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Protecting a Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor

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PROTECTING A CELEBRITY’S LEGACY: LIVING IN CALIFORNIA OR NEW YORK BECOMES THE DECIDING FACTOR

Laurie Henderson*

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I. INTRODUCTION

Given society's overwhelming fascination with celebrities, it may be of little surprise to learn that celebrities continue to earn money after they have passed away. However, it may astonish many how much celebrities actually do earn after their passing. According to Forbes.com's annual list, the "Top-Earning Dead Celebrities" for 2008 earned a combined total of \$194 million over the year.¹ While Elvis Presley topped the list for the second year in a row grossing \$52 million,² industry analysts predicted that Marilyn Monroe³ and James Dean—who generated \$6.5 million and \$5 million, respectively—have true staying power due to their "iconic fame" that has carried each through the decades.⁴

Accordingly, a celebrity's postmortem right of publicity—the right to control the commercial use of a deceased individual's identity⁵—has emerged as a valuable source of income for a deceased celebrity's estate, as well as a key issue in the legal arena.⁶ Although such right has not been implemented in federal law, a growing trend exists toward recognizing a postmortem right of publicity by statute or under common law.⁷ States that recognize such right have analogized the right of publicity to property rights, which are clearly devisable.⁸ Alternatively, some states have plainly rejected claims for a descendible right of publicity,⁹ finding the right more similar to a personal right that terminates upon the death of the individual.¹⁰

The conflict over the existence of a postmortem right of publicity may prove particularly troublesome for celebrities who split their time between California and New York—two states that rest on either side of the spectrum. Since both California¹¹ and New York¹² courts have held that the existence of a postmortem

¹ Peter Hoy, *Top-Earning Dead Celebrities*, FORBES.COM, Oct. 27, 2008, http://www.forbes.com/2008/10/27/dead-celebrity-earning-biz-media-deadcelebs08_cx_mn_de_1027celeb_land.html.

² To put such a figure into perspective, it is necessary to note that Elvis Presley's earnings in 2008 outweighed some of the music industry's current most popular living acts: Justin Timberlake grossed \$44 million and Madonna produced \$40 million in 2008. *Id.*

³ The year 2008 serves as Marilyn Monroe's eighth year in a row on the list. *Id.*

⁴ *Id.*

⁵ See J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995).

⁶ Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 545 (2008).

⁷ See Rosenthal, *infra* note 85 and accompanying text.

⁸ Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980).

⁹ See Rosenthal, *infra* note 86 and accompanying text.

¹⁰ Felcher & Rubin, *supra* note 8, at 1127.

¹¹ See *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1147–49 (9th Cir. 2002) (concluding that heirs of Princess Diana had no right to sue for a violation of California's postmortem publicity statute because Princess Diana was domiciled in England at the time of her death and England did not recognize a right of publicity, not to mention a postmortem right).

¹² See *Se. Bank, N.A. v. Lawrence*, 489 N.E.2d 744 (N.Y. 1985). It is important to note that not all states follow the "domicile rule." Edward H. Rosenthal, *Rights of Publicity and Entertainment Licensing*, in UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 235, 246 (Practising Law Institute ed. 2007). For example, statutes enacted in Nevada and Indiana explicitly state that the rule is not applicable. *Id.* However, under prevailing conflict of law provisions implemented in most states,

right of publicity depends on the domicile of the celebrity at the time of his or her death, a determination as to which state law applies is required in order to discover who is entitled to the deceased celebrity's estate and future earnings. As New York currently does not recognize a postmortem right of publicity,¹³ the recent rulings of the United States District Court for the Central District of California in granting a devisable right of publicity highlight the belief that California may be the better place for celebrities to both live and die.¹⁴

In *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, the court addressed the long-running legal battle—waged in Indiana, New York, and California—between the heirs of Marilyn Monroe and the estates of photographers who own photographs of the iconic actress.¹⁵ At issue is the right of publicity to control how images of Monroe are used commercially in advertisements or on merchandise.¹⁶ During her life, Monroe transferred her rights in such photographs to the photographers who captured the images.¹⁷ However, when Monroe died in August 1962, while she did not expressly bequeath a right of publicity—since such right had not yet been recognized—to her estate, she did include a residual clause in her will.¹⁸ Courts in both the Central District of California and the Southern District of New York granted summary judgment for the photographers' estates, concluding that under both California and New York laws, Monroe lacked the testamentary capacity to devise the statutorily-created right of publicity that failed to come into existence until after her death.¹⁹ Applying the principles of property law, the courts reasoned that only property owned by the testator at the time of his or her death can be devised by will.²⁰

However, immediately after the decisions were issued, the California State Legislature passed Senate Bill 771 (“SB 771”)²¹ “to abrogate the court’s ruling and clarify the meaning of California’s right of publicity statute”²² under California Civil Code section 3344.1.²³ In response to the passage of SB 771, Monroe’s estate filed a motion for reconsideration in the Central District of California.²⁴ Relying on the legislative history and intent of SB 771 and section 3344.1, the court held that the right of publicity is freely transferable or descendible and was

the existence of a postmortem right of publicity is determined by the law of the estate’s domicile. *Id.* Alternatively, other states have opted to apply the law of the state with the greatest interest in the issue. *Id.* at 247.

¹³ See *infra* Part II.C.

¹⁴ See *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, No. CV 05-02200 MMM (MCx), 2008 WL 655604, at *1 (C.D. Cal. Jan. 7, 2008) (on motion for reconsideration); *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008).

¹⁵ *Milton*, 2008 WL 655604, at *1.

¹⁶ *Id.*

¹⁷ Heller, *supra* note 6, at 556.

¹⁸ See *infra* note 104 and accompanying text.

¹⁹ *Milton*, 2008 WL 655604, at *1, *3 n.14 (citing *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007)).

²⁰ *Id.*

²¹ See *infra* Part III.D.

²² *Milton*, 2008 WL 655604, at *2.

²³ CAL. CIV. CODE § 3344.1 (West 1997); see *infra* notes 91–94 and accompanying text.

²⁴ *Milton*, 2008 WL 655604, at *2.

held by Monroe at the time of her death.²⁵ Accordingly, Monroe's estate possessed standing to assert Monroe's postmortem right of publicity claims under California law, and the previous summary judgment rulings were vacated.²⁶ However, the court ultimately decided that Monroe was domiciled in New York at the time of her death, requiring the law of New York—a state, unlike California, that recognizes neither a statutory nor common law descendible, postmortem right of publicity—to apply, resulting in a major win for the photographers' estates.²⁷

The choice of law dichotomy illustrated in *Milton* foreshadows the likelihood of future lawsuits filed in order to determine who can capitalize on a deceased celebrity's earnings that continue after his or her death. For a celebrity who "lived" both in California and New York, it is probable that the celebrity's estate will argue that he or she was domiciled in California in order to benefit from the state's recognition of the postmortem right of publicity while other unauthorized entities interested in exploiting the celebrity's identity will claim that he or she was domiciled in New York to ensure that the right of publicity cannot be devised. In a society where celebrities' fortunes continue to grow exponentially after their deaths, it is alarming that a celebrity's ability to control his or her identity post death is ultimately decided according to a court's finding of his or her domicile. Moreover, as the right of publicity was primarily designed to meet celebrities' needs, it seems anomalous that the two states where most celebrities live have such conflicting laws—making the potential for forum-shopping a likely reality.

This case note discusses the origins, reasoning, and impact of the *Milton* decision. It argues that New York should adopt a similar right of publicity statute as that found in California in order to ensure the protection of a celebrity's identity post death and establish a uniform policy for two states that consistently cater to celebrities. Part II summarizes the general legal principles concerning the right of publicity, the evolution of the right of publicity in both California and New York, and the current issues surrounding the trend toward implementing a postmortem right of publicity.²⁸ Part III describes the relevant facts of the two leading Marilyn Monroe disputes: *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.* and *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, as well as the procedural developments concerning the right of publicity.²⁹ Part IV examines the analysis of the court's opinion in *Milton*.³⁰ Part V presents the future implications of the *Milton* decision.³¹ The case note is concluded in Part VI.³²

²⁵ *Id.* at *3–4, *13–14.

²⁶ *Id.* at *14.

²⁷ *Id.* at *15.

²⁸ *See infra* Part II.

²⁹ *See infra* Part III.

³⁰ *See infra* Part IV.

³¹ *See infra* Part V.

³² *See infra* Part VI.

II. THE RIGHT OF PUBLICITY

A. *The Evolution of the Right of Publicity in the United States*

The right of publicity encompasses the intangible right of an individual—primarily a public figure or a celebrity—to control the commercial value and exploitation of his or her name, picture, likeness, or voice and to prevent others from unfairly exploiting this value through advertising or trade purposes for commercial benefit.³³ While the right of publicity is largely developed by federal courts, such right is truly governed by state law, granting each state the freedom to dictate the future of the right.³⁴

Historically, the right of publicity emerged from the right of privacy.³⁵ During the 1950s, the development of new publishing technologies enabled marketers to exploit celebrities' identities for profit.³⁶ With the rapid increase of mass-marketing schemes, it became apparent to many—especially celebrities—that individuals possess an interest in their personal identities that was not “adequately protected by the tort of invasion of privacy.”³⁷ Thus, a claim for the right of publicity is more generally recognized as a form of intellectual property, where an individual seeks “the right to control and profit from the use of [his or her]” identity and not as a “right to be left alone.”³⁸

While the right of publicity had been discussed in a variety of forms, the

³³ See Rosenthal, *supra* note 12, at 239; Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71 (2005). It is important to note that the right of publicity is possessed by all individuals—both celebrities and non-celebrities. McCarthy, *supra* note 5, at 134. However, as expected, the majority of case law concerns celebrities since only a celebrity's right of publicity commands sufficient value to justify expensive litigation and appeals. *Id.* The right of publicity is limited only to the protection of human beings. *Id.* Accordingly, corporations, partnerships, and institutions cannot claim infringement of their right to publicity. *Id.*

³⁴ Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 934–35 (1995).

³⁵ McCarthy, *supra* note 5, at 134. The right of publicity is also viewed as similar to forms of intellectual property, including trademark and copyright. *Id.*

³⁶ Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, para. 7 (2001), available at <http://www.vjolt.net/vol6/issue1/v6i1a03-Carpenter.html>.

³⁷ *Id.* Although celebrities aimed to recover damages for the unauthorized use of their images under the invasion of privacy tort, they believed that such form of damages did not adequately remedy the source of misappropriation. *Id.* However, many courts reasoned that celebrities assumed the risk of misappropriation and exploitation due to the very nature of their occupation. *Id.* Moreover, since courts were required to decide such issues based on the tort of invasion of privacy, celebrity plaintiffs were forced to show emotional harm and damage to their character of reputation as a result of the exploitation of their identity—concerns that were often irrelevant to the celebrities. *Id.* Rather, celebrities sought to control and profit from the use of their identity, not to prevent any such publication in its entirety. *Id.*

³⁸ James M. Chadwick & Roxana Vatanparast, *The Copyright Act's Preemption of Right of Publicity Claims*, 25 COMM. LAW. 3, 3 (2008). As an increasing number of celebrities filed suit to recover for misappropriation of their identities, it became apparent “that privacy law was inadequate to accommodate ‘uncompensated, rather than unwelcome, publicity.’” Tara B. Mulrooney, Note, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST. JOHN'S L. REV. 1139, 1142 (2000) (quoting Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 622 (1984)).

term was officially coined in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*³⁹ In *Haelan*, a chewing-gum company that had contracted with a baseball player for the exclusive right to use the player's photograph in connection with the sale of gum filed suit against a competitor who produced and sold merchandise using the player's photograph.⁴⁰ The defendant company argued that the plaintiff could not sue based on the claim of invasion of privacy because such right was personal and thus not assignable.⁴¹ However, the court held that "in addition to and independent of [the] right of privacy . . . a[n] [individual] has a right in the publicity value of his [or her] photograph, i.e., the right to grant the exclusive privilege of publishing [the] picture."⁴² Judge Frank reasoned that a right of publicity was essential in ensuring that "prominent persons"—namely, celebrities and athletes—received adequate compensation for the use of their identity for commercial purposes.⁴³ Moreover, the court concluded that such right could be licensed or assigned, and the licensee or assignee was entitled to enforce it against third parties.⁴⁴

Since the right of publicity's inception in *Haelan*, the right has been widely embraced by both courts and state legislatures.⁴⁵ More than half of all states recognize a right of publicity in some legal capacity—either through common law⁴⁶ or state legislation.⁴⁷ Many states that have enacted their own laws explicitly recognize a right to publicity, while others have enacted broad statutes concerning privacy⁴⁸ and unfair competition⁴⁹ that encompass unauthorized

³⁹ See 202 F.2d 866, 868 (2d Cir. 1953); Westfall & Landau, *supra* note 33, at 76. Two lines of cases evolved prior to *Haelan* that expressed justifications for the right of publicity. Westfall & Landau, *supra* note 33, at 76. The older line of cases was based on the natural copyright theory that every person is entitled to a "natural property right in his or her name or likeness." *Id.* The more recent line of cases stressed the idea that appropriation of an individual's identity for profit constituted a violation of his or her right of privacy. *Id.*

⁴⁰ *Haelan*, 202 F.2d at 867.

⁴¹ *Id.*

⁴² *Id.* at 868. Using such language, Judge Frank clearly believed that he was creating an "independent" right that was completely separate from that of the existing right of privacy. Westfall & Landau, *supra* note 33, at 77.

⁴³ *Haelan*, 202 F.2d at 868. Judge Frank further concluded that such right of publicity would essentially be powerless unless it could guarantee an exclusive grant that barred competing advertisers from using a celebrity's image. *Id.*

⁴⁴ Kranz, *supra* note 34, at 951. It is important to note that Judge Frank "did not go so far as to explicitly label the right of publicity as a 'property right' for fear of the effect on unsettled issues regarding inheritance, tax, and divorce." *Id.*

⁴⁵ Carpenter, *supra* note 36.

⁴⁶ *Id.* States with common-law sources for the right of publicity include Alabama, Arizona, Connecticut, Georgia, Hawaii, Maine, Michigan, Minnesota, Missouri, New Jersey, and Oregon. Thomas F. Zuber, *Everlasting Fame: Recent Legislation has Clarified the Descendible Right of Publicity for Personalities Who Died Prior to 1985*, L.A. LAWYER., May 2009, at 29, 31, 34 n.62; see also Rosenthal, *supra* note 12, at 245–46.

⁴⁷ Carpenter, *supra* note 36. States that currently recognize the right to publicity in their state statutes include California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, and Washington. Rosenthal, *supra* note 12, at 245–46.

⁴⁸ See Rosenthal, *supra* note 12, at 239. The right of publicity is included in a group of torts that generally comprise the right of privacy: intrusion, false light, unreasonable publicity, and appropriation of name or likeness. *Id.* Under this formulation, the invasion of the right of publicity is most similar to

commercial exploitation of an individual. Moreover, as new media technologies continue to develop and celebrities discover their images published in novel and creative ways, the right of publicity has expanded to protect more aspects of their commercial identities, including a celebrity's name, picture, likeness, and voice.⁵⁰

B. *The Right of Publicity in California*

As so many celebrities call California home, the state has consistently served as an advocate of the right of publicity.⁵¹ While the state is not the most liberal in its protection of an individual's right of publicity, its statutes are viewed as strong defenders of celebrity rights.⁵²

In 1971, the California State Legislature created a statutory right of publicity—available to all living personalities, regardless of celebrity status—by enacting California Civil Code section 3344.⁵³ The statute, which terminated publicity rights upon an individual's death, was implemented to protect an individual's economic interest by banning the knowing use of the name, likeness, voice, and image of an individual without his or her permission.⁵⁴

In 1979, the California Supreme Court recognized a common law right of

the unauthorized appropriation of one's name or likeness. *Id.*; see RESTATEMENT (SECOND) OF TORTS §§ 652A-1 (1977).

⁴⁹ Carpenter, *supra* note 36. Under the law of unfair competition, actions for the tort of misappropriation or for a wrongful attempt to "pass off" the product as endorsed or produced by the individual aid in protecting the right of publicity. See *id.*; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .").

⁵⁰ Carpenter, *supra* note 36. For example, in *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988), the Ninth Circuit held that an identifiable voice, like a name or likeness, constitutes part of a celebrity's commercial identity and is thus protected by the right of publicity. However, not all states have recognized a claim for use of a sound alike under statutory law. See Rosenthal, *supra* note 12, at 251–53.

⁵¹ Eric Farber, *U-LA-LA, What's Happened to Our California Right of Publicity?*, 11 CHAP. L. REV. 449, 449 (2008).

⁵² *Id.* Although California has a vested interest in the right of publicity—in large part due to the considerable number of celebrities that reside in the state—Indiana and Tennessee have enacted even stronger statutes to protect a celebrity's right of publicity. *Id.* at 463 n.6; see also Zuber, *supra* note 46, at 31. The justification for such protective statutes lies in the fact that Indiana serves as the home to CMG Worldwide—a company that represents the estates of deceased celebrities in the sports, entertainment, and musical fields, including Babe Ruth, Marilyn Monroe, and James Dean—whereas Tennessee boasts the reputation as the home of Elvis Presley. *Id.*; CMG Worldwide, Overview, <http://www.cmgworldwide.com/corporate/overview.html> (last visited Oct. 12, 2009).

⁵³ CAL. CIV. CODE § 3344 (West 1997), amended by CAL. CIV. CODE § 3344.1 (West 1997); see Heller, *supra* note 6, at 549; Farber, *supra* note 51, at 449.

⁵⁴ § 3344. Section 3344(a) provides, in pertinent part:

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, 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.

§ 3344(a). The California State Legislature also created an exemption for the "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." § 3344(d).

publicity⁵⁵ in the companion cases *Lugosi v. Universal Pictures*⁵⁶ and *Guglielmi v. Spelling-Goldberg Productions*.⁵⁷ In *Lugosi*, Bela Lugosi's heirs sued to enjoin and recover profits from Universal Pictures ("Universal") for licensing Lugosi's name and image on merchandise reprising Lugosi's title role in the 1930 film "Dracula." ⁵⁸ The California Supreme Court faced the issue as to whether Lugosi's film contracts with Universal included a grant of merchandising rights in his portrayal of Count Dracula and the descendibility of any such rights.⁵⁹ While the court recognized the presence of a right of publicity, the court concluded that publicity rights were not descendible, reasoning that the "right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."⁶⁰ Four days later, in *Guglielmi*, the California Supreme Court again concluded that the right of publicity does not survive a person's death.⁶¹ In this case, Rudolph Valentino's heir filed suit claiming that Spelling-Goldberg Productions misappropriated Valentino's right of publicity of which the heir currently owned.⁶² The court, citing *Lugosi* as controlling, held that "the right of publicity protects against the unauthorized use of one's name, likeness, or personality, but that the right is not descendible and expires upon the death of the person so protected."⁶³ However, as time would later tell, the issue as to whether the right of publicity is descendible in the state of California would again be addressed and answered in the affirmative.⁶⁴

⁵⁵ Under California's common law right of publicity, a cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) the lack of consent; and (4) the resulting injury. See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (allowing actor Clint Eastwood to state a right of publicity cause of action against *The National Enquirer* magazine).

⁵⁶ See *Lugosi v. Universal Pictures*, 603 P.2d 425, 425 (Cal. 1979).

⁵⁷ See *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 454 (Cal. 1979).

⁵⁸ *Lugosi*, 603 P.2d at 427. Lugosi's heirs were entitled to a share of the profits from Universal's licensing of Lugosi's image as the character Count Dracula. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 431. Applying the aforementioned reasoning, the court concluded that after Lugosi's death, his name, image, and likeness were in the public domain, allowing anyone to exploit them for a "legitimate commercial purpose." *Id.* at 430. Thus, while the court reaffirmed the belief that the right of publicity can be exploited during the course of a celebrity's lifetime, it maintained that a celebrity's heirs cannot enforce such right or reap any financial benefit from the right unless the celebrity "sold [his or her right of publicity] for installment payments and/or royalties due after his [or her] death, in which . . . such payments and/or royalties would . . . be a part of his [or her] estate." *Id.* at 429; see Amy D. Hogue & Michael B. Garfinkel, *The Right of Publicity: Does It Survive Death and Abandonment?*, 30 TORT & INS. L.J. 663, 668 (1995). The court also commented on the need for section 3344 to fill "a gap which exists in the common law tort of invasion of privacy in the state of California." *Lugosi*, 603 P.2d at 443 (quoting Letter from John Vasconcellos, Cal. State Assembly, to Ronald Reagan, Governor, Cal. (Nov. 10, 1971)). The *Lugosi* court's logic was also applied by the Second Circuit in *Groucho Marx Productions, Inc. v. Day & Night Co.*, 689 F.2d 317, 318 (2d Cir. 1982) (holding that the descendibility of the Marx Brothers' rights of publicity was governed by California law and thus such rights did not survive death).

⁶¹ *Guglielmi*, 603 P.2d 454, 455 (Cal. 1979).

⁶² *Id.* at 454.

⁶³ *Id.*

⁶⁴ See *infra* notes 88–94 and accompanying text.

C. *The Right of Publicity in New York*

Although New York was an early leader in establishing publicity rights, the state's advancement of the right has rapidly declined and is now confined within the restrictions of a narrowly defined privacy statute.⁶⁵ Before the historical *Haelan* case, New York paved the way for the right of publicity by enacting New York Civil Rights Law sections 50 and 51 in order to govern privacy law in the state of New York.⁶⁶ The statutes prohibit the use of the name, portrait, or picture of any living person without prior consent for "advertising purposes" or "for the purposes of trade."⁶⁷

After *Haelan* established the belief that a common law right of publicity existed in New York during the 1950s,⁶⁸ the United States District Court for the Southern District of New York decided *Price v. Hal Roach Studios* and confirmed the existence of such common law right.⁶⁹ Moreover, the *Price* court reasoned that the right of publicity qualified as a property right and, as such, was legally distinct from the right of privacy.⁷⁰

However, New York's recognition of a separate right of publicity ended in

⁶⁵ See John C. Fuller, Note, *Like a Candle in the Wind: Shaw Family Archives, Ltd. v. CMG Worldwide, Inc. and the Flickering Recognition of Marilyn Monroe's Right of Publicity in New York*, 15 VILL. SPORTS & ENT. L.J. 299, 312 (2008).

⁶⁶ N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992); see Fuller, *supra* note 65, at 312; Mark A. Roesler, *Celebrity Licensing*, in THE LICENSING DESKBOOK 1, 4 (Gregory J. Battersby & Charles W. Grimes eds., 1999), available at <http://www.markroesler.com/pdf/publishedworks/celebritylicensing.pdf>.

⁶⁷ §§ 50–51. Section 50 provides:

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

§ 50. Section 51 provides remedies for a violation of section 50:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful . . . the jury . . . may award exemplary damages.

§ 51.

⁶⁸ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

⁶⁹ See 400 F. Supp. 836 (S.D.N.Y. 1975). In the case, two plaintiffs, widows of comedians, sued a film studio for which their late husbands had worked claiming that the studio used their husbands' names and likeness without prior authorization. *Id.* at 837–38; see Fuller, *supra* note 65, at 324–25.

⁷⁰ *Price*, 400 F. Supp. at 843. The court explained that the right of privacy and the right of publicity differ greatly in theory and scope in that the right of privacy protects an individual "from intrusion upon [his or her] privacy" whereas the right of publicity protects an individual "from appropriation of some element of [his or her] personality for commercial exploitation." *Id.* The court further elaborated by stating that New York's statutory laws (sections 50 and 51) were created based on privacy law while the common law right of publicity finds its root in property law. *Id.* Lastly, as discussed later in this note, the court rationalized that the right of publicity, as a property right with a "purely commercial nature," is descendible. *Id.* at 844.

1984 when the New York Court of Appeals decided *Stefano v. News Group Publications*.⁷¹ The court of appeals repudiated the belief that a separate right of publicity existed and held that such right is “encompassed under the Civil Rights Law as an aspect of the right of privacy.”⁷² Moreover, the court officially rejected the belief that the right of privacy is limited to situations where “the defendant’s conduct has caused distress to a person who wishes to lead a private life free of all commercial publicity”⁷³ and confirmed that the statutes apply “to any use of a person’s picture or portrait for advertising or trade purposes” without prior authorization.⁷⁴ The Second Circuit soon adopted New York’s interpretation of the right of publicity in *Pirone v. MacMillan, Inc.*⁷⁵ Relying on the decision set forth in *Stefano*, the Second Circuit affirmed that “the state statutory provisions concerning a right of publicity are exclusive,” and thus the Civil Rights Law clearly “preempts any common law right of publicity action.”⁷⁶

D. An Emerging Trend: The Postmortem Right of Publicity

Although the right of publicity has clearly been established as enforceable during an individual’s lifetime, states differ greatly over whether the right is descendible.⁷⁷ In finding a solution to this discrepancy, many courts have determined whether the right of publicity should be descendible by applying analogies to the issue.⁷⁸ When the right of publicity was initially introduced, it was analogized to the right of privacy.⁷⁹ In accordance with this view, since the

⁷¹ 474 N.E.2d 580, 583–84 (N.Y. 1984). In the case, a model claimed that an advertiser used a picture of him without his consent in violation of section 51 of the New York Civil Rights Law and the common law right of publicity. *Id.* at 581.

⁷² *Id.* at 584.

⁷³ *Id.* The court rejected past courts’ notion that the statutory right to privacy was limited to cases for which it was originally enacted—namely, celebrities’ wish to be left alone—and thus “would not preclude the recognition in [New York] of a common-law ‘right of publicity.’” *Id.*

⁷⁴ *Id.* The court clearly set out the circumstances that would allow a claim under the New York Civil Rights Law statutes (and not the now-eliminated independent common-law right of publicity): “where the written consent to use the plaintiff’s name or picture for advertising or trade purposes has expired or the defendant has otherwise exceeded the limitations of the consent.” *Id.* While the court recognized that such violated right may “more accurately be described as a right of publicity,” the court reasoned that the right of publicity falls under the right of privacy, which is “exclusively statutory” in the state of New York, thus eliminating any cause of action under an “independent common-law right of publicity.” *Id.*

⁷⁵ 894 F.2d 579, 586 (2d Cir. 1990). In the case, the heirs of George “Babe” Ruth sued the producers of a calendar that contained the name and images of Ruth. *Id.* at 581; see Fuller, *supra* note 65, at 328–29.

⁷⁶ *Pirone*, 894 F.2d at 585–86 (citing *Stephano*, 474 N.E.2d at 584).

⁷⁷ See Felcher & Rubin, *supra* note 8, at 1125 (“The descendibility of publicity rights has proved to be a troublesome issue, because of both the nature of the claims presented and the distinctions to be made in separating the private and the public domains.”); see also Rosenthal, *supra* note 12, at 245–47.

⁷⁸ Felcher & Rubin, *supra* note 8, at 1127. The author discusses both the advantages and disadvantages of adopting an analogical approach. An advantage of such process is that it allows previously developed logic and conclusions to bear on future decisions concerning the right of publicity. *Id.* Alternatively, while such approach may enable greater predictability in the courtroom, analogies tend to force a formally-established line of reasoning on every issue encountered by right of publicity cases. *Id.* at 1127–28.

⁷⁹ *Id.* at 1127; see McCarthy, *supra* note 5, at 134.

right of privacy was established as a personal right that terminated with the death of the individual claiming it, such parallel led to the conclusion that the right of publicity was also indivisible.⁸⁰

Recently, however, a growing trend has emerged that analogizes the right of publicity to property rights.⁸¹ Courts and commentators have justified this comparison based on the joint purpose of publicity rights: to protect an individual against misappropriation for commercial value of his or her name or likeness and to grant the individual exclusive control over his or her name or likeness.⁸² Accordingly, damages in right of publicity cases are measured by “the commercial injury to the business value of personal identity.”⁸³ Since most forms of property are transferable at death, this line of reasoning allows for the conclusion that an individual’s property right in his or her name or likeness is also devisable.⁸⁴ While only a few states initially recognized a postmortem right of publicity, many states have come to recognize such right—by explicit statute or under common law⁸⁵—while others have clearly rejected a claim for the right.⁸⁶ As the debate over postmortem rights of publicity continues, two states with close ties have taken opposing stances: California and New York.⁸⁷

In response to the *Lugosi* and *Guglielmi* courts’ rulings that rights of publicity are not descendible,⁸⁸ the California State Legislature vested a right of

⁸⁰ Felcher & Rubin, *supra* note 8, at 1127. Accordingly, the right of privacy is understandably terminated at death due to its concern for the “personal sensibilities of an individual.” *Id.* at 1128. Applying this reasoning, a celebrity’s heirs would be prevented from claiming a violation of a right of publicity regarding the deceased celebrity. *Id.* at 1127.

⁸¹ *Id.*; see also Rosenthal, *supra* note 12, at 245–46.

⁸² Felcher & Rubin, *supra* note 8, at 1127. The author further contrasts the interest protected by the right of publicity—economic interest that encourages “individual enterprise and creativity by allowing people to profit from their own efforts”—to the interest satisfied by the right of privacy—“an individual’s desire to avoid unwanted public exposure.” *Id.* at 1128.

⁸³ Roesler, *supra* note 66, at 4.

⁸⁴ *Id.* Infringement of an individual’s right of publicity is thus determined “by the fair market value of the plaintiff’s identity, the infringer’s profits, and damage to the licensing opportunities for the plaintiff’s identity.” *Id.* Alternatively, damages in privacy cases are measured according to the injured individual’s emotional distress. *Id.* at 3–4.

⁸⁵ Rosenthal, *supra* note 12, at 245–46. States that have come to recognize a postmortem right of publicity include the following: California (seventy years after death, CAL. CIV. CODE § 3344.1 (West 1997)); Connecticut (recognized under common law); Florida (forty years after death if claimed by the spouse, issue, or bequest, FLA. STAT. ANN. § 540.08 (West 2009)); Georgia (recognized under common law); Illinois (fifty years after death, 765 ILL. COMP. STAT. ANN. 1075/1–1075/30 (West 2009)); Indiana (one hundred years after death, IND. CODE ANN. §§ 32-36-1-1 to -20 (West 2009)); Kentucky (fifty years after death, KY. REV. STAT. ANN. § 391.170 (West 2009)); Nebraska (NEB. REV. STAT. § 20-202 (2009)); Nevada (fifty years after death, NEV. REV. STAT. § 597.790 (2009)); New Jersey (recognized under common law); Ohio (sixty years after death, OHIO REV. CODE ANN. § 2741.02 (West 2009)); Oklahoma (one hundred years after death, OKLA. STAT. ANN. tit. 12, § 1448 (West 2007)); Tennessee (ten years after death with extension available, TENN. CODE ANN. §§ 47-25-1102 to -07 (West 2009)); Texas (fifty years after death, TEX. PROP. CODE ANN. §§ 26.001-.012 (Vernon 2009)); Utah (UTAH CODE ANN. §§ 45-3-1 to -6 (West 2008)); Virginia (twenty years after death, VA. CODE ANN. § 8.01-40 (West 2009)); Washington (ten years after death with exception for persons whose identity has “commercial value,” WASH. REV. CODE §§ 63.60.010-040 (2009)). Rosenthal, *supra* note 12, at 245–46.

⁸⁶ Rosenthal, *supra* note 12, at 246; see also Zuber, *supra* note 46, at 31 & 34 n.61.

⁸⁷ See *infra* notes 88–97 and accompanying text.

⁸⁸ Heller, *supra* note 6, at 549. The California State Legislature’s decision was also prompted

publicity in celebrities' heirs by enacting California Civil Code section 990 in 1985.⁸⁹ The new statute allowed a celebrity's right of publicity to pass to his or her heirs, who then had the opportunity to prevent the unauthorized use of the celebrity's name and likeness.⁹⁰ In 1999, the California State Legislature amended section 990 and incorporated it into section 3344; consequently, section 990 became section 3344.1.⁹¹ The amended statute grants the heirs and transferees the right to consent to the use of the "name, voice, signature, photograph, or likeness . . . or in products, merchandise, or goods, or for purposes of advertising or selling" concerning the "deceased personality."⁹² Under the statute, "deceased personality" is defined as an individual who died after 1935 and "whose name or personality had commercial value at the time of his [or her] death."⁹³ Essentially, the law created "property rights"—freely transferable by contract or testamentary documents—that extended for seventy years after the celebrity's death.⁹⁴

largely by the Screen Actors Guild, celebrities, and the heirs of deceased celebrities. *Id.* Conversely, the legislation was opposed by the American Civil Liberties Union and various copyright holders—including the Motion Picture Association of America, the Alliance of Motion Picture and Television Producers, CBS, and NBC. *Id.* at 550.

⁸⁹ CAL. CIV. CODE § 990 (West 2007) (current version at § 3344.1 (West 1997)); see Roesler, *supra* note 66, at 5.

⁹⁰ Roesler, *supra* note 66, at 5. Section 990 prevented unauthorized use of the celebrity's persona for a period of fifty years. CAL. CIV. CODE § 990 (West 2007). However, this term was later extended to seventy years. See § 3344.1.

⁹¹ CAL. CIV. CODE § 3344.1 (West 1997).

⁹² *Id.* Section 3344.1(a)(1) provides, in pertinent part:

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

§ 3344.1(a).

⁹³ Heller, *supra* note 6, at 550.

⁹⁴ *Id.*; Roesler, *supra* note 66, at 5. Section 3344.1(b) provides:

The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or person.

§ 3344.1(b). Section 3344.1(c) and (d) also clarified the order in which surviving heirs inherited the deceased personality's rights. Section 3344.1(c) provides:

The consent required by this section shall be exercisable by the person or persons to whom the right of consent, or portion thereof, has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent, or portion thereof, has passed in accordance with subdivision (d).

§ 3344.1(c). Section 3344.1(d) provides:

Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights: [the surviving spouse and surviving children or grandchildren, or the surviving parents of the deceased personality].

Alternatively, New York has elected to restrict the concept of publicity rights within the limits of the state's privacy statute.⁹⁵ Since the right of privacy under the statute is recognized as purely personal, the right of publicity accordingly can only be enforced by the actual individual whose name or likeness has been misappropriated and cannot be transferred.⁹⁶ Moreover, since the New York statute has been interpreted as "clearly limited" to living persons, the courts have concluded that no postmortem right of publicity exists in the state of New York.⁹⁷ However, in the summer of 2008, for the second year in a row, New York lawmakers proposed two bills—Senate Bill 6005 and Assembly Bill 8836—to amend sections 50 and 51 to create a retroactive postmortem right of publicity for any deceased individual who died within seventy years prior to the enactment of the proposed law.⁹⁸ Similar to California's newly-amended right of publicity statute, the proposed New York legislation would create a postmortem right of publicity that is "deemed to vest retroactively to the deceased person before such person's death," enabling a transfer—including one by will—by the deceased person or his or her transferees to "occur before or at the time of death of the deceased person."⁹⁹ As expected, Monroe's heirs, as well as various celebrities and deceased celebrities' estates, have provided much support for the proposed legislation.¹⁰⁰

III. MILTON H. GREENE ARCHIVES, INC. v. CMG WORLDWIDE, INC.: FACTS AND PROCEDURAL HISTORY

A. *The Marilyn Monroe Right of Publicity Debate*

Marilyn Monroe's image was captured by various great photographers throughout the course of her life, including Milton Greene, Tom Kelley, and Sam Shaw.¹⁰¹ Since Monroe transferred her rights to such photos to the photographers, the copyrights to the images currently belong to the photographers' estates and are licensed to vendors for further commercial use.¹⁰² However, when Monroe died in

§ 3344.1(d).

⁹⁵ N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992); see *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 583–84 (1984); Mulrooney, *supra* note 38, at 1152.

⁹⁶ Mulrooney, *supra* note 38, at 1153.

⁹⁷ *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990); see *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (holding that the successors-in-interest do not have a cause of action under New York Civil Rights Law sections 50 and 51 since the statutory rights created by the law "do not survive death").

⁹⁸ Andrew J. Thomas, *Legislators to Celebrities: There's No Such Thing As Too Much (Right of Publicity)*, DAVIS WRIGHT TREMAINE LLP ENT. ADVISORY BULL., Aug. 27, 2008, http://www.dwt.com/practc/entertain/bulletins/08-08_RightofPublicity.htm#_ftn5.

⁹⁹ *Id.*

¹⁰⁰ *Id.* Living celebrities who support the bills include actors Al Pacino, Martin Sheen, and Sophia Loren and singers Liza Minnelli and Yoko Ono. *Id.* Moreover, the estates of Babe Ruth, Jackie Robinson, and Mickey Mantle have pushed for the bills' enactment. *Id.*

¹⁰¹ Heller, *supra* note 6, at 556.

¹⁰² *Id.*

August 1962,¹⁰³ she left a will, which did not expressly bequeath a right of publicity but did include a residual clause leaving the “entire remaining balance” of her estate to Lee Strasberg, Monroe’s acting coach.¹⁰⁴ Lee Strasberg later married Anna Strasberg, who became the sole beneficiary under Lee Strasberg’s will when he died and was named the administratrix of Monroe’s estate.¹⁰⁵ In 2001, Anna Strasberg was authorized to close Monroe’s estate and transfer the residuary assets to Marilyn Monroe, LLC (“MMLLC”), a Delaware company established by Anna Strasberg to control the intellectual property assets of the residuary beneficiaries of Monroe’s will.¹⁰⁶ Accordingly, MMLLC and its licensing agent, CMG Worldwide, Inc. (“CMG”), have claimed the postmortem right of publicity to Monroe’s copyrighted images and have consistently asserted that right in their dealings with venues granted licenses by the photographers’ estates.¹⁰⁷

B. New York’s Ruling on Monroe’s Right of Publicity

In 2005, MMLLC and CMG filed suit against the Shaw Family Archives, Ltd. (“SFA”)¹⁰⁸ in the United States District Court for the Southern District of Indiana, claiming SFA (representing photographers, as well as their estates and agents) violated Monroe’s right of publicity by using Monroe’s “name, image, and likeness for commercial purposes without consent.”¹⁰⁹ Plaintiffs relied on Indiana’s Right of Publicity Act, which prohibits an individual from using another’s right of publicity for commercial purposes without the owner’s

¹⁰³ *Id.*

¹⁰⁴ *Milton H. Greene Archives, Inc. v. CMG Worldwide, No. CV 05-02200 MMM (MCx)*, 2008 WL 655604, at *13–14 (C.D. Cal. Jan. 7, 2008). The residual clause of Monroe’s will provided:

All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and wheresoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:

(a) To MAY REIS the sum of \$40,000.00 or 25% of the total remainder of my estate, whichever shall be the lesser.

(b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her as set forth in ARTICLE FIFTH (d) of this my Last Will and Testament.

(c) To LEE STRASBERG the entire remaining balance.

Id. at *14.

¹⁰⁵ Heller, *supra* note 6, at 556. The determination of Anna Strasberg as the administratrix of Monroe’s estate was settled in New York County Surrogate’s Court. *Id.*

¹⁰⁶ *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 312 (S.D.N.Y. 2007).

¹⁰⁷ Heller, *supra* note 6, at 557.

¹⁰⁸ *Shaw Family Archives*, 486 F. Supp. 2d at 310. SFA is a company organized under New York law with its primary place of business in New York. *Id.* at 312. SFA claimed ownership of a series of photographs of Monroe as the heirs of photographer Sam Shaw. *Id.* at 313.

¹⁰⁹ *Id.* at 310. The original dispute arose in the state of Indiana from the sale of a T-shirt that contained a picture of Monroe and the maintenance of a website by SFA that licensed images of Monroe for use on commercial products. *Id.* at 313.

consent.¹¹⁰ Prior to being served in the Indiana action, SFA filed a separate suit against MMLLC and CMG in the Southern District of New York “seeking a declaratory judgment on whether there is any postmortem right of privacy or publicity in the name, likeness, and image of Marilyn Monroe.”¹¹¹ While the two cases were eventually consolidated in the Southern District of New York, the court determined that Indiana law continued to apply.¹¹²

The court granted SFA’s motion for summary judgment holding that regardless of Monroe’s domicile at the time of her death, “Monroe could not devise by will a property right she did not own at the time of her death in 1962.”¹¹³ The court based its ruling on three findings.¹¹⁴ First, the court confirmed that descendible postmortem rights of publicity were not recognized in California, Indiana, or New York at the time of Monroe’s death.¹¹⁵ Consequently, the court concluded that any right of publicity Monroe enjoyed during her lifetime was “extinguished at her death by operation of law.”¹¹⁶ Second, by examining the language of Monroe’s will, the court reasoned that Monroe did not intend to devise property she did not own at the time of her death—namely, a right of publicity—to her residual beneficiaries.¹¹⁷ Moreover, the court found that even if Monroe’s language in her will had demonstrated an intent to devise such property, the

¹¹⁰ *Id.*; see IND. CODE ANN. § 32-36-1-1 (West 2009) (outlining Indiana publicity rights).

¹¹¹ *Shaw Family Archives*, 486 F. Supp. 2d at 310.

¹¹² *Id.* at 311. The court determined that since SFA was “amenable to jurisdiction in Indiana,” Indiana’s choice of law principles applied to the case. *Id.* Accordingly, the court followed Indiana’s “first-to-file” rule, which gave priority to the Indiana lawsuit filed by MMLLC and CMG over the New York lawsuit later filed by SFA. *Id.*

¹¹³ *Id.* at 314.

¹¹⁴ *Id.* at 314–20.

¹¹⁵ *Id.* at 314. The court reached this holding by reviewing prior case law and each state’s relevant publicity statute. Relying on *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990), the court found that New York law’s privacy statute limited a right of publicity to living persons. *Shaw Family Archives*, 486 F. Supp. 2d at 314. The court then reviewed California Civil Code section 3344.1 and found that the state did not recognize a postmortem right of publicity until it passed its statute in 1984, twenty-two years after Monroe’s death. *Id.*; see also CAL. CIV. CODE § 3344.1 (West 1997). While the court found that California recognized a common law right of publicity prior to 1984, the court maintained that such right was not divisible. *Shaw Family Archives*, 486 F. Supp. 2d at 314. Lastly, the court concluded that Indiana did not recognize a postmortem right of publicity until 1994 when it passed the Indiana Right of Publicity Act. *Id.*; see IND. CODE ANN. §§ 32-36-1-1 to -20 (West 2009).

¹¹⁶ *Shaw Family Archives*, 486 F. Supp. 2d at 314. The court then addressed MMLLC’s argument that although the right of publicity did not exist at the time of Monroe’s death, later statutes bequeathed such right to Monroe and to her heirs. *Id.* at 314–17. Applying Indiana law, which required that the law of the state in which the testator was domiciled at the time of his or her death apply, the court examined California and New York’s probate laws. *Id.* (citing *White v. United States*, 511 F. Supp. 570 (S.D. Ind. 1981)). Although disputed issues of fact existed concerning the domicile of Monroe, the court found such dispute irrelevant since neither state “permitted a testator to dispose by will of property [he or] she does not own at the time of [his or] her death.” *Id.* at 315. Specifically, the court held that in New York State, property not owned by the testator at the time of his or her death cannot be disposed by will. *Id.* (“A disposition by the testator of all his property passes all of the property he was entitled to dispose of at the time of his death.”) (internal quotation marks omitted) (emphasis added) (quoting N.Y. EST. POWERS & TRUSTS LAW § 3-3.1 (McKinney 1998)). The court found California probate law similar to that of New York in that it requires a testator to control all property he or she intends to transfer at the time of his or her death. *Id.* (“A will passes all property the testator owns at death, including property acquired after execution of the will.”) (internal quotation marks omitted) (emphasis added) (quoting CAL. PROB. CODE § 21105 (West 1991)).

¹¹⁷ *Id.* at 317–19.

disposition would be rendered invalid “because she had no legal right to dispose of property that did not exist at the time of her death.”¹¹⁸ Third, the court held that neither the California nor the Indiana¹¹⁹ postmortem right of publicity statute allowed an individual to pass a statutory property right by will that he or she did not possess at the time of his or her death.¹²⁰ Regarding California, the court reasoned that since section 3344.1 only allows an individual to transfer his or her right of publicity “by contract or by means of a trust or testamentary documents”¹²¹—an act that cannot be accomplished by a deceased individual—a postmortem transfer cannot occur.¹²² Similarly, the Indiana statute requires transfer by “contract, license, gift, trust, or testamentary document”—each of which requires a living testator.¹²³ Accordingly, the court concluded that neither statute granted a right of publicity that could be transferred through the will of a deceased personality—like Monroe—who had died by the time of the statute’s enactment.¹²⁴

C. California’s First Ruling on Monroe’s Right of Publicity

The estate of Milton H. Greene Archives, Inc. (“MHG”), a second Monroe photographer, filed a contemporaneous action against CMG, MMLLC, and Anna Strasberg in the United States District Court for the Central District of California.¹²⁵ As in New York, CMG and MMLLC (“Plaintiffs”) argued that they owned the right of publicity “in and to the Marilyn Monroe name, image, and persona”¹²⁶ as granted by Indiana’s postmortem right of publicity statute.¹²⁷ The court granted MHG’s motion for summary judgment, holding that Plaintiffs lacked

¹¹⁸ *Id.* at 318 (“A testator is presumed, as a matter of law, to know that he cannot dispose of property over which he has no testamentary power, including property he does not own at the time of his death.”).

¹¹⁹ New York was not considered because it does not have a postmortem right of publicity statute. *Id.* at 314.

¹²⁰ *Id.* at 319.

¹²¹ *Id.* at 319 (quoting CAL. CIV. CODE § 3344.1 (West 1997)).

¹²² *Shaw Family Archives*, 486 F. Supp. 2d at 319 (“Since a testamentary transfer has no effect until the testator’s death, [a transfer of a publicity right] could not be effectuated ‘before death’ for purposes of the California statute.”) (internal quotation marks omitted).

¹²³ *Id.* (quoting IND. CODE ANN. §§ 32-36-1-1 to -20 (West 2009)).

¹²⁴ *Id.* at 320. The court did not decide the question of where Monroe was domiciled at the time of her death because the court felt that such a decision would not impact the outcome of the case since the relevant laws of both California and New York were similar. *Id.* at 315.

¹²⁵ *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. 05-02200 MMM (MCx)*, 2008 WL 655604, at *1 (C.D. Cal. Jan. 7, 2008). The case was consolidated with another action filed in the Central District of California, *Tom Kelley Studio, Inc. v. CMG Worldwide, Inc.* (CV 05-2568). *Id.* Later, the court consolidated two additional actions with the pending case: *CMG Worldwide, Inc. v. Tom Kelley Studios* (CV 05-5973) and *CMG Worldwide, Inc. v. The Milton H. Greene Archives* (CV 05-7627). *Id.* These later additions were originally filed by CMG and MMLLC in the United States District Court for the Southern District of Indiana where they were eventually transferred to California. *Id.*

¹²⁶ *Id.* Specifically, Plaintiffs asserted that Defendants infringed Monroe’s right of publicity by using her name, image, and likeness “in connection with the sale, solicitation, promotion, and advertising of products, merchandise, goods and services” without first seeking the consent and authorization of Plaintiffs. *Id.* (internal quotation marks omitted).

¹²⁷ *Id.*; see §§ 32-36-1-1 to -20.

standing to assert Monroe's right of publicity.¹²⁸ Specifically, the court reasoned that Monroe "could not have devised a non-statutory right of publicity through her will, and also could not have devised subsequently created statutory rights that did not come into existence until decades after her death."¹²⁹ In reaching this decision, Judge Morrow examined California's right of publicity statute¹³⁰ and the legislative intent behind the statute, finding that for personalities who died before the statute's enactment, the statute vested the postmortem right of publicity "in designated heirs rather than in the 'personality' himself or herself."¹³¹

However, Judge Morrow reached her decision "with reluctance" due to the detrimental effect such ruling would have on charities who had been bestowed the residuary estates of celebrities who had died before the enactment of the California statute in 1984.¹³² In accordance with the court's order, such charities would be "divested" of the deceased celebrity's right of publicity.¹³³ Thus, while limiting the extent of postmortem rights of publicity—and essentially echoing the New York court's decision—Judge Morrow strongly noted that the ruling did not prevent "the California or Indiana legislature from enacting a right of publicity statute that vested the right directly in the residuary beneficiaries of a deceased personality's estate, or in the successors-in-interest of those residuary beneficiaries."¹³⁴

D. Legislative Response to the Limitation on Monroe's Postmortem Right of Publicity

Six weeks after the United States District Court for the Central District of California's order was entered, the California State Legislature accepted Judge Morrow's invitation to enact a postmortem right of publicity.¹³⁵ State Senator Shelia Kuehl amended Senate Bill 771 ("SB 771") to abrogate the New York and California courts' summary judgment rulings and to clarify the meaning of California's right of publicity statute.¹³⁶ Supported by the Screen Actors Guild¹³⁷

¹²⁸ *Milton*, 2008 WL 655604, at *1.

¹²⁹ *Id.*

¹³⁰ *Id.*; see CAL. CIV. CODE § 3344.1 (West 1997).

¹³¹ *Milton*, 2008 WL 655604, at *1. The court based its reasoning on the presumption that the California State Legislature created the statute while remaining conscious of the common law prescription that "a testator cannot devise property not owned at the time of death." *Id.* Moreover, the court believed its interpretation of the statute was correct in light of the relevant legislative history, which revealed no legislative intent that was contrary to the established principles of property and probate law. *Id.*

¹³² *Id.* at *2. Once section 3344.1 of the California Civil Code was enacted, these charities believed that they controlled the celebrity's right of publicity. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Consequently, federal courts in both California and New York interpreted California's postmortem right of publicity statute as prohibiting publicity rights from passing under a deceased celebrity's will if that celebrity died before January 1, 1985—the effective date of section 3344.1 of the California Civil Code. *But see* *Milton H. Green Archives, Inc. v. CMG Worldwide, Inc.* 568 F. Supp. 2d 1152, 1197 (C.D. Cal. 2008) (holding that celebrities who died within seventy years prior to 1985 are deemed to possess a posthumous right of publicity at the time of their death).

¹³⁵ *Milton*, 2008 WL 655604 at *2.

¹³⁶ *Id.*; see also S.B. 771, 2007 Leg., Reg. Sess. § 2 (Cal. 2007) ("It is the intent of the Legislature

and numerous celebrities,¹³⁸ SB 771 passed both houses of the California State Legislature and was signed into law by Governor Schwarzenegger on October 10, 2007.¹³⁹ SB 771 expressly provides that all celebrities who died within seventy years of January 1, 1985, have a retroactive postmortem right of publicity that is deemed to have existed at the time of his or her death.¹⁴⁰ Additionally, SB 771 asserts that a deceased celebrity's postmortem right of publicity "shall vest in the persons entitled to [receive it] under the testamentary instrument of the deceased personality effective as of the date of his or her death."¹⁴¹ Furthermore, SB 771

to abrogate the summary judgment orders entered in *The Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, . . . and in *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.* . . ."), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_771_bill_20071010_chaptered.html.

¹³⁷ See Screen Actors Guild, Contact the Governor in Support of California Assembly Bill SB 771, <http://www.sag.org/content/contact-governor-support-california-assembly-bill-sb-771> (last visited Oct. 12, 2009). Screen Actors Guild urged its members to write to Governor Schwarzenegger asking him to sign SB 771 into law. *Id.* The organization posted a sample letter on its website for members to use when contacting Governor Schwarzenegger. *Id.* The letter stated, in pertinent part:

SB 771 is critical to protect creative artists from constant attempts to commercially exploit their images [It] must be enacted to protect artists' likeness from potentially offensive commercial uses and to make sure that their legends and legacies are not corrupted. The current law must be clarified in order to ensure that a deceased personality's images will be protected in accordance with his or her wishes. I believe SB 771 will accomplish this objective.

Id.

¹³⁸ Sheila Kuehl, California State Senator, Senate Judiciary Committee, SB 771 Bill Analysis 1 (Sept. 6, 2007), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_771_cfa_20070906_123814_sen_comm.html. John Wayne's son, President of Wayne Enterprises and a supporter of SB 771, expressed that the use of John Wayne's name and likeness enables the estate to support the John Wayne Cancer Foundation and the John Wayne Cancer Institute. *Id.* at 9. He added that "legislative protections regarding rights of publicity assist [the estate] in assuring that the use of John Wayne's personality is meaningful and appropriate." *Id.* Wayne's son may be justified in his worry about the damage to his father's image if exploitation is not limited. See Patrick McGreevy, *Bill Attempts to Protect Dead Stars' Images*, L.A. TIMES, July 23, 2007, at B1, available at http://msl1.mit.edu/furdlog/docs/latimes/2007-07-23_latimes_portmortem_publicity_rights.pdf ("There was a public debate in the late 1990s when movie images of John Wayne were digitally inserted into a Coors beer commercial after his death."). Additional deceased celebrities whose rights of publicity provide support to charitable organizations include Albert Einstein, Janis Joplin, Alfred Hitchcock, Elvis Presley, Jimi Hendrix, and John Steinbeck. Kuehl, *supra*, at 8–10.

¹³⁹ *Milton*, 2008 WL 655604, at *2. Although SB 771 received substantial support from celebrities, deceased celebrities' estates, and charitable organizations, individual photographers and their estates strongly opposed the bill's retroactive effect, claiming that such effect would cause substantial damage to "any business that is based on photographs or reproductions of famous people." Kuehl, *supra* note 138, at 10.

¹⁴⁰ *Milton*, 2008 WL 655604, at *3.

¹⁴¹ S.B. 771, § 1. SB 771 amends section 3344.1(b) to provide, in pertinent part:

The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985. The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this

clearly provides that a celebrity's postmortem right of publicity is retroactive, applying to deceased personalities who died *before* January 1, 1985.¹⁴²

Following the passage of SB 771, on November 21, 2007, MMLLC filed a motion for reconsideration of the United States District Court for the Central District of California's order granting summary judgment for MHG.¹⁴³ Specifically, MMLLC sought reconsideration of the court's prior three conclusions: (1) that under either California or New York law, Monroe lacked the testamentary capacity to devise a right of publicity through the residual clause of her will; (2) that Monroe's estate was not an entity capable of holding title to a right of publicity; and (3) that MMLLC and CMG lack the requisite standing to assert Monroe's right of publicity.¹⁴⁴ Judge Morrow granted MMLLC's motion for reconsideration.¹⁴⁵ Judge Morrow's decision is analyzed in the next section.¹⁴⁶

IV. THE MILTON H. GREENE ARCHIVES, INC. V. CMG WORLDWIDE, INC. DECISION

A. Judge Morrow's Opinion: Right of Publicity

District Judge Margaret M. Morrow introduced her opinion with a brief recitation of the facts¹⁴⁷ followed by a detailed procedural history.¹⁴⁸ Judge Morrow then began the discussion with an explanation of the requirements that

section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness, regardless of whether the contract was entered into before or after January 1, 1985.

Id. Newly-added subsection (o) offers an exception to subsection (b) for parties—here, MMLLC and CMG—who exercised postmortem rights of publicity under section 3344.1 prior to SB 771. *Id.* Subsection (o) provides:

Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (d), other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b), that exercise shall not be affected by subdivision (b). In such a case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d), other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes.

Id.

¹⁴² *Id.* Newly-added subsection (p) provides: "The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985." *Id.*

¹⁴³ *Milton*, 2008 WL 655604, at *2.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *13.

¹⁴⁶ *See supra* Part IV.

¹⁴⁷ *Milton*, 2008 WL 655604, at *1.

¹⁴⁸ *Id.* at *1–2.

must be satisfied in order for a motion for reconsideration to be “proper”¹⁴⁹ followed by a brief legislative history of SB 771.¹⁵⁰

Next, Judge Morrow determined the effect of the legislature’s enactment of SB 771 on the present case.¹⁵¹ Applying the laws of statutory construction, she recognized that a statute only has “retrospective effect when it substantially changes the legal consequences of past events[,]”¹⁵² not when it merely clarifies existing law.¹⁵³ However, Judge Morrow also explained that a clarifying statute can be applied to cases predating the statute’s enactment without being viewed as “retroactive” if such statute merely serves as “a statement of what the law has always been.”¹⁵⁴ In determining whether SB 771 was enacted to clarify California’s existing right of publicity statute or to create a new law, Judge Morrow examined the circumstances surrounding the legislature’s change to the statute—namely, the ambiguity present in the current right of publicity statute, the legislature’s intent in passing SB 771, and the speed at which SB 771 was enacted.¹⁵⁵ MMLLC argued that SB 771 clarified California’s right of publicity

¹⁴⁹ *Id.* at *2. Local Rule 7-18 of the Central District of California limits when a party can seek reconsideration of a court’s prior decision on a motion. *Id.* Under Local Rule 7-18, a motion for reconsideration is “proper” only where the moving party demonstrates:

- (a) [A] material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Id. (quoting C.D. Cal. R. 7-18). Since MMLLC did not state the basis on which it sought reconsideration under Local Rule 7-18, Judge Morrow concluded that MMLLC based its argument on the belief that the legislature’s attempt to clarify section 3344.1 constituted “a material difference in fact or law” that could not have been shown to the court prior to its summary judgment ruling, or that the enactment of SB 771 qualified as “the emergence of new material facts or a change of law” overruling the prior ruling. *Id.* (quoting C.D. Cal. R. 7-18).

¹⁵⁰ *See supra* notes 132–35 and accompanying text. Reviewing the Senate Judiciary Committee’s report, Judge Morrow concluded that Senator Kuehl “believed that the court erred in ruling that Marilyn Monroe did not possess a statutory right of publicity when she died and thus that the right could not pass to the residuary beneficiary under her will.” *Milton*, 2008 WL 655604, at *3.

¹⁵¹ *Milton*, 2008 WL 655604, at *4.

¹⁵² *Id.* (quoting *W. Sec. Bank v. Superior Court*, 933 P.2d 507, 513 (Cal. 1997)).

¹⁵³ *Id.* at *5 (“[A] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment.” (quoting *W. Sec. Bank*, 933 P.2d at 514)).

¹⁵⁴ *Id.* (citing *In re Marriage of Fellows*, 138 P.3d 200, 202 (Cal. 2006)). As set forth in the case:

[T]he enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; . . . it simply states the law as it was all the time, and no question of retroactive application is involved.

Id. (quoting *City of Redlands v. Sorensen*, 221 Cal. Rptr. 728, 732 (Ct. App. 1985)).

¹⁵⁵ *Id.* Judge Morrow remarked that a relevant circumstance in this examination was “whether the legislature’s changes are a prompt reaction to the emergence of a novel question of statutory interpretation.” *Id.* (“If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.” (quoting *RN Review for Nurses, Inc. v. California*, 28 Cal. Rptr. 2d 354, 357 (Ct. App. 1994))). Judge Morrow also asserted that a legislature’s declaration of intent when enacting the statute may reflect the entity’s purpose in achieving a retrospective result. *Id.* at *6 (“Thus, where a statute provides that it clarifies or

statute in two primary ways: that a postmortem right of publicity in California existed at the time of death of a celebrity prior to January 1, 1985,¹⁵⁶ and that the right of publicity is descendible by any testamentary instrument executed before or after January 1, 1985.¹⁵⁷

Applying the guidelines for statutory construction established by the California Supreme Court and examining the circumstances surrounding the legislature's passage of SB 771, Judge Morrow reasoned that SB 771 constitutes "a clarification of existing law."¹⁵⁸ First, she held that SB 771 was passed in order "to clarify potential ambiguities" in section 3344.1 that have led to confusion among deceased celebrities' beneficiaries and heirs.¹⁵⁹ Noting that various charitable institutions, who exist as recipients of deceased celebrities' residuary estates, have relied on their ability to support themselves through the exploitation of deceased celebrities' rights of publicity, Judge Morrow found it appropriate for the legislature to clarify the statute to protect such significant expectations.¹⁶⁰ Furthermore, Judge Morrow established that SB 771 clearly confirms that the right of publicity recognized by section 3344.1 "existed at the time a predeceased celebrity died; sets forth the manner in which the right of publicity can be transferred; and declares that the rights recognized by [section] 3344.1 are

declares existing law, it is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment." (quoting *W. Sec. Bank*, 933 P.2d at 515)).

¹⁵⁶ *Id.* MMLLC argued the legislature's intent that a celebrity who died prior to the statute's passage still held the right of publicity at the time of death is illustrated "from the fact that section 3344.1 'always' defined a 'deceased personality' as any person who died within seventy years of January 1, 1985." *Id.* MMLLC also found Senator Kuehl's statement that "nothing in the statute . . . indicates the Legislature intended to treat people differently depending on whether they died before or after 1985" significant. *Id.* (citing Kuehl, *supra* note 138, at 5).

¹⁵⁷ *Milton*, 2008 WL 655604, at *7.

¹⁵⁸ *Id.* at *8.

¹⁵⁹ *Id.* at *13. Judge Morrow found it significant that the meaning of section 3344.1 has never been "finally and definitively" interpreted by California's highest court. *Id.* at *8 (citing *Carter v. Cal. Dep't of Veterans Affairs*, 135 P.3d 637, 642 (Cal. Ct. App. 2006)). Judge Morrow agreed with MMLLC that the definition of "deceased personality" as stated in subsection (h) of section 3344.1 (any natural person who "died within seventy years prior to January 1, 1985") "injects ambiguity" into the language of subsection (b) of section 3344.1, which enables a deceased personality to transfer his or her right of publicity before his or her death. *Id.* at *11; *see supra* note 94 and accompanying text. Since "deceased personality" includes any individual who died within seventy years of January 1, 1985, MMLLC asserted that the California State Legislature "must have contemplated that celebrities who predeceased the enactment would be deemed to have held the right before their death and to have had the ability to transfer it via a residual clause in their will." *Milton*, 2008 WL 655604, at *11. Judge Morrow reasoned that this possible ambiguity is addressed by SB 771. *Id.* Moreover, she believed that SB 771 "makes explicit what was at best implicit, and at worst ambiguous, in the original version of [section] 3344.1." *Id.*

¹⁶⁰ *Milton*, 2008 WL 655604, at *11. Judge Morrow further explained—and reiterated her previous worry—that while such charitable organizations recognize that the celebrity whose right of publicity they hold died prior to 1985, they believed that the celebrity was able to transfer such right in accordance with section 3344.1. *Id.*; *see infra* notes 132–34 and accompanying text. To illustrate, Albert Einstein, who died in 1955, bequeathed his right of publicity to the Hebrew University of Jerusalem, a university co-founded by Einstein. *Milton*, 2008 WL 655604, at *11. While Defendants argued that SB 771 cannot qualify as a clarification since it substantially changes prior law, Judge Morrow explained that the material changes implemented by SB 771 are not viewed as modifications due to the dire need to dispel the ambiguities present in the original version of section 3344.1. *Id.* at *12.

retroactive to celebrities who died before January 1, 1985.”¹⁶¹ Second, Judge Morrow found it indicative that the legislature explicitly stated that it was its intent when passing SB 771 to clarify existing law.¹⁶² As highlighted by MMLLC, the legislative history of SB 771 contains several statements indicating that the bill was passed in order to clarify the meaning of the existing right of publicity statute in California.¹⁶³ Lastly, Judge Morrow recognized the importance in the timing of SB’s passage into law.¹⁶⁴ In agreement with MMLLC, Judge Morrow reasoned that the fact that “SB 771 was introduced, passed, and signed into law within five months of the court’s order” signified that the court should respect the legislature’s intent to clarify existing law.¹⁶⁵

After recognizing SB 771 as a new law that clarifies California’s postmortem right of publicity statute, Judge Morrow concluded that the court must reconsider its prior ruling that MMLLC lacks standing to argue Defendants’ infringement of Monroe’s right of publicity.¹⁶⁶ As clarified, section 3344.1 establishes that Monroe’s right of publicity existed at the time of her death in 1962.¹⁶⁷ Since Monroe did not expressly bequeath her right of publicity in her will, Judge Morrow

¹⁶¹ *Milton*, 2008 WL 655604, at *12. By providing such clear declarations, Judge Morrow concluded that SB 771 eliminates the future need to research numerous legal sources in order to fully and accurately understand the statute’s meaning. *Id.*

¹⁶² *Id.* at *8 (“In interpreting a statute, a California court must determine legislative intent so as to effectuate the purpose of the law.”).

¹⁶³ *Id.*; see Kuehl, *supra* note 138, at 1 (“SB 771 intends to clarify the Legislature’s intent to make the protections under 3344.1 of the Civil Code applicable to deceased personalities who died between January 1, 1915 and January 1, 1985, the seventy year period of protection under the statute.”). Moreover, SB 771’s legislative history highlights that the bill “would indeed clarify 3344.1 in several ways,” effectively abrogating the court’s prior summary judgment order. See Kuehl, *supra* note 138, at 5.

¹⁶⁴ *Milton*, 2008 WL 655604, at *9.

¹⁶⁵ *Id.* *7. “[I]n June 2007, after the court entered its May 14, 2007 order construing the statute,” Senator Kuehl amended SB 771 to address section 3344.1. *Id.* at *9. Once amended, the bill passed in the Assembly without a single negative vote. *Id.* On September 7, 2007, SB 771 was approved by the Senate—again, receiving not one negative vote. *Id.* “On October 10, 2007, . . . [a mere] five months after the court entered a final order, Governor Schwarzenegger signed [SB 771] into law.” *Id.*; see *W. Sec. Bank v. Superior Court*, 933 P.2d 507, 515 (Cal. 1997) (“If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature’s action its intended effect.”). Judge Morrow recognized a “direct link between the court’s May 14, 2007 decision and SB 771” due to the Senate Judiciary Committee’s clear description of how Monroe’s right of publicity would be transferred under SB 771 direction. *Milton*, 2008 WL 655604, at *7. Specifically, Monroe’s postmortem right of publicity would have initially passed to Lee Strasberg under the residuary clause of Monroe’s will. *Id.* Next, the right would have been transferred via will to Lee Strasberg’s wife, Anna Strasberg. *Id.* This transfer would have vested Anna Strasberg with the power to transfer the right to MMLLC. *Id.* Lastly, MMLLC can license the ability to use Monroe’s image and likeness—as granted by the right of publicity—to CMG. *Id.* Accordingly, the legislature clearly intended both to “abrogate the court’s interpretation of [section] 3344.1” and to “delineate how the statute should be applied” in the present case. *Id.*; see Kuehl, *supra* note 138, at 6. Moreover, Judge Morrow squashed Defendants’ argument that the court’s interpretation of SB 771 conflicted with general probate law. *Milton*, 2008 WL 655604, at *13. Under SB 771, a celebrity owns his or her right of publicity at the time of death. *Id.* at *13 n.33. Such language clearly conforms to probate law, which only considers what a decedent owned at the time of death when interpreting a will. *Id.* Accordingly, Monroe clearly had the power to transfer her right of publicity—a property right she owned at the time of her death—through the residuary clause of her will. *Id.*

¹⁶⁶ *Milton*, 2008 WL 655604, at *13.

¹⁶⁷ *Id.*

next examined the residual clause of Monroe's will.¹⁶⁸ Finding that the right of publicity existed at the time of Monroe's death and that such right was not expressly bestowed in her will, Judge Morrow concluded that the right was transferred under the will's residual clause to Lee Strasberg and other residual beneficiaries.¹⁶⁹ Accordingly, even though both Monroe and Lee Strasberg died prior to the enactment of section 3344.1 in 1985, Monroe's right of publicity "passed to [Lee] Strasberg as Monroe's residuary beneficiary at the time of her death, and from [Lee] Strasberg to Anna Strasberg at the time of his death."¹⁷⁰ Thus, since MMLLC was the final recipient of Monroe's right of publicity, Judge Morrow reasoned that MMLLC currently possessed the right and clearly had standing to challenge Defendants' alleged infringement of such right.¹⁷¹

Lastly, Judge Morrow recognized that her decision highlights the stark and significant differences between the laws of California and New York—the two states in which Monroe could have been domiciled at the time of her death—regarding the right of publicity.¹⁷² Under California's newly-clarified section 3344.1, MMLLC was able to argue Monroe's right of publicity, whereas in New York, Monroe's right of publicity was extinguished at the time of her death and prohibited MMLLC from arguing any claims with respect to this right.¹⁷³ Accordingly, since an individual can only have one domicile at a time,¹⁷⁴ the parties' factual dispute regarding Monroe's domicile at the time of her death becomes relevant in the present case.¹⁷⁵ Consequently, Judge Morrow concluded that the numerous factors that must be considered in determining an individual's domicile required that the issue of Monroe's domicile be deferred until the parties could produce sufficient evidence to permit the court to make such determination.¹⁷⁶

¹⁶⁸ *Id.* at *14; *see supra* note 104 and accompanying text.

¹⁶⁹ *Milton*, 2008 WL 655604, at *14.

¹⁷⁰ *Id.* at *14 n.37. Judge Morrow reasoned that such series of transactions of the right of publicity is granted by section 3344.1 as clarified by SB 771. *Id.* at *14.

¹⁷¹ *Id.* Judge Morrow's decision correctly followed the principles of property law whereby an individual has a transferable right of publicity to exclusively protect and control the economic value of his or her name and likeness. *See Felcher & Rubin, supra* note 8, at 1127. Moreover, Judge Morrow recognized and honored the goals of the California State Legislature in granting an individual—who may or may not have been alive at the time the right of publicity statute was officially enacted—the right to continue such protection and control over his or her identity for a specific period after his or her death. *See Kuehl, supra* note 138.

¹⁷² *Milton*, 2008 WL 655604, at *14–15.

¹⁷³ *Id.* Under New York law, the right of publicity is exclusively statutory, is personal to the individual, and is extinguished upon his or her death. *Id.* at *15; *see supra* notes 95–97 and accompanying text.

¹⁷⁴ *Milton*, 2008 WL 655604, at *15. An individual's domicile is defined as his or her "permanent home, where [he or] she resides with the intention to remain or to which [he or] she intends to return." *Id.* (quoting *Gaudin v. Remis*, 379 F.3d 631, 636 (C.D. Cal. 2008); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *15–16. Judge Morrow stated a partial list of factors to be used in determining domicile, including an individual's "current residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes." *Id.* at *15. Judge Morrow also briefly discussed the

B. Judge Morrow's Opinion: Domicile

On July 31, 2008, Judge Morrow ended the Monroe dispute once and for all when she determined that CMG and MMLLC were estopped from asserting that Monroe was domiciled in California at the time of Monroe's death.¹⁷⁷ After analyzing a variety of factors—specifically, statements made by Monroe's estate to the California Inheritance Tax Appraiser indicating that Monroe was a New York resident—Judge Morrow concluded that Monroe was domiciled in New York at the time of her death.¹⁷⁸ Accordingly, California's postmortem right of publicity was inapplicable as to Monroe, and, under New York law, Monroe's right of publicity was extinguished at the time of her death.¹⁷⁹

V. IMPACT OF THE MILTON H. GREENE ARCHIVES, INC. V. CMG WORLDWIDE, INC.
DECISION

A. Generally

Judge Morrow's holding that the right of publicity is descendible and that such right was possessed by a celebrity who died within seventy years of the enactment of section 3344.1 in 1985 proves to be a major win for the estates of deceased celebrities.¹⁸⁰ However, the decision also highlights the shortcomings of New York's right of publicity statute and the need for the New York State Legislature to adopt a similar postmortem right of publicity statute as that currently adopted in California. As long as New York law continues to prohibit a descendible right of publicity, the ability of a celebrity who "lives" both in California and New York to control his or her identity post death will ultimately be

evidence adduced by both parties. *Id.* at *16. Defendants based their argument that Monroe was domiciled in New York at the time of her death on representations allegedly made by MMLLC and CMG in public documents—evidence Judge Morrow did not believe bore on an individual's domicile. *Id.* MMLLC and CMG argued that the fact that Monroe purchased a home in California in 1962—the year of her death—licensed a dog in California, attended psychotherapy sessions in Los Angeles, and maintained a Connecticut driver's license with a California address all proved that Monroe was domiciled in California. *Id.*

¹⁷⁷ See *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008).

¹⁷⁸ *Id.* at 1197–99. Statements made by the executor of Monroe's estate and by counsel for the estate showed that Monroe was a non-resident of California at the time of her death and that her home in Los Angeles was a temporary residence and used primarily for when she was filming movies in California. *Id.* at 1160–61. Accordingly, Judge Morrow held that MMLLC and CMG were judicially estopped from arguing that Monroe was domiciled in California at the time of her death due to the inconsistent positions previously taken by Monroe's estate before the California Inheritance Tax Appraiser. *Id.* at 1197–99. By claiming that Monroe was a New York resident and presenting evidence that she viewed New York as her permanent residence, Monroe's estate succeeded in drastically reducing their California inheritance tax liabilities. *Id.* Therefore, Judge Morrow reasoned that MMLLC and CMG would obtain an "unfair advantage" if allowed to claim now that Monroe was actually domiciled in California at the time of her death to gain access to Monroe's postmortem right of publicity under California law. *Id.* at 1197. In effect, by minimizing their exposure to California's inheritance tax laws, Monroe's estate undermined a future claim to Monroe's postmortem right of publicity under California law. *Id.*

¹⁷⁹ See *supra* notes 95–97 and accompanying text.

¹⁸⁰ See *Milton*, 568 F. Supp. 2d 1152.

determined by a single factor—domicile.

Society as a whole will benefit immensely if New York enacts a reasonably restricted postmortem right of publicity.¹⁸¹ Such right will protect both the heirs and beneficiaries of the deceased celebrity and the vendors who have obtained authorized licenses to exploit the celebrity's image and likeness.¹⁸² Furthermore, if limited in duration, a postmortem right of publicity can establish commercial certainty and provide economic incentives for all involved.¹⁸³ Lastly, uniformity in two states where most celebrities split their time will potentially eliminate the likelihood of forum-shopping in an attempt to protect a deceased celebrity's right of publicity.

B. Commercial Control

New York's non-divisible right of publicity substantially limits a celebrity's ability to effectively control the commercial exploitation of his or her identity.¹⁸⁴ By eliminating the power to control a celebrity's image upon his or her death, New York law conflicts with the underlying basis for the right of publicity: to grant individuals the exclusive power to exercise control over some entity and to exclude others from exercising such control.¹⁸⁵ The primary line of reasoning holds that if a celebrity had the right to control his or her right of publicity while alive, the celebrity's heirs and designated beneficiaries should be empowered to control and reap the rewards from such right after the celebrity's death.¹⁸⁶ To illustrate, although Monroe died in 1962, her name and image continue to exist as a valuable commercial package in today's society—over four decades after her passing.¹⁸⁷ However, a significant aspect of the brand's success is most definitely attributed to Monroe's estate, which has carefully marketed and controlled her image in order to promote consistency and protect her iconic fame.¹⁸⁸ By essentially eliminating Monroe's right of publicity at her time of death, and thus preventing her estate from regulating such right, the New York State Legislature has increased the likelihood that vendors will use Monroe's image in an offensive manner in order to

¹⁸¹ Marc A. Lieberstein, *Why a Reasonable Right of Publicity Should Survive Death: A Rebuttal*, BRIGHT IDEAS (N.Y. State Bar Ass'n, Albany, N.Y.), Fall 2008, at 9.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Mulrooney, *supra* note 38, at 1154. Since New York's right of publicity is "rooted within a right of privacy statute," it highlights the many shortcomings present when enacted under privacy law rather than the less-restrictive property law. *Id.* at 1154–55; *see supra* notes 95–97 and accompanying text.

¹⁸⁵ Felcher & Rubin, *supra* note 8, at 1128.

¹⁸⁶ Lieberstein, *supra* note 181, at 9–10; *see* Carpenter, *supra* note 36, para. 12 (referring to the argument for commercial control as the "labor desert theory").

¹⁸⁷ Lieberstein, *supra* note 181, at 9. Monroe's beauty and aura have transcended decades, and her name continues to represent "beauty, sensuality, and glamour." *Id.*

¹⁸⁸ *Id.* The author argues that "the Monroe name" may represent an entirely different concept—if anything at all—but for the estate's "brand stewardship." *Id.*; *see* Kuehl, *supra* note 138, at 9 ("[MMLLC] has carefully guarded the publicity rights of Marilyn Monroe's image in order to maintain her legacy as she intended.").

achieve monetary benefits.¹⁸⁹

The advantages of a postmortem right of publicity are also apparent in the world of advertising. By recognizing a postmortem right of publicity, New York will protect its consumers from deceptive advertising.¹⁹⁰ As evident in today's highly-commercialized society, celebrity sponsorships are instrumental in both defining a company's message and providing a competitive advantage.¹⁹¹ As many advertising firms have discovered, the "association between a product and a celebrity, living or deceased, creates an indelible image in the consumer's mind, which translates into product recognition, and ultimately, sales."¹⁹² Specifically, the commercial appeal in using a celebrity's image to support a product or service derives from "its duration and exclusivity."¹⁹³ If a celebrity's identity enters the public domain instantly upon death—as is the case in New York—the value of endorsement contracts entered into during the celebrity's lifetime are greatly diminished as the power of control is lost.¹⁹⁴ Moreover, the doctrine of the right of publicity aims to hold advertisers accountable for any misleading use of a celebrity image where the celebrity is not actually associated with the marketer of the image.¹⁹⁵

A postmortem right of publicity also provides commercial certainty for vendors.¹⁹⁶ Under New York law, the exclusivity of a license to use a celebrity's image for commercial purposes—the most valuable asset of a celebrity license—lacks a fixed termination date and ends immediately upon a celebrity's death.¹⁹⁷ Accordingly, a vendor in New York must accept the inevitable: once a celebrity dies, his or her image is available to the public at large, thereby impairing its economic value and eroding the concept of commercial certainty.¹⁹⁸ Alternatively, under California's postmortem right of publicity statute, a vendor knows the exact date on which the celebrity's identity is accessible for consumer conception—

¹⁸⁹ Lieberstein, *supra* note 181, at 10.

¹⁹⁰ *Id.*; see *supra* note 138 and accompanying text.

¹⁹¹ See Lieberstein, *supra* note 181, at 10.

¹⁹² Roesler, *supra* note 66, at 9. To illustrate, after Converse Inc. ("Converse") discovered a photograph of James Dean wearing Converse sneakers, the company launched an advertising campaign focused on the picture and the association of the celebrity with its product. *Id.* Immediately following the launch of the campaign, Converse's sales increased by fifty percent. *Id.*

¹⁹³ Lieberstein, *supra* note 181, at 10. For example, it is well known that golf star Tiger Woods endorses Nike, Inc. ("Nike") apparel and that Nike continues to invest millions to maintain the exclusivity of this relationship. However, under New York law, once Tiger Woods dies, competing apparel companies, such as Adidas, could use Tiger Woods' identity to promote their clothing lines. Such actions by competing companies will not only convince the public that Tiger Woods endorses their products as well, but also destroy the exclusive relationship Nike has created with Tiger Woods. *Id.*

¹⁹⁴ *Id.* A postmortem right of publicity maintains the value of a right to publicity for sponsors who acquired such right "to promote and market the name as their own." *Id.*

¹⁹⁵ Carpenter, *supra* note 36, para. 13 (comparing the harms protected by the right of publicity to those addressed by trademark law, which seeks to protect consumers against deceptive use of a symbol or phrase normally associated with a well-known brand or product).

¹⁹⁶ Westfall & Landau, *supra* note 33, at 87–88.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

seventy years after the celebrity's death.¹⁹⁹

Lastly, while some commentators have argued that the commercial control over a deceased celebrity's identity may ultimately lead to a monopoly, this proposition can easily be dispelled if New York enacts a postmortem right of publicity that lasts for a limited duration.²⁰⁰ In essence, confining the length of a right of publicity bestows the deceased celebrity's estate with the power to control while also ensuring that the public will inherit free access to the image at a specified time.

C. Economic Incentive

The social policy that supports an argument for a postmortem right of publicity is that such right encourages "individual enterprise and creativity" by allowing individuals to profit from their own efforts.²⁰¹ While the media certainly has the power to transform—both positively and negatively—a celebrity's status, a celebrity's fame is ultimately the product of his or her efforts and personal investment.²⁰² Accordingly, a celebrity—and eventually, his or her heirs—should be entitled to reap maximum commercial benefits.²⁰³ As argued first in the 1950s:

[E]very person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity—that is, the right of each person to control and profit from the publicity values which he has created or purchased.²⁰⁴

Similarly, providing celebrities with control over how their rights of publicity will be managed in the future increases the probability that they "will make investments in themselves that serve the public interest."²⁰⁵ The Supreme Court has acknowledged that an individual's right of publicity depends entirely on the associative value of his or her identity.²⁰⁶ To illustrate, in *Zacchini v. Scripps-Howard Broadcasting*, the Court noted that an individual's right of publicity "rests on more than a desire to compensate the performer for the time and effort invested

¹⁹⁹ *Id.*; see *supra* note 159 and accompanying text.

²⁰⁰ Hogue & Garfinkel, *supra* note 60, at 665 (arguing that the public's interest in free dissemination of ideas competes with a celebrity's interest in controlling the exploitation of his or her identity).

²⁰¹ Felcher & Rubin, *supra* note 8, at 1128.

²⁰² Lieberstein, *supra* note 181, at 10. The development of a celebrity's status requires the combination of "money, time, and energy." *Id.*

²⁰³ Mulrooney, *supra* note 38, at 1155. Proponents highlight how the transfer quality present in other forms of intellectual property—copyright, trademark, and patent—promotes economic efficiency. *Id.*; see Lieberstein, *supra* note 181, at 10 ("Since the celebrity has created a valuable capital asset, it is consistent with the celebrity's expectation that this asset will benefit his [or her] heirs and assigns after his [or her] death.")

²⁰⁴ Lieberstein, *supra* note 181, at 10 (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954)).

²⁰⁵ Mulrooney, *supra* note 38, at 1155.

²⁰⁶ Roesler, *supra* note 66, at 5.

in the act; the protection provide[s] an economic incentive for him [or her] to make the investment required to produce a performance of interest to the public.”²⁰⁷

Moreover, a postmortem right of publicity enables a celebrity to transfer the awards produced from his or her efforts to a designated beneficiary.²⁰⁸ With knowledge that the celebrity entrusted his or her future image in the hands of the individual or entity, the chosen beneficiary possesses an incentive to both preserve the celebrity’s image and reap any financial benefits the image produces.²⁰⁹ As evidenced by one of the primary purposes of the passage of SB 771, many charitable organizations are supported by exploitation of deceased celebrities’ rights of publicity.²¹⁰ Under New York law, such organizations are unable to benefit from a celebrity’s goodwill and continue a celebrity’s charitable work.²¹¹ Since many celebrities have opted to leave their residuary estates to specified charities, it only seems fitting that the designated charities receive the benefits associated with use of the celebrity’s identity.²¹²

The danger of unjust enrichment is also clearly present when a legislature refuses to enact a postmortem right of publicity.²¹³ This moral-based argument reflects a basic societal belief that it is wrong for “free-riders” or “parasites” to misappropriate another individual’s hard work and dedication.²¹⁴ It is argued that such act of free-riding, if unchecked, may have far-reaching negative effects for both celebrities and society at large, as it will likely discourage celebrities from contributing their images to the public domain.²¹⁵ Under New York law, regardless of the investment a celebrity made to cultivate his or her image, upon the celebrity’s death, the public can use the image to its economic advantage.²¹⁶ In essence, upon a celebrity’s death, advertisers, vendors, and the public at large receive a “windfall” by having the freedom to use a celebrity’s identity for commercial purposes—an illogical and unfair result.²¹⁷ The arguments against a “windfall” effect are particularly strong given the fact that for many celebrities their popularity survives their death, resulting in substantial annual incomes.²¹⁸

²⁰⁷ 433 U.S. 562, 576 (1977).

²⁰⁸ Mulrooney, *supra* note 38, at 1155. The concept of descendibility assures that a celebrity’s right of publicity is “vested in a suitable beneficiary.” *Id.*

²⁰⁹ *Id.*

²¹⁰ See *supra* note 138.

²¹¹ See *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx)*, 2008 WL 655604, at *13 (C.D. Cal. Jan. 7, 2008)

²¹² Mulrooney, *supra* note 38, at 1155. It is believed that the ability to pass on a right of publicity has a “motivational effect” on the celebrity. *Id.* Specifically, a celebrity may be more motivated to succeed in life if he or she knows that his or her fortunes will in turn provide for the financial security and prosperity of the celebrity’s designated beneficiaries. *Id.*

²¹³ Lieberstein, *supra* note 181, at 10 (arguing that legislation that recognizes a postmortem right of publicity rejects the principle of unjust enrichment).

²¹⁴ Carpenter, *supra* note 36, para. 14.

²¹⁵ *Id.*

²¹⁶ See Mulrooney, *supra* note 38, at 1156.

²¹⁷ *Id.*

²¹⁸ *Id.*; see Hoy, *supra* note 1.

VI. CONCLUSION

In *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, the court upheld the postmortem right of publicity in California for a celebrity who had died before the state's statute had been enacted. However, as it was ultimately determined that the celebrity was domiciled in New York at the time of her death, her right of publicity was extinguished upon death. The case highlights the need for the New York State Legislature to adopt a postmortem right of publicity statute similar to that enacted in California to avoid the risk of a celebrity's domicile determining such a significant right. Since many celebrities "live" in both California and New York, with the two states' differing right of publicity statutes—with one clearly favoring celebrities—it is likely that such disparity will lead to forum-shopping by deceased celebrities' estates in order to adequately protect the celebrity's identity. Moreover, given the many control and economic incentives associated with a postmortem right of publicity, it is evident that New York's enactment of such right will greatly benefit all individuals involved. Until such statute is implemented, it appears now that it is better—both financially and economically—for a celebrity to live and die in California.