

THE RIGHT OF PUBLICITY:

Challenging the Underlying Rationale of a Limited Postmortem Term

Thomas Brierton & Peter Bowal*

I. INTRODUCTION

II. BACKGROUND

A. Right of Publicity

III. TREATMENT OF THE RIGHT OF PUBLICITY

A. California and New York at Opposite Ends of the Postmortem Debate

1. California's Right of Publicity
2. New York's Right of Publicity
3. Choice of Law Issues: Impairing the Obligation of Contracts

IV. ANALYSIS: FULLY RECOGNIZING THE RIGHT OF PUBLICITY

A. Treatment of Other Intangible Property Rights: Why Analogizing Publicity Rights to Copyrights, Patents and Trademarks is like comparing "apples to oranges"

1. Limiting Postmortem Publicity Rights Does Not Promote Creativity
2. The Law Should Recognize that Creating Something is Different than Being Something
3. Not All Intellectual Property is the Same

B. The Remote Heir is a Myth

C. Free Speech Argument

D. Balancing Practical and Policy Considerations of an Unlimited Duration

* Thomas Brierton is an Associate Professor at the Eberhardt School of Business and an Adjunct Professor of the McGeorge School of Law at the University of the Pacific. Peter Bowal is a Professor at Haskayne School of Business at the University of Calgary. They are both grateful for the research and assistance provided by Ashley Lavon Hines while she was at a law student at McGeorge School of Law. Ms. Hines is now a practicing attorney in Washington, D.C.

1. Economic Incentives

2. The Freedom to Contract

V. CONCLUSION

I. INTRODUCTION

During his lifetime, James Dean starred in three movies before coming to an untimely death at the age of 24. He was the first actor to receive an Academy Award nomination after his death. He has become an iconic figure known as the “Rebel Without a Cause,” named after his 1955 movie distributed by Warner Brothers. Through his acting career, James Dean became known as the cultural icon of a disillusioned teen. The estate of James Dean has made more money from his publicity rights than he had ever made while he was alive.¹ Recently, the estate of James Dean brought a lawsuit in Indiana state court against the anonymous owner of the “@JamesDean” account and Twitter for trademark and publicity rights infringement.²

Deceased celebrities can earn millions from the licensing of their images to use on products, for services, as logos, and even for digital placement in television commercials or movies. Elvis Presley consistently brings in more than \$50 million a year from licensing fees, although this is only a fraction of what Michael Jackson brought in

1. See GEORGE LUCAS, BLOCKBUSTING: A DECADE-BY-DECADE SURVEY OF TIMELESS MOVIES INCLUDING UNTOLD SECRETS OF THEIR FINANCIAL AND CULTURAL SUCCESS (2010) (in the three major movies that James Dean starred in, he earned a total of \$327,400). See also *Top Earning Dead Celebrities 2014*, FORBES, <http://www.forbes.com/pictures/mfl45elikj/james-dean-3/> (last visited Apr. 18, 2015) (according to Forbes’ Annual List of the Highest Earning Dead Celebrities, the James Dean’s estate earned \$7 million in 2014).

2. Martha Neil, *Estate of James Dean Sues Twitter and Fan Over @JamesDean Account*, ABA JOURNAL (Feb. 11, 2014, 4:50 PM), http://www.abajournal.com/news/article/james_dean.

after his death.³ Others who have made this exclusive list of top posthumous earners in the last few years include great entertainers such as Marilyn Monroe, Bob Marley, John Lennon, Albert Einstein, and Steve McQueen.⁴ In the case of Marilyn Monroe, the estate was involved in litigation over Monroe's publicity rights with the owners of Marilyn Monroe photographs for more than seven years in three different federal district courts. Even after the Ninth Circuit ruled that the Monroe image had entered the public domain, the estate attempted to enter into a settlement agreement with the archives owners. The district judge refused to allow the settlement, stating that it would effectively erase the ruling of the court.⁵

The right of publicity is the right to control the commercial exploitation of a person's name or likeness.⁶ The dead celebrity's estate can maximize earnings by aggressively marketing the image through licensing agreements that grant exclusive or nonexclusive rights to licensees. Publicity rights have evolved through state common law and, in some cases, through legislation. State legislatures have generally limited the time for which the

3. Erik Heinrich, *Richest Dead Celebrity: Bob Marley*, FORTUNE (Nov. 20, 2009), http://archive.fortune.com/2009/11/20/news/companies/bob_marley.fortune/index.htm.

4. *Id.*

5. Kroll Panda, *Ruling for Copyright Owner Trumps Celebrity Rights Act, Marilyn Monroe Estate Settlement Rejected*, VENTURA CNTY BAR ASS'N (Feb. 25, 2014), <http://www.vcba.org/2013/10/ruling-for-copyright-owner-trumps-celebrity-rights-act-marilyn-monroe-estate-settlement-rejected-by-panda-kroll-esq>.

6. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross . . .'").

heirs exclusively control the right to publicity. Once the term expires, the name and likeness of the celebrity enter the public domain free for all, drastically reducing the earnings potential for the heirs. State legislatures have justified limiting the publicity rights term, analogizing the limitation to copyright and patent law.⁷ The U.S. Constitution limits the time period that an owner of a copyright or patent has exclusive control over his or her intellectual property.⁸ The analogy to federal copyright law by state legislatures may not be the most appropriate one, since no mention of publicity rights is found in the Constitution.⁹ Even so, 21 states recognize the postmortem right of publicity: 14 states by statute, 6 states by common law, and 1 state by a combination of the two.¹⁰ The postmortem right of publicity ranges from 10 years to 100 years and in one state there is no time limit.¹¹

This article will begin in part II by discussing the history of the right of publicity and the doctrine of freedom of contract, which has been a cornerstone of the American society.¹² Part III of this article will discuss the state law treatment of the right of publicity and choice of law issues that may impair the obligation of contracts when term limits are placed on the right. Part IV will discuss the right of publicity in light of other similar intellectual property rights in our legal system and consider the practical and policy considerations and the relative weight of the conflicting interests of the contracting parties, including certain moral presuppositions that may deprive the parties of economic opportunity. Part V of the article concludes with the

7. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428-29 (1979).

8. U.S. CONST. art 1, § 8, cl 8.

9. *See generally* U.S. CONST.

10. *See* 2 J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY* § 9:17 (2d. ed. 2014)

11. *See id.*

12. *See generally* *THE FALL AND RISE OF THE FREEDOM OF CONTRACT*, (F. H. Buckley ed., 1999).

assertion that the heirs of publicity rights are entitled to the full bundle of rights indefinitely.

II. BACKGROUND

A. Right of Publicity

The U.S. Supreme Court defined “privacy” as one’s right to the “control of information concerning his or her person.”¹³ The Court found that the law should protect the “dissemination of . . . allegedly private fact[s] and the extent to which the passage of time rendered [them] private.”¹⁴ The definition came from early privacy cases brought by private persons whose photographs were used in advertisements without their consent.¹⁵ On the other hand, when a celebrity or otherwise public figure brought an invasion of privacy action, the courts were presented with attempts to make the images of individuals that were publically known private.¹⁶ The celebrity plaintiffs did not want to *prohibit* the use of their identity; they only wanted to *control* its use.¹⁷ Where

13. U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

14. *Id.* at 763 (Justice Stevens, writing for the majority, notes the seminal law review article by Warren & Brandeis to support the individual right to determine the extent of personal information that is disclosed to others (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193, 198 (1890))).

15. The first privacy cases involved individuals attempting to control the use of a photograph in an advertisement. *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902) (the defendant used the plaintiff’s picture on a flier promoting the sale of boxes); Pavesich v. New England Life Insurance Co., 122 Ga. 190 (1904) (the defendant used a photograph of the plaintiff in a newspaper advertisement. Despite the defendant promoting the plaintiff as a picture of health, the plaintiff sought to enjoin the use).

16. *See* 1 J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 1:10 (2d. ed. 2014) (discussing the “right to privacy” as a “right preventing truthful but intrusive and embarrassing disclosures by the press”).

17. *See id.* at § 1:8.

privacy law focused on the “indignity and mental trauma” incurred by the use of one’s identity, the right of publicity developed into its own category, to address commercial problems with the use of one’s not-so-private image.¹⁸

Today, the right of publicity is a matter of state law created and regulated as if it were an intellectual property right.¹⁹ It is a distinct legal right, “not just a ‘kind of’ trademark, copyright, false advertising or right of privacy” claim.²⁰ Infringement of such a right is a “commercial tort of unfair competition.”²¹ A claim against the right of publicity arises from the unauthorized exploitation of the name, image, or likeness of another for commercial gain.²² In *Haelan Laboratories v. Topp Chewing Gum*, the Second Circuit was the first court to recognize the right of publicity as a right independent from the right of privacy.²³ Here, a baseball player entered into an exclusive licensing contract to allow a commercial merchandising company to use his name in connection with the sale of chewing gum.²⁴ Applying New York law, the court stated:

This right might be called a “right of publicity” because it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in

18. *Id.* at § 1:7.

19. *See id.* at § 1:3.

20. *Id.*

21. *Id.*

22. *Id.* at § 1:7 (stating the “right to control the commercial use of one’s identity first historically developed within the domain of privacy law”).

23. *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

24. *Id.*

newspapers, magazines, busses, trains and subways.²⁵

The court reasoned that having this right would not “yield money” unless the owner of such a right could prohibit others from using his or her likeness in photographs and other advertising efforts.²⁶ Since this landmark case, 31 states have decided to recognize the right to publicity,²⁷ either by statute or by common law, which was initially derived from the right of privacy, or the “right to be left alone.”²⁸

25. *Haelan Labs, Inc.*, 202 F.2d at 868.

26. *See id.*

27. *See* MCCARTHY, *supra* note 16, at § 6:3.

28. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

III. CALIFORNIA AND NEW YORK AT THE OPPOSITE ENDS OF THE POSTMORTEM DEBATE

A. State Treatment

Some state legislatures and courts have treated the right of publicity similar to that of intellectual property. The United States Constitution provides that the term of protection for copyrights and patents be set for a limited time, to promote progress and encourage innovation among the public.²⁹ The members of Congress are given the duty to create a term of years for protection, while keeping the underlying policy in mind.³⁰ Congress has enacted legislation that protects the owners of copyrights up to 70 years after the author has died.³¹ Patents are protected for a shorter period, from 14 to 20 years.³² However, copyrights and patents are not the only interests recognized as intellectual property in the United States.³³ It is well established that trademark and the newly recognized right of publicity are intellectual property rights, although neither was directly contemplated by the Constitution.³⁴ As a result

29. See U.S. CONST. art 1, § 8, cl 8.

30. *Id.*

31. See 17 U.S.C. § 302(a) (2012).

32. General FAQ, *How Long Does Patent Protection Last?*, USPTO [hereinafter USPTO General FAQ], <http://www.uspto.gov/main/faq/p120013.htm> (last visited Apr. 14, 2015).

33. *What is Intellectual Property?*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/about-ip/en/> (last visited Apr. 18, 2015).

34. See, e.g., William L. Prosser, *Privacy*, 48 CALIF.L.REV 383 (1960). Dean Prosser's article on Privacy enumerates four types of privacy interest protections, against: (1) intrusion into one's private affairs; (2) public disclosure of private facts; (3) placement in a false light; and (4) misappropriation of one's name or likeness for commercial advantage. The fourth invasion of privacy tort recognized the value of one's image and the effort made by that individual to appropriate value in their name or likeness. Notions of the right of publicity were derived from the misappropriation of name and likeness tort. *Id.*

of congressional action, trademarks are federally protected;³⁵ however, the right of publicity has yet to reach this plane.³⁶ The right of publicity is therefore a purely state-regulated property interest. During the 20th century, the California Legislature expansively recognized the postmortem right of publicity through the enactment of several pieces of legislation.³⁷ Other states that recognize the right of publicity, such as New York, have taken a very different view on postmortem rights.³⁸

1. California's Right of Publicity

California law recognizes a common law and statutory right of publicity. In 1971, the California Legislature enacted the statutory version of the right of publicity as Civil Code § 3344, prohibiting the unauthorized use of the name, likeness, voice, and image of an individual celebrity or non-celebrity. The statute provided a means to control the exploitation of a person's image in the public arena. The main provision of Civil Code § 3344 reads as follows:

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling,

35. See The Lanham Act, 15 U.S.C. §§ 1051-1072, 1091-1096, 1111-1129, 1141-1142(n) (2012) (providing national system of trademark registration and protecting owners of federally registered marks against use of similar marks).

36. See generally Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. 2 (2010) (arguing that Congress should enact a federal right of publicity statute).

37. Cal. Civ. Code § 3344.1 (West 2008).

38. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2015); see also *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990) (stating that under New York law, the right of publicity is a non-descendible statutory right).

or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

In 1979, the Supreme Court of California in *Lugosi v. Universal Pictures* officially recognized a common law right of publicity that was limited to the life of the individual.³⁹ Not until 1984, when the California Legislature amended the statute to include § 3344.1, did the right of publicity become descendible for a period of 50 years after death.⁴⁰ In 1999, the California Legislature enacted the Astaire Celebrity Image Protection Act, which inter alia, increased the protection period of the right of publicity to 70 years after death and noted that the term was consistent with a recent extension of the U.S. copyright term.⁴¹ The entertainment industry heavily lobbied the California legislature to enact legislation that mirrored the term of protection under federal copyright law.⁴²

The California Legislature looked to the U.S. Supreme Court case of *Zacchini v. Scripps-Howard Broadcasting* as guidance, defining the underlying policy for the protection of the right of publicity.⁴³ The Court found

39. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428-29 (1979).

40. 50 Comm. Rep. CA A.B. 585, at 1 (2009).

41. S.B. 209, 1999-2000 Reg. Sess., at 5 (Cal. 1999), available at ftp://leginfo.public.ca.gov/pub/99-00/bill/sen/sb_0201-0250/sb_209_cfa_19990907_110336_sen_floor.html.

42. *See id.* at 14-15.

43. *Id.* at 5-6; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). In *Zacchini*, the plaintiff brought an action against the local media, because they filmed his entire cannonball act at the county fair and broadcast it on the evening news. The defendant argued it was constitutionally privileged to include the act in the news because it was a matter of public interest. The Supreme Court disagreed, reasoning that the broadcast of the entire act posed a threat to the economic value of the performance and hence recognized the right of publicity distinct from the right of privacy.

that the state's interest in protecting the right of publicity is "closely analogous to the goals of patent and copyright law," because all three allow the individual to "reap the reward of his endeavors" and protect against "unjust enrichment by the theft of goodwill."⁴⁴ The Court went further to explain that, "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."⁴⁵ The Court recognized that, "sacrificial days devoted to such creative activities deserve rewards."⁴⁶ However, the Supreme Court so far has not addressed whether the term of protection for patents or copyrights and the right of publicity should be analogous.⁴⁷

According to the California Legislature, the Astaire Celebrity Image Protection Act was enacted to address the "improper use of celebrities' hard-earned images once they are no longer here to protect themselves."⁴⁸ The opponents of the bill argued that the justification of a 20-year extension by analogizing the right of publicity to copyright law is "like comparing apples to oranges."⁴⁹ The Screen Actors Guild

44. *Zacchini*, 433 U.S. at 573, 575. See also CA. S. B. 209, *supra* note 41.

45. *Zacchini*, 433 U.S. at 576.

46. *Id.*

47. See generally CA. S. B. 209, *supra* note 41; see also *Zacchini*, 433 U.S. at 576. In *Zacchini*, the Supreme Court relied on the economic incentive theory underlying copyright and patent law to protect the plaintiff's publicity rights. The Court referenced copyright and patent law only as a mechanism to differentiate the right of publicity from privacy rights. The Supreme Court did not comment on the validity of applying the analogy to the postmortem term. Thus far, *Zacchini* is the only case decided by the Supreme Court concerning the right of publicity.

48. CA. S. B. 209, *supra* note 41, at 4; see also Kathy Heller, *Deciding Who Cashes in on The Deceased Celebrity Business*, 11 CHAP. L. REV. 545, (2008).

49. CA. S. B. 209, *supra* note 41, at 14.

(SAG), a proponent of the bill, suggested that it was necessary to extend protection to recognize the “growing international movement towards the adoption of a longer term for intellectual property.”⁵⁰ SAG went on to note that California was at the time a place where celebrity images, of both the living and deceased, were used in commercial advertisements.⁵¹ Where these images were used improperly, the harm was irreversible and affected the potential economic gain of the heirs, who might rely on the compensation for their livelihood.⁵² The pertinent part of the Act amended Civil Code § 3344.1 to read as follows:

(g) An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

The 1997 Ninth Circuit case of *Astaire v. Best Film & Video Corp.* was the inspiration for the Astaire Celebrity Image Protection Act.⁵³ The widow of Fred Astaire brought suit against Best Film and Video Corporation (Best), alleging that Best used unauthorized dance instructional video clips of her late husband in their videotapes.⁵⁴ Mrs. Astaire argued that this use “violated her statutory right to control” her late husband’s right of publicity.⁵⁵ The trial court found in Astaire’s favor; however, the appellate court reversed, interpreting the statutory language in effect at the time to exclude liability where the use of a deceased person’s publicity was in “film.”⁵⁶ The author of the bill and the members of the California Legislature agreed that the court

50. *Id.* at 15.

51. *Id.* at 10.

52. *Id.*

53. CA. S. B. 209, *supra* note 41, at 2; *see also* *Astaire v. Best Films & Video Corp.*, 116 F.3d 1297 (9th Cir. 1997) amended, 136 F.3d 1208 (9th Cir. 1998).

54. *Astaire*, 116 F.3d at 1298.

55. *Id.*

56. *Id.* at 1300-02.

“elevated form over content” by finding that Mr. Astaire’s image in the introductory portions of a video was different from placing his image on a T-shirt.⁵⁷ The Legislature sought to clarify the statutory language, expanding protection for the heirs of the deceased to include film.⁵⁸

2. New York’s Right of Publicity

The state of New York has an alternative view on whether to recognize a descendible right of publicity. New York’s stance on the subject was established in the 1981 Second Circuit case *Factors Etc. v. Pro Arts Inc.*, which concerned the well-known Elvis Presley.⁵⁹ During his lifetime, Mr. Presley assigned the exclusive ownership of his publicity right to Boxcar Enterprises, a corporation he formed.⁶⁰ A few days after Mr. Presley died, Boxcar executed an 18-month exclusive licensing agreement with the plaintiff, Factors, Etc., which was renewable for up to four years.⁶¹ The license was for the use of Mr. Presley’s right of publicity, where Factors would pay five percent of sales, with a minimum of \$150,000 for the first 18 months.⁶² The day after the agreement was signed, the defendant lawfully obtained the copyright of a photograph of Mr.

57. CA. S. B. 209, *supra* note 41, at 10.

58. CAL. CIV. CODE § 3344.1 (i) (West 2012) (“As used in this section, ‘photograph’ means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph if one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.”).

59. *See generally* *Factors Etc. v. Pro Arts, Inc.*, 652 F. 2d 278 (2d Cir. 1981).

60. *Id.* at 279.

61. *Id.*

62. *Id.*

Presley and began selling posters with the photograph on them.⁶³ Exercising diversity jurisdiction, the New York federal district court applied Tennessee law, because the wrong had occurred in that state.⁶⁴ Tennessee law recognized the right of publicity as a subset of the invasion of privacy, which would be extinguished at death, leading to the conclusion that Boxcar failed to assert a valid claim. As explained in the early New York case of *James v. Delilah Films Inc.*, the court found that the successors in interest to the right of publicity had no cause of action under the Civil Rights Law §§ 50 and 51, because the statutory rights do not survive death.⁶⁵

Commentators argue that New York's decision to prohibit an assignable and descendible right of publicity increases the equitable concerns regarding the value of the asset, which cannot pass to the heirs of the person who "cultivated the image throughout his or her lifetime."⁶⁶ Because the right of publicity recognized in New York is rooted in privacy law and therefore is not transferable, the law limits the "economic creation incentives" that allow celebrities to "fully utilize their images to reap maximum commercial benefits."⁶⁷ The New York Civil Rights statute reads as follows:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent

63. *Id.*

64. *Id.* at 280-81.

65. 544 N.Y.S.2d 447, 451 (1989).

66. Tara B. Mulrooney, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST. JOHN'S L. REV. 1139, 1156 (2000).

67. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1169-70 (2006).

of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.⁶⁸

3. Choice of Law Issues: Impairing the Obligation of Contracts

To avoid forum shopping and to increase certainty when contracting, the right to publicity, as with other intangible property rights, should be uniformly alienable, devisable, and descendible.⁶⁹ The choice of law conflicts regarding the duration of publicity rights were demonstrably illustrated in the Marilyn Monroe cases filed in Indiana, California, and New York in 2005.

Marilyn Monroe was found dead in the bedroom of her California home on August 5, 1962, due to what was ruled an overdose of prescription drugs.⁷⁰ Monroe's last will and testament went to probate court less than two weeks after her death.⁷¹ Among other things, the rest and residue clause of the will devised a valuable portion of her estate to her personal acting coach, Lee Strasberg.⁷² When Mr. Strasberg died, his wife Anna Strasberg inherited Mr. Strasberg's portion of the Monroe estate. Over the years, Anna Strasberg took the position that this inheritance included the exclusive right to Monroe's right of publicity.⁷³

68. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2015).

69. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMM. LAW., Aug. 2011, available at http://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf.

70. Sam Kashner, *The Things She Left Behind*, VENEWS (Oct. 2008), <http://www.vanityfair.com/culture/features/2008/10/marilyn200810>.

71. *Id.*

72. *Id.*; Milton H. Greene Archives v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1169 (C.D. Cal. 2008), *aff'd*, 692 F.3d 983 (9th Cir. 2012).

73. Kashner, *supra* note 70.

The bequest is said to have generated millions of dollars from the licensing of Monroe's publicity interest.⁷⁴

After 40 years of generating royalties from licensing contracts, Mrs. Strasberg's claim to Monroe's right of publicity was challenged in federal court.⁷⁵ In 2001, Anna Strasberg and another 25-percent interest holder transferred their interests to their newly formed company Marilyn Monroe LLC (MMLLC). Strasberg hired CMG Worldwide as her licensing agent to market Monroe's image. In 2005, CMG Worldwide Inc., MMLLC, and Anna Strasberg filed suit in Indiana against several photographers to prevent the use of Marilyn Monroe photographs owned by the Shaw Family Archives.⁷⁶ The plaintiffs claimed that they owned Marilyn Monroe's right of publicity and that the defendants had infringed upon their right by using Monroe's name, image, and likeness without their consent "in connection with the sale, solicitation, promotion and advertising of products, merchandise goods and services."⁷⁷ In response, the defendants filed a motion for summary judgment, arguing that, *inter alia*, even if a posthumous right of publicity did exist, the plaintiffs could not show that they possessed the right.⁷⁸ Further, the defendants argued that at least one of the plaintiffs should be judicially estopped from arguing that Monroe was domiciled anywhere other than New York at the time of her death.⁷⁹

At about the same time, the Shaw Family Archives brought its own lawsuit against CMG Worldwide and MMLLC in the Southern District of New York, seeking a declaratory judgment on the issue of postmortem publicity rights. The Indiana case was transferred to New York and

74. *Id.*

75. *Milton*, 568 F. Supp. 2d at 1152.

76. *Id.* (noting that lawsuits were consolidated and adjudicated in California District Court).

77. *Id.* at 1155.

78. *Id.*

79. *Id.*

consolidated in the Southern District of New York. The New York District Court held that postmortem publicity rights are considered property that must pass by will at the time of death. Neither New York nor California recognized postmortem publicity rights in 1962 when Monroe died. Even though Indiana had enacted legislation to protect postmortem publicity rights in 1994, Monroe was not a domiciliary of the state and the statute did not allow for retroactive publicity rights through a testamentary document. The Indiana Legislature attempted to amend its statute prior to a final ruling by the court to allow for retroactive publicity rights but failed to do so. The Estate of Milton H. Greene Archives, owners of a Marilyn Monroe photo collection, filed against CMG Worldwide, MMLLC, and Anna Strasberg in the Central District of California, asserting its right to use Marilyn Monroe photographs. In 2007, the District Court for the Central District of California granted the Archives' motion for summary judgment.⁸⁰ The court found that Monroe could not have devised a common law right of publicity through her will to Strasberg, because in California, the common law right was extinguished at death and the statutory right that allowed descendibility was enacted some 20 years after her death.⁸¹

Recognizing the possible devastating effects of more than 40 years of contracting, the California Legislature responded to the decision just six weeks after the motion was granted.⁸² In 2007, "to clarify the meaning of California's right of publicity statute," the Legislature amended the right of publicity statute so that it was deemed to exist at the time of Monroe's death and was "freely transferable, in whole or part, by contract or by means of trust or testamentary

80. *Id.*

81. *Id.* at 1156.

82. *Id.*

documents.”⁸³ The amended California law reads as follows: “The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985.”⁸⁴

To be clear, the Legislature stated that, in the absence of an express provision in the testamentary instrument, the right of publicity is deemed to pass with the “disposition of the residue of the deceased.”⁸⁵ With the law now on their side, the plaintiffs filed a motion for reconsideration, which was granted.⁸⁶ On reconsideration, the court vacated its prior ruling that the plaintiffs lacked standing to assert Monroe’s right of publicity and instead interpreted California’s “clarified” law to mean that not only did Monroe transfer her right of publicity to Lee Strasberg through her residuary clause, but also Lee was able to transfer his interest in Monroe’s publicity rights through his will to his wife, Anna Strasberg.⁸⁷

The court made it clear, however, that its holding was conditional on finding that Monroe was a domiciliary of California.⁸⁸ In other words, the California law only applies to those domiciled in California, because in property cases the majority view is that the situs of intangible personal property is the legal domicile of its owner.⁸⁹ After considering several factors to determine the domicile of Monroe at death, including inconsistent evidence regarding a California inheritance tax proceeding in which Monroe claimed to be a domiciliary of New York at the time of her death, the District Court judicially estopped the plaintiffs from claiming that Monroe was domiciled in California and

83. *Id.*

84. CAL. CIV. CODE § 3344.1(p) (West 2012).

85. *Milton*, 568 F. Supp. 2d at 1156.

86. *Id.*

87. *Id.* at 1157.

88. *Id.* at 1158.

89. *Id.*; *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 210-11 (S.D.N.Y. 2006).

granted the defendants' motion for summary judgment again.⁹⁰ As a result of the findings in the California suit, CMG Worldwide, Marilyn Monroe LLC, and Anna Strasberg were estopped from continuing litigation in New York against another set of defendants for alleged infringement of Monroe's publicity rights.⁹¹ There, the court found that the New York litigation raised "exactly the same issues" that were decided in California.⁹² New York law does not recognize a descendible right of publicity, and Monroe was deemed to be domiciled in New York at the time of her death, terminating her publicity rights at death.⁹³

Currently, the nature and scope of publicity rights upon death depends largely on which law would apply to a claim initiated by the decedent's estate.⁹⁴ This rationale has also been applied to determinations of which state law would apply when descendibility is at issue.⁹⁵ The differences in state law have caused substantial impairment of contractual

90. *Milton*, 568 F. Supp. 2d at 1198-99.

91. *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 589 F. Supp. 2d 331, 346 (S.D.N.Y. 2008).

92. *Id.* at 334.

93. *Id.* at 334-35.

94. Stanley Rothenberg & Eric P. Bergner, *Candle in the Wind: Would Elton John's Publicity Right Extinguish with His Death?*, 46 J. COPYRIGHT SOC'Y U.S.A. 75 (1998).

95. *Id.* at 76.

rights. As a result, a number of scholars have argued for either a uniform state law or a federal statute.⁹⁶

IV. ANALYSIS: FULLY RECOGNIZING THE RIGHT OF PUBLICITY

Many scholars, commentators, and legislators have suggested the notion that the postmortem term should be limited to a defined number of years.⁹⁷ Three major arguments have been circulated through the literature as the foundation supporting a limited term, although there is no agreement as to the term of years.⁹⁸ The arguments in favor of a defined postmortem term of years first begin with the analogy to the copyright term.⁹⁹ The second major argument in favor of a limited postmortem term concerns the possibility of a remote ancestor claiming commercial rewards decades after the death of the celebrity, hindering

96. See Jonathon L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, State-Based Right of Publicity is Ready to Move to the Federal Level*, 45 NOV. RES. GESTAE 31 (2001); see also Eric J. Goodman, Comment, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL LCS J. ART. & ENT. L. 227 (1999). Considering recent Supreme Court cases, it may be questionable to base a federal right of publicity on Congressional Commerce Clause authority. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (individual mandate under the Commerce Clause was held unconstitutional). See also Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity*, 40 CUM. L. REV. 499 (2010) (arguing for a uniform act adopted by state legislatures and outlining the provisions that should be included).

97. See MCCARTHY, *supra* note 10, § 9:16 ("Assuming that there should be a postmortem right of publicity, almost everyone agrees that it should have some fixed duration.").

98. See *id.* (noting that "ommentators and legislators have widely varying views" concerning the duration of a postmortem right of publicity).

99. C.A. S.B. 209, *supra* note 41, at 2. The California Legislature in 1984 enacted a term of 50 years after death, then in 1999 it increased the term to 70 years, to be consistent with Congressional enactment of the 70-year term for copyright. *Id.*

the commercial interests that have utilized the image. The third argument involves concerns of free speech and free competition.

Balancing several interests, the right of publicity should be treated separately from other limited-term intellectual property rights. In light of practical and policy considerations, including moral presuppositions, state legislatures should enact legislation to expand recognition of an individual's right of publicity beyond the death of the individual, to protect the value of the asset in a licensing agreement, where the value is contingent on the licensor and licensee's expectations of duration and exclusivity. This is especially important because the ownership of other real and personal property does not terminate until 70 years after the owner is deceased. Decades of case law have established that the right of publicity is a property right. Accordingly, there seems to be no public policy justification for limiting its ownership to a term of years.¹⁰⁰

A. Treatment of Other Intangible Property Rights: Why Analogizing Publicity Rights to Copyrights is like comparing “apples to oranges”

The law should not compare the right of publicity with other limited-term intellectual property rights, even with the trend of extending terms. In the 2002 *Elder v. Ashcroft* decision, the Supreme Court upheld the lower court's judgment regarding the constitutionality of

100. See MCCARTHY, *supra* note 10, at § 9:16 (“Once the concept of a fixed term postmortem right of publicity is accepted, it is difficult to defend a particular number of years one selects. The choice is by nature almost arbitrary.”).

Congress's 1998 extension of the copyright duration.¹⁰¹ The Court stated that it would not place any limits on Congress's "authority to extend copyright terms."¹⁰² The Court held that, although some petitioners may believe that it is bad public policy to continue to extend copyright terms, the Court will not second-guess Congress so long as it can be asserted that congress exercised its rational authority..¹⁰³ Here, the Court accepted that extension of copyright terms and reasoned that the trend toward having children later in life is justification to allow future generations to benefit from the economic reward of the protected work.¹⁰⁴ Moreover, commentators have noted that, "from an economic standpoint, the current copyright term 'has nearly the same present value as an infinite copyright term.'"¹⁰⁵

Although Congress and the courts have recognized the economic value in the extended protection of intellectual property, drawing a comparison to copyright law to justify the term of protection for the right of publicity is not the best analogy. First, a copyright only protects a work of authorship that is fixed in a tangible medium of expression.¹⁰⁶ A work is fixed when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated."¹⁰⁷ This may include literary works, musical compositions, dramatic works, pantomimes, chorographic works, pictorials,

101. Tom Braegelmann, *Copyright Law in and Under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits imposed by Constitutional and European Law on Copyright Law in Germany*, 27 CARDOZO ARTS & ENT. L.J. 99, 118-120 (2009).

102. *Id.*

103. *Id.*

104. *Id.*

105. Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 304 (2009).

106. See 17 U.S.C. § 102 (2012).

107. *Id.* at § 101.

graphics, and sculptural works, as well as motion pictures, sound recordings, and architectural works.¹⁰⁸ Secondly, the work must be original, requiring more than a “mere independent creation,” and must possess some minimal degree of creativity, where even a slight amount will suffice.¹⁰⁹ With these requirements, two people may independently think up the exact same plot and words for a story, fix it in a tangible medium, and obtain protection of the law.¹¹⁰ The likelihood of this actually occurring is a different question, but it is important to note that copyright law does not protect an idea, but rather protects the expression of that idea.¹¹¹ Furthermore, procedures, processes, systems, or methods of operation are not protected, regardless of their embodiment.¹¹² These requirements differ drastically from the protectable attributes of the right of publicity, because the right of publicity protects an individual’s personhood, who they are, and not what they have created. The protection afforded copyright owners is the prohibition on any reproduction of the work created; whereas the protection afforded by the right of publicity is in preserving the commercial value associated with the name, image, or likeness of an individual. Preservation of the value of a copyright is a byproduct of the federal statute.

1. Limiting Postmortem Publicity Rights Does Not Promote Creativity

The policy for protecting copyrights also differs from the policy underlying publicity protection. Copyright protection is required so that society may encourage new

108. *See id.* at § 102.

109. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

110. *See* 17 U.S.C. §102 (1978).

111. *Id.*

112. *Id.*

works of authorship.¹¹³ However, “society doesn’t need to encourage more celebrities or more marketing of celebrity image.”¹¹⁴ More importantly, the pure rationale behind the recognition of the right of publicity is economic security.¹¹⁵ The economic theory provides that granting property rights to persons is an efficient means of allocating resources.¹¹⁶ The purpose is to *prohibit* those who did not endure the sweat of the brow from profiting from someone who did without that person’s authorization.¹¹⁷ Protection is for the goodwill of the toiling entertainers, performers, or celebrities who by their own doing created value in themselves — their names, images, likenesses, photographs, and overall personas.¹¹⁸ Unlike copyright law, this interest may not always be fixed in a “tangible medium of expression,” but is embodied in an individual.¹¹⁹ The physical image of the individual may change due to aging, a complete makeover, or for other reasons, yet a copyright is limited to the protection of the original work.¹²⁰ The right of publicity is sufficiently versatile so that if celebrities

113. U.S. CONST. art 1, § 8, cl 8.

114. Dogan & Lemley, *supra* note 67, at 1164. *See also* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 43-44 (2004) (“In the context of the right of publicity, any conceivable notion of development would take the form of providing incentives to invest in celebrity. But even assuming arguendo that this is a legitimate objective, there are many related reasons why the right of publicity would not be necessary to achieve this purpose.”). Professor Carrier argues that the economic incentive is not the only rationale justifying the development of celebrity image and development is not a valid rationale to protect publicity rights. *Id.*

115. *See* MCCARTHY, *supra* note 10, at § 1:7.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. Under the Copyright Act, a copyright owner may create derivative works from the original and still receive copyright protection. A work consisting of “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.” 17 U.S.C.A. § 101 (West 2010).

changed their image every day, then they would not lose protection. The right of publicity requires that a person truly be an original, as compared to a copyright, where originality may be slight.¹²¹

2. The Law Should Recognize the Difference Between Creating Something and Being Something.

Under federal law, copyright and patent terms must be limited. Where Congress has the authority to extend the copyright and patent terms, it may not create a limitless duration of protection. Although protection was sought to reward authors and inventors for their creations, the framers of the U.S. Constitution required that “authors and inventors” have only a “limited monopoly” to their creations, to promote progress and facilitate a robust public domain.¹²² This is because works in the public domain may then be used to change, remake, or create new works or inventions that build upon those once-protected works or inventions. Limiting copyright and patent terms gives authors and inventors the incentive to create new works, but also eventually rewards the public with the opportunity to do the same.

The same cannot be said of placing someone’s personhood into the public domain. The right of publicity of an individual may not be altered or changed to create a new

121. See Dogan & Lemley, *supra* note 67, at 1164.

122. U.S. Const. art 1, § 8, cl 8 (“To promote the Progress of Science and useful Arts by securing” copyrights and patents “for limited times.”). However, some scholars have argued that the clause was drafted in the context of anti-monopolist sentiment. See, e.g., Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 909(2002).

“work.”¹²³ Placing the right of publicity in the public domain only allows members of society the right to profit financially from the lifelong efforts of another. Giving general members of the public the opportunity to use another’s publicity rights, which does not require the public to exert any effort — not even a minimal amount — is exactly what the right of publicity is meant to prevent. Because society cannot change, remake, or create new “works” based solely on one individual’s right of publicity, allowing the public to profit from it would be the greatest form of misappropriation. Allowing the public the right to freely use the personhood or publicity rights of another does not serve the same or similar function as under patent or copyright law. Where there is no constitutional restriction on the right of publicity, it makes more sense to allow the heirs and descendants of the deceased the right to maintain the commercial legacy and image of their ancestors as they wish.

3. Not All Intellectual Property Is Created Equal

The courts have recognized that not all intellectual property rights are equal.¹²⁴ Protection of the right of publicity is in some ways more comparable to trademark law than to copyright and patent law; however, the law should treat all three interests distinctly. A trademark is meant to identify the source of a good, to protect the consumer from possible confusion, where copyright protection is there to

123. Although the California Supreme Court has curtailed publicity rights when a new work is “transformative,” the court noted that publicity rights are not a right of “censorship” but a right to prevent others from misappropriating economic value. The transformative work must add significant expression such that it does not interfere with the economic interest protected by the right of publicity. *See Comedy III Prod. v. Gary Saderup, Inc.*, 21 P.3d 797 (2001).

124. *U.S. v. Giles*, 213 F.3d 1247, 1252 (10th Cir. 2000).

protect the exclusive rights of the owner.¹²⁵ In *U.S. v. Giles*, the court drew clear distinctions between copyrights and trademarks — as the law should for the right of publicity.¹²⁶ Here, the court stated that “[c]opyright law gives the author the right to prevent copying of the copyrighted work in any medium. Trademark law prevents the use of a similar mark on such goods or services as would probably cause confusion. Thus, the scope of rights in copyrights and trademarks is defined quite differently.”¹²⁷ Moreover, the court refused to “stretch the trademark statute into an area more appropriate to copyright law.”¹²⁸ Although trademark is also a federally protected interest, Congress has created a potentially perpetual right as long as the owner of the interest continues to use the protected mark.¹²⁹ Provided there are other policy considerations contemplated in trademark law, such as fair use, genericism, dilution, scandalousness, and disparagement.¹³⁰ Because trademarks are meant to protect different persons — the consumer versus the owner of the interest — the law should also identify the duration necessary to afford those persons with adequate protection. Commentators have stated that, due to the enactment of anti-dilution statutes, the underlying rationale for protection seems to be shifting from the consumer interests in avoiding confusion to the interest of the owner of the mark’s “business reputation” and the

125. *Id.*

126. *Id.*

127. *Id.* (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 6:14 (4th ed. 1996)); *see also* *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) (opinion of Holmes, J.) (“[A trademark] does not confer a right to prohibit the use of the word or words. It is not a copyright. . . . A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his.”).

128. *Giles*, 213 F.3d at 1253.

129. *Id.*

130. *Id.*

“distinctive quality of the mark.”¹³¹ However, Congress maintains that the primary objective of trademark law is to protect the consumer. States should enact publicity laws that focus primarily on protecting the interests of the individual, which is the primary purpose that the law was created to protect and may also include the contracting parties in a licensing agreement.

State legislatures would find greater consistency in the law of trademark protection and publicity rather than federal copyright law.¹³² In *Allen v. National Video, Inc.*, the plaintiff, Woody Allen, brought a Lanham Act lawsuit against the defendant for using a look-alike in an advertisement for its video rental business.¹³³ The advertisement was published in several magazines featuring Boroff, the Allen look-alike, merely standing at the video store rental counter. The court recognized that the underlying purpose of the Lanham Act was to protect a trademark in cases of misrepresentations where a product or a service has been endorsed by a public figure.¹³⁴ The court acknowledged that an endorsement by a public figure can be valuable and consumers may be confused if there is a false

131. Harding, *supra* note 105, at 306 (2009).

132. The Tennessee Legislature enacted the Tennessee Protection of Personal Rights statute, which treats publicity rights similarly to the rights protected under trademark law. Under the statute, publicity rights are protected as long as they are being used by the individual or his/her heirs. The Tennessee code states: “The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual’s death.” Tenn. Code Ann. § 47-25-1104 (West).

133. *Allen v. Nat’l Video, Inc.*, 610 F. Supp.612 (S.D.N.Y. 1985).

134. *Id.* at 626. *See also* Geisel v. Poynter Prod’s, Inc., 283 F.Supp. 261 (S.D.N.Y. 1968).

designation of origin.¹³⁵ The court reasoned that the plaintiff's mark, name, and likeness were well known to the public and that he had built up considerable investment in a unique, positive image. The court applied Standard & Poor's six-factor likelihood of confusion analysis.¹³⁶ The first factor of Standard & Poor's test is the strength of the plaintiff's mark and name. The court concluded as to Allen's likeness that the plaintiff's "mark, to analogize from trademark law, is a strong one."¹³⁷ After considering all six factors, the District Court held that the defendant had violated the Lanham Act and issued an injunction against the use of Boroff's photograph in future advertising, because a likelihood of confusion existed over the plaintiff's endorsement or involvement.¹³⁸

The underlying principle of the Lanham Act is the protection of the trademark owner's economic interest. This is carried out through prohibiting the use of false designations that cause consumer confusion. Because trademark law indefinitely protects the trademark holders' economic interest and is premised on the protection of consumers from deceptive advertising, so should state publicity laws.

135. *Id.* at 625 ("Another interest, which provides plaintiff with standing, is that of the 'trademark' holder in the value of his distinctive mark A celebrity has a similar commercial investment in the 'drawing power' of his or her name and face in endorsing products in marketing a career.").

136. *Standard & Poor's Corp. v. Commodity Exchange Inc.*, 683 F.2d 704 (2d Cir. 1982) (involving the use of the S&P 500 stocks as a basis for the defendant's futures trading contracts. S&P brought a cause of action for Lanham Act violation, attempting to enjoin the defendant from calling its index the Comex 500. The court upheld the injunction of the lower court and applied the six factors of the likelihood of confusion test.).

137. *Allen*, 610 F.Supp. at 627.

138. *Id.* at 628, 632.

B. The Remote Heir Argument is a Myth

Some commentators and scholars assert that a fixed postmortem term is necessary to avoid the problem of a remote heir inheriting the publicity rights of a distant ancestor.¹³⁹ A remote heir is an heir of a famous ancestor who could appear on courthouse steps claiming his or her financial rewards, decades after commercial interests have used the publicity rights.¹⁴⁰ An illustration of the argument is as follows: The heirs of John Hancock bring a cause of action against the John Hancock Insurance Company for a violation of their postmortem publicity rights. The insurance company could argue that the policy interests in protecting postmortem publicity rights decline as the public's interest in free speech increases.¹⁴¹ Sometimes this distant relative is called the "laughing heir," because he or she had nothing to do with the decedent and has now received a windfall.

Consider the Marilyn Monroe case involving her acting instructor Lee Strasberg. Monroe died suddenly in 1962 at the age of 36, and left behind a will that did not specifically bequeath her right of publicity. Lee Strasberg inherited Monroe's right of publicity under the residue clause of the will. Lee Strasberg passed the publicity rights

139. See MCCARTHY, *supra* note 10, at § 9:16. But see Richard E. Fikes, Comment, *The Right of Publicity: A Descendible and Inheritable Property Right*, 14 CUMBERLAND L. REV. 347, 367 (1984). Fikes contends that a right of publicity should descend without any durational limitation, similar to any other property right. *Id.* Fikes argues that the public's right to receive information is only minimally impacted, because the First Amendment will prevail when a societal value has been met. *Id.*

140. See, e.g., Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity*, 40 CUMB. L. REV. 499 (2009-2010).

141. Nicholas J. Jollymore, *Expiration of the Right of Publicity -- When Symbolic Names and Images Pass Into the Public Domain*, 84 TRADEMARK REP. 125, 129 (1994) (arguing that, at the point that the celebrity's persona becomes a symbol in society, the publicity rights should expire, in order to promote a greater exchange of ideas).

to his wife, Anna, by his will when he died. When the photographers who owned pictures of Monroe in three different states sued Anna Strasberg and CMG (the licensing agent) over the Monroe publicity rights, the federal district court determined that Monroe was domiciled in New York at the time of her death, and thus the Monroe publicity rights perished with the decedent in the state of New York. In states like New York and Wisconsin, the possibility of a remote heir is nonexistent, since they do not recognize postmortem publicity rights.¹⁴² Nineteen states have not recognized the postmortem right of publicity either judicially or by statute.¹⁴³ Some states have enacted statutes that provide postmortem publicity rights to the heirs irrespective of the domicile of the celebrity at death.¹⁴⁴

142. MCCARTHY, *supra* note 10, §§ 9:31, 9:41.

143. *See id.* at § 9:17.

144. *See* *Experience Hendrix, LLC v. HendrixLicensing.com Ltd*, 766 F.Supp. 2d 1122 (W.D. Wash. 2011). The Washington Legislature enacted the Personality Rights Act of 1998. The Act created a statutory right of publicity for life, plus 75 years after the individual's death. The Act applies to all persons who have died since 1948. The heir of Jimi Hendrix assigned his publicity rights to two companies in 1995. Jimi Hendrix died in 1970 outside the United States. The assignee brought a lawsuit in 2005 in the state of Washington under the Act. The district court held that Hendrix was domiciled in New York at the time of his death and that New York applied, thus the heir inherited no publicity rights. The Ninth Circuit affirmed the lower court decision. After the decision, the Washington legislature amended the Act to apply to all persons, irrespective of where the decedent was domiciled at death. After the amended statute went into effect, Experience Hendrix sued Hendrix Licensing.com. During the course of the litigation, the amendments to the Act were at issue. The district court held that the Act was unconstitutional in violation of the Commerce Clause, Due Process Clause, and Full Faith and Credit Clause of the Constitution. *Id.* The case was appealed to the Ninth Circuit, which affirmed in part, reversed in part, and vacated in part, holding that the Washington Personality Rights Act was constitutional. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829 (9th Cir. 2014).

If Monroe did not have a will at the time of her death, then her property would have passed by intestate succession. And if she were domiciled in California at the time of her death, then her publicity rights would pass to blood relatives at her death. Under the amended California statute, Monroe's heirs could inherit the publicity rights going back to her death in 1962. Without the California amendment in 2007, Monroe's publicity rights would have died with her, since the original statute was enacted in 1985, 28 years after her death. In California, through the amended statute, a remote heir would have to inherit after 1915. The right of publicity was first judicially recognized in the *Haelan* decision of 1953. In the case of enacted legislation recognizing the postmortem right of publicity, 13 of the 14 postmortem publicity statutes were enacted during the latter half of the 20th century. With the exception of California, Texas, Oklahoma, and Washington, the effective date for postmortem rights goes back to 1973.¹⁴⁵ It is only within the last several decades that heirs have been allowed to claim the publicity rights of a distant ancestor, because the right was not descendible until a state legislature enacted a statute or the courts upheld the right. The possibility of a remote heir of the nth generation arriving on the scene to collect the publicity rights of a long-lost ancestor is slight, because the recognition of the postmortem right of publicity is a relatively recent development in the law. The remote heirs of George Washington and John Hancock would be precluded from claiming the publicity rights of their distant

145. See MCCARTHY, *supra* note 10, at § 9:17. The effective year for postmortem rights in each state is as follows: California 1915, Illinois 1999, Indiana 1994, Kentucky 1984, Nebraska 1979, Nevada 1989, Ohio 1998, Oklahoma 1936, Pennsylvania 1973, Tennessee 1984, Texas 1937, Utah 1990, Virginia 1977, and Washington 1948. *Id.* at §§ 6:39-6:126.

relatives, because no publicity rights existed, either judicially or legislatively, at the time of their deaths.¹⁴⁶

C. The Free Speech Argument

The argument has been made that allowing a descendible and unlimited right of publicity will create a “chilling effect” as to the “free and open exchange of information about the celebrity.”¹⁴⁷ This argument has primarily evolved out of the *Memphis Development Foundation v. Factors* case, where the court stated that the “memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system.”¹⁴⁸ The court asserted that fame and celebrity status is actually created by the public and press, due to their desire to hear more about a person’s bad and good conduct.¹⁴⁹ Therefore, the court was reluctant to exclude the public from obtaining an interest in such a right that they helped to create, finding that excluding the public “somehow seems contrary to moral presuppositions.”¹⁵⁰ Further, the court reasoned that there is no indication that allowing heirs to control the use of the

146. John Hancock died Oct. 8, 1793 in Boston. To date, Massachusetts does not protect postmortem publicity rights. However, in 2014, a bill was introduced in the legislature that would allow postmortem rights for individuals domiciled in the state at the time of death. See Bill S.2022: An Act Protecting the Commercial Value of Artists, Entertainers and Other Notable Personalities, The 189th Court of the General Commonwealth of Ma., <https://malegislature.gov/Bills/188/Senate/S2022> (last visited Apr. 18, 2015).

147. Kenneth E. Spahn, *The Right Of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1029 (1995).

148. *Memphis Dev. Found. v. Factors*, 616 F.2d 956, 960 (6th Cir. 1980).

149. *Id.* at 958.

150. *Id.*

deceased publicity rights will increase the “efficiency or productivity of our economic system.”¹⁵¹

The problem with the criticism discussed above is that it fails to adequately acknowledge the intent and reasonable expectations of contracting parties prior to the death of the licensor of the publicity rights.¹⁵² It is unreasonable to allow a legally executed contract to terminate due to the expected or unexpected death of one of the contracting parties. It is also unreasonable to allow the public to “reap the rewards” because they “helped” make a person famous by wanting information and images about an individual.¹⁵³ Any statute that allows the lifespan of a person to determine the duration and exclusivity of a property right should be found to “substantially impair” a contract, because it significantly alters the reasonable expectations of the contracting parties and intrudes upon the bargaining relationship.¹⁵⁴ Consider an up-and-coming actress who has been able to secure a leading role in a major film. As her career progresses, she accumulates a significant amount of assets while becoming a household name.¹⁵⁵ At the height of her career, the actress dies suddenly. The actress leaves her publicity rights to a friend and the friend contracts with an agency to license the actress’s image. A licensee may invest a great deal of time, money, and energy into the advertisement and merchandising of a publicity interest.¹⁵⁶ The licensee may have established his livelihood around the actress’ image. At the death of the actress, depending on the domicile of the decedent, postmortem publicity rights may exist or the right of publicity may be completely

151. *Id.*

152. *See id.*

153. *Id.*

154. *Hodges v. Rainey*, 533 S.E.2d 578, 585-86 (2000) (citing U.S. CONST. art 1, § 10, cl 1).

155. *See generally* *Milton H. Greene Archives v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1169 (C.D. Cal. 2008), *aff’d*, 692 F.3d 983 (9th Cir. 2012).

156. *Id.*

extinguished. If no postmortem publicity right is recognized in the state, the public would instantly have a “free and open exchange” of the celebrity’s image.¹⁵⁷ Therefore, the “chilling effect” would actually be felt by potential licensees of publicity rights, who must weigh their possible gain against the need to somehow attempt to “police” the domicile of the licensor or protect the licensor from the risk of an accidental death, in order to shield themselves from the loss.¹⁵⁸

According to the court in *Gionfriddo v. Major League Baseball*, the First Amendment requires that the right of publicity be “balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.”¹⁵⁹ To consider both interests, the California Court of Appeals has stated that it must “determine the public interest in the expression” and then weigh it against the economic interests of the plaintiff.¹⁶⁰ In *Gionfriddo*, retired baseball players brought an action for the common law tort of unauthorized appropriation of their publicity rights against those persons and companies responsible for disseminating statistics about the plaintiffs in programs at baseball games and on the defendant’s website.¹⁶¹ The information regarding the players was factual data about their statistics, video clips of their performances, and verbal commentary.¹⁶² The court

157. *Id.*

158. *Id.*

159. *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 409 (Cal. Ct. App. 2001) (plaintiff baseball players alleged Major League Baseball association appropriated their names and likenesses in violation of common law and that they were entitled to relief pursuant to Cal. Civ. Code § 3344 (a)(d) (1995)).

160. *Id.* at 410.

161. *See id.* at 409.

162. *See id.* at 410-11.

found that the plaintiff's economic interest was far outweighed by the public's interest of having the ability to freely disseminate information regarding the history of baseball.¹⁶³ This reasoning is aligned with the notion that baseball is a national pastime, and therefore the league's use of the retired players' names, images, and likenesses fits within the "public affairs use" exception, recognized in the California right of publicity statute.¹⁶⁴ The statute found that certain uses in connection with news, public affairs, and sports broadcasts shall not constitute a wrongful appropriation.¹⁶⁵ This exception fit the case at bar, because major league baseball is followed by millions of people daily and fans have an interest in the history of the sport.¹⁶⁶ The court found that the statistics and records set by the players create the standard of measurement of players for years to come.¹⁶⁷ More important, the court found that this information is owed constitutional protection, because the information is fact-based, historical data and is not presented in a commercial context, as suggested in the argument advanced by the plaintiff.¹⁶⁸

Publicity rights only deter the free and open exchange of a celebrity's image for commercial exploitation. Courts have consistently held that the news media may use the name, image, and likeness of a celebrity to illustrate the quality and content of the news periodical.¹⁶⁹ On the contrary, an advertiser might intend to attract attention to his product through the image of a famous person. The advertiser is not intending to inform the public about the famous person, and instead only intends to use the image as a conduit to make a profit. Where there has been no First

163. *See id.* at 415; *see also* Cal. Civ. Code § 3344 (a)(d).

164. *See Gionfriddo*, 94 Cal. App. 4th at 412-16; *see also* Cal. Civ. Proc. Code § 3344 (a)(d).

165. *See Gionfriddo*, 94 Cal. App. 4th at 409-10.

166. *See id.* at 411.

167. *See id.* at 409-10.

168. *See id.* at 414-15.

169. *See id.* at 414.

Amendment concern regarding public interest, the rationale for providing the public with rights of publicity should not prevail.¹⁷⁰ Therefore, if the law does not allow the public to use a person's right of publicity during his lifetime where the use is not protected by the First Amendment, the law should not assume that the right should one day ultimately belong to the public at large without justification.

In addition, when considering the potential for publicity rights to restrict the dissemination of celebrity information involving various forms of entertainment, the courts have broadly held on the side of free speech. In *Hicks v. Casablanca Records*, the Southern District of New York upheld the free speech rights of the defendants, who had produced a movie about the famous mystery writer Agatha Christie.¹⁷¹ The movie was based on a real event that occurred in Agatha Christie's life. The mystery writer had gone missing for 11 days, and it was never revealed what had actually happened. The movie created a fictional story explaining the 11 days as a time when Christie was plotting to kill her husband's mistress. The heirs of Christie brought action for defamation and violation of her publicity rights. The court held in favor of the defendant on First Amendment grounds.¹⁷² The court stated:

Since the cases at bar are more factually similar to the Notre Dame case, [i.e., there were no

170. *Keller v. Electronic Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D.Cal. Feb. 8, 2010) (distinguishing the public interest defense of factual news reporting from commercial misappropriation).

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

172. *Id.* at 430 (holding that, under New York law at the time, publicity rights survived the decedent, and stating: "Thus, it seems clear as it pertains to the present motions that her right of publicity survived her death and was properly transferred to the plaintiffs as her heirs and assignees.").

deliberate falsifications alleged by plaintiffs, and the reader of the novel in the book case by the presence of the word “novel” would know that the work was fictitious, this Court finds that the [F]irst [A]mendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess and for this reason their complaints must be dismissed.¹⁷³

The court went on to hold that the right of publicity did not attach where a fictionalized account of a celebrity was depicted in a movie or a novel.

D. Balancing Practical and Policy Considerations of an Unlimited Duration

Take the case of James Dean, who has regularly made the Highest Paid Dead Celebrities list. The James Dean Estate generates \$5 to \$10 million from postmortem publicity rights annually. James Dean was born in Marion, Ind., in 1931 and died outside Palm Springs in an auto accident in 1955. Presently, CMG Worldwide markets James Dean’s publicity rights. Indiana passed its publicity rights statute in 1994, providing retroactive rights prior to 1994 and a 100-year postmortem duration. If Dean was a domicile of Indiana at his death, then his postmortem rights would have continued until 2055. In February of 2014, CMG brought an action in Indiana against Twitter for using the handle “@JamesDean.”¹⁷⁴ In *Dillinger LLC v. Electronic Arts, Inc.*, a federal judge refused to apply the Indiana publicity statute retroactively.¹⁷⁵ Because the court refused to give the statute retroactive effect, the James Dean image and name became part of the public domain in the year of

173. *Id.* at 433.

174. Neil, *supra* note 2.

175. 795 F.Supp.2d 829 (S.D.Ind. 2011). The estate of John Dillinger sued the publisher Electronic Arts for using Dillinger in *The Godfather* video games. The district court held that the Indiana statute was not passed until 1994 and as such should not be applied retroactively. *Id.*

James Dean's death, effectively eliminating the potential for licensing income.

1. Economic Incentives

In *Zacchini*, the United States Supreme Court recognized that at least one state interest in recognizing the right to publicity includes allowing individuals to "reap the reward of his endeavors."¹⁷⁶ The courts have also recognized that the right of publicity "creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition."¹⁷⁷ To develop these skills and reap such rewards, those who have a valuable right of publicity license their interest to persons or companies that may assist in increasing the value and generating a considerable return through advertising and merchandising.¹⁷⁸ For example, the Bob Marley estate in 2009 was able to license 50 percent of Marley's publicity rights for an estimated \$20 million.¹⁷⁹ This deal was possible only after a 2002 decision in Jamaica that established the common law jurisprudence allowing the disposition of publicity rights by will.¹⁸⁰ As the Marley estate recognized and the licensee, Hilco Consumer Capital, affirmed, "Bob Marley has become a global legend with a legacy of music that has captured audiences worldwide. Marley's evocative messages remain timeless, universal, and continue to appeal

176. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977).

177. Spahn, *supra* note 147, at 1028.

178. See *Fifty Percent of Bob Marley's Right of Publicity and Related IP Sells for \$20 Million*, RIGHT OF PUBLICITY (Feb. 20, 2009), <http://rightofpublicity.com/bob-marley-heirs-sell-portion-of-intellectual-property-rights>.

179. See *id.*

180. See Phillip D. Howard, *Comparative Views on a Commercial Right to Publicity: Should There Be Durational Limitations?*, 8 REV. BUS. RESEARCH 58 (2008).

to music fans, both young and old.”¹⁸¹ Marley has been deceased for more than 30 years; however, this prominent investment firm recognized the value in the right to Marley’s name, image, and likeness.¹⁸²

However, some argue that the incentive theory is only applicable to an individual while he or she is alive, because the “primary incentive” is to derive profit from the individual’s fame or fortune during his or her lifetime and is not concerned with the ability to pass on such assets to the estate.¹⁸³ Even if this is true, courts and commentators fail to recognize that this argument may be made about every property interest that has the potential to increase in or sustain its value. For example, a homeowner who maintains his yard and the exterior of the structure will likely realize appreciation in the value of the property. Homeowners have an incentive to preserve their property for future sale or inheritance by their heirs. Furthermore, the owner of a valuable painting or vehicle keeps the asset safe so that it may continue to increase in value, thereby giving the owner increased wealth during his or her life. However, the law does not fail to recognize that even though the real and personal property owner’s “primary objective” may not be to ensure that his or her heirs have a valuable asset at the owner’s death, the owner may freely pass such property onto heirs with little restraint.

2. Freedom of ConDonetract

181. See *Bob Marley Family Partners With Hilco Consumer Capital for Exclusive Product Licensing Representation and Management*, PR NEWswire (Feb 10, 2010), <http://www.prnewswire.com/news-releases/bob-marley-family-partners-with-hilco-consumer-capital-for-exclusive-product-licensing-representation-and-management-65712037.html>.

182. See *id.*

183. Spahn, *supra* note 147, at 1028-29.

The freedom to contract is a right firmly embedded in and protected by the United States Constitution.¹⁸⁴ Limiting the duration of postmortem publicity rights significantly limits the ability and value of contracts involving publicity rights. In the 1819 landmark decision *Dartmouth College v. Woodward*, the U.S. Supreme Court had to decide whether a contract that granted a private charter to the Trustees of Dartmouth College was one that the state could not impair by subsequent legislation.¹⁸⁵ The Supreme Court found that Dartmouth College was a private, charitable corporation and the state's regulation could not unilaterally amend the existing contract.¹⁸⁶ The court reasoned that the framers of the Constitution added the Contract Clause specifically to "restrain the legislature in [the] future from violating the right to property."¹⁸⁷ The Contract Clause, which prohibits states from passing any law "impairing the obligation of contracts," was in reference to "contracts respecting property, under which some individual could claim as a right to something beneficial to himself."¹⁸⁸ In *Fletcher v. Peck*, the Marshall Court reiterated the importance of private contracting and the limitation on a state legislature's power to interfere.¹⁸⁹ In *Fletcher*, the Georgia Legislature repealed a law that annulled legally executed conveyances of land in Georgia.¹⁹⁰ The Court found that the repeal of the law was unconstitutional, because the repeal impaired the obligation of the contracting persons, i.e., the grantor and grantee of the

184. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 589 (1819) (citing U.S. CONST. art 1, § 10).

185. *Id.* at 552-557.

186. *Id.* at 711-12.

187. *Id.* at 628.

188. *Id.*

189. *Fletcher v. Peck*, 10 U.S. 87 (1810).

190. *Id.*

property, because the “law in its nature is a contract” and a “repeal of the law cannot divest those rights.”¹⁹¹

Although the language of the Contract Clause appears facially absolute, it is also well established that the right to contract is not free of governmental regulation when the public interest is involved.¹⁹²

There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.¹⁹³

The Contract Clause must be “accommodated to the inherent police power of the State to safeguard the vital interests of its people.”¹⁹⁴ The state therefore is able to enact laws affecting contracts to maintain “peace and security” and to promote the health, safety, and welfare of its citizens.¹⁹⁵ In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, the Supreme Court laid out the test to determine whether a state law that impacts the right to contract is ultimately a proper exercise of a state’s police power.¹⁹⁶ First, the court must determine “whether the state law has, in fact, operated as a substantial impairment of a

191. *Id.* at 135.

192. See generally *West Coast Hotel v. Parrish*, 300 U.S. 379 (1973).

193. *Chi. B & Q. R. Co. v. McGuire*, 219 U.S. 549, 567 (1911).

194. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (citing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434(1934)).

195. *Chicago*, 219 U.S. at 568.

196. *Energy Reserves*, 459 U.S. at 411.

contractual relationship.”¹⁹⁷ The legislature will be held to an increased level of scrutiny depending on the severity of the impairment.¹⁹⁸ Where there is minimal impairment, the inquiry may end there.¹⁹⁹ However, a “careful examination of the nature and purpose of the state legislation” will be conducted where the legislation is found to severely impair a contractual relationship.²⁰⁰

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.²⁰¹

If the state regulation is found to substantially impair, the state must justify the regulation by showing that there is a “significant and legitimate public purpose” for the enactment of the law.²⁰² The Court found that the requirement for a legitimate purpose ensures that the state is “exercising its police powers, rather than providing a benefit to special interests.”²⁰³ The final step in the inquiry is determining whether the regulation “adjusting the rights and responsibilities of contracting parties” is reasonable and appropriate to the legislature’s purpose for its adoption.²⁰⁴ In

197. *Id.*; see also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

198. *Energy Reserves*, 459 U.S. at 410; see also *Allied*, 438 U.S. at 245.

199. *Energy Reserves*, 459 U.S. at 412.

200. *Allied*, 438 U.S. at 245; *Energy Reserves*, 459 U.S. at 410.

201. *Allied*, 438 U.S. at 245.

202. *Energy Reserves*, 459 U.S. at 411.

203. *Id.* at 412.

204. *Id.* (quoting *U.S. Trust Co. v. N.J.*, 431 U.S. 1, 22 (1977)).

its review of economic and social regulation, the Court will “defer to legislative judgment” as to the need and reasonableness of the regulation.²⁰⁵ Despite “the customary deference” given to the state legislature, the Court has recognized a violation of the Contract Clause and a need to limit the state’s power when “its exercise affects substantial modifications of private contracts” and is found to be “neither necessary nor reasonable.”²⁰⁶

The freedom to contract is a highly important right.²⁰⁷ Generally, the making of a contract “shall be free from government interference.”²⁰⁸ Contracting parties are able to engage in terms to their liking, so long as the provisions of the contract are not void for being against public policy or procured as a result of fraud.²⁰⁹ The freedom to contract allows parties to integrate terms of the agreement that are “mutually satisfactory.”²¹⁰ These terms may be in regards to how and when to end the agreement and what each party will receive if the other party does not uphold its end of the bargain.²¹¹

V. CONCLUSION

Distinct from state privacy law, the right of publicity is the right to control the exploitation of one’s name or image.²¹² This right provides an incentive for people to work throughout their lifetimes to create valuable assets in their name or image. They may use these assets to create wealth for themselves and possibly for their families. Creating this wealth may entail contracting with other individuals and companies who may use the profitable image in

205. *Id.* at 413.

206. *Allied*, 438 U.S. at 244.

207. *See, e.g., Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 883 (Fla. 1974).

208. 16 C.J.S. *Constitutional Law* § 720 (1984).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See MCCARTHY, supra* note 16, at § 1:7.

merchandising and advertising of products and services. A licensee to another person's right of publicity likely values the contract based on the term of duration and exclusivity of the right.

The traditional rationale for limiting the term of postmortem publicity rights has been accepted by legislatures and some courts. The analogy of a right to publicity with copyright law has been a popular one. However, when an in depth consideration is conducted between the two property interests, the analogy breaks down. Unlike copyright and patent law, where authors or inventors are granted limited protection of their works or inventions to promote societal progress,²¹³ the policy rationale for the right of publicity is to protect the owner and potential licensor of such a right from wrongful commercial appropriation. Furthermore, trademark law is also used to prevent wrongful appropriation; the underlying policy rationale is to protect the owner's economic interest as well as the consumer. After balancing other policy concerns, trademark protection may warrant a limitless duration. Because the right of publicity contains a distinct rationale for protection, it should not be analogized to other intellectual property rights when durational limits are established. Doing so may lead to inequities for the persons the law is meant to protect and may ultimately lead to the substantial impairment of one's contractual obligations. In particular, having the duration of the right based on a life term creates great uncertainty as to the value of the right. State legislatures should not enact laws that allow the public to reap the rewards of others without promulgating underlying policy considerations that justify such a transfer of rights. As state courts and legislatures during the 20th century began to recognize the right of publicity separately and distinctly from the right of privacy, so should the right

213. U.S. CONST. art 1, § 8, cl 8.

of publicity be recognized separately and distinctly from copyright and patent laws that come under constitutional purview.

The concern over a remote heir appearing on the scene generations later is also moot, because remote heirs likely do not have proper claims. Because most publicity statutes were enacted in the latter half of the 20th century, the right of publicity did not exist before the statutes' effective dates. Only heirs inheriting after the effective date of the statutes may claim publicity rights of the decedent.

The First Amendment argument attempts to assert that a serious chilling of free speech would occur if an unlimited term were allowed. The only free speech that might be lessened is commercial speech, because general publicity statutes only apply to the advertisement of a product or a service. Free speech to disseminate truthful information about a dead celebrity when there is a newsworthy item is fully protected by the First Amendment. Authors are completely protected in publishing biographies about celebrities, making movies about celebrities' lives, or even creating fictional stories about celebrities.

Attempting to justify the evisceration of significant contract rights at the death of a celebrity or within some arbitrary number of years after death does not seem warranted without a paramount policy rationale in support of the limitation. If society lacks such an overriding policy rationale, the heirs or licensees of the right of publicity should be able to maintain the legacy of a celebrity's personhood for a limitless duration, to protect the value of the asset, and the right of all parties to contract.