, 50 S.E. at 79. Subsequent to *Roberson*, the New York Legislature enacted a statutory right of privacy which provides a remedy for "any person whose name, portrait or picture is used . . . for advertising purposes or purposes of trade . . ." N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1982).

⁹ As early as 1891, the Supreme Court observed: "A man's name is his own property and he has the same right to its use and enjoyment as he has to other species of his property." *Brown Chem. Co. v. Meyer*, 139 U.S. 540, 544 (1891) (holding that defendant may sell a preparation called "Brown's Iron Tonic" despite plaintiff's prior marketing of a preparation called "Brown's Iron Bitters"). Also in 1891, a New York court held that an injunction was appropriate to restrain the defendant's unauthorized use of the plaintiff's name and facsimile signature to endorse a medication. *MacKenzie v. Soden Mineral Spring Co.*, 18 N.Y.S. 240 (Sup. Ct. 1891). Although *Brown Chemical* and *MacKenzie* did not involve invasion of privacy claims, they underscore the judiciary's long-standing recognition of an individual's property right in her name.

¹⁰ *E.g.*, *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911). A five year old sued jewelry merchants for invading his privacy by using his picture in an advertisement without permission. In evaluating those precedents which failed to recognize the right of privacy, the court concluded that "if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of

tion of the property right of an individual in her name and likeness prompted these courts to recognize explicitly that any value inherent in an individual's likeness belongs exclusively to that individual.¹¹

Although most of the plaintiffs in the early invasion of privacy decisions were private individuals seeking compensation for the injury to their feelings caused by the defendants' appropriation of their likenesses,¹² these decisions nevertheless support the proposition that those wishing to capitalize upon another's name or likeness for advertising purposes should not be free to do so without compensating the principal. Had any of these pioneer privacy plaintiffs instead sought compensation for the benefits received by the defendants from the unauthorized appropriation, the evolution of the right of publicity might have taken an entirely different course.¹³

Despite the emphasis which the early invasion of privacy decisions placed upon the value of an individual's property right in her name and likeness, the idea of compensating an individual for another's beneficial

privacy would freely concede a remedy to restrain its invasion for all agree that equity will forbid an interference with one's right of property." *Id.* at 658, 134 S.W. at 1078. The court established that a person does, in fact, have such a property right in his picture:

The privilege and capacity to exercise a right, though unexercised, is a thing of value — is property — of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. . . . One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?

Id. at 658-59, 134 S.W. at 1078; *see also* Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (1907). In enjoining the defendant from using Thomas A. Edison's name and picture for commercial purposes, the court observed: "[I]t is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it." *Id.* at 141, 67 A. at 394

¹¹ *See supra* notes 8, 10 and accompanying text.

¹² *But see, e.g.*, Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (1907). Edison sought to enjoin the defendant company from using his name and likeness in connection with the manufacture and sale of a medicinal preparation, but he did not claim injury to his feelings.

¹³ *See infra* note 14 and accompanying text. For a discussion of the confusion which has resulted from the filing of lawsuits based on privacy violations rather than the appropriation of property rights, *see* Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. REV. 553 (1960).

appropriation of her name and likeness did not receive a great deal of attention until the 1950's.¹⁴ In 1953, the Second Circuit explicitly recognized the right of publicity as a legal theory distinct from the right of privacy in its landmark decision, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁵ *Haelan* considered a contract entered into by a baseball player and the plaintiff for the exclusive right, for a limited term, to use the ballplayer's photograph in connection with the sales of its gum. The defendant, a rival chewing gum manufacturer, subsequently induced the ballplayer to grant contract rights for the use of his

¹⁴ During the first half of this century, courts deciding invasion of privacy actions had little precedent for compensating plaintiffs for the publicity value of their names and likenesses because most of the privacy plaintiffs sought compensation for their injured feelings rather than for the appropriation of their names and likenesses. Therefore, the emphasis which the initial privacy decisions placed upon an individual's property right in her name and likeness frequently escaped attention. As one commentator observed:

Although . . . early leading cases which established the right of privacy as a new right in the common law were unanimous in recognizing the property rights of one in his name and likeness, the element of appropriation was so apparent that few difficulties arose when the courts eliminated the property aspect and based their decisions on an independent right of privacy, especially in cases involving private individuals who sued for the injury to their feelings.

Gordon, *supra* note 13, at 560.

¹⁵ 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Prior to *Haelan*, some courts acknowledged the possibility of a plaintiff recovering the reasonable value of the use of her likeness for commercial purposes. In *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), the court denied recovery to a renowned football player for invasion of his privacy when the defendant company published his picture, without consent, in the 1939 Pabst Football Calendar. The court predicated its holding, in part, upon the plaintiff's status as a public personality who constantly sought publicity in other contexts. A dissenting opinion focused on the proprietary interest of a person in his name and likeness and argued that the plaintiff was "entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes." *Id.* at 170 (Holmes, J., dissenting). The majority opinion rejected this position because the plaintiff had not sought damages for the defendant's appropriation of his name and likeness for advertising purposes. *See also* *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 648, 86 N.E.2d 306, 308 (1949) (affirming partial damage award for an optical lens grinder in action against manufacturer of optical lenses; complaint alleged that defendant's use of plaintiff's picture in advertisement, without his consent, invaded his privacy and deprived him "of the commercial value of advertisement of his skill and ability"); *Bunnell v. Keystone Varnish Co.*, 254 App. Div. 885, 5 N.Y.S.2d 415 (1938) (plaintiff could recover for defendant's unjust enrichment under New York's privacy statute). For a discussion of these and other pre-*Haelan* decisions which implicitly recognize a right of publicity, see Gordon, *supra* note 13, at 560-65; Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 218-21 (1954).

photograph in connection with the sale of its gum. The defendant argued that the plaintiff's contract was no more than a release by the ballplayer to the plaintiff which prevented the ballplayer from suing the plaintiff for invasion of his right of privacy. The contract thus did not vest in the plaintiff a property right or other legal interest which the defendant's conduct invaded. The court rejected this argument and held that an individual has, independent of the right of privacy, a right in the publicity value of her photograph. A grant of the exclusive privilege of publishing a person's picture may be made "in gross" . . . without an accompanying transfer of a business or of anything else."¹⁶

In the thirty years following the *Haelan* decision, the right of publicity has sought recognition as an independent legal doctrine supporting a cause of action for the appropriation of an individual's name or likeness when such appropriation benefits the defendant. As discussed above, historically the right of privacy has served as a means of compensating an individual for injured feelings caused by the defendant's conduct.¹⁷ In the typical right of publicity action, however, the plaintiff is not objecting primarily to the *fact* of the exploitation, but rather to the *loss of financial gain* associated with the unauthorized appropriation. The gravamen of the harm is that the defendant has not compensated the plaintiff for using the plaintiff's name and likeness.

Several distinct rationales support protection for the right of publicity. One rationale focuses on the benefit which society receives from

¹⁶ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

¹⁷ *See supra* notes 12-14 and accompanying text. In an article published shortly after *Haelan* was decided, Professor Nimmer explored the inadequacy of the privacy doctrine in protecting the right of publicity. He emphasized that because the right of privacy evolved as a vehicle for preventing offensive publicity, recovery is grounded upon the mental distress inflicted upon the plaintiff. Even in those jurisdictions in which a nonoffensive use supports an invasion of privacy cause of action, a plaintiff will be unable to recover damages unless she can show offensive use and concomitant injured feelings. Thus, Nimmer concluded that "since a defendant may well exploit for his own gain the publicity values of a plaintiff without presenting such publicity in an offensive manner, it follows that in such instances a plaintiff will usually be unable to protect his publicity values under a privacy theory." Nimmer, *supra* note 15, at 209.

Nimmer also noted other reasons why the privacy doctrine cannot assure an individual's control over the use of her name and likeness: First, the celebrity status of an individual frequently is construed as a waiver of the right of privacy; and second, in most jurisdictions the right of privacy is a personal right rather than a property right, and therefore, it is not assignable. In addition, the right of privacy is limited to human beings and thus cannot protect the publicity values inherent in the name or portrait of a well-known animal or business enterprise. *Id.* at 204-10.

such protection. In *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁸ the Supreme Court observed that the states have an interest in "protecting the proprietary interest of the individual in his act in part to encourage such entertainment."¹⁹ In *Zacchini*, the petitioner brought an action for damages against a television station for showing his entire human cannonball act, without his consent, on its nighttime newscast. The Court emphasized that protection of an individual's right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public" and analogized this protection to that which is afforded by the patent and copyright laws.²⁰

A second rationale for the right of publicity is the recognized interest of the individual in enjoying "the fruits of his own industry free from unjustified interference."²¹ This rationale is particularly relevant to celebrities and other public figures who spend considerable time, effort, and financial resources in perfecting their trade to the point where their names and likenesses are valuable commodities capable of generating significant income.²²

Closely related to the individual's interest in profiting from the fruits of her labors is society's interest in preventing unjust enrichment by those appropriating another's identity without consent for commercial advantage.²³ Respect for the property rights of individuals underlies society's interest in preventing unjust enrichment.²⁴ By focusing on the

¹⁸ 433 U.S. 562 (1977). *Zacchini* is the only Supreme Court decision which discusses the right of publicity in detail.

¹⁹ *Id.* at 573.

²⁰ *Id.* at 576. The Court quoted the following language from *Mazer v. Stein*, 347 U.S. 201, 219 (1954):

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

²¹ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970). One commentator has labelled this policy consideration "the very *raison d'être* for the existence of the right of publicity as distinct from the right of privacy." Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 116 (1980).

²² See, e.g., *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835-36, 603 P.2d 425, 438, 160 Cal. Rptr. 323, 336-37 (1979) (Bird, C.J., dissenting).

²³ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Hirsch v. S.C. Johnson & Son*, 90 Wis. 2d 379, 391, 280 N.W.2d 129, 134 (1979).

²⁴ As one commentator observed: "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which

degree to which the defendant is enriched rather than on the plaintiff's efforts in perfecting her skill, this rationale, unlike the first two, applies equally to private individuals and public figures.²⁵

In addition to denying an individual just compensation for the publicity value of her name and likeness, a defendant's unauthorized appropriation can have other adverse consequences. For example, the individual whose identity is appropriated may suffer damage to her reputation, particularly when the advertised product or service is of poor quality or when a significant segment of the public is aware that the individual named or depicted neither uses nor recommends the product.²⁶ The resulting damage to an individual's reputation may preclude opportunities for future endorsements,²⁷ and may even impede the celebrity's professional development.

In addition, a defendant's unauthorized appropriation of an individual's name and likeness can have a negative effect upon people other than the person whose identity is appropriated. The unauthorized appropriation of an individual's identity in a commercial setting dilutes the value of any third party's prior contract rights to use that individual's name and likeness for commercial purposes.²⁸ This is especially true when an individual's identity is appropriated to promote products similar to those which the individual has endorsed previously. Not only does the promoter of the second product receive a free endorsement, but the simultaneous presence of these competing products in the market can result in consumers mistaking the second product for the first prod-

he would normally pay." Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966), quoted in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

²⁵ See *infra* notes 38-51 and accompanying text.

²⁶ Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 643 (1973). Treece notes that this "injurious potential" also exists for noncelebrities:

Many advertisers use endorsements by "average" people, often naming them, to attract attention to advertising messages and motivate decisions to purchase. Noncelebrity testimonials probably attract more attention to advertising messages than any other device except celebrity testimonials and are, therefore, perennial favorites of advertisers. . . . Especially in an advertisement that names as well as pictures a noncelebrity, the likelihood seems high that those who know him will assume that he knows something about the product and has lent his personality to the marketing effort on the basis of what he knows.

Id. at 643 n.27.

²⁷ *Id.* at 643.

²⁸ See Hoffman, *supra* note 21, at 117.

uct, thereby diminishing the value of the endorsement received by the promoter of the first product.²⁹

B. *Persons Protected by the Right of Publicity*

A fundamental question concerning the scope of the right of publicity focuses on the proprietors of the right. Does everyone have a right of publicity or is this right reserved only for those who have achieved public recognition? This issue has received little attention in the past because the majority of decisions treating the right of publicity have involved entertainers and other public figures rather than private citizens.³⁰

At least one recent decision can be interpreted to suggest that the right of publicity belongs exclusively to celebrities and other types of public figures. In *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products*,³¹ the Georgia Supreme Court held that the widow of Dr. Martin Luther King, Jr. could rely upon his right of publicity to prevent the defendant's unauthorized distribution of plastic busts of the deceased civil rights leader. The court considered whether Georgia recognizes the right of publicity as a right distinct from the right of privacy,³² and defined the right of publicity "as a *celebrity's* right to the exclusive use of his or her name and likeness."³³ It concluded that a private citizen can rely upon the right of privacy to prevent the appropriation of her photograph for commercial purposes, whereas a public figure or celebrity has a "similar" right of publicity.³⁴

In drawing this distinction between private and public citizens, the court relied upon *Pavesich v. New England Life Insurance Co.*,³⁵ a landmark invasion of privacy suit brought by a private plaintiff against an insurance company for unauthorized appropriation of the plaintiff's picture in an advertisement for insurance.³⁶ In *Pavesich*, as in most of the early invasion of privacy decisions, the plaintiff sought compensa-

²⁹ *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835, 603 P.2d 425, 438, 160 Cal. Rptr. 323, 336 (1979) (Bird, C.J., dissenting); see also *Treece, supra* note 26, at 647 ("Allowing individuals to control the advertising use of their personalities could thus provide a private law mechanism for advertising regulation.").

³⁰ See *infra* text accompanying note 141.

³¹ 250 Ga. 135, 296 S.E.2d 697 (1982). See *infra* notes 126, 140, 141 and accompanying text, and notes 223-29 and accompanying text for a discussion of this decision.

³² 250 Ga. at 138, 296 S.E.2d at 700.

³³ *Id.* (emphasis added).

³⁴ *Id.* at 143, 296 S.E.2d at 703.

³⁵ 122 Ga. 190, 50 S.E. 68 (1905).

³⁶ See *supra* note 8.

tion for his injured feelings rather than for the value of the defendant's unauthorized appropriation.³⁷ By failing to recognize explicitly that situations can and do arise in which private plaintiffs seek compensation for the publicity value of their identities, the *Martin Luther King* court erroneously labelled the right of privacy asserted in *Pavesich* as the basis for relief in all appropriation cases in which the plaintiff is a private citizen. By focusing on the private or public status of the plaintiff, the court overlooked the important theoretical differences between the traditional right of privacy and the right of publicity.³⁸

This issue of a plaintiff's status as a public or private citizen also was implicated in a much earlier decision by an intermediate New Jersey court, *Canessa v. J.I. Kislak, Inc.*³⁹ *Canessa* was an invasion of privacy suit brought by a family of private citizens against a real estate company for distributing, for its own commercial purposes, reprints of a newspaper article about the plaintiffs which contained a family picture.⁴⁰ In an exhaustive opinion, the *Canessa* court reviewed the early invasion of privacy decisions which emphasized the property right of an individual in her name and likeness,⁴¹ and concluded that the plaintiffs' names and likenesses, which "belong to them," are property and "things of value," as evidenced by the defendant's appropriation.⁴² The court further observed that the distinction between private citizens and public figures in appropriation cases is relevant "only to the question of damages."⁴³ Thus the *Canessa* court recognized the potential value

³⁷ See *supra* notes 12-14 and accompanying text.

³⁸ A careful reading of the *Martin Luther King* decision suggests that the court may not have perceived any significant substantive differences between the right of privacy and the right of publicity, except for the status of the individuals protected under the respective rights. See *infra* note 141 and accompanying text.

³⁹ 97 N.J. Super. 327, 235 A.2d 62 (1967).

⁴⁰ The defendant's motion for summary judgment was supported in part by its argument that the plaintiffs' cause of action for invasion of privacy was barred by the two year statute of limitations governing actions for injury to the person. N.J. STAT. ANN. § 2A:14-2 (West 1952). The court rejected the defendant's argument, however, and held that to the degree the plaintiffs' claim was based on the appropriation of their names and likenesses for the defendant's commercial advantage, the action was for an invasion of a property right and, therefore, was governed instead by the six-year-statute of limitations relating to actions for tortious injury to property rights. N.J. STAT. ANN. § 2A:14-1 (West 1952).

⁴¹ See *supra* notes 8-15 and accompanying text.

⁴² *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 351, 235 A.2d 62, 76 (1967).

⁴³ *Id.* at 350, 235 A.2d at 75. The court emphasized that "however little or much plaintiff's likeness and name may be worth, [the] defendant . . . should be made to pay for what he has taken. . . ." *Id.* at 351, 235 A.2d at 75; see *infra* notes 54-57 and accompanying text.

which inheres in every individual's name and likeness.⁴⁴ Although the plaintiffs in *Canessa* did not explicitly invoke their right of publicity,⁴⁵ the decision implicitly recognizes the right of publicity as a fundamental safeguard belonging to everyone.

Several commentators view the right of publicity as a doctrine which can be relied upon by all individuals to redress unauthorized exploitation of their names and likenesses for commercial purposes.⁴⁶ This position is supportable on several grounds. As *Canessa* illustrates, recognition of a right of publicity for every individual accords with the judiciary's long-standing recognition of an individual's property right in her name and likeness.⁴⁷ Recognition of a universal right of publicity also comports with the realities of modern advertising because advertisers frequently use endorsements by private citizens.⁴⁸

Moreover, the right of publicity does not exist merely to protect the celebrity status of the individual whose identity is appropriated. The right also prevents unjust enrichment of the defendant as a result of an

⁴⁴ *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 351, 235 A.2d 62, 75 (1967).

⁴⁵ In addition to alleging damage to the plaintiffs' reputation, the complaint in *Canessa* alleged that the defendant's appropriation of plaintiffs' names and pictures was an "unauthorized appropriation of defendant of the pictures, names and elements of the personalities and private lives of all the plaintiffs for commercial use." *Id.* at 331, 235 A.2d at 65.

⁴⁶ See, e.g., Gordon, *supra* note 13, at 610-11; Nimmer, *supra* note 15, at 217; Pilpel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC'Y 249, 255-57 (1980); Treece, *supra* note 26, at 646-48. *Contra* Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979) ("Because the right of publicity rests on the idea of damage to property of demonstrated economic worth, it does not extend to the misappropriation of a person's name or likeness when that person has not previously exploited these attributes in some commercial manner."); Hoffman, *supra* note 1, at 14.

⁴⁷ See *supra* text accompanying note 41 and notes 8-15 and accompanying text.

Twenty-five years before *Canessa* was decided, the dissent in *O'Brien v. Pabst Sales Co.* recognized what amounts to a universal right of publicity:

The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to everyone; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.

124 F.2d 167, 170 (5th Cir. 1941) (Holmes, J., dissenting); see *supra* note 15; see also Prosser, *supra* note 5, at 423 (observing that the appropriation cases create "in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness" which confer upon the individual "rights much more extensive than those which any corporation engaged in business can expect under the law of unfair competition").

⁴⁸ See *supra* note 26.

unauthorized appropriation.⁴⁹ Indeed, a defendant can be unjustly enriched by the appropriation of either a celebrity's or private citizen's name or likeness so long as the defendant reaps a commercial benefit from the appropriation.⁵⁰ Those private citizens who desire compensation for the publicity value of their appropriated names and likenesses should have the same remedy as celebrities and public figures.⁵¹

Recognition of a universal right of publicity has the additional advantage of freeing courts from the difficult task of drawing lines with regard to the celebrity status of a particular plaintiff.⁵² If only celebrities and other public figures possess a right of publicity, courts must determine the degree of fame or public recognition that allows a plaintiff to invoke the right. Such determinations would be particularly difficult when the plaintiff's reputation is local or regional in scope.

Although the celebrity status of an individual should be irrelevant to the assertion of a right of publicity,⁵³ the relative fame of an individual can affect the amount of damages awarded for infringement of this right.⁵⁴ In all situations, the damage award should include not only the measure of the defendant's profits to which the plaintiff is entitled,⁵⁵

⁴⁹ See *supra* text accompanying notes 23-25.

⁵⁰ "In a given case, . . . the apparently candid photograph of a private person buying or using a product might be more convincing than either a celebrity or a professional actor." Treece, *supra* note 26, at 646.

⁵¹ See, e.g., *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824-25 n.11 (9th Cir. 1974) ("the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless"); *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Hawaii 374, 441 P.2d 141 (1968) (private individuals alleging a cause of action for unjust enrichment in suit against corporation for appropriating their names and likenesses for advertising purposes).

⁵² Nimmer, *supra* note 15, at 217.

⁵³ Recognizing a universal right of publicity may be at odds with decisions holding that the right of publicity is descendible only when the individual whose identity is appropriated actually exploited her right of publicity while alive. See *infra* notes 105-34 and accompanying text. Even under this view, it is still possible to conclude that every individual possesses a right of publicity while alive, but that only the heirs of celebrities and public figures who exploited their right of publicity during their lifetimes (and perhaps the heirs of private citizens who publicly endorsed certain products while alive) can inherit the right. As the discussion in Part II demonstrates, this exploitation requirement is unsound because it fosters such arbitrary distinctions and ignores the underlying rationales supporting the existence of the right. See *infra* notes 127-34 and accompanying text.

⁵⁴ Nimmer, *supra* note 15, at 217.

⁵⁵ *Gordon*, *supra* note 13, at 611; see also *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 350, 235 A.2d 62, 75 (1967) (quoting *Gordon*); *infra* note 256 and accompanying text.

but also an amount representing the fair market value of the plaintiff's name or likeness. In the case of a celebrity, fame, skill, and prior marketability must be taken into account in establishing the fair market value of the plaintiff's name or likeness.⁵⁶ In contrast, one measure of the fair market value of a private citizen's name and likeness is the amount which a professional would charge to pose for a picture possessing equal audience appeal.⁵⁷

C. *Personal Attributes Protected by the Right of Publicity*

Although this Article focuses on the right of publicity as the vehicle for preventing commercial exploitation of an individual's name and likeness, the right of publicity also has the potential for protecting numerous other personal attributes. For example, the Sixth Circuit recently held that a portable toilet manufacturer violated Johnny Carson's right of publicity when it used the phrase "Here's Johnny" in conjunction with the slogan, "The World's Foremost Comedian."⁵⁸ In so holding, the court observed that "a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes."⁵⁹ Other courts have approved equally expansive applications of the right of publicity by holding that it protects from appropriation aspects of an individual's identity such as a nickname,⁶⁰ professional statistical information,⁶¹ and a distinctive racing car.⁶²

⁵⁶ See, e.g., *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), in which the court awarded Cher as general damages 25% of the value of the defendants' false and misleading advertising. In addition, the court determined that each defendant should pay Cher \$100,000 in special damages for the fair market value of the usage of her name and likeness. This value had been established by one of the defendants in its prior negotiations with Cher's representatives. The Ninth Circuit affirmed the trial court's damage award with respect to those defendants whose liability it affirmed. See also *Gordon*, *supra* note 13, at 611; *Hoffman*, *supra* note 1, at 13 (discussing factors relevant to establishing fair market value of a celebrity's right of publicity).

⁵⁷ See *Treece*, *supra* note 26, at 649.

⁵⁸ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); see *infra* notes 239-42 and accompanying text.

⁵⁹ 698 F.2d at 837.

⁶⁰ *Hirsch v. S.C. Johnson & Son*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979) (prominent athlete had right of publicity in his nickname "Crazylegs" and could bring an action against manufacturer for commercial misappropriation of his nickname on a shaving gel); see *infra* text accompanying notes 237-38.

⁶¹ *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (baseball table game manufacturer violated baseball players' right of publicity by the unauthorized appropriation of their names and playing statistics for commercial use); cf. *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 79, 232 A.2d 458, 462 (1967) (action by

Courts do not uniformly endorse such extensions of the right of publicity. For example, in an action by actress Shirley Booth against an advertiser and advertising agency to recover damages for the defendant's use, in television commercials, of a voice imitative of the one the plaintiff had used in the television program "Hazel," the court held that the plaintiff could not show that her right of publicity was infringed because the defendants had used neither her name nor her likeness in the commercials.⁶³ The dissenting opinion in the Sixth Circuit's *Johnny Carson* decision advocated a broader scope for protection for the right of publicity than that adopted in the decision involving Shirley Booth, but nevertheless refused to extend the right "beyond an individual's name, likeness, achievements, identifying characteristics, or actual performances to include phrases or other things which are merely associated with the individual."⁶⁴ Even under this standard, however, courts must make some determinations as to which attributes should be protected by the right of publicity as "identifying characteristics."

One commentary has suggested that courts should grant recovery for the portrayal of any recognizable attribute of a person that has become

professional golfers against manufacturer of game incorporating golfers' professional profiles; using biographical data of a well-known figure "for the purpose of capitalizing upon the name by using it in connection with a commercial project" constitutes an invasion of privacy).

⁶² *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) held that California would protect an individual's proprietary interest in his own identity, and determined that the plaintiff race car driver was identifiable in a television commercial for cigarettes on the basis of the unique and distinctive decorations appearing on his car. Although the plaintiff's face was not visible in the commercial, the markings appearing on the plaintiff's car were peculiar to his racing cars and caused some people to assume that the car in question was the plaintiff's and that the plaintiff endorsed the cigarettes. *See infra* text accompanying note 246.

⁶³ *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973). The court observed that since the commercials were anonymous and did not use Ms. Booth's name or likeness in any way to identify her as the source of the voice of Hazel, she could not show that her publicity rights were infringed. *Cf. Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969) (commercials allegedly imitative of renowned singing group's performance of a song did not invade the plaintiff's right of privacy because commercials were anonymous and did not convey the impression that they embodied the performance or voice of any particular individual or group of individuals); Hoffman, *supra* note 1, at 9 (observing that majority of courts have held that "absent an identification of the celebrity by name or likeness, the imitation of his or her voice *per se* does not constitute unfair competition or violate one's publicity rights") (emphasis added).

⁶⁴ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (Kennedy, J., dissenting); *see infra* notes 243-46 and accompanying text.

marketable through that person's efforts when the plaintiff is able to demonstrate that she was injured from an economic standpoint by the defendant's portrayal.⁶⁵ Although this author would dispute a requirement of demonstrating the prior marketability of a given personal attribute,⁶⁶ an approach which makes public recognition the touchstone appears most appropriate.⁶⁷ At a minimum, such a standard would protect from commercial exploitation the names and likenesses of all individuals because every person is publicly identified by these two attributes. This standard also would protect additional personal attributes of celebrities and other public figures when such attributes trigger public recognition.

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.⁶⁸

⁶⁵ Felcher & Rubin, *supra* note 46, at 1601, 1615.

⁶⁶ A requirement of prior marketability conflicts with the recognition of a universal right of publicity. See *supra* notes 46-57 and accompanying text and *infra* notes 127-29 and accompanying text.

⁶⁷ Sometimes the capacity of an attribute for triggering public recognition is dependent upon the substance of the defendant's use. See *infra* text accompanying note 166 and notes 234-49 and accompanying text.

⁶⁸ The laws of copyright, trademark and unfair competition have been analogized to the right of publicity, yet none of these doctrines provide a degree of protection against unauthorized appropriation equal to that afforded by the right of publicity. See Hoffman, *supra* note 1, at 20-21. For example, protection under the 1976 Copyright Act, 17 U.S.C. §§ 101-810 (1982), is limited to "works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1982). Generally, the attributes protected by the right of publicity are intangible, and therefore, outside the scope of the 1976 Copyright Act. See Hoffman, *supra* note 1, at 18. At least one commentator has argued, however, that to the extent the interests protected by the right of publicity are also protected under the 1976 Copyright Act, the copyright law preempts the right of publicity. See Shipley, *supra* note 1, at 673.

Although a discussion of the preemption issue is beyond the scope of this Article, it should be noted that those courts which have addressed the issue in the context of both the 1909 and 1976 Copyright Acts have concluded that the copyright laws do not preempt protection for the right of publicity. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting) (approving district court's conclusion); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (1909 Copyright Act does not preempt a state-based right of publicity); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 849, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (Bird, C.J., dissenting). *But see Carson v. Here's Johnny Portable Toilets, Inc.*, 698

II. EXERCISE OF A DECEDENT'S RIGHT OF PUBLICITY

During the past ten years, Elvis Presley, Bela Lugosi, Rudolph Valentino, the Marx Brothers, Martin Luther King, Jr., and Agatha Christie have been the subject of lawsuits revolving around whether the right of publicity survives an individual's death and can be exercised by the decedent's heirs and grantees. The courts' discussions of the descendibility issue are as diverse as the individuals whose publicity rights have inspired this litigation. Considerable disagreement among the courts over this issue injects an additional element of fascination into a question which possesses great academic appeal.⁶⁹ Aside from its

F.2d 831, 840-41 (6th Cir. 1983) (Kennedy, J., dissenting) (suggesting possibility of preemption); *see also* 17 U.S.C. § 301 (1982) (preemption with respect to other laws).

Trademark law also has been analogized to the right of publicity. One commentator has observed that "the effect of a state's protection against misappropriation of a celebrity's name and picture is to recognize the celebrity's name as a species of trade name, and his likeness as a kind of trademark." Hoffman, *supra* note 1, at 19; *see also* Prosser, *supra* note 5, at 423. Yet, because trademark rights arise through extensive and continuous use, trademark law cannot adequately prevent the unauthorized appropriation of an individual's name or likeness when that individual has not previously exploited her name or likeness in a commercial context.

The principles of unfair competition law do provide adequate relief, in certain contexts, in cases involving infringement of an individual's right of publicity. *See, e.g.,* Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314, 320 (Pa. Ct. C.P. 1957) (in granting relief to a famous golfer for misappropriation of his likeness, court observed that "the right of publicity . . . is but another way of applying the doctrine of unfair competition"). Historically, the law of unfair competition has required plaintiffs to prove the elements of competition between the parties, passing off of one's goods or services as those of another, and likelihood of confusion. *See* Hoffman, *supra* note 1, at 20; Nimmer, *supra* note 15, at 210-14. Although modern courts may not require an unfair competition plaintiff to prove competition and passing off, *see* Hirsch v. S.C. Johnson & Son, 90 Wis. 2d 379, 399, 280 N.W. 2d 129, 138 (1979), a plaintiff still must prove likelihood of confusion to recover under an unfair competition theory. *See* Hoffman, *supra* note 1, at 20. A right of publicity plaintiff, on the other hand, need not prove likelihood of confusion. In fact, in the Sixth Circuit's recent decision, Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983), the court held that although Johnny Carson's right of publicity had been infringed by the defendant's use of the slogan "Here's Johnny" in connection with its sales of portable toilets, the defendant's use of the slogan did not present a likelihood of confusion, mistake or deception that Carson was connected with the product. The court, therefore, affirmed the district court's judgment denying Carson's unfair competition claim. *Id.* at 834; *see also* Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983) (holding that although plaintiffs could not show confusion to establish unfair competition, the performers were entitled to relief based on violation of their publicity rights).

⁶⁹ The descendibility question has prompted much commentary in recent years. *See, e.g.,* Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Hoffman, *supra* note 1, at 26;

theoretical appeal, however, the descendibility controversy affects the practice of law in the fields of estate planning⁷⁰ and advertising.⁷¹

Much of the controversy surrounding the survival of publicity rights stems from those decisions addressing this issue in the context of actions predicated upon the right of privacy. Traditionally, the right of privacy has been regarded as a personal right which terminates upon the death of the individual.⁷² Relying on the personal nature of the right of privacy, several courts have held that a decedent's relatives could not recover for invasion of their privacy resulting from the defendant's appropriation of the deceased's name or likeness, unless the defendant's activity also invaded their own privacy.⁷³

Some courts have refused recovery for the relatives of a decedent even when the defendants appropriated the deceased's name and likeness for commercial purposes. In *James v. Screen Gems, Inc.*,⁷⁴ for example, the court held that the widow of Jesse James, Jr. could not recover damages based on invasion of her privacy for the defendants' wrongful portrayal of her deceased husband in a television film. The court emphasized that the wrongful portrayal was directed toward Jesse James, Jr.,

Hoffman, *supra* note 21, at 111; Pilpel, *supra* note 46, at 249; Comment, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703 (1983) [hereafter Comment, *Commercial Exploitation*]; Comment, *Privacy's Stepchild*, *supra* note 3, at 1103; *see also infra* note 144.

⁷⁰ A descendible right of publicity has consequences for estate planners in pre-death estate planning as well as post-mortem administration. *See infra* note 100; *see also* Comment, *Privacy's Stepchild*, *supra* note 3, at 1118-19.

⁷¹ Given the unsettled state of the law in this area, it is difficult for attorneys representing advertisers and advertising agencies to advise their clients when they wish to use the name or likeness of a deceased person in an advertisement. As the discussion in this part demonstrates, unless such clients first secure the permission of the decedent's heirs and grantees, they may face liability in some, but not all, jurisdictions for infringing the deceased's publicity rights.

⁷² *See* Gordon, *supra* note 13, at 595; Nimmer, *supra* note 15, at 209.

⁷³ *See, e.g.*, *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (2d Dist. 1939) (invasion of privacy action brought by husband of deceased against newspaper for publishing picture of deceased in connection with story of her suicide); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (right of privacy not extended to provide damages for anguish of mother of murdered son caused by publication of magazine articles about the murder which did not feature the plaintiff); *Schuyler v. Curtis*, 147 N.Y. 434, 448-49, 42 N.E. 22, 26 (1895) (invasion of privacy action brought by relatives of a deceased philanthropist to enjoin the erection of a bust of the deceased in a public place; plaintiffs must show that some right of their own is violated, apart from evidence that defendant's action would have caused the deceased pain if she were living).

⁷⁴ 174 Cal. App. 2d 650, 344 P.2d 799 (2d Dist. 1959).

rather than the plaintiff, and concluded that the plaintiff's privacy had not been invaded.⁷⁵ Similarly, in *Maritote v. Desilu Productions, Inc.*,⁷⁶ the court held that the relatives of Al Capone could not maintain an action for invasion of privacy against the defendants for their televised fictional broadcasts about Capone because the plaintiffs themselves were not featured in any of the broadcasts.⁷⁷

In contrast, other courts have allowed recovery in invasion of privacy actions by the relatives of a decedent where the appropriation was for commercial purposes. In *Bazemore v. Savannah Hospital*,⁷⁸ for example, an injunction and damages were granted to the parents of a deceased, malformed child for the defendants' commercialization of pictures of the child. Further, some states have enacted statutes which specifically provide relief to the personal representatives and relatives of a decedent whose name or likeness is appropriated for commercial purposes.⁷⁹

⁷⁵ Mrs. Jesse James, Jr., also alleged that the defendants' use of the name Jesse James, Jr., "exploited for pecuniary gain plaintiff's interest in the joint family name without any compensation to her." *Id.* at 653, 344 P.2d at 800. The court did not address this issue.

⁷⁶ 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965).

⁷⁷ The plaintiffs in *Maritote* also argued misappropriation of Al Capone's name, likeness, and personality, and sought recovery for the defendants' unjust enrichment. The court, however, discounted this claim given the plaintiffs' misplaced reliance on their "claimed right of privacy," *id.* at 419, and deemed irrelevant to the instant case those decisions relied upon by the plaintiffs which, in allowing recovery for the mental suffering caused by tampering with a relative's corpse, recognized a person's property right in the body of a deceased relative.

⁷⁸ 171 Ga. 257, 155 S.E. 194 (1930); *see also Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 209, 50 S.E. 68, 76 (1905) (suggesting that relatives of a deceased should be able to recover when her portrait is published after death without their consent).

In addition, some courts have been inclined to grant recovery to the relatives of a decedent in actions predicated on the appropriation of a property right rather than injury to feelings. For a comprehensive discussion of both the privacy and property decisions, *see Gordon, supra* note 13, at 598-605. Gordon concludes that "[w]hile the decisions are conflicting, eminent authority and authors of legal articles on the subject are almost unanimous in recognizing the rights of surviving relatives, both as to their right of recovery for their own injured feelings as well as for a property interest in some aspect of the deceased's personality which is commercialized *after his death*." *Id.* at 598-99 (footnotes omitted); *see also Green, The Right of Privacy*, 27 ILL. L. REV. 237, 248 (1932) ("[I]n the case of exploiting the personality of an individual for profit the courts might well . . . allow the surviving relatives an action on the basis of profit-making from the exploitation of a deceased relative's personality.").

⁷⁹ *See, e.g., OKLA. STAT. ANN.* tit. 21, §§ 839.1, 839.2 (West 1981); VA. CODE ANN. § 8.01-40 (1977) and § 18.2-216.1 (1982).

Thus, precedent does exist in invasion of privacy actions for granting relief to the relatives of a decedent whose name or likeness has been exploited by others for commercial purposes. Those decisions denying recovery to the relatives of decedents in such invasion of privacy actions failed to appreciate the elements of appropriation and conversion of property rights.⁸⁰ In contrast, right of publicity actions by relatives of a decedent theoretically should not suffer from this confusion because the right of publicity, unlike the personal right of privacy, can be assigned or licensed during an individual's lifetime and made the subject of an express or implied contract.⁸¹ In fact, the act of assigning or licensing one's publicity rights is the embodiment of the important distinction between the personal right of privacy and the severable right of publicity.

Unfortunately, the publicity decisions addressing the descendibility issue are as confused as the privacy decisions examining the commercial exploitation of a deceased's name and likeness. As the following discussion demonstrates, the right of publicity decisions range from those which hold that the right survives an individual's death in all situations to those which unconditionally oppose the descendibility of the right. Many cases endorse a middle of the road position, requiring some form of commercial exploitation by the principal before allowing the right to be descendible. Some of these middle-ground decisions hold that an individual's *intent* to exploit her right of publicity while alive will suffice for the right to survive that person's death, and that such exploitation need not involve commercial "tie-ups" or contracts. Other middle-ground cases, however, adopt a narrower view of exploitation and require that a person commercially "tie-up" her right of publicity while alive if the right is to be descendible.

⁸⁰ See Gordon, *supra* note 13, at 605; see also *supra* notes 75, 77 and accompanying text.

⁸¹ See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); see also *supra* text accompanying notes 15-16.

Indeed, frequently the value of an individual's right of publicity cannot be realized fully if the individual does not transfer all or part of her interest in the publicity right to another for its development. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 845, 603 P.2d 425, 445, 160 Cal. Rptr. 323, 343 (1979) (Bird, C.J., dissenting). A prime example is Elvis Presley, who during his lifetime had licensed to Boxcar Enterprises the exclusive rights to print, publish, and distribute his likeness in exchange for royalties. See *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

A. *Unconditional Opposition to Descendibility*

In *Memphis Development Foundation v. Factors Etc., Inc.*,⁸² the Sixth Circuit concluded that the right of publicity does not survive a celebrity's death even when the celebrity exploited the right by contract during her lifetime. In *Memphis Development*, the defendant held an exclusive license to exploit Elvis Presley's name and likeness for commercial purposes. Factors had purchased this license two days after Presley's death from Boxcar Enterprises, the company to which Presley had conveyed, during his life, the exclusive right to exploit his name and likeness in exchange for royalties. The plaintiff, a nonprofit corporation, sought a declaratory judgment that the defendant's license would not preclude the Foundation from erecting a bronze statue of Presley in downtown Memphis and distributing pewter replicas of the proposed statue to individuals who donated \$25 or more to help finance the memorial statue. In opposing the Foundation's motion, Factors argued that the Foundation was selling the statuettes, thereby appropriating its exclusive right to exploit Elvis Presley's name and likeness.⁸³

Recognizing the complete lack of precedent in Tennessee, the *Memphis Development* court looked to policy considerations, the treatment of what it regarded as similar rights in our legal system, the interests of the parties, and "certain moral presuppositions concerning death, *privacy*, inheritability and economic opportunity."⁸⁴ The court articulated two reasons for recognizing a descendible right of publicity: to encourage effort and creativity on the part of the celebrity, and to vindicate the hopes and expectations of the decedent and those with whom she contracts. The court observed that making the right of publicity inheritable would not foster creative endeavors because, in its view, the desire to exploit fame for the commercial benefit of one's heirs is a weak element of motivation when compared with the desire to achieve success, contribute to society's happiness, and "receive the psychic and financial rewards of achievement."⁸⁵

The *Memphis Development* court enumerated the problems of judicial line-drawing that would result from recognizing a descendible right

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

⁸³ The district court in *Memphis Development* enjoined the Foundation from manufacturing or distributing the statuettes, but did not prohibit it from building the memorial. *Id.* at 957; *see Memphis Dev. Found. v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977).

⁸⁴ *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958, *cert. denied*, 449 U.S. 953 (1980) (emphasis added).

⁸⁵ *Id.*

of publicity.⁸⁶ For example, it questioned whether the right should last in perpetuity, whether it should be taxable, and whether it collides with the first amendment's guarantee of free expression. Further, the court focused on a descendible right of publicity solely as a vehicle for passing the attribute of fame to one's heirs, and determined that fame, like other personal attributes such as reputation, cannot be owned by anyone other than the principal.

The court concluded its discussion by noting that considerations of fairness and economic opportunity militate against a descendible right of publicity. Finding an equal distribution of the opportunity to use a decedent's name and likeness preferable, the court observed that these attributes of a deceased celebrity "should be regarded as a common asset to be shared, an economic opportunity available in the free market system."⁸⁷

Memphis Development properly recognized that a rationale for a descendible right of publicity which focuses on encouraging creativity is somewhat strained. This rationale assumes that a celebrity's ability to bequeath the right of publicity will increase her motivation, benefiting the public by fostering creativity. In addition, it presumes that if individuals do not believe they are providing adequately for their heirs, they may abandon their respective professions and pursue other interests, thus depriving society of their work.⁸⁸ Many individuals, however, are motivated to achieve prominence for reasons other than providing for their heirs.⁸⁹ Therefore, standing alone, this rationale cannot justify a descendible right of publicity.⁹⁰

Unfortunately, *Memphis Development* did not explore fully the second of its articulated rationales for a descendible right of publicity: vindication of the hopes and expectations of the deceased and those with whom she contracts that they are creating a valuable capital asset.⁹¹ In this regard, the court merely observed that Presley's lifetime assignment of his right of publicity "suggests that he intended to convert a mere opportunity or potential for profit into a tangible possession and consciously worked to create the asset with, perhaps, the hope of devising it."⁹² The court added, however, that any extra creativity resulting from

⁸⁶ *Id.* at 959.

⁸⁷ *Id.* at 960.

⁸⁸ See Hoffman, *supra* note 1, at 28.

⁸⁹ See *supra* text accompanying note 85.

⁹⁰ See also Hoffman, *supra* note 21, at 136.

⁹¹ *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

⁹² *Id.* at 960.

“allowing a person to pass on his fame for the commercial use of his heirs or assigns” does not outweigh the reasons discussed for opposing a descendible right of publicity.⁹³ Yet, the court does not discuss either Boxcar’s or Factor’s expectations regarding Factor’s payment of \$150,000 to Boxcar for its license to exploit Presley’s name and likeness commercially. In failing to address this issue, the court ignored the most compelling rationale for a descendible right of publicity: the fundamental unfairness of allowing an enterprise to reap windfall benefits from exploiting a decedent’s identity at the expense of that person’s heirs and grantees.⁹⁴

Underlying this second rationale is the recognition of an individual’s proprietary interest in the value of her name and likeness. To the extent that an individual’s name and likeness possess commercial value, that individual’s heirs and grantees are entitled to the exclusive enjoyment of the financial benefit resulting from any commercial use, given their personal or financial relationship to the decedent.⁹⁵ In essence, this rationale for a descendible right of publicity is an extension of the unjust enrichment rationale justifying the existence of the right of publicity.⁹⁶ Both of these rationales are predicated on the theory that if someone appropriates something of value, she must pay the rightful owner the value of that which is appropriated. Moreover, both rationales are applicable to all individuals and are not confined to celebrities and public figures. Although enterprises which appropriate a deceased celebrity’s name or likeness for commercial purposes undoubtedly receive a greater windfall than those which appropriate the name or likeness of an unknown decedent, the appropriation of any person’s name or likeness which possesses a commercial value always will result in a windfall.

Perhaps *Memphis Development* overlooked the critical rationale disfavoring windfall benefits due to its erroneous belief that a descendible right of publicity would allow an individual to bequeath the personal attribute of fame.⁹⁷ Had the court focused instead on the right of pub-

⁹³ *Id.*

⁹⁴ See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 446, 160 Cal. Rptr. 323, 344, (1975) (Bird, C.J., dissenting).

⁹⁵ See *Hoffman*, *supra* note 1, at 29 (“The heirs and grantees [of a decedent], rather than an unrelated commercial concern have a greater nexus to the deceased celebrity’s property rights.”).

⁹⁶ See *supra* text accompanying notes 23-25.

⁹⁷ *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959-60 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); see *supra* text following note 86.

licity as a vehicle for passing on a person's *proprietary interest* in her name and likeness, its analysis might have been more tenable. At a minimum, the court would have been required to explain why an individual's proprietary interest in her name and likeness should not be treated upon that person's death like any other type of personal property, inuring to the benefit of the deceased's heirs and grantees rather than the public at large. Indeed, the court's observation that it is more fair for the commercial, aesthetic and political use of a celebrity's name and image to be open to all, rather than monopolized by a few,⁹⁸ evinces a total misunderstanding concerning the nature of a descendible right of publicity.

A further problem with the *Memphis Development* decision is the treatment of the judicial line-drawing problems which the court believed would result from a descendible right of publicity.⁹⁹ Judicial recognition of a descendible right of publicity raises questions such as the appropriate duration of the right, the tax consequences, and the right's interaction with the first amendment. The court in *Memphis Development* regarded these questions as further reasons for precluding a descendible right of publicity, and thus failed to recognize that these concerns can and should be treated as limitations on the scope of the right.¹⁰⁰

⁹⁸ 616 F.2d at 960; *see also supra* text accompanying note 87.

⁹⁹ 616 F.2d at 959; *see supra* text accompanying and following note 86.

¹⁰⁰ The appropriate duration of the right and its interaction with the first amendment are discussed *infra* in part III.

A detailed discussion of the tax consequences of a descendible right of publicity is beyond the scope of this Article. The principal tax issues with respect to descendibility are the valuation of the decedent's right of publicity for estate tax purposes and the income tax consequences associated with the subsequent exploitation of the decedent's right of publicity by the decedent's heirs and grantees.

Section 2031(a) of the Internal Revenue Code provides that "[t]he value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." I.R.C. § 2031(a). The Treasury Regulations promulgated under § 2031 provide:

The value of every item of property includible in a decedent's gross estate . . . is its fair market value at the time of the decedent's death. . . . The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

Treas. Reg. § 20.2031-1(4)(b).

It is difficult to derive a practical approach to the valuation of an individual's right of publicity. The valuation process may be somewhat easier in the case of a celebrity who has commercially exploited her right of publicity through merchandising contracts

The precedential value of *Memphis Development* is unclear. At the

while alive. In this situation, market values for the particular individual's name or likeness are estimable. One commentator has suggested that in such a situation, the initial value of the right should be determined by capitalizing the celebrity's actual royalty receipts earned during her lifetime, using an approach similar to that which one would use for valuing a copyright or a profit participation, and applying a substantial discount based on the likelihood that the royalties will decline rapidly with the celebrity's death. Bauman & Hoffman, *Estate Planning for Individuals in the Entertainment Industry*, 1979 S. CAL. TAX INST. 875, 947-48.

In the case of celebrities who did not exploit their names and likenesses commercially during their lifetimes, the initial value of the right must be based on factors such as the celebrity's relative fame, the amounts she received from normal professional activity, and perhaps the amount of royalties received by a similarly situated celebrity who did exploit her publicity right.

The right of publicity of a deceased celebrity or other public figure is valuable because a willing buyer would pay a substantial amount for the right to exploit commercially the names and likenesses of such individuals, since substantial income might be derived from that right. In the case of private individuals, however, it is unlikely that a potential buyer would be willing to pay a significant sum for the use of the decedent's name or likeness. Therefore, although the publicity right of a private individual still constitutes property, *see supra* notes 31-51 and accompanying text, as a practical matter, it can be ignored when valuing the estate because of its nominal value.

The second tax issue presented by a descendible right of publicity concerns the treatment of income received by the heirs and grantees of a decedent through contractual arrangements providing for the use of the decedent's name and likeness. Two cases have held that such income is characterized as ordinary income rather than capital gain. *Miller v. Commissioner*, 299 F.2d 706 (2d Cir.), *cert. denied*, 370 U.S. 923 (1962); *Runyon v. United States*, 281 F.2d 590 (5th Cir. 1960). These courts concluded that the publicity right received by heirs of the respective decedents did not constitute "property." *See also* Rev. Rul. 65-261, 1965-2 C.B. 281 (when a celebrity transfers the exclusive and perpetual right to exploit for merchandising purposes her name and likeness, such rights do not constitute a capital asset absent a simultaneous transfer of a specific business or product with which the celebrity's name is associated).

Neither these decisions, nor the Revenue Ruling, militate against this Article's position that the right of publicity constitutes a descendible property right. First, the foregoing authority was decided before the descendibility issue became a controversial subject, and as one commentator has suggested, recent developments in the substantive law of the right of publicity might mandate a different result today. *See* Bauman & Hoffman, *supra*, at 938 n.199. Second, the *Miller* case clearly does not preclude the possibility that in the future, the property interest asserted by the plaintiff in that case would be found to exist. *See Miller v. Commissioner*, 299 F.2d 706, 710 (2d Cir.), *cert. denied*, 370 U.S. 923 (1962). In *Miller*, the plaintiff, Glen Miller's widow, argued that the proceeds of a contract purporting to sell the "right" to make a movie about her late husband should be treated as a capital gain. In responding to her argument that Universal Pictures would not have paid her a share of income in connection with the movie if there was no danger in Universal's free use, the court concluded that Universal "bought off" . . . the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful." *Id.* at 710.

time of the court's decision, there was no Tennessee law on the subject.¹⁰¹ Shortly after *Memphis Development* was decided, however, two judges of the Tennessee Chancery Court ruled on the descendibility issue. In the first decision, the court held that bluegrass musician Lester Flatt's right of publicity survived his death and noted that the Sixth Circuit's *Memphis Development* decision is irreconcilable not only with its decision but also with the majority view.¹⁰² The second decision, which also involved Elvis Presley, reached the opposite result, concluding that any rights to exploit Presley's name and likeness commercially on an exclusive basis terminated at his death.¹⁰³ Given these conflicting decisions by the Tennessee Chancery Court, resolution of the descendibility issue in Tennessee must await a decision by the Tennes-

Finally, the *Runyon* decision rested on an alternate holding. In that case, the taxpayer, who was the son of the renowned sports writer, Damon Runyon, had entered into a contract by which he gave motion picture rights, for a limited period of time, to his father's life story. The court emphasized that even if the taxpayer had a property right in the story of his father's life, there was no sale of the right because of the limited nature of the right transferred. Thus, the court denied capital gain treatment for the amount received by the taxpayer for granting these contract rights because there was "no conveyance of every substantial right owned by the taxpayer, if, in fact, he owned anything." *Runyon v. United States*, 281 F.2d 590, 592 (5th Cir. 1960).

As the *Runyon* decision illustrates, ordinary income treatment is justified for the proceeds of contracts granting such limited rights. On the other hand, it should be possible to structure a complete transfer of the right which would result in capital gain. This is a subject which merits attention in the future from both tax practitioners and academicians.

¹⁰¹ *Memphis Development* was a diversity case and the court applied Tennessee law to the facts at issue. See *supra* text accompanying note 84.

¹⁰² *Commerce Union Bank v. Coors*, 7 MEDIA L. REP. (BNA) 2204, 2207 (Chan. Ct. Tenn. 1981). See *infra* note 126. *Commerce Union Bank* was decided in the context of the defendant's motion to dismiss the complaint. The court ruled against the defendant on the right of publicity issue, and the case proceeded to trial. As of this writing, the case still is being litigated in the chancery court.

¹⁰³ *Lancaster v. Factors Etc., Inc.*, 9 MEDIA L. REP. (BNA) 1109 (Chan. Ct. Tenn. 1982). *Lancaster* involved an action by a photographer against Factors for rescission of two one-year sublicensing agreements, executed after Presley's death, which enabled the photographer to produce and sell postcards using Presley's name and likeness on an exclusive basis. Factors moved to dismiss the case, arguing that because it had acquired from Boxcar Enterprises, Inc. an exclusive license to use Presley's name, likeness, and image with regard to the sale of merchandise, it had the right to enter into the sublicensing agreements with the plaintiff. The court denied Factors' motion to dismiss and ruled that the right of publicity is not descendible in Tennessee. Thereafter, the plaintiff moved for a voluntary dismissal of the case for reasons unrelated to the descendibility issue. The court dismissed the case and subsequently denied the defendant's motion to set aside the Order of Voluntary Dismissal. This ruling was sustained by the Court of Appeals.

see Supreme Court.¹⁰⁴

B. Descendibility Conditioned upon Commercial Exploitation

A second approach to the descendibility question conditions the survival of an individual's right of publicity upon the affirmative exercise of the right by the individual during her lifetime. Specifically, this theory precludes descendibility unless the decedent had entered into agreements allowing the merchandising of her persona. Alternatively, some courts allow the right to descend if the decedent manifested an *intent* to exploit her name or likeness.

One of the first decisions to endorse the exploitation requirement was *Factors Etc., Inc. v. Creative Card Company*.¹⁰⁵ In that case, a federal district court in New York granted Factors a preliminary injunction

¹⁰⁴ The Second Circuit, in denying Factors' petition for rehearing in yet another case involving Elvis Presley's right of publicity, observed that the *Lancaster* decision may have a special relevance to the case before the court because *Lancaster* also involved a claim by Factors regarding the descendibility of Presley's publicity rights. *Factors Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11, 12 (2d Cir. 1983). The procedural history of the *Pro Arts* litigation, which was predicated on diversity jurisdiction, is rather complex. Initially, the Second Circuit affirmed the district court's grant of a preliminary injunction forbidding Pro Arts from manufacturing and selling a poster displaying Presley's picture. The Second Circuit thus held that Presley's right of publicity was descendible under New York law. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *aff'g* 444 F. Supp. 288 (S.D.N.Y. 1977) [hereafter *Factors I*].

Factors then moved for summary judgment in the district court. Pro Arts responded that Factors was collaterally estopped from asserting that it possessed any exclusive rights to exploit Presley's name and likeness commercially in view of the Sixth Circuit's recent decision in *Memphis Development*. The district court apparently rejected this contention and granted Factors a permanent injunction. 496 F. Supp. 1090 (S.D.N.Y. 1980). On appeal, the Second Circuit reversed because, in its view, Tennessee law rather than New York law was controlling, and under Tennessee law, Presley's publicity rights were not descendible. 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) [hereafter *Factors II*]. Thereafter, Factors petitioned for a rehearing on the ground of an alleged intervening change in state law in light of the *Commerce Union Bank* decision. In denying Factors' petition, the Second Circuit discussed the *Lancaster* decision and concluded: "[W]e have no doubt that the appearance of two conflicting decisions of the Chancery court on the precise point at issue affords us no basis for considering the law of Tennessee to have authoritatively been changed since our June 29, 1981, decision." 701 F.2d at 12.

¹⁰⁵ 444 F. Supp. 279 (S.D.N.Y. 1977). The day after Judge Tenney issued an opinion in *Factors Etc., Inc. v. Creative Card Co.*, he granted Factors preliminary injunctive relief in the companion case, *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). See *supra* note 104.

against the defendant company and restrained it from manufacturing and selling souvenir merchandise bearing Presley's likeness. *Creative Card* discussed at length the defendant's contention that Presley's right of publicity terminated upon the entertainer's death, and concluded that because Presley had exercised and assigned the right in his lifetime, it survived his death and was capable of further assignment.¹⁰⁶ The decision did not specifically state that the right of publicity could not survive an individual's death if that person failed to exercise the right while alive, but the clear import of the decision is that the court would not allow descendibility under such circumstances.¹⁰⁷

California appears to endorse a variation of the requirement of commercial exploitation, although the existing case law is riddled with ambiguity. In *Lugosi v. Universal Pictures*,¹⁰⁸ the California Supreme Court held that the right to exploit one's name and likeness is personal to the artist and, therefore, can be exercised only by that individual

¹⁰⁶ 444 F. Supp. at 283. Initially, the court in *Creative Card* observed that although the concept of privacy is relevant when an individual has not engaged in "personal commercialization," it is not applicable when a defendant appropriates the name or likeness of a celebrity such as Presley who had elected to commercialize his own name and face through souvenir merchandise while alive. 444 F. Supp. at 283. The court concluded that it could not discern any reason why Presley's "valuable, alienable property right" in his name and image, which financially benefited him in life through his clear exercise of the right, should not descend at death "like any other intangible property right." *Id.* at 284.

¹⁰⁷ In discussing *Price v. Hal Roach Studios*, 400 F. Supp. 836 (S.D.N.Y. 1975), in which the court held that the publicity rights of Laurel and Hardy were descendible despite the dearth of evidence showing that the performers had never exploited their own personalities through merchandising efforts, the *Creative Card* court stated that it would adopt the *Price* treatment of the descendibility question "on the much stronger facts here presented." *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 (S.D.N.Y. 1977); see also *infra* notes 135-38 and accompanying text. Moreover, in rejecting *Creative Card*'s reliance on *Maritote v. Desilu Prods.*, 230 F. Supp. 721 (N.D. Ill. 1964), *aff'd*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965), the court observed that it agreed with the *Maritote* court's refusal to consider the plaintiffs' unjust enrichment claim because Al Capone "was not trying to create an image with widespread commercial appeal" in his lifetime. *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. at 285; see *supra* notes 76-77 and accompanying text.

In contrast to *Creative Card*, at least two other courts confronted with the survival of Presley's publicity rights have adopted the result of the *Creative Card* decision while expressly reserving the question whether the right of publicity survives absent active exploitation on the part of the decedent. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 n.11 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

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

during her lifetime.¹⁰⁹ *Lugosi* involved a right of publicity action by actor Bela Lugosi's widow and his surviving son against Universal Pictures for authorizing its licensees to use Bela Lugosi's likeness from the film *Dracula* on various commercial products.

At the outset, the *Lugosi* court observed that no evidence was presented regarding Lugosi's lifetime use of his name or likeness as Dracula or otherwise "in connection with any business, product or service so as to impress a secondary meaning on such business, product or service."¹¹⁰ The court stated that, had Lugosi "tied-up" his name, face or likeness with a business, product, or service, he could have created a tangible and saleable product. In the court's view, however, whether Lugosi's heirs could succeed to such property rights would depend entirely on how these rights were managed before Lugosi's death.¹¹¹ Thus, had Lugosi sold the property and spent the consideration before he died, there would have been no property for his heirs to receive. This reasoning suggests that even commercial exploitation by the decedent may not suffice for the right of publicity to survive in all instances.

Further support for this interpretation of *Lugosi* is found in *Guglielmi v. Spelling-Goldberg Productions*,¹¹² which the California Supreme Court decided two days after *Lugosi*. In that case, Rudolph Valentino's nephew sought damages from and injunctive relief against the defendants for exhibiting a fictionalized version of Valentino's life which featured the actor's name, likeness, and personality. Relying on *Lugosi*, the court concluded that although "the right of publicity protects against the unauthorized use of one's name, likeness or personality, . . . the right is not descendible and expires upon the death of the person so protected."¹¹³

The *Lugosi* decision contains language, however, which appears to sanction a descendible right of publicity when the decedent exercised

¹⁰⁹ *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329. The Supreme Court of California adopted, with minor modifications, the opinion of the intermediate appellate court, which had reversed the trial court's judgment that actor Bela Lugosi's right of publicity survived his death. *Id.*; *Lugosi v. Universal Pictures*, 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct., L.A. County 1972).

¹¹⁰ 25 Cal. 3d at 818, 603 P.2d at 428, 160 Cal. Rptr. at 326.

¹¹¹ *Id.* at 820, 603 P.2d at 429, 160 Cal. Rptr. at 327. The court stated that: "Lugosi may have sold the property and spent the consideration before he died, or sold it for installment payments and/or royalties due after his death, in which latter event such payments and/or royalties would, of course, be a part of his estate." *Id.*

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

¹¹³ *Id.* at 861, 603 P.2d at 454, 160 Cal. Rptr. at 353; see also *infra* text accompanying note 118.

her right while alive. Focusing on the personal nature of the decision to exploit one's name and likeness,¹¹⁴ the court observed that "[a]ssertion by the heirs of the right to exploit their predecessor's name and likeness to commercial situations *he left unexploited* simply is *not* the exercise of that right by *the person* entitled to it."¹¹⁵ The court concluded that "[i]f rights to the exploitation of artistic or intellectual property never exercised *during the lifetime* of their creators were to survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served."¹¹⁶ Taken together, these statements imply that the outcome of the case might have been different had Lugosi elected to exploit his right of publicity during his lifetime through commercial tie-ups of his name or likeness with a business, product, or service.

The confusion generated by the *Lugosi* decision was underscored by a recent Second Circuit decision, *Groucho Marx Productions, Inc. v. Day and Night Co.*,¹¹⁷ which noted two possible interpretations of *Lugosi*. First, *Lugosi*, when evaluated in conjunction with *Guglielmi*, indicates that an individual's right of publicity terminates at death, regardless of any commercial exploitation of the right by the decedent while alive.¹¹⁸ Alternatively, *Lugosi* suggests that if a decedent had exploited her publicity right while alive, the right is descendible, but only with respect to the particular product or service promoted by the decedent during her lifetime.

Under the second interpretation, had Lugosi established a company

¹¹⁴ The court refused to accept the premise that because Lugosi did not exploit his right of publicity in his lifetime, *the opportunity* to have done so is property which descends to his heirs. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 822, 603 P.2d 425, 430, 160 Cal. Rptr. 323, 328 (1979).

¹¹⁵ *Id.* at 823, 603 P.2d at 431, 160 Cal. Rptr. at 329 (emphasis added). Lugosi had assigned to Universal the right to exploit his name and likeness in connection with advertising and exploiting the movie *Dracula*, but the real question presented in the case was whether this grant of rights included those merchandising rights exercised by Universal in connection with its licensing agreements.

¹¹⁶ *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329 (emphasis added).

¹¹⁷ 689 F.2d 317 (2d Cir. 1982). The district court in that case held that under New York law, the Marx Brothers' right of publicity was descendible. The Second Circuit determined that California rather than New York law governed the case, and therefore reversed. *See infra* notes 125-26 and accompanying text.

¹¹⁸ *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 320 (2d Cir. 1982). The court stated that further exploration of the issue is warranted because *Lugosi*, "on which *Guglielmi* relies, is at least open to the interpretation that its holding is narrow and therefore it is arguable that the broadly stated rule of *Guglielmi* should also be understood to have a narrower meaning than first appears." *Id.*; *see supra* text accompanying notes 112-13.

to market "Lugosi as Dracula" T-shirts, for example, his heirs would have a right of publicity that could prevent others from marketing his likeness on T-shirts, but not on any other product.¹¹⁹ The Second Circuit emphasized, however, that it was "reasonably confident" that California would *not* "recognize a descendible right of publicity so broad as to enable the heirs to prevent *any* use of a celebrity's name and likeness so long as the celebrity exploited his right of publicity to promote at least one product or service during his lifetime."¹²⁰ The Second Circuit's interpretation suggests that California imposes a far more stringent commercial exploitation standard than that employed in the *Creative Card* decision and its progeny.¹²¹

Other courts have articulated a considerably more liberal standard for commercial exploitation. These decisions do not require actual exploitation as evidenced by commercial tie-ups or merchandising contracts, but rather an "intent" to exploit one's name and likeness by capitalizing upon the value of these assets. In *Hicks v. Casablanca Records*,¹²² for example, a federal district court in New York ruled that Agatha Christie's right of publicity survived her death because she had exploited her name during her lifetime by assigning rights to her literary works to a corporation and bequeathing similar rights by testamentary disposition, and by entering into contracts for the use of her name during her lifetime in connection with movies and plays based on her books. The court found this conduct sufficient to meet its definition of exploitation, which requires that a decedent "acted in such a way as to evidence his or her own recognition of the extrinsic commercial value of his or her name or likeness, and manifested that recognition in some overt manner."¹²³ In so concluding, the court rejected the defendants' allegation that Christie's assignment of her rights did not constitute "exploitation" because she had not exercised her right of publicity independently of the thing for which she was known.¹²⁴

¹¹⁹ 689 F.2d at 321. Support for this position is provided by the language in *Lugosi* which rejects the right of Lugosi's heirs to assert rights to "commercial situations he left unexploited." See *supra* note 115 and accompanying text.

¹²⁰ *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 322 (2d Cir. 1982). The Second Circuit concluded that under either interpretation of *Lugosi*, the Marx Brothers' right of publicity was not descendible.

¹²¹ See *supra* notes 105-07 and accompanying text.

¹²² 464 F. Supp. 426 (S.D.N.Y. 1978) (heirs and assignees of Agatha Christie sought to enjoin movie producers and publisher from distributing movie and book fictionalizing an incident in Christie's life). See *infra* text accompanying notes 215-17.

¹²³ 464 F. Supp. at 429.

¹²⁴ The defendants in *Hicks* relied on *Factors I* as support for this allegation, arguing

The *Hicks* standard for commercial exploitation was refined by the district court opinion in *Groucho Marx Productions, Inc. v. Day and Night Co.*,¹²⁵ which concluded that exploitation need not entail product endorsements or other activities outside the scope of the celebrity's normal professional activity. Instead, a celebrity need only manifest the requisite intent to exploit the commercial value in her name and likeness, which can be accomplished through the celebrity's regular performances and activity.¹²⁶

that the court's omission of any reference to Presley's assignment of movie rights supports their contention that the exploitation must take the form of merchandise or some other product. *Id.* at 429 n.6; see *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). The *Hicks* court refused to attach any significance to this omission, however, because it believed that it may have been the result of the plaintiffs' failure to produce any evidence regarding Presley's assignment of movie rights in the trial court. See also *supra* note 107 and accompanying text; *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 287 n.4 (2d Cir. 1981) (Mansfield, C.J., dissenting) (endorsing exploitation requirement articulated in *Hicks*).

¹²⁵ 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982) (right of publicity action against defendants for the production of a musical play featuring performers simulating the appearance, style and mannerisms of the Marx Brothers); see also *infra* notes 206-09 and accompanying text.

¹²⁶ The court found that the Marx Brothers exploited their rights of publicity in their self-created characters, and their respective rights were descendible. Although Julius Marx had made an *inter vivos* transfer of his rights similar to that of Elvis Presley and had included a testamentary disposition of his rights in his will, neither Leo nor Adolph Marx had made any such provisions. In this regard, the court observed:

As a common sense matter, it must be noted that Leo and Adolph Marx, no less than Julius, 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. Here, . . . there can be no question of intent to capitalize on the commercial value of artificial personalities created for entertainment purposes. 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, as defendants do, 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.

523 F. Supp. at 491-92. Although the Second Circuit subsequently reversed this decision, see *supra* text accompanying and following notes 116-17, the reversal was predicated on the choice of law issue rather than on the merits of the descendibility claim.

Cf. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd per curiam*, 694 F.2d 674 (11th Cir. 1983), in which the court, applying Georgia law, concluded that Dr. King's right of publicity did not survive his death because there was no "showing of at least some intent on Dr. King's part to capitalize on the commercial value of his name and likeness." *Id.* at 865. Upon the plaintiff's appeal, the Eleventh Circuit decided to certify to

Thus, the case law discloses three distinct standards for commercial exploitation. The first two standards require that an individual translate her right of publicity into contract rights or commercial tie-ups outside of the individual's main field of endeavor. The first standard allows the right to descend freely once this requirement is satisfied, whereas the more stringent second standard allows the right to descend only with respect to the particular products or services endorsed by the decedent while alive. The third and most lenient standard does not require commercial tie-ups for the right to survive as long as the decedent manifested an *intent* to exploit the commercial value of her name or likeness through normal professional activity.

From an analytical standpoint, any commercial exploitation requirement is problematic for the same reason as the approach which unconditionally opposes the descendibility of the right. Any bar to a descendible right of publicity, be it absolute or limited, cannot be reconciled with the rationale for descendibility which emphasizes the inherent unfairness of a person or enterprise reaping windfall benefits by exploiting a deceased's name and likeness.¹²⁷ Indeed, a commercial exploitation requirement ignores not only the proprietary interest of all individuals in their names and likenesses but also the unjust enrichment which results from any unauthorized appropriation of a person's name or likeness.¹²⁸ An advertiser who freely appropriates a deceased's name

the Georgia Supreme Court the question whether Georgia recognizes a descendible right of publicity, and if so, whether commercial exploitation of the right is necessary. *See* 250 Ga. 135, 296 S.E.2d 697 (1982). The Georgia Supreme Court concluded that with regard to celebrities and other public figures, the right of publicity need not be exploited commercially before it can survive. *See supra* notes 31-38 and accompanying text, *infra* notes 140-41, 223-29 and accompanying text for a discussion of this decision. Based on this ruling by the Georgia Supreme Court, the Eleventh Circuit reversed the district court's decision. 694 F.2d 674 (11th Cir. 1983); *see also* *Commerce Union Bank v. Coors*, 7 MEDIA L. REP. (BNA) 2204 (Chan. Ct. Tenn. 1981) (bluegrass singer Lester Flatt's right of publicity was descendible given that he commercially exploited his name and image as a bluegrass musician through his relationship with Martha White Flour, which sponsored a radio show and television program which featured Flatt).

¹²⁷ *See supra* text accompanying notes 94-96.

¹²⁸ *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 (S.D.N.Y. 1977) acknowledged that recent decisions have labelled the right of publicity a species of property, but nevertheless apparently assumed that the right of publicity is triggered only when a celebrity has attempted to commercialize his own name and likeness. *See supra* note 106 and accompanying text.

Lugosi, which focused on the personal nature of the right to exploit one's name and likeness, concluded that it is pointless to debate whether the right "sounds in tort or property." *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823-24, 603 P.2d 425, 431,

or likeness receives a windfall benefit regardless of whether the decedent actually exploited or even intended to exploit her right of publicity while alive. In fact, because novelty has a special appeal, the benefit may be even greater if an advertiser appropriates the name or likeness of a celebrity who consciously avoided such exploitation while alive.¹²⁹

Moreover, hinging the resolution of the descendibility question upon the decedent's actions requires courts to tackle difficult line-drawing problems. For example, the most stringent standard, which allows the right of publicity to descend, but only with respect to the type of product or service promoted by the decedent in her lifetime, leaves courts vulnerable to adjudicating the relative similarity of products and product categories. If a model endorsed lipstick while alive, could her heirs prevent the unauthorized use of her name and likeness in connection with face powder or perfume?¹³⁰ Even the more lenient standards for exploitation require courts to enforce arbitrary distinctions which can produce inequitable results. One obvious inequity is that all three stan-

160 Cal. Rptr. 323, 329 (1979). In a concurring opinion, Justice Mosk emphasized that Lugosi could not retain a proprietary interest in the characterization of Dracula because, in his view, "[m]erely playing a role . . . creates no inheritable property right in an actor, absent a contract so providing." *Id.* at 825, 603 P.2d at 432, 160 Cal. Rptr. at 330 (Mosk, J., concurring). Again, this approach ignores Universal's licensing of the distinctive portrayal of Lugosi as Count Dracula. That other actors also may have played the same role does not extinguish Lugosi's proprietary interest in his own likeness, even when that likeness appears as Count Dracula rather than Bela Lugosi. In this regard, see Chief Justice Bird's dissenting opinion, *id.* at 844, 603 P.2d at 444-45, 160 Cal Rptr. at 342-43 (Bird, C.J., dissenting) ("[T]here appears to be no reason why the right of publicity should not extend to one's *own* likeness while portraying a particular fictional character.").

¹²⁹ See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (in discussing damages for the appropriation of Cary Grant's right of publicity, court noted that there may be a "recognized first-time value" for the commercial use of Grant's name and likeness).

¹³⁰ See *supra* notes 119-21 and accompanying text. As Chief Justice Bird observed in her dissent in *Lugosi v. Universal Pictures*:

[T]here is no reasonable method for ascertaining in a particular case if the right has been sufficiently exploited to warrant passing the right to the decedent's beneficiaries. There are no practical standards for measuring which uses and what period of use are required to create a protectible right. Absent clear rules, the right of publicity might be lost by the unwary. Hence, requiring 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.

25 Cal. 3d 813, 848, 603 P.2d 425, 447, 160 Cal. Rptr. 323, 345 (1979) (Bird, C.J., dissenting).

dards preclude descendibility of the publicity rights of anonymous private citizens while allowing the rights of public figures to descend.¹³¹

Consider the following scenario: A coffee manufacturer photographs a woman purchasing its brand of coffee at a local supermarket. The coffee manufacturer then uses her picture, without endeavoring to obtain her consent, in an advertisement for the product. In the interim, the woman dies, leaving her entire estate to her husband. Under all three standards requiring commercial exploitation, the woman's husband could not recover from the coffee manufacturer for its unauthorized appropriation of the decedent's name and likeness, notwithstanding the free endorsement received by the manufacturer. Assume, however, that prior to her visit to the store, the woman had been the subject of an "average person" endorsement for a detergent. The result under the most stringent standard would be the same, but under the other two, it is at least arguable that the woman's prior endorsement was a commercial exploitation of her right of publicity sufficient to enable the right to descend. These hypothetical situations illustrate that an approach which conditions descendibility upon actions taken by a decedent not only results in arbitrary distinctions, but also sidesteps the real issue: whether the advertiser benefited by appropriating the deceased's property interest.

Such inequities are not limited to situations involving private citizens. One of the earliest decisions examining the descendibility question was concerned with the publicity rights of the comedians Laurel and Hardy.¹³² In 1961, Stan Laurel had granted a company the exclusive right in perpetuity to utilize and merchandise his name and likeness.

¹³¹ Most of the decisions which have endorsed the commercial exploitation requirement involved celebrities or other public figures. Therefore, the courts have had no occasion to address how this standard affects a private person's right of publicity. *See, e.g.,* *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835 n.10, 603 P.2d 425, 438 n.10, 160 Cal. Rptr. 323, 336 n.10 (1979) (Bird, C.J., dissenting) (expressing no opinion on whether rights recognized in dissent apply to individuals other than prominent persons.); *see also supra* note 53 and *infra* note 141.

In one recent decision, however, a federal district court in New Jersey held that the wife and children of a deceased noncelebrity could not maintain an action based on the right of publicity to recover damages for injury caused by the publication of the name and photograph of the deceased in connection with an article on the dangers of radioactive materials. The court focused on those decisions which hold that if the right of publicity is descendible, it is only in those situations in which the deceased commercially exploited her own name and likeness while alive, through an *inter vivos* transfer of the rights. *Gleason v. Hustler*, 7 MEDIA L. REP. (BNA) 2183, 2185 (D.N.J. 1981).

¹³² *Price v. Hal Roach Studios*, 400 F. Supp. 836 (S.D.N.Y. 1975). *See infra* notes 135-38 and accompanying text for a discussion of this decision.

Oliver Hardy had already died at the time of this agreement, so his widow granted the company these rights on behalf of her late husband.¹³³ If descendibility is determined by the existence of a contract or commercial tie-up during the individual's lifetime, Laurel's widow could maintain a right of publicity action but Hardy's widow could not do so.¹³⁴ The inherent unfairness of such an approach is amply illustrated by its application to these "twin" performers with identical celebrity status.

C. *A Freely Descendible Right of Publicity*

The decision involving Laurel and Hardy's publicity rights, *Price v. Hal Roach Studios, Inc.*,¹³⁵ was the first case to endorse the position that the right of publicity is freely descendible, regardless of whether the decedent had exploited her name or likeness while alive. In *Price*, the plaintiffs were the widows of Laurel and Hardy. They were joined in the lawsuit by a corporation engaged in the business of producing films and licensing games, which had acquired the exclusive right in perpetuity to merchandise the names, likenesses and characters of Laurel and Hardy through the 1961 agreement.¹³⁶ One of the defendants, a purported holder of certain copyrights to Laurel and Hardy films, claimed to be a successor-in-interest to rights derived from employment agreements entered into by Laurel and Hardy. Based on these rights, this defendant attempted to convey to a second defendant the "worldwide exclusive merchandising rights" to the names and likenesses of Laurel and Hardy.¹³⁷ Determining that the plaintiffs had asserted a valid property right which should be protected, the court emphasized the "purely commercial nature" of the right of publicity, as distinct from the traditional right of privacy, and concluded that there was "no logical reason to terminate this right upon [the] death of the person protected."¹³⁸

¹³³ 400 F. Supp. at 838.

¹³⁴ Under this standard, the same inequity would result regarding the Marx Brothers' right of publicity. See *supra* note 126.

¹³⁵ 400 F. Supp. 836 (S.D.N.Y. 1975).

¹³⁶ See *supra* text accompanying note 135. Another corporation, which was formed to employ Laurel and Hardy to produce motion pictures, also was a party to this agreement.

¹³⁷ 400 F. Supp. at 838. The second defendant, in turn, purported to convey to a third defendant the exclusive merchandising rights outside of the United States to the names and likenesses of Laurel and Hardy.

¹³⁸ *Id.* at 844. The court rejected the defendants' contention that they were not precluded from using the names and likenesses of Laurel and Hardy because either the

The position adopted in *Price* was approved by Chief Justice Bird in her well-reasoned dissent in *Lugosi v. Universal Pictures*,¹³⁹ and most recently, by the Georgia Supreme Court in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*¹⁴⁰ Finding valid reasons for protecting a principal's right of publicity during that person's lifetime, these opinions refuse to terminate the right upon the death of the principal or, alternatively, to draw arbitrary distinctions regarding which celebrities and public figures have a descendible right of publicity.

Although these three opinions fall short of expressly endorsing a descendible right of publicity for all individuals regardless of their celebrity status, this failure undoubtedly is attributable largely to the fact that all of these decisions involved either celebrities or public figures. Thus, it was unnecessary for these courts to promulgate more sweeping rulings covering private citizens. A careful reading of these decisions discloses that they do not preclude a descendible right of publicity for all individuals.¹⁴¹ On the contrary, they implicitly support this result by

plaintiffs never had an exclusive right to their commercial use, or if they did, the plaintiffs had waived them.

¹³⁹ 25 Cal. 3d 813, 828, 603 P.2d 425, 434, 160 Cal. Rptr. 323, 332 (1979) (Bird, C.J., dissenting).

¹⁴⁰ 250 Ga. 135, 296 S.E.2d 697 (1982); see *supra* note 126.

¹⁴¹ Chief Justice Bird expressly refrained from discussing the applicability of the rights recognized in her dissent to private persons. See *supra* note 131.

The *Roach* decision suggests that the right of privacy may be the appropriate doctrine to protect individuals who do not commercially exploit their names and likenesses. In rejecting the defendants' arguments that Laurel and Hardy "abandoned" the right to use their caricatures and imitations, the court observed:

Such an argument would appear nonsensical. It cannot be possible for Laurel and Hardy to lose rights in their own names and likenesses through "non-use." If a person chooses not to exercise the right of publicity, there is the attendant statutory right of privacy in New York which protects that person from commercial exploitation by others. There cannot, therefore, be any necessity to exercise the right of publicity during one's life in order to protect it from use by others or to preserve any potential right of one's heirs.

Price v. Hal Roach Studios, 400 F. Supp. 836, 846 (S.D.N.Y. 1975); see also *supra* note 8. Nevertheless, the *Price* court's recognition of the theoretical distinction between the right of publicity and the right of privacy is manifested by its observation that because the theoretical basis of both the traditional right of privacy and the New York statutory right is to prevent injury to feelings, it is logical to terminate any such claims upon the individual's death. *Id.* at 844. *Price*, therefore, leaves open the question whether the heirs of a private person can bring a right of publicity action based on the commercial exploitation of their deceased relative's name or likeness.

Although the *Martin Luther King* decision limits the applicability of the right of

emphasizing considerations applicable to all people such as the proprietary interest of an individual in her name or likeness and the windfall which those who appropriate a deceased's name or likeness receive at the expense of that person's heirs and grantees.¹⁴²

In sum, 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.¹⁴³ Whether this approach will be adopted by courts which have yet to confront this issue remains to be

publicity to celebrities and public figures, its significance for the descendibility issue is diminished by the court's superficial view of the difference between the right of publicity and the right of privacy. *See supra* notes 31-38 and accompanying text. The decision distinguishes the right of publicity from the right of privacy based on the status of the individual asserting the right, but nowhere does it imply that these two rights entail different consequences. *See supra* note 38. On the contrary, the decision refers to them as "similar" rights. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 250 Ga. 135, 143, 296 S.E.2d 697, 703 (1982).

The *Martin Luther King* court clearly viewed the early common law as supporting the survivability of the right of privacy, a factor which reinforces the court's analogizing the right of privacy to the right of publicity. *Id.* at 145-46, 296 S.E.2d at 705. Moreover, in discrediting those cases that require commercial exploitation for the right of publicity to survive, the court observed:

The net result of following them would be to say that celebrities and public figures have the right of publicity during their lifetime (*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.

Id. at 147, 296 S.E.2d at 706 (emphasis added). The court went on to conclude: "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." *Id.* Although the court made this statement with respect to a public figure who avoided exploiting his prominence, this comment also is pertinent to private citizens who, in the court's view, have a right of privacy.

¹⁴² *See Price v. Hal Roach Studios*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 846, 603 P.2d 425, 445-46, 160 Cal. Rptr. 323, 343 (1979) (Bird, C.J., dissenting); *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 250 Ga. 135, 145, 296 S.E.2d 697, 704-05 (1982).

These decisions also discuss a rationale for descendibility which focuses on the encouragement of creativity on the part of the celebrity. *See Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 839-40, 603 P.2d 425, 441, 160 Cal. Rptr. 323, 339-40, (1979) (Bird, C.J., dissenting); *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 250 Ga. 135, 145-46, 296 S.E.2d 697, 705 (1982). As discussed in the text, however, this rationale for a descendible right of publicity is not as compelling as the one which focuses on the inequity of an enterprise obtaining windfall benefits from its appropriation. *See supra* text accompanying notes 85, 89-90, 94-96.

¹⁴³ *See supra* text accompanying and following notes 94-96.

seen.¹⁴⁴

III. INTERPLAY BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

The broad scope of protection for the right of publicity endorsed in this Article allows an individual and her heirs and grantees to control the commercial exploitation of any personal attribute capable of public recognition. The unrestricted exercise of this right, however, would conflict with the first amendment's guarantee of free expression.¹⁴⁵ If the right of publicity is to function as a viable legal doctrine, some means of reconciling these competing rights must be formulated.

The structure of any such balancing mechanism should be defined by the rationales underlying the respective rights.¹⁴⁶ As discussed in Part I, three distinct rationales justify protection for an individual's right of publicity during the person's lifetime: society's interest in fostering creative endeavors, the individual's interest in profiting from the fruits of her labors, and society's interest in preventing unjust enrichment.¹⁴⁷ Once an individual dies, protection for her right of publicity continues to be warranted, given the unjust enrichment that would result from an enterprise reaping windfall benefits by exploiting the decedent's name and likeness at the expense of the heirs and grantees.¹⁴⁸ A secondary rationale for a descendible right of publicity focuses on society's interest

¹⁴⁴ The split among courts regarding the appropriate treatment for the survival of publicity rights is mirrored in the opinions of those scholars who have addressed the descendibility issue. *See, e.g.*, Felcher & Rubin, *supra* note 69, at 1130-31 ("As far as the specific issue of descendibility is concerned, these rights should be protected only when they have been translated into concrete form through the medium of a contract"); Gordon, *supra* note 13, at 612-13 ("If any individual, public figure or not, possesses a property right in such intangibles as his name and likeness, these rights do not pass into the public domain after death, but rather, accrue to the deceased's estate for the benefit of his next of kin."); Hoffman, *supra* note 21, at 133-39 (publicity rights should terminate upon a celebrity's death); Hoffman, *supra* note 1, at 33 n.180 ("there should be no requirement of active exploitation of a celebrity's persona, separate and apart from his main field of endeavors, to substantiate the valid descent of publicity rights"); Pilpel, *supra* note 46, at 257 ("everyone and everyone's heirs should have the exclusive right to his name and picture for commercial purposes").

¹⁴⁵ *See generally* Felcher & Rubin, *supra* note 69, at 1128-29.

¹⁴⁶ *Cf.* Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186 (1970) (noting that first step in reaching a definitional balance between copyright and free speech is "to articulate what it is that is sought to be achieved" by each interest).

¹⁴⁷ *See supra* notes 18-25 and accompanying text.

¹⁴⁸ *See supra* notes 94-96 and accompanying text.

in encouraging creativity, which is arguably fostered when celebrities are motivated to maximize the asset to be bequeathed.¹⁴⁹

Three rationales also justify the first amendment's guarantee of free expression. First, "free speech is a necessary concomitant" of a democratic society.¹⁵⁰ Second, free speech fulfills the human need for self-expression. Third, guarantees of free speech serve to guard against violent eruptions in society by providing people with other meaningful forms of expression.¹⁵¹

Although the rationales underlying these two interests are not necessarily diametric, the potential for conflict exists. This is particularly true when an individual's publicity rights are violated in media such as books and movies which enjoy a high degree of constitutional protection.¹⁵² One commentator has suggested several ways in which the right of publicity may conflict with the first amendment's guarantee of free expression. For example, the right of publicity can eliminate many subjects for literature and the arts, and can result in the censorship of reports and commentaries about public figures. Furthermore, the threat of potential liability, and perhaps costly litigation, may cause the media to avoid works that are powerful and provocative.¹⁵³

The potential for conflict between the right of publicity and the first amendment is similar to that which exists between the copyright laws and the first amendment.¹⁵⁴ Both the right of publicity and the copyright laws are designed to provide economic incentives for individuals to devote themselves to creative endeavors which will benefit society. Further, the protection afforded by both doctrines prevents the unauthorized appropriation of valuable property rights.¹⁵⁵ In accomplishing

¹⁴⁹ See *supra* text accompanying notes 88-90 and note 142.

¹⁵⁰ Nimmer, *supra* note 146, at 1187.

¹⁵¹ *Id.* at 1188. See *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

¹⁵² Hoffman, *supra* note 21, at 124-25; see, e.g., *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980) (literary work alleged to infringe Marilyn Monroe's right of publicity); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (television film featuring a "fictionalized version" of Rudolph Valentino's life).

¹⁵³ Hoffman, *supra* note 21, at 125-26. Hoffman notes that a chilling effect can result from the imposition of monetary damages alone, regardless of whether injunctive relief is sought. *Id.* at 126.

¹⁵⁴ Indeed, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Supreme Court analogized the rationales supporting the right of publicity to those which support protection for copyrights. See *supra* note 20 and accompanying text.

¹⁵⁵ See *Felcher & Rubin, supra* note 69, at 1129-30; *Shipley, supra* note 1, at 682-84 for discussions analogizing the right of publicity to copyright laws.

these objectives, both the right of publicity and the copyright laws restrict forms of expression which infringe on these respective rights.¹⁵⁶

To mitigate the potential conflict between the copyright laws and the first amendment's guarantee of free speech, Congress has specified that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."¹⁵⁷ The "fair use" doctrine as codified in section 107 of the 1976 Copyright Act expressly recognizes the judicial doctrine of "fair use" which was already well-established at the time the statute was enacted.¹⁵⁸ In explaining the "fair use" doctrine, one court has observed that it "offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry."¹⁵⁹

The "fair use" doctrine is extraordinarily flexible, and its invocation typically turns on the particular facts in issue.¹⁶⁰ Section 107 does provide some guidance, however, in that it sets forth the following four factors for determining whether a particular use is a fair use:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.¹⁶¹

Courts typically balance these four factors in determining whether a particular use of a work constitutes a "fair use."¹⁶²

¹⁵⁶ See Nimmer, *supra* note 146, at 1189-90 (emphasizing that copyright law protects the "expression of ideas" rather than "ideas *per se*").

¹⁵⁷ 17 U.S.C. § 107 (1982).

¹⁵⁸ See *infra* note 162 and accompanying text.

¹⁵⁹ *Wainwright Secs., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (enjoining defendants from publishing abstracts of plaintiff's financial research reports), *cert. denied*, 434 U.S. 1014 (1978).

¹⁶⁰ Professor Nimmer has observed that the issue of "fair use" arises when it is established "that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity." In these circumstances, "[t]he result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he has made of the plaintiff's material is a 'fair use.'" 3 M. NIMMER, COPYRIGHT § 13.05[A], at 13-56 (1982).

¹⁶¹ 17 U.S.C. § 107 (1982).

¹⁶² See, e.g., *Roy Export Co. Establishment of Vaduz Liechtenstein v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (defendant's use of six Charlie Chaplin films to which plaintiffs held the exclusive rights not protected by

The "fair use" doctrine, long applied in the context of copyright law, suggests an appropriate mechanism by which courts can balance the competing interests of the right of publicity and the first amendment.¹⁶³ The four factors identified in the copyright "fair use" doctrine provide a useful starting point, but they should not be inserted verbatim into the right of publicity arena.¹⁶⁴ For example, the second "fair use" factor focuses on the nature of the protected work. The application of this factor in the context of the right of publicity would require consideration of the nature of the attribute appropriated. As discussed in Part I, however, the right of publicity should protect automatically any personal attribute capable of public recognition.¹⁶⁵ When a defendant appropriates a personal attribute which clearly triggers public recognition, such as an individual's name or likeness, a court need not evaluate further the nature of the attribute in its "fair use" analysis. Occasionally, a given use does not invoke a specific or visible attribute but instead merely suggests an individual's identity. In these situations, courts can determine whether that which is appropriated is sufficient to trigger public recognition by applying the proposed "fair use" factor focusing on the substantiality of the use.¹⁶⁶ Therefore, a "fair use" factor focusing exclusively on the nature of the attribute appropriated is unnecessary in right of publicity cases.¹⁶⁷

"fair use" because the films were created for commercial gain, the defendant's use was qualitatively great, and there was evidence of bad faith), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 103 S. Ct. 60 (1982). It should be noted that because the four "fair use" factors had been applied by the judiciary prior to their codification, the analysis in those decisions predating the effective date of the 1976 Copyright Act (January 1, 1978) mirrors that of decisions invoking the new Act. *See also* Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

¹⁶³ As one commentator has observed, "[j]udicial recognition of a fair use limitation on publicity rights would find its antecedent in the judge-made doctrine of copyright fair use." Hoffman, *supra* note 21, at 139; *see id.* at 139-45, for a brief discussion of a fair use limitation on the right of publicity; *see also* Estate of Presley v. Russen, 513 F. Supp. 1339, 1358 n.18 (D.N.J. 1981); Hoffman, *supra* note 1, at 18-19; Comment, *Privacy's Stepchild*, *supra* note 3, at 1128.

¹⁶⁴ *See* Hoffman, *supra* note 21, at 140 ("[T]his article does not propose grafting the copyright fair use doctrine onto the right of publicity; it proposes that courts begin to weld the case law limitations on publicity rights into a cohesive fair use doctrine, borrowing the four-factor approach from copyright as an organizational aid.").

¹⁶⁵ *See supra* text accompanying and following notes 65-66.

¹⁶⁶ *See infra* notes 233-49 and accompanying text.

¹⁶⁷ *But see* Hoffman, *supra* note 21, at 142-43 (suggesting that whether a celebrity's persona is completely his own creation should have a bearing on "fair use," as should the origin or nature of a celebrity's fame).

In contrast, the nature of a copyrighted work can sometimes influence the outcome of

Instead of incorporating a "fair use" factor which focuses on the nature of the attribute, the "fair use" discussion in a right of publicity decision should consider when the defendant's use occurred in relation to the life span of the individual whose publicity rights have been appropriated. Unlike copyright law,¹⁶⁸ the right of publicity has no specific time limit. Yet, whether a particular appropriation should be deemed a "fair use" should depend, at least in part, on whether the defendant's unauthorized use occurs during the individual's lifetime, one hundred years after the person's death, or some period of time in between.¹⁶⁹ Although, as discussed in Part II, the right of publicity should be freely inheritable, it is questionable whether the unjust enrichment and motivation rationales for descendibility can support protection for an individual's right of publicity as much as one hundred years after that person's death. Indeed, in situations involving the publicity rights of individuals who have been dead for a long period of time, the policies underlying the first amendment ought to prevail.¹⁷⁰

a given copyright infringement action and this consideration should, therefore, be factored into a copyright "fair use" discussion independently. For example, a court might be less inclined toward a determination of "fair use" if the copyrighted work was created for commercial gain. *See, e.g., Roy Export Co. Establishment of Vaduz Liechtenstein v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (in discussing the second fair use factor, the court observed that "the crucial consideration is that the six Chaplin films were created for commercial gain" and that the jury reasonably could have concluded that the defendant used the films to fulfill the same function), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 103 S. Ct. 60 (1982). As *Roy Export* illustrates, the nature of the protected work also is implicated in the fourth copyright "fair use" factor which focuses on the effect of the defendant's use upon the potential market for or value of the protected work. *See infra* notes 250-56 and accompanying text.

¹⁶⁸ 17 U.S.C. § 302(a) (1982) provides: "Copyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death." *See also infra* notes 259-63 and accompanying text.

Prior to the 1976 Copyright Act, copyright protection began on the date of publication (or the date of registration in unpublished form) and continued for a twenty-eight year period. Subsequently, the copyright could be renewed for an additional twenty-eight year period, for a total of fifty-six years of protection. *See* 17 U.S.C. § 24 (1970) (repealed). The need for a duration for copyright protection derives from the Constitution's grant of power to Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

¹⁶⁹ *See infra* notes 257-70 and accompanying text.

¹⁷⁰ *Cf.* Professor Nimmer's observations regarding why the common law concept of copyright in perpetuity is inconsistent with the policies underlying the first amendment:

Some may question why literary property should be treated differently

As in the area of copyright law, the particular facts of each case always will be determinative. Nevertheless, the following four "fair use" factors do provide a set of criteria for "balancing the equities"¹⁷¹ in a right of publicity action: 1) the purpose and character of the use; 2) the amount and substantiality of the appropriation; 3) the effect of the use upon the potential market for or value of the publicity rights appropriated; and 4) the time frame of the use in relation to the life span of the individual whose publicity rights have been appropriated. The remainder of this Part demonstrates how these four factors can be applied in deciding right of publicity cases.¹⁷²

A. Purpose and Character of the Use

The critical inquiry under this factor is the extent to which the defendant's use involves a constitutionally protected medium of expression.¹⁷³ A defendant's appropriation of an individual's name or likeness may be used for one of three different purposes: to inform, to entertain, or to sell a product.¹⁷⁴ Those uses which primarily inform will typically enjoy greater first amendment protection than those which are essentially commercial in nature. Frequently, however, these uses overlap,

from other forms of property? If I may own Blackacre in perpetuity, why not also *Black Beauty*? The answer lies in the first amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright. I have suggested that the speech interest in so far as it relates to expression rather than idea should be given less weight than the copyright interest in encouraging creativity. But when we consider copyright protection beyond the life expectancy of the author's children and grandchildren the balance between speech and copyright must shift. The real, if relatively slight, speech interest in expression remains constant, while the copyright interest in encouraging creativity largely vanishes. At that point the first amendment should prevail, and perpetual common law copyright protection should give way.

Nimmer, *supra* note 149, at 1193.

¹⁷¹ H.R. REP. NO. 1476, 94th Cong., 2d. Sess. 65 (1976) (discussing general background of the "fair use" problem).

¹⁷² For a somewhat different approach to resolving the first amendment problems with media portrayals of real people, see Felcher & Rubin, *supra* note 46, at 1596. Felcher & Rubin suggest that courts should look first to the purpose of the media portrayal. If the medium is not immune from liability by virtue of serving a cultural or informative function, courts then should determine whether the individual portrayed has suffered any identifiable harm. If such is the case, relief should be granted.

¹⁷³ See Hoffman, *supra* note 21, at 140.

¹⁷⁴ Felcher & Rubin, *supra* note 46, at 1597.

triggering problems of judicial line-drawing.¹⁷⁵

The 1976 Copyright Act enumerates the following purposes for which one may use a copyrighted work if such use constitutes a "fair use": criticism, comment, news reporting, teaching, scholarship, and research.¹⁷⁶ Professor Nimmer has emphasized, however, that a defendant's copying for one of these purposes "merely suggests, but does not necessarily require a finding of fair use," and that "[t]his factor must still be balanced against the other factors listed in Section 107."¹⁷⁷ This observation should apply as well to the proposed "fair use" doctrine for the right of publicity, as is evidenced by the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Company*.¹⁷⁸ There, the Court rejected the defendant's contention that its broadcast of the plaintiff's human cannonball act was privileged reporting, stating that the first amendment does not "immunize the media when they broadcast a performer's entire act without his consent."¹⁷⁹

In some cases, however, the informative content of the use has prevailed over the commercial aspects, precluding any protection for the publicity rights in question. In *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹⁸⁰ for example, the court held that a corporation which was formed ostensibly to prevent the publication of certain biographical material about Howard Hughes could not maintain an action against the publisher and author of a biography about Hughes. In rejecting the plaintiff's argument that Hughes had assigned to it "the sole and exclusive world-wide rights to exploit commercially in any manner the name, personality, likeness or the life story . . . of Hughes,"¹⁸¹ the court emphasized that the "publication of a biography is clearly outside the ambit of 'commercial use' contemplated by the 'right of publicity' and such right can have no application to the publication of factual material which is constitutionally protected."¹⁸²

¹⁷⁵ See *id.*

¹⁷⁶ 17 U.S.C. § 107 (1982); see *supra* text accompanying note 157.

¹⁷⁷ 3 M. NIMMER, *supra* note 160, § 13.05[A][1], at 13-58.

¹⁷⁸ 433 U.S. 562 (1977); see also *supra* text accompanying notes 18-20.

¹⁷⁹ 433 U.S. at 575; see also *infra* text accompanying notes 230.

¹⁸⁰ 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969).

¹⁸¹ 58 Misc. 2d at 3, 294 N.Y.S.2d at 125.

¹⁸² *Id.* at 6, 294 N.Y.S.2d at 129. The court then added:

Just as a public figure's "right of privacy" must yield to the public interest so too must the "right of publicity" bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.

Because of such considerations, a public figure can have no exclusive

In *Paulsen v. Personality Posters, Inc.*,¹⁸³ the court adopted an even more expansive constitutional privilege as applied to alleged infringements of publicity rights in the context of matters of public interest. In *Paulsen*, the court denied the popular comedian Pat Paulsen temporary injunctive relief from the marketing of a commercial poster embodying a photograph of Paulsen and stating "FOR PRESIDENT" at the bottom. The defendant began marketing the posters in response to the public's interest in Paulsen's comedy routine based upon his entry into the 1968 presidential race. Although Paulsen's suit was predicated on an alleged invasion of New York's statutory right of privacy,¹⁸⁴ the court recognized that Paulsen actually was concerned with his right of publicity, rather than his right of privacy.¹⁸⁵ The court observed, however, that the right of publicity, like the right of privacy, is not applicable to the use of one's name or picture in connection with a matter of public interest.¹⁸⁶ Defining the scope of subject matter which can be considered "of public interest" as including "all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general,"¹⁸⁷ the court rejected Paulsen's argument that his activities constituted a "publicity stunt," and, therefore, were outside the constitutional privilege.¹⁸⁸

rights to his own life story, and others need no consent or permission of the subject to write a biography of a celebrity.

Id. (citations omitted); see also *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982) (magazine's publication of interview with public figure is protected by first amendment; protection extends to use of headlines and cover display as long as such devices were true).

¹⁸³ 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

¹⁸⁴ N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 1976 & Supp. 1982); see *supra* note 8.

¹⁸⁵ *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S.2d 501, 508 (Sup. Ct. 1968). Paulsen alleged that the defendant's distribution of the posters infringed his licensing arrangement with a California company to which he had granted the exclusive right to merchandise all buttons, posters, and stickers concerning his campaign. *Id.* at 446, 299 N.Y.S.2d at 504.

¹⁸⁶ *Id.* at 451, 299 N.Y.S.2d at 508.

¹⁸⁷ *Id.* at 448, 299 N.Y.S.2d at 506.

¹⁸⁸ *Id.* at 449, 299 N.Y.S.2d at 507. In this regard, the court observed:

When a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. A poster which portrays plaintiff in that role, and reflects the spirit in which he approaches said role, is a form of public interest presentation to which protection must be extended. That the format may deviate from traditional patterns of political commentary, or that to some it may appear more entertaining than informing, would not alter its protected status. It is not for

The *Paulsen* court distinguished its case from those involving a use of an individual's name or likeness "purely for 'advertising purposes', in the sense of promoting the sale of a collateral product."¹⁸⁹ In these situations, as well as in those instances when a person's name or likeness is actually employed in the merchandise itself, courts typically refuse to protect the particular use. In *Flores v. Mosler Safe Co.*,¹⁹⁰ for example, the court held that the plaintiff could maintain an action under New York's statutory right of privacy against a manufacturer of fireproof safes for reprinting, as part of an advertisement, a news report of a fire which discussed the plaintiff.¹⁹¹ Similarly, courts have been inclined to enjoin the use of factual information about a person as part of commercial products for amusement such as board games.¹⁹² Although *Paulsen* also involved the sale of a commercial commodity (i.e., the poster), the court "treated the poster as an alternate form of distributive publication"¹⁹³ rather than as a form of commercial exploitation. *Paulsen*, therefore, provides a basis for broadening the constitutional privilege with respect to appropriations possessing an informative element, but so far courts have declined to extend *Paulsen* beyond its unique facts.¹⁹⁴ Generally, in cases involving an appropriation of a per-

this or any court to pass value judgments predicated upon ephemeral subjective considerations which would serve to stifle free expression. "What is one man's amusement, teaches another's doctrine."

Id. at 449-50, 299 N.Y.S.2d at 507-08 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

¹⁸⁹ *Id.* at 447, 299 N.Y.S.2d at 505; see *infra* notes 220-30 and accompanying text.

¹⁹⁰ 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959).

¹⁹¹ See also *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967); *supra* notes 39-45 and accompanying text.

¹⁹² See *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 146 (Sup. Ct.), *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973) (use of Howard Hughes' name and biographical data in connection with an entertaining game of chance is not "legitimate to the public interests"); see also *supra* note 61. *But see* *Treece*, *supra* note 26, at 665-68 (arguing that the use of an individual's name or biographical data in a game should be regarded no differently from privileged use of such information in biographies).

¹⁹³ *Rosemont Enters., Inc. v. Urban Sys.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 146 (Sup. Ct.), *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

¹⁹⁴ See *id.* ("The *Paulsen* case is unique to its facts and must be so considered."). Also, in *Factors I*, the Second Circuit rejected Pro Arts' reliance on *Paulsen* for the proposition that its "IN MEMORY" poster of Elvis Presley was privileged because it celebrated a newsworthy event: "We cannot accept Pro Arts' contention that the legend 'IN MEMORY' . . . placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate. We hold, therefore, that Pro Arts' poster of Presley was not privileged as celebrating a newsworthy event." *Factors Etc., Inc. v. Pro*

son's publicity rights *for the ultimate purpose* of selling a separate commodity, courts refrain from according the use a privileged status, despite the presence of an informative element. In contrast, courts will exempt a particular use if the commodity legitimately can be viewed as a vehicle for disseminating information of public interest.

Frequently, the unauthorized use of an individual's name or likeness will be for entertainment rather than strictly informative purposes. Some uses which are primarily entertainment oriented nevertheless contain a strong informative element in that they depict "real people" and therefore, generally will be protected to the same extent as purely informative works.¹⁹⁵ In *Gautier v. Pro-Football, Inc.*,¹⁹⁶ another action under New York's statutory right of privacy, a renowned animal trainer sued local and national television stations for broadcasting, without his consent, his performance which occurred at the halftime of a professional football game. Immediately preceding the plaintiff's act, a one-minute commercial was aired. The court held that unless the plaintiff's name or picture was somehow connected with the commercial, the sponsorship of the telecast did not constitute a use for "purposes of trade" in violation of the statute.¹⁹⁷ The court observed that when television is characterized by an informative or news element, it should be entitled to the same degree of protection as that afforded newspapers and magazines.¹⁹⁸

Arts, Inc., 579 F.2d 215, 222 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). In attempting to reconcile these two cases, one commentary has suggested that posters such as the one featuring Pat Paulsen are a "familiar mode of campaign dialogue" whereas "full-color wall posters" such as that of Presley are not "a common form of obituary notice." Felcher & Rubin, *supra* note 46, at 1603.

¹⁹⁵ Felcher & Rubin, *supra* note 46, at 1604.

¹⁹⁶ 304 N.Y. 354, 107 N.E.2d 485 (1952).

¹⁹⁷ *Id.* at 358, 107 N.E.2d at 488; *see also supra* note 8.

¹⁹⁸ The court reasoned that because the legitimate use of a person's name or picture in a newspaper or magazine in connection with an item of news is not regarded as use "for purposes of trade" under the statute, the televising of an individual attending a public event such as a football game "in the status in which he attends" similarly is protected. 304 N.Y. at 359, 107 N.E.2d at 488. In so concluding, the court emphasized that, in any medium of communication, an "individual may not be singled out and unduly featured merely because he is on the scene." *Id.* at 359, 107 N.E.2d at 488. Thus, with respect to televising an individual attending a football game, the court observed:

If a mere spectator, he may be taken as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly featured for public view. Where, however, one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but

An entertainment use without an informative element must derive its social value from its own creative components if it is to be deemed a privileged use.¹⁹⁹ When a defendant's appropriation of a person's name or likeness for entertainment purposes serves primarily to imitate or exploit that individual's identity commercially, protection will be denied. In contrast, uses which can be viewed legitimately as criticism, comment, satire, or parody typically will be protected. The critical inquiry is whether the defendant's use contributes something new to our cultural experience.²⁰⁰

Two recent cases illustrate the difficulties courts face in determining whether appropriations for entertainment purposes constitute protected expressions. In *Estate of Presley v. Russen*,²⁰¹ the defendant produced THE BIG EL SHOW, which featured a performer impersonating the late Elvis Presley by dressing, singing, and performing generally in Presley's unique style.²⁰² The court concluded that "although THE BIG EL SHOW contains an informative and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society."²⁰³ *Russen* distinguished the defendant's use from a pure commercial use of Presley's picture to advertise a product in that the defendant's use constituted a form of entertainment and provided information by illustrating the performance of a legendary star.²⁰⁴ Nevertheless, in the court's

limited.

Id. at 360, 107 N.E.2d at 489.

A concurring opinion disagreed with the conclusion that the defendants' televising of the plaintiff's act was not a use "for advertising purposes," but concurred in the result on the ground that no invasion of the plaintiff's privacy occurred because his real grievance was that he was not paid for the telecasting of his show. *Id.* at 361, 107 N.E.2d at 489 (Desmond, J., concurring). Thus, Judge Desmond properly characterized the plaintiff's action as one involving the right of publicity rather than the right of privacy.

¹⁹⁹ Felcher & Rubin, *supra* note 46, at 1604; *see also* *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981).

²⁰⁰ *See* *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981). ("Entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment."); Felcher & Rubin, *supra* note 46, at 1604-05 ("[A] work that merely capitalizes on the attributes of another, without contributing anything substantially unique or new, is likely to be subject to liability.").

²⁰¹ 513 F. Supp. 1339 (D.N.J. 1981).

²⁰² *Id.* at 1349. THE BIG EL SHOW opened with the theme from the movie "2001 — A Space Odyssey," which Presley had also used to open his shows. In addition, the show featured musicians called the TCB Band, the name of Presley's band.

²⁰³ *Id.* at 1359.

²⁰⁴ *Id.* at 1359-60.

view, the entertainment lacked its own creative component and the information which the performance provided about Presley was of limited value as compared with a biographical film or play about Presley.²⁰⁵

The district court in *Groucho Marx Productions, Inc. v. Day and Night Co.*²⁰⁶ relied on the *Russen* decision in concluding that the defendant's production of a play featuring performers simulating the Marx Brothers' unique style, appearance, and mannerisms was not protected expression.²⁰⁷ The court did not believe the play qualified as a parody because it simply duplicated the original, rather than building upon it by adding its own creative elements.²⁰⁸ The Second Circuit subsequently reversed this decision on the choice of law issue,²⁰⁹ but the appellate court opinion suggests that otherwise it might have been inclined to reverse the district court's first amendment ruling.²¹⁰

²⁰⁵ *Id.*

²⁰⁶ 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *see also supra* notes 125-26 and accompanying text.

²⁰⁷ 523 F. Supp. at 494. Specifically, in the second half of the play, three performers dramatized Chekhov's novel *The Bear* as the Marx Brothers would have dramatized the work. 689 F.2d at 318-19.

²⁰⁸ The court noted that although "literary comment may been the intent of the playwright, any such intent was substantially overshadowed in the play itself by the wholesale appropriation of the Marx Brothers characters." 523 F. Supp. at 493. The court stated:

Under the fair use doctrine in copyright law, a parodist is entitled to "conjure up" the original — a concept that allows the artist considerable leeway in building upon the original. Here, defendants have gone beyond merely building on the original to the point of duplicating as faithfully as possible the performances of the Marx Brothers, albeit in a new situation with original lines. The Marx Brothers themselves were a parody on life; the play does not present a parody on their parody but instead successfully reproduced the Marx Brothers' own style of humor. Although the playwright may have intended to comment "about 1930's Hollywood, its techniques, its stars and its excesses," . . . the content of the relevant portion of the play attempts to accomplish that objective exactly as would the Marx Brothers themselves.

Id. at 493 (citation omitted); *see also* Felcher & Rubin, *supra* note 46, at 1605 ("[I]f a self-proclaimed parody actually appropriates substantial amounts of the original material, and thus relies on the original rather than its own contributions for its appeal, it will not be protected, no matter how humorous its intent." (footnote omitted)).

²⁰⁹ 689 F.2d 317 (2d Cir. 1982).

²¹⁰ The appellate court indicated, in a footnote, that if it had to rule on the soundness of the district court's interpretation of the federal constitutional law, it "would have to examine closely defendants' substantial argument that their play is protected expression as a literary work, especially in light of the broad scope permitted parody in First Amendment law." *Id.* at 319 n.2.

Both the *Russen* and *Day and Night* courts were faced with entertainment uses which implicated the distinction between actionable imitation and protected expression. Other recent cases have involved entertainment uses constituting fictionalizations. In this area, the cases consistently have adhered to the position that fictionalized movies and books should be accorded a privileged status because they are legitimate vehicles for disseminating ideas and opinions.²¹¹ Chief Justice Bird's concurrence in *Guglielmi v. Spelling-Goldberg Productions*²¹² emphasized that because fiction frequently is used as a vehicle to comment upon our "values, habits, customs, laws, prejudices, justice, heritage and future," no distinction should be drawn between fictional and factual accounts in the context of determining whether a work is entitled to constitutional protection.²¹³ Her opinion stressed the importance, from the first amendment standpoint, of allowing authors of fictional works to incorporate real people and events into their works.²¹⁴ Simi-

²¹¹ See Hoffman, *supra* note 1, at 22-23.

²¹² 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (Bird, C.J., concurring); see also *supra* text accompanying notes 112-13. Although Chief Justice Bird believed Rudolph Valentino had a descendible right of publicity, see *supra* text accompanying note 139, she concurred in the majority's decision to dismiss the complaint because, in her view, the film in question was a constitutionally protected medium of expression.

²¹³ *Guglielmi*, 25 Cal. 3d at 867-68, 603 P.2d at 459, 160 Cal. Rptr. at 357 (Bird, C.J., concurring).

²¹⁴ In rejecting the plaintiff's argument that the defendant's use of Rudolph Valentino's name and likeness was unnecessary and that it was incorporated into the film solely to increase its value, Chief Justice Bird remarked:

If [the plaintiff's] analysis were used to determine whether an expression is entitled to constitutional protection, grave harm would result. Courts would be required not merely to determine whether there is some minimal relationship between the expression and the celebrity . . . but to compel the author to justify the use of the celebrity's identity. Only upon satisfying a court of the necessity of weaving the celebrity's identity into a particular publication would the shadow of liability and censorship fade. Such a course would inevitably chill the exercise of free speech — limiting not only the manner and form of expression but the interchange of ideas as well.

Id. at 869, 603 P.2d at 460, 160 Cal. Rptr. at 358. In Chief Justice Bird's view, Rudolph Valentino's life and career are part of the cultural history of an era, and as such, his "lingering personality is an apt topic for poetry or song, biography or fiction." *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 870, 603 P.2d 454, 460, 160 Cal. Rptr. 352, 358 (1979) (Bird, C.J., concurring) (footnote omitted). *But see* Pilpel, *supra* note 46, at 260-62 (suggesting that fictionalizations involving living people may be vulnerable on a combination of privacy and publicity grounds unless the individuals depicted are public figures whose names and likenesses are used for incidental or back-

larly, in *Hicks v. Casablanca Records*,²¹⁵ the court accorded first amendment protection to a movie and book fictionalizing an incident in the life of Agatha Christie, and determined that such protection outweighed the publicity rights possessed by the plaintiffs.²¹⁶ In so holding, the court emphasized that neither the movie nor the book contained deliberate falsifications and that, with respect to both media, the public would know that the events depicted were fictitious.²¹⁷ A broad scope of protection for fictional works also was endorsed in *Frosch v. Grosset & Dunlap, Inc.*,²¹⁸ wherein the court considered a literary work about Marilyn Monroe. The court concluded that the right of publicity should not be extended to support a cause of action against the publication of a literary work about a deceased person, regardless of whether the literary work in question is characterized as "a biography, a fictional biography, or any other kind of literary work."²¹⁹

Perhaps the easiest cases to resolve are those in which an individual's name or likeness is appropriated primarily to advertise or to enhance the sales of a collateral product. Such merchandising uses are vulnerable because they serve merely to exploit the identity of the individual depicted without possessing a sufficient socially valuable component.²²⁰

Universal Picture's appropriation of Bela Lugosi's likeness in connection with the sale of toy pencil sharpeners and other products is a prime example of a pure commercial use designed to market a collateral product.²²¹ Other recent right of publicity decisions, however, have involved commercial uses which could be regarded as meriting protec-

ground purposes).

²¹⁵ 464 F. Supp. 426 (S.D.N.Y. 1978).

²¹⁶ *Id.* at 433; see *supra* notes 122-24 and accompanying text.

²¹⁷ 464 F. Supp. at 433.

²¹⁸ 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980).

²¹⁹ *Id.* at 769, 427 N.Y.S.2d at 829. The court articulated its rationale as follows:

It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services. The protection of the right of free expression is so important that we should not extend any right of publicity, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person.

Id.; see also *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 264, 272 P.2d 177, 183 (1954) (Utah's right of privacy statute was intended to prohibit use of a person's name or picture in advertising or promoting the sale of a collateral commodity but did not prohibit such a use in a movie fictionalizing a person's life).

²²⁰ See *Felcher & Rubin, supra* note 46, at 1606; *supra* notes 189-94 and accompanying text.

²²¹ See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

tion. For example, the pewter replicas of Elvis Presley distributed by the plaintiff in *Memphis Development Foundation v. Factors Etc., Inc.*,²²² and the plastic busts of Dr. Martin Luther King, Jr. marketed by the defendant in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*²²³ arguably could have been protected by the first amendment as art forms.²²⁴ Such an argument might have succeeded in *Memphis Development*, in which the replicas were distributed by a nonprofit corporation in return for a twenty-five dollar contribution to help finance the erection of a larger version of the Presley statue in downtown Memphis.²²⁵ In *Martin Luther King*, however, the facts disclose a more typical commercial setting.²²⁶ The defendants formed a company to make plastic busts of Dr. Martin Luther King, advertising its offer of the busts as "an opportunity to support the Martin Luther King, Jr. Center for Social Change." The advertisements stated that "a contribution from your order goes to the King Center for Social Change."²²⁷ In fact, out of the \$29.95 purchase price, the defendants set aside three percent as a contribution to the Center.²²⁸ Further, the defendants pursued this activity despite its prior request for, and failure to receive, the plaintiffs' support and participation in the marketing of the busts.²²⁹ As this comparison of *Memphis Development* and *Martin Luther King* suggests, whether a particular commercial use should be afforded protection always will depend upon the specific facts at issue.²³⁰

²²² 616 F.2d 956 (6th Cir. 1980).

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

²²⁴ See Felcher & Rubin, *supra* note 69, at 1132 n.30; see also *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 150, 296 S.E.2d 697, 708 (1982) (Weltner, J., concurring) (disagreeing with majority's assumption that the defendants' activity does not constitute "speech").

²²⁵ See Felcher & Rubin, *supra* note 69, at 1132 n.30. Cf. 17 U.S.C. § 107 (1982) (the first fair use factor focuses on "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes" (emphasis added)).

²²⁶ *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 135, 296 S.E.2d 697, 698 (1982).

²²⁷ *Id.*

²²⁸ *Id.* The testimony revealed, however, that the money had been offered to the Center, but was not accepted by its governing board. *Id.* at 136, 296 S.E.2d at 699.

²²⁹ *Id.*

²³⁰ Even in the context of commercial uses designed to advertise a product, courts refrain from imposing liability in two situations. See Hoffman, *supra* note 21, at 141. The first is when an individual's name or likeness is used to advertise a privileged work which features that individual. Such was the case in *Guglielmi*, wherein Chief Justice Bird's concurrence stressed that the use of Rudolph Valentino's name and likeness in

As the foregoing discussion illustrates, it is frequently difficult to determine whether a particular use of an individual's name or likeness constitutes protected expression. If a court concludes that the use in question is constitutionally privileged, it need not consider the remaining proposed "fair use" factors. In such cases, the right of publicity should yield automatically to the first amendment.²³¹ On the other hand, if a court concludes that the defendant's use is not privileged, it should proceed to evaluate the impact of the other three factors. Even if a court declines to hold that a particular use is constitutionally privileged, it can consider the informative and entertainment aspects of a particular use in its overall balancing of the four proposed "fair use" considerations.

B. *The Amount and Substantiality of the Appropriation*

The second proposed "fair use" factor focuses on the magnitude of

advertisements for the film was not actionable given the privileged status of the film itself. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 873, 603 P.2d 454, 462, 160 Cal. Rptr. 352, 360 (1979) (Bird, C.J., concurring); *see supra* note 212. This type of advertising use is allowed because it merely serves to promote a privileged expression.

Second, courts have allowed advertising uses that are deemed "incidental." In *Namath v. Sports Illustrated*, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (1975), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd mem.*, 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976), for example, the defendant magazine used photographs of Joe Namath, which were originally published in January, 1969, in ten advertisements to promote subscriptions during the latter half of 1972. Although Namath sued for a violation of his right of privacy under New York's statutory right, the court observed that he actually was seeking damages for violation of his publicity right. Nevertheless, the court held that the use of Namath's photograph by the defendants was merely "incidental advertising of the defendants' magazine in which plaintiff had earlier been properly and fairly depicted" and, as such, was not violative of New York's statutory right of privacy. 48 A.D.2d at 483, 371 N.Y.S.2d at 11. In so holding, the court emphasized that the reproductions of Namath were used exclusively to illustrate the quality and content of the periodical in which they had originally appeared and that none of the defendants' advertisements involved an endorsement by Namath of the magazine. *Id.* at 488, 371 N.Y.S.2d at 12; *cf.* *Cher v. Forum Inter'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982) (defendants' use of Cher's name and likeness in advertisements for *Forum* magazine constituted an implied endorsement); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959) (rejecting defendant's incidental use argument when defendant, a manufacturer of fireproof safes, reprinted a newspaper article in which the plaintiff was mentioned three times as part of an advertisement for its products).

²³¹ *See Felcher & Rubin, supra* note 46, at 1608 ("[I]f a portrayal is found to serve an informative or cultural function, it will generally be immune from liability, even if it causes substantial harm."); *see also supra* note 172.

the appropriation. Sometimes a defendant's use clearly will be sufficient to mandate liability, as in *Zacchini v. Scripps-Howard Broadcasting Company*,²³² in which the defendant appropriated the plaintiff's entire act, thereby interfering with the plaintiff's ability to earn a living as an entertainer. In the Court's view, an appropriation of the activity by which the entertainer acquired his reputation presents the strongest case for a right of publicity.²³³

In addition to the length of the use, the second "fair use" factor is concerned with the substance of the appropriation. Part I of this Article suggests that the right of publicity should protect only personal attributes capable of public recognition.²³⁴ Those attributes which trigger public recognition most readily are an individual's name and likeness. Thus, a defendant's appropriation of either of these attributes should be the most vulnerable. The proposed requirement of public recognition may be more difficult to satisfy, however, if a defendant appropriates a less visible or specific aspect of an individual's identity. When evaluating uses which are merely suggestive of an individual's identity, courts must consider not only the use itself, but also the context in which it appears. For example, in *Ali v. Playgirl, Inc.*,²³⁵ the court held that Muhammad Ali's right of publicity was violated by a drawing of a naked black man with facial characteristics recognizable as those of Ali. Although the picture was captioned "Mystery Man," the identification of the man as Ali was reinforced by the context. The figure was seated on a stool in the corner of a boxing ring and there was an accompanying reference to the figure as "The Greatest," Ali's self-proclaimed appellation.²³⁶

Similarly, in *Hirsch v. S.C. Johnson & Son, Inc.*,²³⁷ the court concluded that a prominent athlete whose nickname was "Crazylegs" made out a prima facie case against a manufacturer of a shaving gel called "Crazylegs" for appropriating his nickname for purposes of trade. In so holding, the court suggested that the connection between the product and the plaintiff was fostered not only by the defendant's sponsoring a running event for women as the initial promotion of the product, but also by its use of a television commercial similar to the

²³² 433 U.S. 562 (1977).

²³³ *Id.* at 576; see also *infra* notes 251-52 and accompanying text; Hoffman, *supra* note 21, at 143-44.

²³⁴ See *supra* text accompanying notes 65-66.

²³⁵ 447 F. Supp. 723 (S.D.N.Y. 1978).

²³⁶ *Id.* at 726-27.

²³⁷ 90 Wis. 379, 280 N.W.2d 129 (1979); see *supra* note 60 and accompanying text.

“Crazylegs” cheer initiated at the college football games where plaintiff was the athletic director.²³⁸

Recently, the Sixth Circuit endorsed an expansive application of the right of publicity in a decision holding that Johnny Carson’s right of publicity was violated by a toilet manufacturer’s sale of “Here’s Johnny” portable toilets.²³⁹ The defendant used this phrase, which has served as Carson’s introduction on “The Tonight Show” since 1962 and is associated with Carson by a substantial segment of the television viewing public, in conjunction with the phrase “The World’s Foremost Comedian.” The evidence disclosed that the defendant adopted the name “Here’s Johnny” because it identified the plaintiff, and further coupled the phrase with the “Comedian” phrase “to make a good play on a phrase.”²⁴⁰ The majority opinion held that Carson’s right of publicity was invaded because the defendant “intentionally appropriated his identity for commercial exploitation.”²⁴¹ Further, the court observed that evidence of the defendant’s use of “Here’s Johnny” in a suggestive context was unnecessary given the defendant’s admission that it used the phrase because of its identification with Johnny Carson.²⁴²

In a forceful dissenting opinion, Judge Kennedy argued that the majority’s extension of the right of publicity to include phrases and other things which are “merely associated” with an individual “permits a popular entertainer or public figure, by associating himself or herself with a common phrase, to remove those words from the public domain.”²⁴³ Judge Kennedy attributed no relevance to the intentional aspects of the defendant’s appropriation, based on her belief that the phrase was not protected by law and thus, could not be taken from

²³⁸ 90 Wis. at 398, 280 N.W.2d at 138. The court stated that “[t]hese facts may augment and further identify the sports context in which the name, ‘Crazylegs,’ has been particularly prominent.” *Id.*; see also *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.2d 620, 396 N.Y.S.2d 661 (1977) (court upheld cause of action by Guy Lombardo against car manufacturer and advertising agency for exploitation of proprietary interest in his public personality based on production of a televised commercial against the background of a New Year’s Eve party with all the trappings, featuring an actor conducting a band and using the same gestures, musical beat and choice of music with which plaintiff had become associated in the public’s mind).

²³⁹ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983). See *supra* text accompanying note 58.

²⁴⁰ *Id.* at 833.

²⁴¹ *Id.* at 835-36. The court thus reversed the district court’s dismissal of Carson’s publicity claim because the defendant’s use did not more specifically identify Johnny Carson.

²⁴² *Id.* at 836.

²⁴³ 698 F.2d at 837 (Kennedy, J., dissenting); see *supra* text accompanying note 64.

public use.²⁴⁴ In support of her position that phrases associated with an individual should not be protected by the right of publicity, Judge Kennedy cited two public policy considerations. First, in her view, the protection of such phrases creates a “common law monopoly that removes items, words and acts from the public domain,” thereby inhibiting free enterprise.²⁴⁵ Second, she stated that concern for the first amendment should outweigh any protection which the right of publicity might afford phrases associated with an individual.²⁴⁶

The anticompetitive and first amendment concerns articulated by Judge Kennedy provide the rationale for incorporating the second pro-

²⁴⁴ *Id.* at 838.

²⁴⁵ *Id.* at 840. In this regard, Judge Kennedy also stated:

Protecting phrases and other things merely associated with an individual provides virtually no notice to the public at all of what is claimed to be protected. By ensuring the invocation of the adjudicative process whenever the commercial use of a phrase or other associated thing is considered to have been wrongfully appropriated, the public is left to act at their peril. The result is a chilling effect on commercial innovation and opportunity.

Id.

²⁴⁶ *Id.* at 841. Judge Kennedy specified two sources of concern regarding the potential conflict of the right of publicity with the first amendment. First, unlike the protection of tangible expressions under the copyright statute, the protection of phrases by the right of publicity is not “complemented by saving notice or duration requirements” Second, although the copyright law does not restrain the use of ideas or concepts, the same cannot be said for the right of publicity’s protection for phrases such as “Here’s Johnny” which, in her view, are “more akin to an idea or concept of introducing an individual than an original protectible fixed expression of that idea” *Id.* Judge Kennedy also suggested that the right of publicity may be subject to federal preemption when it conflicts with the Copyright Act of 1976. *Id.* at 840-41; *see also supra* note 68.

In addition, Judge Kennedy claimed that the case law bolstered her position because the right of publicity had never been extended to protect specific phrases associated with an individual. *Id.* at 842. She rejected the majority’s reliance on the *Hirsch* and *Ali* cases, distinguishing them on the ground that they involved uses which reinforced the identities of the respective plaintiffs by a suggestive context. *Id.* at 842-45. Similarly, she discredited the majority’s reliance on *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), discussed *supra* note 62, in which the court extended the right of publicity to protect from appropriation an individual’s distinctive racing car as an aspect of his identity. Judge Kennedy justified the holding in *Motschenbacher* on the ground that the distinctive markings of the plaintiff’s racing car were “identifying characteristics” unique to the plaintiff and the product of his time and effort. 698 F.2d at 844 (Kennedy, J., dissenting). Judge Kennedy also observed that “[t]his uniqueness provides notice to the public of what is claimed as part of [Motschenbacher’s] publicity right, as does an individual’s name, likeness or actual performance, and narrowly limits the scope of his monopoly.” *Id.* *But see infra* note 62 and accompanying text.

posed “fair use” factor into any right of publicity analysis. Indeed, free enterprise and expression undoubtedly would be hampered if the right of publicity sanctioned, in all instances, the removal from the public domain of phrases and other things merely associated with an individual. On balance, however, the Sixth Circuit’s decision in the *Johnny Carson* case is supportable. The evidence showed that the phrase “Here’s Johnny” has been used to introduce the plaintiff on his national television show for over twenty years. The defendant even admitted that it adopted the phrase because of its identification with Johnny Carson.²⁴⁷ Therefore, it is difficult to understand why this phrase should not be treated as an “identifying characteristic” of the plaintiff, and thus protectable even under the dissent’s standard.²⁴⁸ Whether the phrase is unique to Carson is irrelevant if a substantial segment of the public understands the phrase as identifying Johnny Carson.²⁴⁹ Further, the defendant’s use of the phrase “The World’s Foremost Comedian” provides a strong contextual reference to the plaintiff. In these circumstances, the defendant’s use of the phrase “Here’s Johnny” constituted a commercial appropriation of an attribute capable of public recognition.

The decisions discussed herein illustrate the factors courts should consider in determining whether a particular appropriation of an individual’s identity is sufficiently substantial to warrant the imposition of liability. Just as the first proposed “fair use” factor requires courts to make a value judgment regarding the nature of the use, the second “fair use” factor requires courts to evaluate independently the degree of the use. With respect to both of these inquiries, the particular facts at issue always will be determinative.

C. *Effect of the Use upon the Market for Publicity Rights*

The third proposed “fair use” factor focuses on whether the defen-

²⁴⁷ See *supra* text accompanying note 240.

²⁴⁸ See *supra* note 235 and text accompanying note 64.

²⁴⁹ That the public did, in fact, make this identification is evident from the following observation by the court: “We do not understand appellee [the defendant] to even contend that it did not successfully accomplish its intended purpose of appropriating his [Carson’s] identity.” *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983).

In her dissent, Judge Kennedy stressed that the phrase “Here’s Johnny” cannot be viewed as an identifying characteristic because it is not the result of his personal time and effort. *Id.* at 844. This argument is not persuasive, given the plaintiff’s use of this phrase consistently for over twenty years, during which time he has spent considerable energy and effort developing his public personality.

dant's use affects the potential market for or value of the appropriated publicity rights. To aid this analysis in the copyright context, Professor Nimmer has developed a "functional test" which is equally applicable to publicity cases. This test emphasizes the purposes for which the plaintiff's and the defendant's works are used, and requires a narrow application of the "fair use" doctrine when the two works fulfill the same function with respect to actual or potential consumer demand.²⁵⁰ Conversely, the scope of the "fair use" doctrine is expanded when the functions of the respective works differ. Under this test, a defendant's use is more likely to be regarded as a "fair" one when it does not fulfill the same function as the plaintiff's use.

Zacchini v. Scripps-Howard Broadcasting Co. illustrates an implicit application of Professor Nimmer's "functional test." In holding that the defendant's broadcast was not immune from liability, the court emphasized that the effect of the defendant's broadcast of the plaintiff's entire act was "similar to preventing petitioner from charging an admission fee."²⁵¹ The court reasoned that if people can see the act on television for free, they will be less inclined to pay to see it at the fair.²⁵²

Typically, the third "fair use" factor will assume a greater importance in cases such as *Zacchini* which involve entertainers and other public figures. Such plaintiffs can more readily demonstrate that a particular appropriation interfered with their ability to market their public personalities than can private individuals. Once a plaintiff demonstrates

²⁵⁰ 3 M. NIMMER, *supra* note 160, § 13.05[B], at 13-66, 13-67.

²⁵¹ 433 U.S. 562, 575-76 (1977).

²⁵² *Id.* at 575; *see also* *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 74-75, 232 A.2d 458, 459 (1967) (plaintiff golfers alleged that the defendant's use of their respective names in conjunction with a golf game reduced their ability to obtain satisfactory commercial affiliation by licensing agreements; court granted plaintiffs' motion for summary judgment on ground that defendant's conduct constituted invasion of privacy); *Hoffman*, *supra* note 21, at 144-45.

Courts faced with motions for preliminary injunctions sometimes discuss this factor in conjunction with the plaintiff's showing of irreparable injury. *See, e.g.*, *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1378-80 (D.N.J. 1981) (although plaintiff did not prove that presentation of show featuring a performer imitating the late Elvis Presley had resulted in any loss of commercial opportunities for the plaintiff, plaintiff did prove that irreparable harm would result from the defendant's continued sale of pendants and records displaying likeness of Presley); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 285 (S.D.N.Y. 1977) (irreparable harm based on plaintiff's claim that its licensing programs were being jeopardized by its inability to grant exclusive rights). Although a plaintiff's showing of economic injury clearly is relevant to a determination of irreparable injury, courts considering motions for preliminary injunctions should not overlook the importance of this factor in determining a plaintiff's likelihood of success on the merits.

economic harm resulting from an unprivileged use, it is unlikely that a court will refrain from imposing liability.²⁵³ Private individuals, however, have a more difficult time showing actual or even potential economic harm, given the absence of a ready market for their publicity rights. Nevertheless, if the other three "fair use" factors militate in favor of liability, a court should hold a defendant liable even if its appropriation had no effect upon the market for the plaintiff's publicity rights.²⁵⁴ The same is true with respect to those appropriations which enhance, rather than diminish, the value of a plaintiff's publicity rights. In *Zacchini v. Scripps-Howard Broadcasting Co.*, for example, the court recognized the possibility that the defendant's broadcast could have "increased the value of petitioner's performance by stimulating the public's interest in seeing the act live."²⁵⁵ Contrary to the Court's subsequent assertion that *Zacchini* would be unable to recover in this situation, a court always can award a plaintiff damages in an amount measured by the defendant's unjust enrichment if it determines that liability is warranted based on its overall "fair use" determination. Thus, under the facts in *Zacchini*, the defendant network would be unjustly enriched if it enjoyed higher ratings and increased revenues for some period following its broadcast of the plaintiff's act, and the plaintiff, therefore, would be entitled to a proportional share of the defendant's profits.²⁵⁶

D. The Time Frame of the Use

A descendible right of publicity is similar to an inheritable copyright in that the rationales justifying both doctrines are relatively weak when applied to protect the interests of an individual who has been dead for a

²⁵³ Cf. 3 M. NIMMER, *supra* note 160, § 13.05[A][4], at 13-65 ("[i]f one looks to the fair use cases, if not always to their stated rationale, . . . [the "potential market" factor] emerges as the most important, and indeed, central fair use factor"); *supra* note 231 and accompanying text.

²⁵⁴ *But see Hoffman, supra* note 21, at 145 ("In publicity cases, the plaintiff should have the burden of proving adverse effect on an actual market, even if his name and likeness or performance has clearly been infringed.").

²⁵⁵ 433 U.S. 562, 575 n.12 (1977).

²⁵⁶ *See supra* note 55 and accompanying text. In fact, Justice Powell criticized the majority opinion in *Zacchini* because it articulates an "unjust enrichment" rationale for the right of publicity but "inconsistently accepts a measure of damage based not on the defendant's enhanced profits but on harm to the plaintiff." 433 U.S. at 565 n.2 (Powell, J., dissenting). It should be noted, however, that Justice Powell did not believe the defendant had gained financially by showing the plaintiff's act. *Id;* cf. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 250 Ga. 135, 143, 296 S.E.2d 697, 703 (1982) ("the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user").

long period of time. Although an individual's children, grandchildren and even great-grandchildren have a right to benefit financially from her efforts and possessions, this right is less compelling when it is asserted by remote descendants.²⁵⁷ After a certain point, the descendants of the person originally protected should have no greater claim to the publicity rights or copyrights of the principal than should a totally unrelated concern. Moreover, because the first amendment's interest in free speech remains constant, it should prevail over the rationales justifying descendibility once they are sufficiently diminished.²⁵⁸

The 1976 Copyright Act²⁵⁹ provides a specific duration period for copyrights: the life of the author plus fifty years after the author's death.²⁶⁰ One of the rationales supporting this duration period focuses on the need to protect the rights of the creator's spouse and children in a potentially valuable legacy. Fifty years is considered a reasonable period of protection for this purpose.²⁶¹ Similarly, a reasonable period of protection for an individual's publicity rights would ensure that the spouse and immediate descendants, as well as the licensees, of the decedent will reap the financial rewards derived from the exploitation of the decedent's rights.²⁶² The analogous policies underlying the copyright law and the right of publicity prompted Chief Justice Bird to adopt in

²⁵⁷ In *Schumann v. Loew's Inc.*, 144 N.Y.S.2d 27, 30 (1955), the court dismissed a complaint by the great-grandchildren of composer Robert Schumann against the defendant company for producing a motion picture about Schumann. In rejecting the plaintiff's claim that they were entitled to recover from the defendant's violation of Schumann's property rights in the name "Robert Schumann," the court observed: "If plaintiffs' theory were correct, exhibitors of motion pictures dealing with the lives of Shakespeare, Jefferson, Voltaire and tens of thousands of other playwrights, authors, etc. could be successfully sued by their presently living descendants for violation of their ancestors' property rights in their names." *Id.* at 30. The court also noted that even if Schumann's property right could be enforced by the plaintiffs, they made no showing that they actually inherited the assumed property right. *Id.*; see also Gordon, *supra* note 13, at 601 (emphasis in original):

Along with the growing recognition that intangible property rights accrue to the personal representative or administrator for the benefit of the next of kin, it is also recognized that such rights do not accrue to mere descendants. The line of demarcation lies in the existence, creation or re-opening of a valid estate in which the next of kin can make an *authentic proof of heirship*.

²⁵⁸ See *supra* note 170 and accompanying text; see also Comment, *Privacy's Stepchild*, *supra* note 2, at 1126-28.

²⁵⁹ 17 U.S.C. § 302(a) (1982); see also *supra* note 168 and accompanying text.

²⁶⁰ 17 U.S.C. § 302(a) (1982).

²⁶¹ See Comment, *Privacy's Stepchild*, *supra* note 3, at 1127.

²⁶² See *supra* notes 69-144 and accompanying text.

her dissent in *Lugosi* the present duration period for copyrights as the appropriate duration for an individual's publicity rights.²⁶³

Perhaps the appropriate duration for an individual's publicity rights should be resolved by the legislature rather than the judiciary.²⁶⁴ One commentator has invited the Commissioners on Uniform State Laws to formulate a model statute on the right of publicity generally.²⁶⁵ In the interim, however, those courts which uphold a descendible right of publicity must grapple with its duration.

Rather than adhering to a formula which specifies an arbitrary limit for the duration period, courts should demonstrate the same degree of flexibility in applying the fourth proposed "fair use" factor as is needed in applying the first three. To accommodate the interests of a decedent's heirs and grantees, an individual's descendible right of publicity should be protected from unauthorized commercial exploitation for a minimum of twenty years after that person's death.²⁶⁶ In most cases, twenty years would allow a reasonable degree of protection for the decedent's heirs and grantees because the value of an individual's publicity rights typically will decline with the number of years following the individual's

²⁶³ *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 847, 603 P.2d 425, 446-47, 160 Cal. Rptr. 323, 344-45 (1979) (Bird, C.J., dissenting); see also Felcher & Rubin, *supra* note 69, at 1131 (suggesting possibility of applying duration period for copyrights to right of publicity); Pilpel, *supra* note 46, at 262; Comment, *Privacy's Stepchild*, *supra* note 3, at 1128.

²⁶⁴ See, e.g., *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 n.10 (D.N.J. 1981); Felcher & Rubin, *supra* note 69, at 1131 n.27; Hoffman, *supra* note 1, at 43 ("state legislatures should establish a durational limit only when there appears to be an abuse of this right"); cf. VA. CODE ANN. § 8.01-40.B (1977) (specifying that the personal representatives of a decedent cannot commence an action more than 20 years after the decedent's death for the unauthorized commercial use of that person's name or likeness).

In California, a Senate committee recently passed a bill prohibiting the unauthorized use of another's "name, voice, signature, photograph, image or likeness" for "purposes of advertising or selling products, merchandise or goods, or advertising or providing services, or for purposes of solicitation or purchases of products, merchandise, goods or services, or for any other commercial purpose for which consent is required under the common law." The bill, which does not limit its protection to famous people, makes consent by heirs a requisite for such use of a decedent's likeness for 100 years after that person's death. In addition, the bill provides for damages in an amount equal to the greater of \$750.00 or the actual damages suffered by the plaintiff as a result of the unauthorized use, plus any profits that are attributable to the use and are not taken into account in computing the actual damages. Punitive damages and attorney's fees and costs also may be awarded. Presently, the bill is scheduled for immediate hearing before the full Senate without debate. S.B. 613, 1983-1984 Reg. Sess. (Cal.).

²⁶⁵ Pilpel, *supra* note 46, at 262.

²⁶⁶ See VA. CODE ANN. § 8.01-40.B (1977) (adopting 20 year limit), *supra* note 264.

death.²⁶⁷ A shorter period of protection, however, probably is inadequate to safeguard the interests of the decedent's heirs and grantees. On the other hand, given the competing interests of the first amendment, it would be difficult to justify such protection under any circumstances for more than one hundred years after a person's death. When considering uses which fall between these two limits, a court can balance the time frame of the use in conjunction with its findings on the other "fair use" factors.

In applying the fourth "fair use" factor, courts should be more tolerant of appropriations which take place long after the death of the individual being exploited. A plaintiff challenging such an appropriation must make a strong showing of liability with respect to the other three factors. For example, a court should be inclined to protect a decedent's right of publicity for a longer period of time when considering a use which is primarily commercial in nature as opposed to one which, although not constitutionally protected, has strong informative overtones.²⁶⁸ Such an approach not only would absolve the judiciary from the arguably legislative function of setting a fixed duration period,²⁶⁹ but also would complement the balancing required by the overall "fair use" determination.²⁷⁰

Admittedly, the proposed "fair use" analysis requires that courts make value judgments. Such value judgments, however, are inherent in the judicial process. The four factors proposed are not to be regarded as the exclusive criteria for determining whether liability should attach to a given appropriation of an individual's identity. Instead, they should be viewed in much the same way as their counterparts in the copyright law, as guidelines for determining whether a particular use is a "fair use."²⁷¹ A court also can employ these factors in assessing the appropriate damages once it has determined that a particular use mandates liability. Indeed, the strength of a plaintiff's showing with respect to each of the four factors should have a marked influence upon the damage award in any given case.²⁷²

²⁶⁷ See Comment, *Commercial Exploitation*, *supra* note 69, at 1721.

²⁶⁸ See *supra* text following note 231.

²⁶⁹ See *supra* notes 264-65 and accompanying text.

²⁷⁰ Cf. *supra* notes 160-62 and accompanying text.

²⁷¹ See *supra* text accompanying notes 160-61.

²⁷² See *supra* notes 54-57 and accompanying text for a discussion of the factors considered in computing damages.

CONCLUSION

In its infancy, the right of publicity was tied completely to its parent doctrine, the right of privacy. Slowly, however, courts began to appreciate the importance of independent recognition for the right of publicity. Currently, the right of publicity is on the verge of complete independence, but its scope remains indeterminate.

If the right of publicity is to function as an independent legal doctrine, its limitations must be defined without reference to the right of privacy. Due to the right of privacy's development as a means of compensating an individual for offensive publicity, recovery traditionally has been linked to the individual's injured feelings.²⁷³ As a result, the right of privacy always has been regarded as a personal right, which terminates upon the death of the individual asserting the right. No such limitation should attach to the right of publicity because it is concerned with an individual's financial position rather than her personal feelings. For the same reason, the right of publicity should survive the death of the principal in all circumstances, so that the heirs and grantees of the decedent can exercise this right on her behalf. Those courts which either do not allow the right of publicity to descend, or condition its descendibility upon certain actions taken by the principal while alive, fail to appreciate this significant difference between the right of publicity and the right of privacy. Until universal recognition exists for the unique protection afforded by the right of publicity, its growth will continue to be stunted by inconsistent resolutions of the descendibility question.

Other questions pertaining to the scope of the right of publicity also beg for resolution. If the right of publicity is to reach its full potential, the judiciary must clearly define what and whom it protects. This Article calls for a broad scope of protection for the right of publicity, so that everyone may rely upon it to prevent the commercial exploitation of any personal attribute capable of public recognition. Such an expansive construction of the right of publicity is necessary to effectuate completely the policies underlying the right.

If a well-defined right of publicity is to command respect as an important safeguard in our legal system, it must revere the interests protected by the more "seasoned" legal doctrines. Although some conflict between the right of publicity and the first amendment is inevitable, these two doctrines can be reconciled in much the same way as the copyright law and the first amendment. Thus, the right of publicity

²⁷³ See *supra* note 17 and accompanying text.

must demonstrate its true maturity by tolerating some arguably infringing appropriations if they can be justified as "fair uses" under the proposed analysis.

