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Timothy C. Williams

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The Right of Publicity: "You Can't Take it With You"

The "right of publicity," a progeny of the right to privacy, has evolved into a valuable property right of the rich and famous. However, indecisive courts and disinterested legislatures have failed to arrive at any consensus on whether the "right of publicity" should be descendible and inheritable upon its owner's death. This comment seeks to evaluate the sundry arguments and policies concerning this issue, and to advocate a freely descendible "right of publicity."

I. INTRODUCTION

The advent of modern technology in the mass media has spawned the growth of a relatively new right of the famous which has come to be known as "the right of publicity."¹ It is defined as the right of one² to prevent the commercial exploitation of his name, likeness, or picture, and is designed to protect against the unauthorized appropriation of these characteristics by others for commercial gain.³ Unlike its parent, the right to privacy, this right is invoked to reap the monetary benefits of the publicity the celebrity has been deprived of, and

1. The term "right of publicity" became popularized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The court stated:

We think that, in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph, . . . i.e., without an accompanying transfer of a business or of anything else.

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

Id. at 868.

2. This comment will not concern those of lesser notoriety who might suddenly be cast into the limelight by death, disaster, or crime. The "right of publicity" has evolved into a true right of the famous.

3. The right has been defined in various ways. In *Lerman v. Chuckleberry Publishing Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981), the court stated that "[t]he right of publicity comprises a person's right to own, protect and commercially exploit his own name, likeness and persona." It was defined in *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981), as "the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit."

to prevent unjust enrichment of the defendant.⁴

The primary controversy concerning the "right of publicity," which continues to loom over the judicial and legislative forums of this country, is whether the right should be able to survive and descend upon the death of its owner. The judiciary has consistently been unable to agree upon the question,⁵ and the legislatures have taken an almost *laissez faire* attitude toward the dispute.⁶ The purpose of this comment is to explore the judicial, legislative and theoretical treatment the "right of publicity" has received, and to advocate the position that the "right of publicity" should be a freely survivable and descendible right.

Initially, the right to privacy will be discussed. The "right of publicity" will then be examined, including its property considerations, its application to commercial exploitation of celebrities today, and whether the right is freely assignable. Finally, both sides of the descendibility issue will be fully discussed, and a proposed model statute for a descendible "right of publicity" introduced.

II. EARLY BEGINNINGS IN THE RIGHT TO PRIVACY

The right to privacy owes its origin to the influential article, "The Right to Privacy," authored by Samuel Warren and Louis Brandeis.⁷

4. See Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1588-89 (1979). "Many of the individuals involved are professional performers of one sort or another, such as actors or athletes; their complaint is not that they have received publicity, but that they have failed to receive its benefits." *Id.* at 1588.

5. The following decisions hold the "right of publicity" terminates at one's death: *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982) (Marx Brothers); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (Elvis Presley); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (Rudolph Valentino); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Bela Lugosi).

However, the following decisions recognize a survivable "right of publicity": *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983) (Clyde Beatty); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods.*, 694 F.2d 674 (11th Cir. 1983) (Martin Luther King); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (Elvis Presley); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977) (Elvis Presley); and *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (Stan Laurel and Oliver Hardy).

6. Only seven state legislatures currently have statutes that in effect allow for an appropriation action by a deceased's surviving relatives. These include the following: CAL. CIV. CODE § 990 (West Supp. 1985); FLA. STAT. ANN. § 540.08 (West 1972); KY. REV. STAT. § 391.170 (1984); NEB. REV. STAT. § 20-208 (1982); OKLA. STAT. ANN. tit. 21, §§ 839.1-839.2 (West 1983); TENN. CODE ANN. §§ 47-25-1103, 47-25-1104 (1984); VA. CODE §§ 8.01-40, 18.2-216.1 (1982). See *infra* notes 203-16 and accompanying text.

7. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). This seminal article was supposedly inspired by attacks upon Samuel Warren and his wife by yellow journalists of the day. The authors stated that "[g]ossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." *Id.* at 196.

The article equated privacy with "the right to be let alone," and emphasized the "intangible" property rights all of us have in our lives.⁸ Warren and Brandeis could not have anticipated the arrival of film, radio, or television, nor the huge impact it would have upon "the right to privacy." Although judicial affirmation of Warren and Brandeis' tort was slow,⁹ the Georgia Supreme Court became the first to recognize "the right to privacy" in *Pavesich v. New England Life Insurance Co.*¹⁰

Early case law began to distinguish a mini-tort in the right to privacy,¹¹ which would later be designated "misappropriation"¹² by Dean Prosser.¹³ Inconsistent judicial decisions led to confusion concerning this new tort action.¹⁴ The two cases of *O'Brien v. Pabst Sales Co.*¹⁵ and *Jansen v. Hilo Packing Co.*¹⁶ illustrate the indecisiveness which surrounded misappropriation just a few years ago. In *O'Brien*,

8. *Id.* at 193. "[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible." *Id.*

9. In *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), the New York Court of Appeals refused to recognize a common law right to privacy.

10. 122 Ga. 190, 50 S.E. 68 (1905).

11. In the case of *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (N.J. Ch. 1907), the famous inventor, Thomas Edison, was successful in enjoining the use of his name and likeness to advertise and promote a medicinal remedy.

A minor recovered damages in *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911), for publication of his picture in a jeweler's advertisement.

Wood v. Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), was one of the first cases to recognize a celebrity's endorsement as a marketable commodity and, therefore, assignable and enforceable by implied contract.

12. For a general discussion of commercial appropriation, see Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973).

13. Dean Prosser created four separate actions out of the right to privacy which included the following: (1) intrusion upon solitude; (2) public disclosure of private facts; (3) false light in the public eye; and (4) misappropriation of name or likeness. W. PROSSER & W.P. KEETON, *THE LAW OF TORTS* § 117, at 849-68 (5th ed. 1984).

14. Ironically, early decisions seemed to deny relief to personalities because they were public figures who had intentionally subjected themselves to publicity. In *Gautier v. Pro-Football*, 304 N.Y. 354, 107 N.E.2d 485 (1952), the plaintiff, an animal trainer, was denied relief when his act during a televised football game was aired in violation of a contract. Similarly, in *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), the plaintiff, who at an early age was recognized as a genius, unsuccessfully challenged an account concerning his life in *New Yorker* magazine.

Yet some decisions reflected the rationale of modern, commercial exploitation cases. This was best displayed in *Kerby v. Hal Roach Studios Co.*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), which allowed an actress to recover for the use of her name in a suggestive letter that had advertised a movie.

15. 124 F.2d 167 (5th Cir. 1942).

16. 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct. 1952).

a well-known football player was denied relief when a beer company had displayed his picture on a calendar advertising its beer.¹⁷ In *Jansen*, however, professional baseball players had a cause of action when their likenesses were used on popcorn and chewing gum containers.¹⁸ The ambiguities associated with this common law right to privacy action¹⁹ would soon be clarified by the Second Circuit Court of Appeals.²⁰

III. THE EVOLUTION OF THE "RIGHT OF PUBLICITY"

Asserting the "right of publicity" as the progeny of the right to privacy has been termed "a misuse of language and law."²¹ These two legal doctrines are inherently different: the right to privacy seeks to redress mental suffering and humiliation, and the "right of publicity" endeavors to reimburse financial loss caused by an unauthorized appropriation.²²

The realization of a separate cause of action and the recognition of a distinct "right of publicity" arose in the decision of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*²³ The plaintiff, an exclusive contractual assignee of a ballplayer's photograph for usage in chewing gum sales, was allowed recovery from the defendant chewing gum manufacturer, who had subsequently contracted with the same player and used his likeness in advertising.²⁴ The Second Circuit Court of Appeals reasoned "a man has a right in the publicity value of his photograph, . . . [and] his right might be called a 'right of publicity.'"²⁵ The court perceptively recognized that property considerations were at the heart of the doctrine of publicity. "Whether it be

17. The court in *O'Brien v. Pabst Sales Co.* denied relief based on the presumption the plaintiff had voluntarily subjected himself to publicity. *O'Brien*, 124 F.2d at 170.

18. *Jansen v. Hilo Packing Co.*, 202 Misc. at 901, 118 N.Y.S.2d at 163-64.

19. A common law cause of action can be established for appropriation by effectively pleading "(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." W. PROSSER & W.P. KEETON, *THE LAW OF TORTS* § 117, at 856-59 (5th ed. 1984).

20. In the decision of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), the "right of publicity" was recognized.

21. Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1588-89 (1979).

22. Chief Justice Bird, dissenting in *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835-36, 603 P.2d 425, 438-39, 160 Cal. Rptr. 323, 336-37 (1979) (Bird, C.J., dissenting), expounded on this inconsistency between privacy and publicity. "[T]he gravamen of the harm flowing from an unauthorized commercial use of a prominent individual's likeness in most cases is the loss of potential financial gain, not mental anguish." *Id.*

23. 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

24. *Id.*

25. *Id.* The court went on to say celebrities "would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways." *Id.*

labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."²⁶ Thus, the "right of publicity" became a recognized legal cause of action that would begin to shelter the affluent and famous from proliferation in the mass media.

The "right of publicity" had evolved from a tort which stressed the protection of one's feelings and privacy into one that was to prevent "unjust enrichment."²⁷ Within a few years of the *Haelan*²⁸ decision, courts began to consistently acknowledge a right to protect one's likeness, name, and persona.²⁹ Acceptance of the "right of publicity" came quickly. However, many questions concerning this new action remained unanswered. What must be proven to constitute a cause of action? Who may assert and enforce the "right of publicity?" What personal characteristics are protected?

A test for a cause of action under the "right of publicity" was laid down in *Lerman v. Chuckleberry Publishing, Inc.*³⁰ by Judge Werker:

An individual claiming a violation of his right of publicity must show: (1) that his name or likeness has publicity value; (2) that he himself has "exploited" his name or likeness by acting "in such a way as to evidence his . . . own recognition of the extrinsic commercial value of his . . . name or likeness, and manifested that recognition in some overt manner . . ." (citations omitted); and (3) that defendant has appropriated this right of publicity, without consent, for advertising purposes or for the purposes of trade.³¹

This test emphasizes that the plaintiff should in fact be a personality who has already "exploited" his likeness. Therefore the test differs

26. *Id.*

27. The United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), stated that "[t]he rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will." *Id.* at 576.

28. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

29. In *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956), a federal court of appeals awarded damages to an ex-prizefighter when an unauthorized telecast of one of his early fights was aired.

Similarly, in *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314 (1957), Ben Hogan, the professional golfer, was allowed relief for loss of "good will" and "commercial value" in his name when a golf instruction book had used his photograph.

California also recognized the pecuniary value of one's name and likeness in *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955), where an attorney recovered damages for use of his name in a photocopier advertisement.

30. 521 F. Supp. 228, 232-33 (S.D.N.Y. 1981). The plaintiff, Jackie Collins Lerman, successfully recovered for loss of right of publicity for usage of her name in connection with a nude photograph in defendant's *Adelina* magazine.

31. *Id.*

from a mere "misappropriation" action,³² and thus begs the question, who can assert the "right of publicity?"

Theoretically, everyone should be able to exercise a "right of publicity"; but some authorities³³ suggest it is a right only assertable by a "celebrity."³⁴ The most logical solution is to grant everyone the "right of publicity," even though it may be of inappreciable value, and allow the amount of damages to reflect the relative worth of one's right.³⁵ Bear in mind, however, that people would have little anxiety over the violation of their "right of publicity" unless they have achieved some level of fame themselves.

The protection granted under the "right of publicity" has expanded to encompass one's name,³⁶ picture,³⁷ likeness,³⁸ identity,³⁹ prop-

32. See W. PROSSER & W.P. KEETON, *supra* note 19.

33. Professor Nimmer stated that "the right of publicity should be limited to those persons having achieved the status of a 'celebrity,' as it is only such persons who possess publicity values which require protection from appropriation." However, he went on to say, "the right of publicity accorded to each individual 'may have much or little, or only a nominal value,' but the right should be available to everyone." Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 217 (1954).

One author stated the problem in this manner: "It is unclear whether the right attaches only to celebrities, or whether everyone, at least theoretically, has a right of publicity." Comment, *The Right of Publicity Revisited: Reconciling Fame, Fortune, and Constitutional Rights*, 62 B.U.L. REV. 965, 970 (1982) (footnotes omitted).

34. Dean Prosser states that "[a] public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession . . . has become a 'public personage.' He is, in other words, a celebrity." W. PROSSER, PROSSER ON TORTS § 112, at 844 (3d ed. 1964).

35. One author argues "[a]lthough the celebrity status of an individual should be relevant to the assertion of a right of publicity, the relative fame of an individual can affect the amount of damages awarded" Kwall, *Is Independence Day Dawning For The Right of Publicity?*, 17 U.C.D. L. REV. 191, 203 (1983). She goes on to argue these damages should comprise "not only the measure of the defendant's profits to which the plaintiff is entitled, but also an amount representing the fair market value of the plaintiff's name or likeness." *Id.*

36. Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228 (S.D.N.Y. 1981).

37. Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). Use of famous model's picture for a poster without consent was held to be in violation of New York Civil Rights Law sections 50 and 51. This statute was one of the first of its kind to allow for a statutory action for misappropriation. It provides in part:

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.

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

38. Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978). The famous fighter was granted injunctive relief for the use of his image in a cartoon in defendant's magazine, since damages were difficult to ascertain.

39. "Identity" here refers to one's entire persona. In other words, a defendant has used a look-alike to imitate a particular celebrity's "identity" to create the illusion, albeit fraudulently, that the real celebrity is advertising its product.

This appropriation was recently acknowledged in *Onassis v. Christian Dior-New York, Inc.*, 122 Misc. 2d 603, 612, 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984), where a look-alike was used by the defendant to imitate Jackie Onassis in order to promote a beauty product. The court held that when an imitator is used in "such a way as to be decep-

erty,⁴⁰ group image,⁴¹ act,⁴² and even extended to cases where one's name or likeness was not used.⁴³ Illustrative of the modern protections celebrities enjoy under the right is *Ali v. Playgirl, Inc.*⁴⁴ Here the famous prizefighter, Muhammad Ali, was depicted nude in a cartoon in defendant *Playgirl* magazine.⁴⁵ The court found it probable that Ali's "right of publicity" was infringed and granted him preliminary injunctive relief under the New York Civil Rights Statute.⁴⁶ The court also remarked that "[t]he distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.'"⁴⁷

Recent decisions have even stretched privacy beyond its limits into

tive or promote confusion, that use can be enjoined." *Id.* at 612, 472 N.Y.S.2d at 261. The court stated that the New York Civil Rights Law was, by its terms, "to protect the essence of the person" *Id.* at 610, 472 N.Y.S.2d at 260.

This concept has even been extended to entertainers who imitate deceased celebrities. In *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981), an Elvis Presley impersonator was enjoined from conducting any further concerts. The court reasoned that when the impersonation lacked informational and entertainment value, and was primarily for commercial exploitation, the first amendment freedom of speech protection was no longer a valid defense. *Id.* at 1356. See also *Felcher & Rubin, supra* note 21, at 1596-99.

40. In *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), the court held a famous race car driver was "identifiable" when defendant tobacco company used a photograph of his car in its advertisement. *Id.* at 826-27.

41. A musical group has been held to be able to develop a "persona" which should be entitled to a "right of publicity." *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (N.D. Ill. 1981).

42. In *Zacchini*, 433 U.S. 562 (1977), the United States Supreme Court held a television broadcast of plaintiff's entire "human cannonball act" was not protected by the first and fourteenth amendments. The Court stated:

Thus, in this case, Ohio has recognized what may be the strongest case for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity [his act] by which the entertainer acquired his reputation in the first place.

Id. at 576.

43. In *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983), Johnny Carson was allowed recovery even though there was no appropriation of his surname or likeness. See also *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

44. 447 F. Supp. 723 (S.D.N.Y. 1978).

45. *Id.* at 725.

46. *Id.* at 726; N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976). See *supra* note 37 for text of section 50.

47. 447 F. Supp. at 728. The violation of one's "right of publicity" was analogized to unjust enrichment, which results from the theft of goodwill. *Id.* at 728-29.

libel and slander. In *Eastwood v. Superior Court*,⁴⁸ movie personality Clint Eastwood challenged a *National Enquirer* article which alleged he was in a "love triangle" with Sandra Locke and Tanya Tucker.⁴⁹ The court held that the intentional falsification of the account could be in actuality a ploy to appropriate Eastwood's name and likeness for commercial exploitation of their newspaper.⁵⁰ Thus, the limits of the "right of publicity's" coverage continues to swell to conceivably infinite situations.

The inconsistency which plagued the early misappropriation cases has disappeared,⁵¹ and, in the absence of some type of waiver,⁵² celebrities today enjoy a relatively stable "right of publicity." Yet problems still plague this new right, such as whether the right should be freely assignable and even descendible to one's legatees.

Assignability is the sine qua non for a descendible "right of publicity." The "right of publicity," unlike its parent, the right to privacy, is a "proprietary" interest in the commercial worth of one's name and likeness. Therefore, it is not a personal right but a property right assignable to another.⁵³ The recognition of this right as a prop-

48. 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

49. *Id.* at 414, 198 Cal. Rptr. at 345. Although the court held the story to be nondefamatory, the question presented was whether the article, presented as true, should be actionable under Eastwood's "right of publicity" because of its inherent falsity. *Id.* at 413, 198 Cal. Rptr. at 344.

50. *Id.* at 426, 198 Cal. Rptr. at 352. The court stated that "the deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable when it is presented to the reader as if true with the requisite scienter." *Id.*

51. All of the following cases are examples of successful "right of publicity" suits by the famous: *Clark v. Celebrity Publishing, Inc.*, 530 F. Supp. 979 (S.D.N.Y. 1981) (Lynda Clark recovered punitive damages for publication of photos in pornographic magazine); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (baseball players able to enjoin game manufacturer); *Bell v. Birmingham Broadcasting Co.*, 266 Ala. 266, 96 So. 2d 263 (1957) (football announcer recovered for use of name by station to secure advertising contracts); *Selsman v. Universal Photo Books, Inc.*, 18 A.D.2d 151, 238 N.Y.S.2d 686 (1963) (actress Carol Lynley recovered for use of name and likeness in camera manual); *Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, Inc.*, 80 Misc. 2d 479, 363 N.Y.S.2d 231 (1974) (usage of television personality's name and picture to advertise furniture store held actionable).

52. Consent to an invasion is a complete defense to appropriation. *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 406-07 (E.D. Pa. 1963). However, merely being a public figure does not constitute a waiver of one's "right of publicity." *Nimmer, supra* note 33, at 216. But, where a personality has failed to object to an earlier use of his name or likeness, a waiver may occur. *See Booth v. Curtis Publishing Co.*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962) (memorandum decision); *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975).

53. *See Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1199-1200 (S.D.N.Y. 1983). The Restatement of Torts recognizes assignability of the right:

Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.

RESTATEMENT (SECOND) OF TORTS § 652C comment a (1977).

erty interest⁵⁴ distinguishes it from a nontransferable right to privacy.⁵⁵ When one comes to the realization that the "right of publicity" is assignable inter vivos,⁵⁶ then the theoretical step to acknowledging a descendible and survivable right can easily be made.⁵⁷

IV. A SURVIVABLE AND DESCENDIBLE "RIGHT OF PUBLICITY?"

A judicial division of authority has occurred over the question of whether one's "right of publicity" should be survivable and thus descendible to one's heirs.⁵⁸ Initially, the arguments against the descendibility of the right will be discussed. Secondly, an analysis of the policy and decisions favoring a descendible "right of publicity" will be examined. The final discussion considers the limitations on a

54. Professor Nimmer states that "[t]he right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee." Nimmer, *supra* note 33, at 216.

55. The right to privacy is not an assignable right, because of its inherent nature in protecting one's feelings and privacy. See *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

56. One of the earliest cases to recognize that one's reputation or endorsement is assignable was the implied contract case of *Wood v. Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

Today the courts have consistently allowed for an assignable "right of publicity." The following decisions all recognized an inter vivos assignment of some aspect of one's "right of publicity": *Cepeda v. Swift and Co.*, 415 F.2d 1205 (8th Cir. 1969) (baseball player assigned right); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981) (musical groups assigned rights to retailer); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (Elvis Presley's right held assignable inter vivos and descendible); *Rosemont Enters., Inc. v. Urban Sys. Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. 1973) (Howard Hughes' assignee enforced his right).

57. See Hoffman, *The Right of Publicity — Heir's Right, Advertiser's Windfall, or Courts' Nightmare?*, 31 DE PAUL L. REV. 1, 26 (1981). The author argues "[t]he reasons that permit inter vivos transfer of publicity rights may, however, also enable courts to logically substantiate the survival and descent of publicity rights at the time of the celebrity's death." *Id.*

58. Lack of statutory guidance in most states has left federal and state courts in a theoretical battle over whether the right is descendible. All of the following decisions have held that the right is neither survivable nor descendible: *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). However, the following decisions acknowledge a descendible "right of publicity": *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Price v. Hal Roach Studios Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975); and *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

descendible "right of publicity"; these include the exploitation requirement, durational limits, and first amendment concerns.

A. A Personal "Right of Publicity?"

At the very heart of the argument against descendibility of the "right of publicity" is the legal principle that the right to privacy is a personal right, and as such, cannot be assigned or inherited.⁵⁹ Since the right to privacy is a purely personal one,⁶⁰ the analogy is made that the "right of publicity" derived from this right is personal as well, and thus nonassignable and noninheritable.⁶¹ However, the analogy fails when one recognizes that the "right of publicity" is not personal⁶² and is freely assignable.⁶³

Several other policy arguments can be asserted against the descendibility of the "right of publicity." A descendible right will effectively stagnate the free dissemination of information and ideas in violation of the first amendment.⁶⁴ The creation of the "right of publicity" requires a "wide public participation in its creation," therefore, it should belong to the public domain at a celebrity's death.⁶⁵ Finally, the inherent difficulties associated with a descendible right, such as whether there should be an exploitation requirement and how long the right should be enforceable, would more likely create confusion than solve problems.

The judiciary has been quite sluggish in acknowledging a survivable and descendible "right of publicity."⁶⁶ *Lugosi v. Universal Pic-*

59. See *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775 (10th Cir. 1965) (right of privacy does not survive one's death); *Corliss v. E.W. Walker*, 57 F. 434 (D. Mass. 1893) (privacy a personal right and not relational); *Abernathy v. Thorton*, 263 Ala. 496, 83 So. 2d 235 (1955) (privacy does not survive to relatives); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895) (one of first cases to recognize the principle).

60. Since a right is personal it is said to be assertable only by its owner; therefore any attempts at assignment or bequest of that right are invalid. See *Hendrickson v. California Newspapers, Inc.*, 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429, 431 (1975).

61. "[T]he right of publicity as a derivative of the right of privacy can reasonably determine that the right of publicity, like its progenitor, is not descendible." *Reeves v. United Artists*, 572 F. Supp. 1231, 1234 (N.D. Ohio 1983).

62. The Restatement of Torts states that "[e]xcept for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." RESTATEMENT (SECOND) OF TORTS § 652I (1977).

63. See *supra* notes 55-56 and accompanying text.

64. See *infra* notes 186-202 and accompanying text.

65. See Comment, *The Right of Publicity: Premature Burial For California's Property Right in the Wake of Lugosi*, 12 PAC. L.J. 987, 993 (1981).

66. The following cases represent examples of judicial decisions which have denied relief to the descendants of someone whose "right of publicity" has been appropriated after death. See *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (Al Capone's estate unsuccessful in assertion); *Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983) (Jimmy Reeve's widow not allowed recovery for portrayal of husband in the movie "Raging Bull"); *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *cert. denied*, 434 U.S. 1013 (1978) (Rosenberg's children unsuccessfully challenged biography of executed parents); *James v. Screen Gems, Inc.*,

tures⁶⁷ illustrates the frustration that most courts have felt when attempting to reconcile the descendibility issue.⁶⁸ There, the widow and surviving son of Bela Lugosi, of Dracula fame, brought suit for damages and equitable relief against Universal Pictures for its exploitation of the Dracula character Lugosi had made so famous.⁶⁹ In reversing a superior court decision for the plaintiffs, the California Supreme Court held 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."⁷⁰

The court in justifying its position, however, left an ambiguity that would finally be settled by the California Legislature.⁷¹ This inconsistency appears in the following language of the court: "[i]f rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served."⁷² What is curious here is that the court qualifies its language to "intellectual property never exercised during the lifetime of their creators" Thus, did the court take the position that there is no descendible right in California, or did it impliedly grant a qualified right depen-

174 Cal. App. 2d 650, 344 P.2d 799 (1959) (widow of Jesse James, Jr. unable to recover for movie portrayal of deceased husband); *Loft v. Fuller*, 408 So. 2d 619 (Fla. App. 1982) (denied recovery to dead pilot's descendants only because no commercial exploitation as required under Florida statute); *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899) (nonlibelous appropriation upheld to advertise cigars); *Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960) (Glen Miller's widow had no property interest in the Glen Miller "sound"); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954) (portrayal of deceased entertainer not "for purposes of trade" under statute). However, it should be realized that few of these earlier cases were pure commercial exploitation decisions, as many are biographical in nature and thus allowed a noncommittal court a safe way out via the first amendment.

67. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

68. For an earlier discussion of *Lugosi*, see Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 UCLA L. REV. 1103 (1975).

69. *Lugosi*, 25 Cal. 3d at 816-17, 603 P.2d at 427, 160 Cal. Rptr. at 325.

70. *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329. The court also stated that "such 'a right of value' to create a business, product or service of value is embraced in the law of privacy and is protectable during one's lifetime but it does not survive the death of Lugosi." *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326 (citing W. PROSSER, LAW OF TORTS 807 (4th ed. 1971)).

71. In CAL. CIV. CODE § 990 (West Supp. 1985), the California Legislature enacted the most comprehensive descendibility bill concerning the "right of publicity" in the country. See *infra* notes 205-11 and accompanying text.

72. *Lugosi*, 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

dent on exploitation of it?⁷³ Although the court does acknowledge that the right is commercially exploitable,⁷⁴ the absence of any express language granting a descendible right if exploited should necessitate the conclusion that the court denied any type of a survivable right. However, subsequent judicial treatment curiously has treated *Lugosi* as granting an inheritable right.⁷⁵

Lugosi was reaffirmed in *Guglielmi v. Spelling-Goldberg Productions*,⁷⁶ which was a companion case to *Lugosi*. A nephew of the late Rudolph Valentino had brought suit against the defendant production company for misappropriation of his uncle's likeness in a fictional depiction of the performer's life.⁷⁷ The court denied the nephew recovery and held "that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that right is not descendible and expires upon the death of the person so protected."⁷⁸ Similarly, *Groucho Marx Productions v. Day and Night Co.*⁷⁹ followed *Lugosi* when assignees of the Marx Brothers were denied equitable relief against a musical which concerned the late comedy trio.⁸⁰ The Second Circuit Court of Appeals, applying California law, ruled that a person's "right of publicity" termi-

73. In *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 323 (2d Cir. 1982), the court discussed these two interpretations:

It may mean that California does not recognize any descendible right of publicity and that the heirs of a celebrity must rely on trademark law to protect the goodwill that the celebrity brought to a product during his lifetime.

Alternatively, *Lugosi* might mean that . . . California recognizes a descendible right of publicity that enables the heirs to prevent the use of a celebrity's name and likeness on any product or service the celebrity promoted by exploiting his right of publicity during his lifetime.

74. *Lugosi*, 25 Cal. 3d at 818, 603 P.2d at 428, 160 Cal. Rptr. at 326. The court accepted the principle that during one's lifetime a person may commercially exploit his name, face, or likeness. The court, citing Dean Prosser, also recognized assignability of such a right, stating that one can "capitalize by selling licenses" of their right. *Id.* (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 807 (4th ed. 1971)).

75. *Lugosi* was interpreted in *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983), to grant an inheritable right. The court in *Acme Circus* applied California law and surprisingly interpreted *Lugosi* to grant a survivable right if the celebrity has exploited it during his lifetime. *Id.* at 1544. For a full discussion, see *infra* notes 146-51 and accompanying text.

Other previous California decisions had failed to recognize a descendible right. *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958); and *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958).

76. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

77. *Id.* at 861, 603 P.2d at 455-56, 160 Cal. Rptr. at 353.

78. *Id.* Chief Justice Bird, who usually champions a descendible right, concurred in the opinion because the appropriation was for a biographical film and thus was protected by the first amendment. *Id.* at 872, 603 P.2d at 462, 160 Cal. Rptr. at 360 (Bird, C.J., concurring).

79. 689 F.2d 317 (2d Cir. 1982).

80. *Id.* at 320. For a general discussion of the *Groucho Marx* case, see Note, *Famous Person's Right of Publicity is Descendible-The Need for a Durational Limit on the Right of Publicity*, 14 SETON HALL L. REV. 190 (1983).

nates at death.⁸¹

Ironically, this line of decisions will soon lose much of its persuasive value to other jurisdictions, as the California Legislature has passed California Civil Code section 990,⁸² which became effective January 1, 1985.⁸³ The statute, being the most comprehensive of its kind in the country, allows for a descendible "right of publicity," which is assertable for fifty years after the personality's death.⁸⁴ The creation of section 990 negates much of the judicial precedent which had held that the "right of publicity" is not survivable.

Effective judicial precedent still exists which denies a descendible "right of publicity." In *Memphis Development Foundation v. Factors Etc., Inc.*,⁸⁵ the Sixth Circuit Court of Appeals refused to acknowledge the descendibility of the "right of publicity." A Memphis non-profit organization sought to enjoin the assignee of Elvis Presley's "right of publicity" from interfering with the sale of Elvis statuettes so that the profits could be used to erect a statue of the late musician.⁸⁶ The court, in reversing the United States District Court,⁸⁷ held that the right of the famous to control and profit from the commercial use of their name and personality is not inheritable.⁸⁸ The court's reasoning was that "[a]fter death the opportunity for gain shifts to the public domain, where it is equally open to all."⁸⁹ The policy reasons listed by the court for noninheritability included the following: (1) the real motivation in acquiring fame is self-realization; (2) the uncertainty in the duration such a right would last; (3) the question of taxing the right; (4) interference with the first amendment; and (5) applicability of the right to a limited class.⁹⁰

81. *Id.* See *supra* note 73 and accompanying text for the *Groucho Marx* court's interpretation of *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

82. CAL. CIV. CODE § 990 (West Supp. 1985).

83. See *infra* notes 205-10 and accompanying text for a full discussion of this new statute.

84. CAL. CIV. CODE § 990(g) (West Supp. 1985).

85. 616 F.2d 956 (6th Cir. 1980).

86. *Id.* at 960. The statuettes at twenty-five dollars apiece were to fund a statue in memory of Elvis Presley to be erected in Memphis.

87. 441 F. Supp. 1323 (W.D. Tenn. 1970), *rev'd*, 616 F.2d 956 (6th Cir. 1980). The lower court had held Presley's "right of publicity" was assignable and inheritable after his death.

88. *Memphis Dev. Found.*, 616 F.2d at 957.

89. *Id.* "The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system." *Id.* at 960.

90. *Id.* at 958-59.

The reasoning of the court that "the law has always thought that leaving a good name to one's children is sufficient reward in itself"⁹¹ is highly questionable.

Although the *Memphis Development* court seemed to ignore the current trend in the law, one other court has followed its lead. In *Factors Etc., Inc. v. Pro Arts, Inc.*,⁹² the Second Circuit Court of Appeals, giving full faith to *Memphis Development*, reversed its own earlier decision⁹³ which had held there was an inheritable "right of publicity." The case arose when Factors became the assignee of Elvis Presley's "right of publicity" after the star's death. The Second Circuit Court of Appeals held that Pro Arts' appropriation of Presley's picture for a memorial poster should be enjoined.⁹⁴ However, on remand to the United States District Court,⁹⁵ an appeal was taken from the permanent injunction which was issued. The Second Circuit Court of Appeals then reversed its earlier decision, holding that *Memphis Development* was controlling law.⁹⁶

What must be gained from these illustrative cases is that there is great uncertainty with regard to the descendibility issue. The legislative challenging of *Lugosi v. Universal Pictures*⁹⁷ in California and the indecisiveness of the Second Circuit Court of Appeals in *Factors Etc., Inc. v. Pro Arts Inc.*⁹⁸ illustrates the inherent difficulties courts are realizing in deciding to deny a descendible "right of publicity." Until a fully descendible right is recognized, the inconsistency in our judicial forums will continue.

B. The Argument for Descendibility

1. Underlying Policy Considerations

The following discussion will concern the basic policy justifications which support a survivable and descendible "right of publicity." There are four major policy reasons necessitating a descendible right: (1) it is a recognized property right and thus should descend as any other intellectual property would; (2) a descendible right will provide motivation and incentive for the personality; (3) without such a recognized right, advertisers would be unjustly enriched as they would receive a windfall at a celebrity's death; and (4) because of the right's

91. *Id.* at 959.

92. 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1973 (1982).

93. 579 F.2d 215 (2d Cir. 1978), *remanded*, 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd*, 652 F.2d 278 (2d Cir. 1981).

94. 579 F.2d at 222. The court held that a merchandiser's "exclusive right to exploit the Presley name and likeness, because exercised during Presley's life, survived his death."

95. 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd*, 652 F.2d 278 (2d Cir. 1981).

96. 652 F.2d at 278.

97. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

98. 652 F.2d 278 (2d Cir. 1981).

similarity to copyright law it should descend to a personality's descendants for fifty years after his death.

The basic policy reason a court will use to justify a survivable "right of publicity" is that it has developed "beyond its origins in privacy into a 'species of "property."'"⁹⁹ Since the "right of publicity" during one's lifetime is considered to be a nonpersonal property right,¹⁰⁰ it, like other property rights, should descend to one's heirs.¹⁰¹ Although some courts and authorities insist the property label is "immaterial," they still recognize that the "right of publicity" is a thing of value which has inherent worth.¹⁰² Dean Prosser stated the argument in the following terms:

The interest protected [in appropriation] is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity. It seems quite pointless to dispute over whether such a right is to be classified as "property." If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses.¹⁰³

Even if the "property" label is superfluous, the "right of publicity" is acknowledged as a nonpersonal, assignable thing of inherent value.¹⁰⁴

99. *Reeves v. United Artists*, 572 F. Supp. 1231, 1234 (N.D. Ohio 1982). For a discussion of inter vivos property rights in one's "right of publicity," see *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970) (baseball players had a "property interest" in name and likeness); *Hogan v. A.S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314, 316-17 (1957) (Ben Hogan, a professional golfer, had a property right of "good will" and "commercial value"); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (one has an exclusive right to his picture as a property right); *Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, Inc.*, 80 Misc. 2d 479, 363 N.Y.S.2d 231 (Sup. Ct. 1974) (use of television personality's name and picture considered a valuable property right).

100. *Reeves v. United Artists*, 572 F. Supp. at 1235. The Restatement of Torts states that "the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right" RESTATEMENT (SECOND) OF TORTS § 652C comment a (1977).

101. See Comment, *The Right of Publicity — Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 547 (1976). "The financial benefits of that labor should go to the celebrity's heirs as do all other property rights" *Id.*

102. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), where a court first recognized a "right of publicity," the property argument was addressed. The court stated that "[w]hether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." *Id.* at 868. See also Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960); Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 HASTINGS L.J. 751, 767-68 (1978).

103. Prosser, *supra* note 102, at 406.

104. See Nimmer, *supra* note 33, at 216. In this influential article, Melville Nimmer recognized early that the "right of publicity" should be a property right instead of a personal one.

Therefore, like all other property rights, it should descend at one's death.

A survivable "right of publicity" also serves as incentive for individuals to reach their ultimate potential. Since one would know his heirs would ultimately receive the fruits of his labors, this would provide a "motivational effect" to the individual that would benefit everyone concerned.¹⁰⁵ Chief Justice Bird, dissenting in *Lugosi v. Universal Pictures*,¹⁰⁶ argued that "providing legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition and assures that the individual will be able 'to reap the reward of his endeavors'"¹⁰⁷ Although the public domain would not receive the commercial benefits of a personality's name and likeness at his death, society will receive a more beneficial gift as the personality will have more incentive to reach his potential in his respective pursuits.

Another policy justification for a survivable right is that advertisers should not be unjustly enriched and receive a windfall upon a celebrity's death. The underlying policy of the "right of publicity" is to prevent unjust enrichment.¹⁰⁸ The advertiser unjustly receives benefits of another's lifetime labors, which should rightly descend to his descendants.¹⁰⁹ To allow such a windfall violates all notions of fairness inherent in our legal system.¹¹⁰

The final policy consideration for requiring a descendible "right of publicity" is that in analogizing the issue to copyright law one can argue publicity, like copyrights, should be inheritable. Article one of the United States Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their

105. "[T]he possibility of providing for one's heirs may have a motivational effect during one's life." Felcher & Rubin, *supra* note 21, at 1619.

106. 25 Cal. 3d 813, 840, 603 P.2d 425, 441, 160 Cal. Rptr. 323, 339 (1979).

107. *Id.* (citations omitted).

108. This was best stated in Kalven, *Privacy in Tort Law — Were Warren And Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966). "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will." *Id.*

109. The Restatement of Torts takes this position: "[s]ince appropriation of name or likeness is similar to impairment of a property right and involves an aspect of unjust enrichment of the defendants (sic) or his estate, survival rights may be held to exist following the death of either party." RESTATEMENT (SECOND) OF TORTS § 652I comment b (1977).

110. See Comment, *supra* note 101, at 547. The author argues "[t]here is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status." *Id.*

. . . Writings"¹¹¹ From this grant of power Congress has passed the Copyright Act of 1976,¹¹² which allows for the survivability and descendibility of a copyrighted work.¹¹³ However, the interests protected under the "right of publicity" do not constitute a "writing"¹¹⁴ as required under the Constitution,¹¹⁵ nor is publicity part or parcel of any of the enumerated categories covered in the Copyright Act.¹¹⁶ Therefore, copyright law serves only as an analogy to the issue of descendibility and the copyright preemption doctrine should not apply to the "right of publicity."¹¹⁷

Copyright law, like the "right of publicity," gives the individual

111. U.S. CONST. art. I, § 8, cl. 8.

112. 17 U.S.C. §§ 101-810 (1982).

113. *Id.* § 201(d)(1). "The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." *Id.*

114. The United States Supreme Court in *Goldstein v. California*, 412 U.S. 546, 561 (1972), *reh'g denied*, 414 U.S. 883 (1973), defined writings "to include any physical rendering of the fruits of creative, intellectual or aesthetic labor." Chief Justice Bird, dissenting in *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 849, 603 P.2d 425, 448, 160 Cal. Rptr. 323, 346 (1979) (Bird, C.J., dissenting), argued that the intangible "right of publicity" is not a "writing" and therefore not subject to congressional regulation.

See also *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983). "The intangible proprietary interest protected by the right of publicity simply does not constitute a writing; (citation omitted) and therefore falls outside of the preemption standards established by Congress in the copyright law (citations omitted)." *Id.*

115. U.S. CONST. art. I, § 8, cl. 8.

116. 17 U.S.C. § 102(a) (1982) provides as follows:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

117. At least one author has attempted to apply the preemption doctrine of 17 U.S.C. § 301(a) (1982), to "right of publicity" decisions. Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567, 1577-78 (1983). The preemption section of the Copyright Act provides that works under the statute "are governed exclusively by this title." 17 U.S.C. § 301(a) (1982). Thus, any common law or statute of a state would be preempted by the application of the Act, as in a case where the appropriation involved a work covered by the Copyright Act. If copyright law does not apply, then state law would govern. However, this argument must be dismissed because the "right of publicity" could not at this time be included under the Copyright Act's protections.

"exclusive rights"¹¹⁸ in order to protect an appropriation of creative efforts.¹¹⁹ Whether an author registers a copyright or a celebrity exploits his likeness, both have a protectable property interest.¹²⁰ Therefore, in analogizing publicity to the Copyright Act of 1976,¹²¹ it must be recognized that both of these proprietary interests should be survivable and descendible to one's heirs.¹²²

2. The Judicial Trend

The recognition of an inheritable "right of publicity" has become a trend in the judicial forums of this country in the last decade.¹²³ *Price v. Hal Roach Studios, Inc.*¹²⁴ was the first decision to acknowledge a freely descendible "right of publicity" even though the decedents had never exploited their names or likenesses during their lifetimes.¹²⁵ In this decision the widows of Stan Laurel and Oliver Hardy and the assignee of the comedians' rights successfully challenged the commercial appropriation of the late duo's rights by defendant Roach and its assignees.¹²⁶ The court in recognizing that the right does not terminate at death stated, "[t]here cannot . . . be any necessity to exercise the right of publicity during one's life in order to protect it from use by others or to preserve any potential right of one's heirs."¹²⁷ Thus, for the first time a descendible "right of public-

118. One author puts it in this manner: "[a]s copyright gives authors exclusive rights in their creative works, the right of publicity gives individuals exclusive rights in their personas." Note, *supra* note 117, at 1572.

119. "Like the right of publicity, the underlying policy of copyright is to provide an incentive for enterprise and creativity by allowing individuals to benefit from their personal efforts." Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1129 (1980).

120. "Both 'registration' and 'exploitation' manifest the artist's or celebrity's recognition of the commercial value of his creation and his intention to protect that value for himself and his heirs." Note, *Famous Person's Right of Publicity is Descendible-The Need for a Durational Limit on the Right of Publicity*, 14 SETON HALL L. REV. 190, 209 (1983).

121. 17 U.S.C. §§ 101-810 (1982).

122. For a good discussion of copyright application to the "right of publicity," see Note, *supra* note 117, at 1567.

123. The following decisions recognized a descendible right of one sort or another: *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods.*, 694 F.2d 674 (11th Cir. 1983); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975); and *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

124. 400 F. Supp. 836 (S.D.N.Y. 1975).

125. *Id.* at 846.

126. *Id.*

127. *Id.* In *Price v. Worldvision Enterprises*, 455 F. Supp. 252, 266 (S.D.N.Y. 1978), plaintiffs were entitled to summary judgment because under the doctrine of res judi-

ity" was recognized, even in the absence of exploitation by the celebrity during his lifetime.

The decision of *Factors Etc., Inc. v. Creative Card Co.*¹²⁸ purported to follow the reasoning of *Price*, in recognizing a descendible "right of publicity." The case dealt with the assignees of Elvis Presley's right of publicity attempting to obtain injunctive relief against the defendant manufacturer to prevent it from using the late entertainer's likeness in a poster.¹²⁹ The court did follow the precedent of *Price*;¹³⁰ however, they conditioned their holding upon the fact that Elvis Presley had exploited his right during his lifetime.¹³¹ Thus, inconsistency already existed concerning the descendibility issue, even where the decisions both arose from the same court.

*Hicks v. Casablanca Records*¹³² similarly ignored the *Price* rationale in holding that the "right of publicity" is only inheritable if exploited during the lifetime of the celebrity.¹³³ The case arose when the heirs of Agatha Christie, the famous mystery writer, sought to enjoin the production of a movie and publication of a book concerning the late writer.¹³⁴ Although the court found for the defendants based upon the first amendment biographical privilege,¹³⁵ they expressed the opinion that the right should never descend unless ex-

cata *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975), had already decided the issues presented.

This principle of descendibility was recognized by a New York state court (*Price* was in a federal court) in *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977). The court stated in dicta that "while a cause of action under the Civil Rights Law is not assignable during one's lifetime and terminates at death, the right to publicity . . . is under no such inhibition." *Id.* at 621, 396 N.Y.S.2d at 664.

128. 444 F. Supp. 279 (S.D.N.Y. 1977).

129. *Id.*

130. *Id.* at 284. The court in giving credence to *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975), stated "[t]here is no reason why the valuable right of publicity—clearly exercised by and financially benefiting Elvis Presley in life—should not descend at death like any other intangible property right." 444 F. Supp. at 284 (emphasis in original).

131. 444 F. Supp. at 284.

132. 464 F. Supp. 426 (S.D.N.Y. 1978).

133. *Id.* at 429 (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d at 222 n.11). The court defined "exploitation" in the following manner: "a party claiming the right must establish that the decedent acted in such a way as to evidence his or her own recognition of the extrinsic commercial value of his or her name or likeness, and manifested that recognition in some overt manner" *Id.*

134. *Id.* at 428-29.

135. *Id.* at 433. "[T]his Court finds that the first amendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess and for this reason their complaints must be dismissed." *Id.* For a full discussion of the biographical privilege, see *infra* notes 199-200 and accompanying text.

ploited by the celebrity during his life.¹³⁶

Similarly, *Estate of Presley v. Russen*¹³⁷ qualified its grant of a descendible right on it "having been exercised during the individual's life and thus having attained a concrete form"¹³⁸ Interestingly, the decision arose when Elvis Presley's estate sought relief against an impersonator who conducted "the Big El Show."¹³⁹ The court, in finding that the show did not have the requisite informational and entertainment value for a first amendment privilege, held the "Show" should be enjoined because it was primarily for commercial gain.¹⁴⁰ Thus, these cases illustrate the trend to acknowledge a descendible "right of publicity," but only if the personality during his lifetime exploited that right in some overt manner.

The decision by the Eleventh Circuit Court of Appeals in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,¹⁴¹ adopted a different theory in acknowledging a descendible "right of publicity" in Georgia.¹⁴² The court ruled that the "right of publicity" survives the death of its owner even if the owner had not commercially exploited the right during his or her life.¹⁴³ This case dealt with the heirs and assignees of Martin Luther King who brought suit to enjoin the defendant's production and sale of busts of the late civil rights advocate.¹⁴⁴ The court, in acknowledging a descendible "right of publicity," held that "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death, just as much if not more than a person who exploited his image during life."¹⁴⁵ This argument for a descendible "right of publicity" even in the absence of exploitation during one's lifetime must be the better position to take on the descendibility issue. One who values his privacy and thus does not greedily exploit his notoriety should be given equivalent or even greater protection to his "right of publicity" upon his death.

A recent decision of the Eleventh Circuit Court of Appeals, *Acme*

136. *Id.* at 429.

137. 513 F. Supp. 1339 (D.N.J. 1981).

138. *Id.* at 1355. The court held "that Elvis Presley's right of publicity survived his death and became part of his estate." *Id.*

139. *Id.* at 1348.

140. *Id.* at 1361. In discussing the biographical privilege, the court stated that "[i]f, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted." *Id.* at 1356.

141. 694 F.2d 674 (11th Cir. 1983).

142. This decision was entirely based upon certified questions issued by the Eleventh Circuit Court of Appeals to the Georgia Supreme Court. The Georgia Supreme Court's answers are appended to the Eleventh Circuit Court's opinion as "Exhibit A." *Id.* at 675-87. See also 250 Ga. 135, 296 S.E.2d 697 (1982).

143. 694 F.2d at 683.

144. *Id.* at 675.

145. *Id.* at 683.

*Circus Operating Co. v. Kuperstock*¹⁴⁶ has strengthened the survivable "right of publicity." There, Clyde Beatty, a famous animal trainer, had assigned his name to be used in connection with the circus he previously had owned. After Beatty's death, the defendants failed to continue payment for this license and Beatty's widow brought the action.¹⁴⁷ The federal court of appeals sitting in Florida applied California law¹⁴⁸ to decide that a descendible "right of publicity" exists "where the right was exercised during the lifetime and turned into a commercial venture or other contract right"¹⁴⁹ In approving the Second Circuit's analysis of *Lugosi v. Universal Pictures*,¹⁵⁰ the court surprisingly interpreted *Lugosi* to impliedly grant a survivable "right of publicity":

We thus interpret *Lugosi* to say that where a right to publicity of a name has been exercised in conjunction with a specific product or business during a lifetime sufficiently to create a secondary meaning in that name and the right to use that name in conjunction with the same product or business has been validly assigned to another, the rights flowing therefrom survive the death of the assignor.¹⁵¹

Thus, even *Lugosi* has now been interpreted to acknowledge a survivable "right of publicity" if the decedent exploits that right during his lifetime.

Most judicial authority refuses to give credence to *Memphis Development Foundation v. Factors Etc., Inc.*¹⁵² and its limited progeny, and the federal judicial trend as witnessed by this line of precedent is to uphold a survivable and inheritable "right of publicity" when the decedent has exploited his name or likeness during his lifetime.

146. 711 F.2d 1538 (11th Cir. 1983).

147. *Id.* at 1539-40.

148. *Id.* at 1540. "The district court correctly noted that because this diversity action was transferred from the Central District of California to the Middle District of Florida, it was to apply the choice of laws principles on which the Central District of California would have relied." *Id.* (citation omitted).

149. *Id.* at 1544 (emphasis omitted).

150. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). The Second Circuit Court of Appeals in *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982), held *Lugosi* is capable of two interpretations: either that the "right of publicity" is not descendible at all or it is descendible if exploited by the owner during his lifetime. *Id.* at 323. See *supra* note 73 and accompanying text.

151. 711 F.2d at 1544 (citing *Lugosi*, 25 Cal. 3d at 826-27, 603 P.2d at 433, 160 Cal. Rptr. at 330 (Mosk, J., concurring)). The court in interpreting *Lugosi* in such a loose manner stated that to hold "that the publicity interest never survives . . . would mean much of the *Lugosi* majority opinion is pure dicta and surplusage." *Id.* at 1543. The court reasoned the continual "juxtaposition" of factual exploitation situations by the court in the *Lugosi* opinion showed an intent to acknowledge a descendible right if exploited during one's life. *Id.*

152. 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

3. Restrictions on Descendibility

a. Exploitation — A Condition Precedent to Survival?

Exploitation has become almost a recognized concept in acknowledging an inheritable "right of publicity."¹⁵³ Exploitation is the recognition of the "extrinsic commercial value" in one's own name or likeness and the attempt to profit from it in an "overt manner."¹⁵⁴ Activities which constitute exploitation include assignment of one's rights during his or her lifetime and commercial endorsement of a product.¹⁵⁵ The rationale behind the requirement of exploitation is that the courts require some recognizable right to uphold after death. If in a "concrete form," the extension of the "right of publicity" into an inheritable right is more easily accomplished.¹⁵⁶

Although some courts have failed to recognize an inheritable right even where the decedent has exploited it,¹⁵⁷ the trend has been to acknowledge a descendible right if it was exploited in the owner's lifetime.¹⁵⁸ *Hicks v. Casablanca Records*¹⁵⁹ stands for the principle that a descendible "right of publicity" exists if this right has been exploited during the life of the decedent.¹⁶⁰ This principle has been followed by other courts¹⁶¹ and even applied to *Lugosi v. Universal Pictures*.¹⁶² However, basic disagreement still exists over the exploitation requirement.

153. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978). For arguments pro and con on the exploitation controversy, see Ausness, *The Right of Publicity: A "Haystack in a Hurricane,"* 55 TEMP. L.Q. 977 (1982); Hoffman, *The Right of Publicity — Heir's Right, Advertisers' Windfall, or Court's Nightmare?*, 31 DE PAUL L. REV. 1 (1981); Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703 (1983).

154. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

155. See Note, *supra* note 153, at 1712.

156. Some authorities go too far and argue that the right is only descendible if in contract form. Felcher & Rubin, *supra* note 119, at 1130-31 ("these rights should be protected only when they have been translated into concrete form through the medium of a contract"); Kwall, *supra* note 35, at 210 ("right of publicity actions . . . can be assigned or licensed during an individual's lifetime and made the subject of an express or implied contract").

157. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The court held that "the right of publicity should not be given the status of a devisable right, even where as here a person exploits the right by contract during life." *Id.*

158. See *supra* text accompanying notes 123-52.

159. 464 F. Supp. 426 (S.D.N.Y. 1978).

160. *Id.* at 429. For more on *Hicks*, see *supra* text accompanying notes 132-36.

161. *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); and *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977).

162. In *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983), the Eleventh Circuit Court of Appeals, applying California law in a diversity suit, held that *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), should stand for the proposition that there is an inheritable right if it is exploited in one's lifetime. 711 F.2d at 1544. See *supra* note 151 and accompanying text.

The decision of *Grant v. Esquire, Inc.*¹⁶³ was the first to distinguish between an exploitative and nonexploitative right.¹⁶⁴ The court held that actor Cary Grant was not required to have exploited his "right of publicity" in order to enjoin the defendant magazine from using his name and likeness in a clothing advertisement.¹⁶⁵ Similarly, *Price v. Hal Roach Studios, Inc.*¹⁶⁶ recognized a freely descendible right even though the decedent comedians had not exploited their right while alive.¹⁶⁷ Finally, the Eleventh Circuit in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,¹⁶⁸ held that "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."¹⁶⁹

This judicial split of authority must be reconciled by the uniform adoption of a freely descendible "right of publicity," with no exploitation requirement. Inherent difficulties with an exploitation requirement include: (1) absence of an appropriate medium to exploit the right; (2) the early and untimely death of a celebrity; (3) the abstention from publicity in order to leave a legacy to heirs; (4) difficulty in determining whether exploitation occurred;¹⁷⁰ and (5) the basic right of one to avoid publicity even though in the public limelight. In short, an exploitation requirement shuns everything the "right of publicity" encompasses, which is not only the prevention of unjust enrichment, but also the protection of one's privacy.

b. Durational Limitations or Laughing Heirs?

An unlimited durational period for a survivable "right of publicity" would lead to a multitude of suits by distant laughing heirs of famous ancestors.¹⁷¹ This is illustrated by *Schumann v. Loew's, Inc.*,¹⁷²

163. 367 F. Supp. 876 (S.D.N.Y. 1973).

164. *Id.* at 880.

165. *Id.*

166. 400 F. Supp. 836 (S.D.N.Y. 1975). See *supra* text accompanying notes 124-27 for more on *Price*.

167. *Id.* at 846.

168. 694 F.2d 674 (1983).

169. *Id.* at 683. For more on *Martin Luther King*, see *supra* text accompanying notes 141-45.

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

171. One is termed a laughing heir when his remote relation to the decedent causes him to joyfully welcome the death of such decedent so that he may reap the benefits of his testamentary disposition. See Note, *supra* note 102. "A plethora of suits by distant

which denied relief to descendants of the famous composer over one hundred years after his death.¹⁷³ The problem of laughing heirs can only be solved by creating some sort of judicial or legislative durational limit.

Since property law¹⁷⁴ is hardly applicable to an intangible property right such as the "right of publicity," one must examine copyright law and statutory schemes for a solution. The Copyright Act of 1976¹⁷⁵ can serve as an analogy¹⁷⁶ in determining a durational limit.¹⁷⁷ The Act provides that a newly copyrighted work shall be valid through the author's life and for fifty years thereafter.¹⁷⁸ Chief Justice Bird, dissenting in *Lugosi v. Universal Pictures*,¹⁷⁹ argued that this "period represents a reasonable evaluation of the period necessary to effect the policies underlying the right of publicity."¹⁸⁰ Thus, copyright law is one recognizable solution.

Of the seven jurisdictions which today provide a statutory, descendible "right of publicity,"¹⁸¹ California, Florida, Kentucky, Tennessee, and Virginia recognize a durational limit. California's newly-enacted bill and Kentucky's statute¹⁸² provide for a fifty-year limitation after

descendants of historical figures could result from a rule of unlimited descent." *Id.* at 772.

172. 135 N.Y.S.2d 361 (Sup. Ct. 1954), *aff'd*, 144 N.Y.S.2d 27 (Sup. Ct. 1955).

173. 135 N.Y.S.2d at 369. The descendants of Schumann failed to obtain damages against defendant for a motion picture which dealt with the life of the famous composer.

174. Under property law, the right of publicity would first pass to one under a specific bequest, then to residuary legatees, and finally to descendants by intestacy. *See* Comment, *supra* note 68, at 1119. *See also* Note, *supra* note 101, at 549 (author argues for a fully descendible "right of publicity" based on property law).

175. 17 U.S.C. §§ 101-810 (1982).

176. *See supra* text accompanying notes 111-22.

177. For a discussion of the fifty-year durational limit, *see* Felcher & Rubin, *supra* note 119, at 1131.

178. 17 U.S.C. § 302(a) (1982).

179. 25 Cal. 3d 813, 847, 603 P.2d 425, 446, 160 Cal. Rptr. 323, 344 (1979) (Bird, C.J., dissenting).

180. *Id.* Several authors make the copyright analogy, but it is best expressed in Felcher & Rubin, *supra* note 119, at 1229. They support the copyright analogy by the following argument:

Like the right of publicity, the underlying policy of copyright is to provide an incentive for enterprise and creativity by allowing individuals to benefit from their personal efforts. Copyright is also similar to the right of publicity in that the control it grants involves a substantial possibility of conflict with the First Amendment. These similarities suggest that copyright, not privacy, defamation, or property, is the proper analogy for defining the operation of the right of publicity.

Id. (footnotes omitted).

181. CAL. CIV. CODE § 990 (West Supp. 1985); FLA. STAT. ANN. § 540.08(4) (West 1972); KY. REV. STAT. § 391.170 (1984); NEB. REV. STAT. § 20-208 (1982); OKLA. STAT. ANN. tit. 21, §§ 839.1, 839.2 (West 1983); TENN. CODE ANN. §§ 47-25-1103, 47-25-1104 (1984); and VA. CODE § 18.2-216.1 (1982).

182. CAL. CIV. CODE § 990 (West Supp. 1985). This bill introduced by State Senator

the death of the celebrity.¹⁸³ Florida's is forty years, Virginia's is twenty years, and Tennessee only provides for a ten-year period.¹⁸⁴ Undoubtedly, Tennessee's period is too brief, since valuable publicity rights will still exist and the decedent's lineal descendants will still be alive when the period expires. California's and Kentucky's fifty-year limitations, the longest in the country, serve the purpose for which they were created—to protect a decedent's name and character, and to entitle descendants to their rightful legacy. Any shorter period neglects the theory of having a descendibility statute in the first place.

Since an estate is primarily designed to benefit those individuals who were living during the decedent's lifetime and would subsequently survive him,¹⁸⁵ the rigidity of a fixed statutory duration is not the answer. A more logical solution, that would serve as a valid incentive to celebrities, is to allow the statutory, durational period to extend for the lives of the surviving spouse and any issue the couple might have had. This flexible standard insures that either the spouse or children will receive the full benefits of their decedent's legacy while they are alive.

C. *First Amendment Concerns*

Since every public use of a celebrity's name or likeness does not necessitate financial gain by the celebrity,¹⁸⁶ one must consider conflicting issues arising out of the first amendment.¹⁸⁷ Theoretically, the "right of publicity," being of commercial value, should never con-

William Campbell provides "the strongest safeguards in the country for heirs of the famous." *Variety*, Oct. 2, 1984, at 1, col. 3. It became effective January 1, 1985.

183. See KY. REV. STAT. § 391.170 (1984) and CAL. CIV. CODE § 990(g) (West Supp. 1985), which provide: "No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 50 years from the death of the deceased personality."

184. See FLA. STAT. ANN. § 540.08(4) (West 1972); TENN. CODE ANN. §§ 47-25-1103, 47-25-1104 (1984); VA. CODE § 18.2-216.1 (1984).

185. See Note, *supra* note 102, at 773. "Estates are generally intended for those persons who were alive during the decedent's lifetime and would be expected to survive his or her death." *Id.*

186. See *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134, 140 (S.D.N.Y. 1953) (supplemental decision) ("It is not every public use of a prominent person's name that he has a right to exploit financially."); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S.2d 501, 508 (Sup. Ct. 1968) (the right of publicity "does not invest a prominent person with the right to exploit financially every public use of name or picture").

187. "When publicity rights are involved, recognition must be given . . . to the countervailing policy of the First Amendment interest in the free use of information." *Felcher & Rubin, supra* note 119, at 1128.

flict with free speech.¹⁸⁸ However, when the means of appropriation take the form of speech the two concepts collide.¹⁸⁹

Samuel Warren and Louis Brandeis in their seminal article on privacy¹⁹⁰ argued that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."¹⁹¹ In following this principle, courts have held that the "right of publicity" must succumb to the public's interest in the free dissemination of ideas and information.¹⁹² However, this first amendment protection will not bar a "right of publicity" action where the account is blatantly false¹⁹³ or primarily for commercial exploitation.¹⁹⁴ This latter principle was elaborated on by the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁹⁵ There, plaintiff Hugo Zacchini sought relief for a telecast of his entire "human cannonball act" on defendant's station.¹⁹⁶ The Court held "that the First and Four-

188. See Note, *supra* note 101, at 527. The author argues there is no overlapping of the concepts of free speech and publicity since "the right of publicity is not a restriction on free speech because material that is the object of the right's protection is thoroughly commercial, beyond the reach of the first amendment." *Id.* at 549.

189. This primarily includes books, newspapers, and movies. See Kwall, *supra* note 35, at 230.

190. Warren & Brandeis, *supra* note 7, at 193.

191. *Id.* at 214.

192. The following decisions barred a "right of publicity" claim when the publication was protected by the first amendment: *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3089 (1983) (an exclusive magazine interview with Cher); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (child prodigy's biographical sketch in magazine); *Ann-Margaret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980) (Ann-Margaret unsuccessful in suit against magazine for publication of nude photograph of her); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (movie and book concerning Agatha Christie); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941, *cert. denied*, 459 U.S. 1146 (1982) (*New York Times Magazine* article on the black middle class); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. 1972) (publication of Elvis Presley's press conference); and *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (publishing of "Paulsen For President" poster upheld, as comedian in election).

193. See *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983). The court there held that a *National Enquirer* story concerning Clint Eastwood in a "love triangle" with two other personalities was a deliberate falsification for commercial exploitation of the magazine, and therefore the first amendment should not allow it protection. *Id.* at 426, 198 Cal. Rptr. at 352.

For a slightly different perspective, see *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978). The court held that "the right of publicity does not attach . . . where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and it is evident to the public that the events so depicted are fictitious." *Id.*

194. *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). The court here held that an Elvis impersonator lacked the requisite informational and entertainment value to be protected by the first amendment. The court stated that "[i]f . . . the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted." *Id.* at 1356 (citation omitted).

See also *Gautier v. Pro-Football*, 304 N.Y. 354, 107 N.E.2d 485 (1952).

195. 433 U.S. 562 (1977).

196. *Id.* at 563-64.

teenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."¹⁹⁷ Thus, where the speech is primarily for commercial exploitation, first amendment protections should not apply.

Even though people have gained prominence and notoriety, they still have a distinct right to prohibit the use of their names or likenesses, even if newsworthy, from commercial exploitation.¹⁹⁸ Yet, widely recognized first amendment doctrines, such as the "biographical privilege," do not allow this to be an absolute right.¹⁹⁹ Thus, the "right of publicity" is severely limited when a literary work or movie portrays biographical information concerning a celebrity.²⁰⁰

The first amendment in relation to a descendible "right of publicity" will struggle through the same conflicts as the *inter vivos* right has.²⁰¹ Although it may be argued the descent of one's "right of publicity" will only limit the free dissemination of information and ideas,²⁰² the real purpose of preventing unjust enrichment by commercial exploitation will be better served by an inheritable right. The death of a celebrity will not then restrict first amendment

197. *Id.* at 575.

198. *Brinkley v. Casablanca Records*, 80 A.D.2d 428, 433, 438 N.Y.S.2d 1004, 1008 (1981) (citations omitted). See *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980). "It is clear that a public figure does not, simply by nature of his or her notoriety lose all rights of privacy . . ." *Id.* at 404 (citations omitted).

199. The following decisions represent examples of "right of publicity" actions which have failed because of the "biographical privilege": *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (magazine article); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (movie); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968) (book); *Frosch v. Grosset Dunlap, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980) (book); and *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954) (movie).

200. *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877, *vacated*, 387 U.S. 239 (1966). There the court held "[t]he factual reporting of newsworthy persons and events is in the public interest and protected." *Id.* at 328, 221 N.E.2d at 545, 274 N.Y.S.2d at 879.

However, when a game manufacturer has attempted to legitimize his appropriation based on the "biographical privilege" the courts have recognized an enforceable "right of publicity." See *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967) (Arnold Palmer and other professional golfers); *Rosemont Enters., Inc. v. Urban Sys. Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. 1973) (Howard Hughes assignee).

201. See *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1356 (D.N.J. 1981) (where the court discussed first amendment concerns in holding an Elvis impersonator had exploited the late Elvis Presley's "right of publicity").

202. *Lugosi v. Universal Pictures*, 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

speech, as one's heirs will only be enforcing a right that had previously been exercised by the decedent.

1. A Legislative Solution

The inability of the judiciary to adopt a consistent approach to a descendible "right of publicity" necessitates a legislative solution to the problem. Currently, several states²⁰³ have some sort of appropriation statute, and of these only seven allow for a survivable and descendible "right of publicity."²⁰⁴ A uniform descent statute would alleviate all uncertainty which has plagued the "right of publicity."

California recently enacted the most comprehensive descent statute of its kind in the country.²⁰⁵ It provides for a freely descendible

203. CAL. CIV. CODE § 990 (West Supp. 1985); FLA. STAT. ANN. § 540.08 (West 1972); KY. REV. STAT. § 391.170 (1984); MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1984-1985); NEB. REV. STAT. § 20-202 (1982); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976); OKLA. STAT. ANN. tit. 21, § 839.1 (West 1983); TENN. CODE ANN. § 47-25-1103 (1984); UTAH CODE ANN. §§ 45-3-1, 45-3-6 (1978); and VA. CODE §§ 8.01-40, 18.2-216.1 (1984).

204. CAL. CIV. CODE § 990 (West Supp. 1985); FLA. STAT. ANN. § 540.08 (West 1972); KY. REV. STAT. § 391.170 (1984); NEB. REV. STAT. § 20-208 (1982); OKLA. STAT. ANN. tit. 21, § 839.20 (West 1983); TENN. CODE ANN. §§ 47-25-1103, 47-25-1104 (1984); and VA. CODE §§ 8.01-40, 18.2-216.1 (1984).

205. CAL. CIV. CODE § 990 (West Supp. 1985). The significant provisions of the statute are as follows:

(a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred and fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. . . . Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorneys' fees and costs.

(b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or 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 such rights vest under this section or the transferees of that person or persons.

(d) 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 such rights:

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of

"right of publicity," which is enforceable by the surviving spouse, children, or parents of the decedent for fifty years following his

the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable on a per stirpes basis according to the number of the deceased personality's children represented

.....

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

.....

(f) (2) Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee of ten dollars (\$10)

.....

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 50 years from the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation or purchase of, products, merchandise, goods or service. A "deceased personality" shall include, without limitation, any such natural person who has died within 50 years prior to January 1, 1985.

.....

(j) For purposes of this section, a 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, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply . . . unless it is established that such owners or employees had knowledge of the unauthorized use

.....

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

death.²⁰⁶ This is the longest statutory period recognized today for a descendible "right of publicity." Of major significance is a provision which states that the decedent need not exploit his "name, voice, signature, photograph, or likeness" to be entitled to the statute's protections.²⁰⁷ Thus, the California Legislature went against the judicial precedent, which had earlier required exploitation before the "right of publicity" could descend.²⁰⁸ Also, it is important to note that "knowledge of the unauthorized use" is required before the appropriation can be actionable.²⁰⁹ This intent provision, coupled with one requiring each appropriation to be "a question of fact,"²¹⁰ illustrates the legislature's unwillingness to accept a strict liability theory.

Unfortunately, no other jurisdiction has adopted a statute as technical and comprehensive as California's.²¹¹ To obtain uniformity among our jurisdictions a model statute should be considered which would allow for a freely survivable and inheritable "right of publicity." The following model statute is proposed as a guide:

Model Statute

(1) *Acts Constituting Violation* — No person, firm, or corporation shall use a deceased person's name, voice, signature, portrait, likeness, or photograph for any type of commercial advertising, solicitation, or publicity without first obtaining written authorization from such person(s) as specified in subdivision (3).

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

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

(3) Single and original works of fine art.

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

206. *Id.* § 990(d), (g). Unlike other jurisdictions, California set down a testamentary scheme for the descendibility of the "right of publicity." First, it should pass to the surviving spouse, and he or she would share the right with any children or grandchildren alive. If there is no surviving spouse then the surviving children and their children would take. Finally, the decedent's parent or parents will inherit the right, but if they are deceased and the right has not been assigned, it terminates. *Id.* § 990(e).

207. *Id.* § 990(h).

208. See *supra* text accompanying notes 148-51.

209. CAL. CIV. CODE § 990.

210. *Id.* § 990(k).

211. Only six other jurisdictions have a statute acknowledging a descendible right. Florida's (FLA. STAT. ANN. § 540.08 (West 1982)), is one of the most comprehensive of the seven. Section 540.08(1)(c) reads: "If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of his name or likeness, or if no person, firm or corporation is so authorized, then by anyone from among a class composed of his surviving spouse and surviving children." Unlike California's new statute, this statute is silent on the question of the exploitation requirement. Ironically, Tennessee imposes no exploitation requirement on the celebrity, but the executor, assignee, or heir must exploit the right or the right will lapse. TENN. CODE ANN. § 47-25-1104 (1984).

The statutes of Kentucky, Virginia, Nebraska, and Oklahoma are even less helpful in explanatory terms because they all summarily recognize the descendible right and do little more. KY. REV. STAT. 391-170 (1984); NEB. REV. STAT. § 20-208 (1982); OKLA. STAT. ANN. tit. 21, §§ 839.1, 839.2 (West 1983); VA. CODE § 18.2-216.1 (1982).

(2) *Ownership of Right* — Upon the death of the deceased person, the rights under this section will automatically and immediately descend to the person(s) specified in subdivision (3). The rights enforced under this section are property rights; therefore, they are assignable before and after death of the deceased person, and capable of testamentary disposition.

(3) *Descent of Right* — The right enumerated in subdivision (1) shall, in the absence of trust, testamentary disposition or assignment, descend with full undivided ownership rights to the following person(s): (a) the surviving spouse shall take the full undivided ownership right; (b) if the spouse has predeceased the deceased person or predeceases the surviving children, then said right shall descend to the surviving children of the deceased person; (c) the right shall terminate at the death of the surviving spouse or at the death of the last surviving child, whichever is later.

(4) *Exploitation* — The right under this section will descend whether or not the deceased person during his lifetime exploited his or her name, voice, signature, portrait, likeness, or photograph, in some overt manner.

(5) *Culpability* — Any person found to be in violation of subdivision (1) shall be held liable for such remedies as are provided under subdivision (8) regardless of that person's intent, knowledge, or state of mind in connection with the unauthorized appropriation. Nothing in this subdivision applies to the owners, agents, or employees of the means of communication used for such appropriation unless some type of intent, knowledge or culpable state of mind is shown in connection with the unauthorized use, wherein joint and severable liability attaches.

(6) *Duration* — The right protected under this section shall terminate and accede to the public domain at the death of the surviving spouse or at the death of the last surviving child of the deceased person, whichever is later.

(7) *Exemptions* — The provisions of this section shall not apply to the use of a deceased person's name, voice, signature, portrait, likeness, or photograph in: (a) any newspaper, book, magazine, film, television or radio broadcast which concerns a legitimate public interest; (b) any literary, artistic, or musical creation; and (c) any publication that has some type of newsworthiness.

(8) *Remedies* — For violation of subdivision (1) of this section, the violator will be liable to the injured person(s) specified in subdivision (3) under the following remedies: (a) minimum damages of \$1,000 or the amount of actual damages, whichever is higher; (b) any profits obtained by the illegal use; (c) punitive damages; (d) injunctive relief; and (e) attorney's fees and costs.

The significant distinction between this model and California section 990²¹² is the approach to the lineal descendants who would inherit the right. Instead of enforcing an inflexible fifty-year limit, as in California,²¹³ the natural objects of a deceased's bounty would be better served by a right which only terminates at the last surviving child's or spouse's death. The inflexibility of a fixed requirement may be too long if all the lineal descendants have died, or too brief if the surviving spouse lives for a significant time beyond a prematurely deceased spouse, thereby excluding the children. Furthermore, with knowledge that one's heirs will be assured of receiving his "right of

212. CAL. CIV. CODE § 990 (West Supp. 1985).

213. *Id.* § 990(g). See *supra* notes 205-06.

publicity," a celebrity will have more incentive to reach his ultimate potential. Testamentary dispositions are for the benefit of those alive during the decedent's lifetime.²¹⁴ Thus, a flexible approach terminating the right at the death of the last surviving, immediate family member will best serve the interests of one's heirs and society. Another distinction between this proposed model and California's section 990 is the degree of culpability required of the violator. California's section 990(k) consciously neglects to impose a strict liability standard; rather, it requires each case to be judged on a "question of fact" to determine if the appropriation is "directly connected" with some sort of commercial exploitation.²¹⁵ However, under subdivision (5) of the proposed model statute, the violator would be held strictly liable once it is determined he had made an unauthorized appropriation. This standard ignores any question of scienter. It seems to be a more equitable solution to place the burden of proof on the party violating the statute instead of requiring the injured party to prove some evidence of an intent to commercially exploit.

A final distinction between the two descendibility statutes is section 990(f)'s requirement that a "successor in interest" to the "right of publicity" must register with the Secretary of State and tender a ten-dollar filing fee as a prerequisite to having any enforceable rights.²¹⁶ The model statute alternatively provides that the specified persons would take ownership rights immediately without the burdensome technicalities of section 990(f). Although like distinctions would inevitably occur between any statutes with regard to the "right of publicity," it must be concluded that some specie of statutory scheme, whether similar to this proposed model or not, is the only viable solution to the inconsistency which seems to haunt the question of a descendible "right of publicity."

V. CONCLUSION

The "right of publicity" has slowly evolved out of the right to privacy into an independent doctrine. The uncertainty which once plagued the legal right has subsided, yet important inconsistencies concerning a survivable and descendible right remain unsolved. The inability of our judicial system to acknowledge the descendible "right of publicity" ignores the very basis for which the right exists. Unlike its parent, the right to privacy, the "right of publicity" is to protect one from the unjust enrichment that results from the commercial exploitation of one's name, likeness, or persona. It is admitted that one's right to privacy is a purely personal, nontransferable right that

214. See *supra* note 185.

215. See *supra* note 205 for the text of § 990(k).

216. See *supra* note 205 for the text of § 990(f).

terminates upon one's death. However, the "right of publicity" in its independence is a nonpersonal, assignable, property right which must therefore survive and descend upon one's death.

Once an inheritable right has been acknowledged, one must then consider limitations which include the exploitation requirement, durational limits, and first amendment concerns. A freely descendible "right of publicity" should not be conditioned on an exploitation requirement. A person who has sought privacy and avoided exploitation in his lifetime should be entitled to the same protections, perhaps to an even greater degree, that a person who has exploited his name or likeness would enjoy. The descended right should exist in the heirs until the last surviving child or surviving spouse has died. Therefore, the natural objects of the decedent's bounty would be served, and society will be enriched when the right terminates and accedes to the public domain. The first amendment and a descendible "right of publicity" will always be at odds. They can co-exist, however, at least until a free speech medium is used as a guise for commercial exploitation.

The uncertainty surrounding the descendibility of the "right of publicity" cannot be eliminated by indecisive and inconsistent courts. A freely survivable and inheritable right must be recognized, and legislative action seems to be the only solution to the celebrity's plight.

TIMOTHY C. WILLIAMS

