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THE RIGHT OF PUBLICITY AND ITS DESCENDIBILITY

VICKY GERL NEUMEYER*

I. INTRODUCTION

"The right of publicity . . . represents the right of an individual to control the commercial value of his name and likeness and to prevent their unauthorized exploitation by others."¹ The purpose behind the right of publicity is similar to that underlying many of the tenets of a democratic society.² It has been described as the "encouragement of individual enterprise and creativity by allowing people to profit from their own efforts."³

Most courts and many state legislatures recognize the right of publicity.⁴ However, the trend toward recognizing its descendibility is not unanimously accepted.⁵ Even those accepting its descendibility disagree over the theoretical basis supporting the doctrine of descendibility. Similarly, tension exists between the first amendment freedom of speech and a descendible right of publicity.⁶ This Article addresses the origin of the right of publicity and the theoretical and legal bases concerning descendibility,⁷ cur-

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1. *Groucho Marx Productions, Inc. v. Day & Night Co., Inc.*, 523 F. Supp. 485, 487 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982).

2. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 576-77 (1976), where the Court finds the rationale for the right of publicity analogous to those underlying copyright and patent law.

3. Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?* 89 YALE L.J. 1125, 1128 (1980) [hereinafter Felcher & Rubin].

4. Dewey, *The Evolving Doctrine of Right of Publicity: Judicial Protection of Celebrity's Pecuniary Interest from Commercial Exploitation of His or Her Identity and Theatrical Style*, 22 CREIGHTON L. REV. 39, 46, 62 (1988).

5. Terrell & Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985) [hereinafter Terrell & Smith].

6. Specifically, the concern is with the possibility of an unlimited right of publicity. Some fear that historical and biographical analysis, as well as public comment, could be threatened. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 250 Ga. 135, 296 S.E.2d 697, 708-09 (1982) (Weltner, J., concurring). This concern is further endangered by the possibility of a right of publicity that is unlimited in duration. See *Schumann v. Loew's, Inc.*, 144 N.Y.S.2d 27 (N.Y. Sup. Ct. 1955).

7. See *infra* notes 10-20 and accompanying text.

rent legislation and associated problems,⁸ and proposed solutions.⁹

II. ORIGIN OF THE RIGHT OF PUBLICITY

The term "right of publicity" was introduced in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁰ It emerged from the right of privacy,¹¹ that is, the appropriation of one's name or likeness for another's advantage.¹² The right of privacy was historically viewed as a personal right terminating at death. By analogy, the right of publicity should also terminate at death.¹³ However, the *Haelan* court rejected this analogy, explaining that prominent persons have an economic interest in the publicity value of their images that is separate and independent of the right of privacy.¹⁴ The court did not address the issue of descendibility, as it was not faced with that question.

Philosopher John Locke suggested that an analogy to property rights would be more appropriate.¹⁵ Under Locke's theory, property rights existed before the state, which later developed to protect individuals' rights "to the fruits of their labor."¹⁶ Accordingly, as property rights were inheritable, the right of publicity can also be descendible.¹⁷

The debate is one of personal right versus property right. Is the right of publicity a personal right that is not devisable upon death? Or is the right of publicity a property right that is devisable? Neither is a perfect classification. Publicity rights are suscep-

8. See *infra* notes 146-179 and accompanying text.

9. See *infra* notes 180-220 and accompanying text.

10. 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

11. Felcher & Rubin, *supra* note 3, at 1127. See *Groucho Marx Productions, Inc. v. Day & Night Co.*, 523 F. Supp. 485, 487 (S.D.N.Y. 1981); *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981). See also R.F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 134 (1987).

12. Terrell & Smith, *supra* note 5, at 11. The right of privacy comprises four distinct causes of action: (1) "the appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness;" (2) "intrusion upon the plaintiff's physical solitude or seclusion;" (3) disclosing "private information about the plaintiff, even though it is true and no action would lie for defamation;" and (4) casting "the plaintiff in a false light in the public eye." W.L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 804 (4th ed. 1971). See also W.L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 635 (2d ed. 1955).

13. Felcher & Rubin, *supra* note 3, at 1127.

14. *Haelan*, 202 F.2d at 868. See also Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1705 (1983).

15. See Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (cited in Note, *supra* note 14, at 1705).

16. Note, *supra* note 14, at 1706 n.20.

17. Felcher & Rubin, *supra* note 3, at 1127.

tible of pecuniary value which is unique to a property right.¹⁸ Yet, falling within the property classification does not automatically lead to descendibility.¹⁹

A common thread in the search for a theoretical basis for the publicity right is the idea that individuals have the right to control the fruits of their efforts and enterprise. Third parties should not be allowed to appropriate the work of another for his or her own profit and advantage.²⁰

III. CASE LAW

The theoretical debate regarding the descendibility of the right of publicity has produced a body of case law described as a "legal wilderness."²¹ Historically, the legal descendibility issue involved many well-known persons. In *Lugosi v. Universal Pictures Co.*,²² the California Superior Court held that Bela Lugosi's identity as Dracula was a property right and, as such, descended to his heirs.²³ In *Price v. Hal Roach Studios, Inc.*,²⁴ the New York district court faced the issue of infringement of the publicity rights of Stan Laurel and Oliver Hardy.²⁵ The court explored the differences between a personal right and a property right,²⁶ and concluded that the widows of the comedy team had a cause of action because

18. Terrell & Smith, *supra* note 5, at 11.

19. J.T. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:7 (1988).

20. See, e.g., *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Esq. 136, 67 A. 392, 395 (N.J. Ch. 1907) (extending the term "property rights" to include the use of one's name and pictorial representation); Hart, *The 100: A Ranking of the Most Influential Persons in History*, in 48 JOHN LOCKE 262 (1978) (discussing a 1689 writing by Locke which set forth Locke's belief in a natural right to private property). See generally *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (discussing the natural rights of the individual).

21. Note, *supra* note 14, at 1703.

22. 172 U.S.P.Q. 541 (Cal. Super. Ct. 1972), *rev'd*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (Ca. 1979).

23. *Lugosi*, 172 U.S.P.Q. at 551.

24. 400 F. Supp. 836 (S.D.N.Y. 1975)

25. *Id.* at 838.

26. The *Price* court commented:

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

Id. at 844 (footnotes omitted).

the right of publicity descended to them.²⁷

Three years later, in *Hicks v. Casablanca Records*,²⁸ the same district court defined what is known as the lifetime exploitation requirement:

[A] party claiming the right [of publicity] 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, e.g. making an *inter vivos* transfer of the rights in the name [], or posing for bubble gum cards. . . .²⁹

In *Hicks*, which involved the publicity rights of Agatha Christie, the court concluded that the author had exploited her right of publicity during her lifetime, and because of this, the right was descendible.³⁰

The lifetime exploitation requirement is viewed as a limiting principle meant to "physicalize" the intangible right of publicity,³¹ as an interest manifested in a discernible form is more easily legitimized as a survivable property right.³² While the *Hicks* court acknowledged the lifetime exploitation requirement, it rejected the defendants' argument for an extension of the theory. The defendants had maintained that the exploitation must involve conduct or property not associated with the primary profession of the decedent.³³ The court concluded all that was necessary was some recognition of the publicity right by the author during her lifetime.³⁴

In *Price v. Hal Roach Studios, Inc.*,³⁵ decided three years before *Hicks*, the New York district court had raised a variation of

27. *Id.* at 846.

28. 464 F. Supp. 426 (S.D.N.Y. 1978).

29. *Id.* at 429.

30. *Id.* at 429-30.

31. Note, *supra* note 14, at 1707-14.

32. *Id.* at 1712. See also Felcher & Rubin, *supra* note 3, at 1131.

33. *Hicks*, 464 F. Supp. at 429 n.6.

34. *Id.* at 429. One commentator criticized this decision, claiming that the court misinterpreted a footnote in an earlier decision rendered by the Second Circuit in *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978). McCARTHY, *supra* note 19, at §9. In *Factors*, which involved Elvis Presley's estate, the court stated that it did not have to decide if the descendibility of publicity rights was contingent on lifetime exploitation, because Presley had exploited his right of publicity. *Factors*, 579 F.2d at 222 n.11. The *Hicks* court followed the Second Circuit's reasoning, explaining that that court had held that the right of publicity "survive[d] only if it [was] found that the owner 'exploited' the right during his or her lifetime." *Hicks*, 464 F. Supp. at 429. See *infra* notes 68-94 and accompanying text for a discussion of the *Factors* case.

35. 400 F. Supp. 836 (S.D.N.Y. 1975). See *supra* notes 24-27 and accompanying text.

the lifetime exploitation requirement.³⁶ In that case, defendants argued that Laurel and Hardy abandoned their publicity rights by not using them prior to their deaths.³⁷ The court found this assertion to be nonsensical, and rejected the notion that decedents had to have asserted their publicity rights during their lifetime for them to descend to their heirs.³⁸ Therefore, it is clear that the court changed its position between 1975 and 1978.

In 1979, the Supreme Court of California reversed the 1972 *Lugosi* decision.³⁹ The court explained: "It seems to us rather novel to urge that because one's immediate ancestor did not exploit the flood of publicity and/or other evidence of public acceptance he received in his lifetime for commercial purposes, *the opportunity* to have done so is property which descends to his heirs."⁴⁰ This decision has been criticized as "opaque" and "thoroughly confus[ing] the rights of publicity, privacy, and the law of trademarks, mixing them up into an unpalatable soufflé of confusion."⁴¹

The lifetime exploitation doctrine provides the link between the right of publicity and the notion of unlawful appropriation of a property right. The application varies from court to court, and is made even more confusing by choice of law principles. In 1982, in *Groucho Marx Productions v. Day and Night Co.*,⁴² the Second Circuit reversed a district court decision involving the publicity rights of the Marx Brothers.⁴³ The district court, applying New York law, concluded that a right of publicity existed,⁴⁴ and that it survived death.⁴⁵ The Second Circuit, however, found that California law applied,⁴⁶ and under the law of that state, the Marx Broth-

36. *Price*, 400 F. Supp. at 844.

37. *Id.* at 839.

38. *Id.*

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

40. *Id.* at 822, 603 P.2d at 430, 160 Cal Rptr. at 328.

41. *McCarthy*, *supra* note 19, at §9.

42. 689 F.2d 317 (2d Cir. 1982), *rev'g* 523 F. Supp. 485 (S.D.N.Y. 1981).

43. *Id.* at 318.

44. *Groucho Marx Productions v. Day and Night Co.*, 523 F. Supp. 485, 489 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982).

45. *Id.* at 492.

46. *Groucho Marx*, 689 F.2d at 320. The Second Circuit noted that the district court's decision to look to New York law was incorrect. *Id.* at 319. Recognizing that the three Marx brothers were California residents at the time of their deaths, and although the conduct alleged to impair their rights occurred in New York, California was the state with the most significant contacts. *Id.* at 319-20.

ers' right of publicity ended at death.⁴⁷ The court cited the *Lugosi* decision for the proposition that California did not "recognize a descendible right of publicity available to the heirs of a celebrity who did not exploit his own right during his lifetime."⁴⁸ The *Groucho Marx* court reasoned that the *Lugosi* decision had two different interpretations: 1) California recognized no descendible right of publicity; or 2) California law recognized a descendible law of publicity, but this right protected only those products or services with which the decedent associated or promoted during his lifetime.⁴⁹ Because defendants in *Groucho Marx* used the likeness and comedic style of the Marx Brothers in an original play with which the entertainers had not themselves associated while alive,⁵⁰ the right of publicity did not descend in this situation.⁵¹ Thus, the Second Circuit seemed to adopt the defendants' argument in the *Hicks* case⁵² implying that only the direct efforts of the deceased would be protected from unlawful commercial appropriation.

At the same time the New York courts were grappling with the right of publicity issue, an unrelated line of decisions was rendered involving the estate of Elvis Presley. In *Memphis Dev. Found. v. Factors Etc., Inc.*,⁵³ the Sixth Circuit rejected a post-mortem right of publicity.⁵⁴ Plaintiff, Factors Etc., was the exclusive licensee of the Presley estate.⁵⁵ Factors Etc. brought suit to enjoin defendant from making and selling small pewter replicas of a statue of Presley in return for a twenty-five dollar donation,⁵⁶ the proceeds of which were to be used to build a bronze statue of the star in downtown Memphis.⁵⁷ The district court granted the pre-

47. *Id.* at 323.

48. *Id.* at 321.

49. *Id.* at 323.

50. *Id.*

51. *Id.* The court went on to hold:

Since California would recognize, at most, a descendible right of publicity only in connection with particular commercial situations—products and services—that a celebrity promoted during his lifetime, we conclude that California would not recognize a descendible right of publicity that protects against an original play using a celebrity's likeness and comedic style.

Id. (footnote omitted).

52. See *supra* text accompanying note 33.

53. 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980).

54. *Memphis Development*, 616 F.2d at 957.

55. *Id.* Two days after the entertainer's death, Factors, Etc. purchased the license from Boxcar Enterprises, as Presley had previously conveyed Boxcar the exclusive rights to exploit the commercial value of his name. *Id.*

56. *Id.*

57. *Id.*

liminary injunction.⁵⁸ The Sixth Circuit reversed, holding that the right of publicity was not inheritable, and stated that "[a]fter death, the opportunity for gain shifts to the public domain, where it is equally open to all."⁵⁹

The *Memphis Development* court further asserted that the public's right to the free commercial and competitive use of the famous decedent's name and likeness outweighed any increased creativity of the decedent that would be motivated by the knowledge that the heirs would benefit.⁶⁰ The court explained:

Heretofore, the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual, whether famous or not. Commercialization of this virtue after death in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture. . . . It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few. An equal distribution of the opportunity to use the name of the dead seems preferable. 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.⁶¹

Consequently, unjust enrichment from appropriation of another's work would not be prohibited after the other person's death.

Finally, the Sixth Circuit identified several issues associated with an inheritable right of publicity, questioning, for example, the duration of the right.⁶² Would the right be taxed?⁶³ Did the right apply only to famous entertainers, public officials, military heroes, etc?⁶⁴ How would conflict with the first amendment be resolved?⁶⁵ What would the right cover (e.g., pastry ("Napoleon"), a football stadium ("RFK"), apartment complex names, posters, electric util-

58. *Memphis Dev. Found. v. Factors Etc., Inc.*, 441 F. Supp. 1323, 24 (W.D. Tenn. 1977), *rev'd*, 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980). The injunction allowed the Memphis Foundation to build the memorial, but prohibited it from "manufacturing, selling or distributing any statuette bearing the image or likeness of Elvis Presley, or utilizing commercially or in any manner or form the name, image, photograph or likeness of Elvis Presley." *Memphis Development*, 616 F.2d at 957.

59. *Id.*

60. *Id.* at 959-60.

61. *Id.*

62. *Id.* at 959.

63. *Id.*

64. *Id.*

65. *Id.*

ities ("Edison"), or insurance ("John Hancock"))?⁶⁶ The court concluded that fame was "an attribute from which others may benefit but may not own."⁶⁷

Another suit involving the Presley estate was litigated in New York. In *Factors Etc., Inc. v. Pro Arts, Inc.*,⁶⁸ plaintiff brought suit to enjoin infringement of its exclusive license to Presley's name and likeness.⁶⁹ Defendants had published a poster of Presley entitled "In Memory," thereby making commercial use of the Presley name.⁷⁰ The district court granted the preliminary injunction, and the Second Circuit affirmed and remanded.⁷¹ On remand,⁷² the district court granted plaintiffs' motion for summary judgment,⁷³ basing its decision on "careful consideration of relevant cases and competing policy concerns," thus not conforming with the views of the Sixth Circuit.⁷⁴

Defendants again appealed to the Second Circuit, which this time reversed the lower court.⁷⁵ The Second Circuit found that Tennessee law was applicable;⁷⁶ the only question facing the court was whether to defer to the opinion of the Sixth Circuit in *Memphis Development*.⁷⁷ The Second Circuit concluded:

Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward

66. *Id.*

67. *Id.*

68. 579 F.2d 215 (2d Cir. 1978).

69. *Id.* at 217.

70. *Id.*

71. *Id.* at 222.

72. *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980).

73. *Id.* at 1092.

74. *Id.* at 1095. Defendants had raised the defenses of federal preemption, contractual right of first refusal, and the first amendment. The Second Circuit rejected all three arguments. Specifically, the court found that the right of publicity has not been addressed by federal law, and was outside of the scope of copyright law. *Id.* at 1100. Second, the court determined that the events surrounding this dispute forced a finding contrary to a valid right of first refusal. *Id.* at 1103. Finally, the court acknowledged that the right of publicity "may have to yield to the First Amendment under certain circumstances." *Id.* However, the facts of this case did not present an occasion to assert a constitutional privilege. *Id.*

75. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 284 (2d Cir. 1981).

76. *Id.* at 281.

77. *Id.* See *supra* notes 53-67 and accompanying text for a discussion of the *Memphis Development* case.

a different rule.⁷⁸

Because there was a lack of evidence demonstrating that the Sixth Circuit decided incorrectly, the Second Circuit deferred to the opinion of the Sixth Circuit, and reversed the permanent injunction.⁷⁹

In a forceful dissent, Circuit Judge Mansfield disagreed with the deference given the Sixth Circuit by the majority.⁸⁰ He explained that the Sixth Circuit's opinion was "not in any way derived from the local law of Tennessee," and that it was inconsistent with "nearly every other case which had considered the issue."⁸¹ Moreover, it was "contrary to all current views of scholarly commentators on the subject."⁸² The dissenting judge refuted the "parade of horrors conjured by the Sixth Circuit, . . ."⁸³ referring to the practical concerns associated with a recognized descendible right of publicity.

Judge Mansfield instructed that it was not sufficient for the decedent to have been a public figure to recognize a descendible publicity right;⁸⁴ the law required some degree of commercial exploitation of decedent's fame.⁸⁵ Further, the publicity right did not apply to titles and offices not alienable by law.⁸⁶

The *Factors* case was next remanded to the district court for entry of final judgment. Entry of judgment was stayed pending plaintiffs' petition to the Second Circuit to reverse its order based on a change in state law.⁸⁷ Plaintiffs had cited a 1981 Tennessee decision which held that Tennessee did recognize a descendible right of publicity.⁸⁸ The Second Circuit,⁸⁹ however, pointed out

78. *Factors*, 652 F.2d at 283.

79. *Id.*

80. *Id.* at 284 (Mansfield, J., dissenting).

81. *Id.*

82. *Id.*

83. *Id.* at 287.

84. *Id.*

85. *Id.* Judge Mansfield pointed out that he "would require proof of some form of exploitation along the lines outlined . . . in *Hicks* . . ." *Id.* at 287 n.4.

86. *Id.* at 287.

87. *Factors Etc., Inc. v. Pro Arts, Inc.*, 541 F. Supp. 231 (S.D.N.Y. 1982).

88. *Factors*, 541 F. Supp. at 233. The case relied upon by plaintiffs was *Commerce Union Bank v. Coors of the Cumberland, Inc.*, 7 Media L. Rptr. (BNA) 2204 (Tenn. Ch. Ct. 1981). Because this case held that, under Tennessee law, the right of publicity was descendible, plaintiffs requested the Second Circuit to stay entry of judgment, so that they could petition the Second Circuit to recall its mandate and rehear the case on the basis of the intervening *Commerce Union Bank* case. *Factors*, 541 F. Supp. at 233.

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

that a subsequent Tennessee decision⁹⁰ held that Tennessee did not recognize a descendible right of publicity,⁹¹ and concluded that conflicting decisions of the state court afforded it "no basis for considering the law of Tennessee to have authoritatively been changed. . . ."⁹²

Judge Mansfield again dissented, noting:

The conflicting Tennessee Chancery Court decisions only serve to emphasize that, with due respect for our distinguished and able colleagues of the Sixth Circuit, we are in as good a position as they to divine what would be the position of the Supreme Court of Tennessee on the issue of whether the right of publicity is descendible.⁹³

Judge Mansfield recommended the court follow its usual practice when faced with a circuit conflict, namely, to "decid[e] a case according to what we believe to be the more rational basis."⁹⁴

Cases concerning the issue of a descendible right of publicity arose in other parts of the country. In *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*,⁹⁵ the Eleventh Circuit was faced with a case involving the publicity rights of Martin Luther King, Jr.⁹⁶ Defendants had manufactured and sold plastic busts of King. Plaintiffs refused to endorse the promotion, and sought to enjoin defendants from reproducing the image of King for commercial purposes, basing their request on the right of publicity.⁹⁷ The district court for Georgia granted in part plaintiffs' motion for a preliminary injunction,⁹⁸ and plaintiffs appealed.⁹⁹ The Eleventh Circuit certified to the Supreme Court of Georgia the questions of whether the right of publicity was recognized in Georgia as a right distinct from the right of privacy, and if

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

91. *Factors*, 701 F.2d at 12.

92. *Id.*

93. *Id.* at 13 (Mansfield, J., dissenting).

94. *Id.*

95. 694 F.2d 674 (11th Cir. 1983).

96. *Id.* at 675.

97. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 508 F. Supp. 854, 862 (N.D. Ga. 1981).

98. *Id.* at 854. The district court granted plaintiff's motion for an injunction as to the use of the name of Martin Luther King, Jr. Center for Social Change in the marketing of the busts, and as to the use of his name for commercial profit. The court did not enjoin defendants, however, from the sale and manufacture of the plastic busts of the image of King. *Id.* at 866.

99. *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods.*, 694 F.2d 674 (11th Cir. 1983).

so, whether the right survived the death of its owner.¹⁰⁰ In reply, the Georgia Supreme Court instructed that Georgia recognized a descendible right of publicity, having a measure of damages equal to "the value of the appropriation to the user."¹⁰¹ The Georgia court relied on the principle that the unlawful appropriation of another's property "for the financial gain of the appropriator is a tort. . . ."¹⁰² Moreover, the Georgia court declared that it did not subscribe to the lifetime exploitation requirement.¹⁰³ Accordingly, the Eleventh Circuit reversed the district court's judgment.¹⁰⁴

Later in 1983, the Eleventh Circuit in *Acme Circus Operating Co. v. Kuperstock*¹⁰⁵ applied California law to find that the publicity rights in the name "Clyde Beatty" were descendible.¹⁰⁶ Beatty, an animal trainer and operator of the Clyde Beatty Circus, assigned all of the rights in his name to his wife before his death.¹⁰⁷ Plaintiff Acme Circus initially sought a declaratory judgment to recognize its right to use the Beatty name with its circus.¹⁰⁸ The Eleventh Circuit noted that it faced "no small task" in trying to apply California law,¹⁰⁹ as it had to clarify the confusing *Lugosi* decision.¹¹⁰ The court interpreted *Lugosi* to require lifetime exploitation, thereby turning the right of publicity into a commercial venture.¹¹¹ The *Kuperstock* court found that where the right was so exploited, as well as assigned during the owner's lifetime, the rights from the assignment survived the owner's death.¹¹² Because Beatty satisfied both requirements, his wife held valid publicity rights in his name.¹¹³ Thus, the court reinforced the underlying notion of publicity rights, namely, that a third party cannot appropriate the labor and accomplishments of another for his own com-

100. *Id.* at 674.

101. *Id.* at 680.

102. *Id.*

103. *Id.* at 682.

104. *Id.* at 675.

105. 711 F.2d 1538 (11th Cir. 1983).

106. *Id.* at 1545.

107. *Id.* at 1539.

108. *Id.* at 1539-40. In 1958, Beatty had sold his circus equipment and property to Acme Circus, licensing to the circus the right to use the name of Clyde Beatty and Clyde Beatty Circus. *Id.* at 1539. The agreement was for a term of ten years. *Id.* In 1965, Beatty assigned all of his "right, title and interest in the Clyde Beatty Circus title and equipment" to his wife, Jane Beatty Kuperstock. *Id.*

109. *Id.* at 1541.

110. *Id.* at 1541-45. See *supra* notes 39-41 and accompanying text for a discussion of the *Lugosi* opinion.

111. *Kuperstock*, 711 F.2d at 1544.

112. *Id.*

113. *Id.* at 1545.

mercial gain.

A more recent decision absolutely rejecting a post-mortem right of publicity is *Reeves v. United Artists*.¹¹⁴ Plaintiff, the widow of boxer J.R. Jimmy Reeves, brought suit alleging misappropriation of her deceased husband's "name, identity, character, ability and performance,"¹¹⁵ resulting from defendant's release of a motion picture depicting a portion of one of Reeves' fights.¹¹⁶ The district court, looking to the Ohio Supreme Court decision in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹¹⁷ noted that the state supreme court expressly rejected the right of publicity as a property right and found it to be in harmony with the right of privacy.¹¹⁸ For this reason, the district court concluded "that under Ohio law, the right of publicity, like the right of privacy, [was] not descendible."¹¹⁹

In 1984, the New York courts encountered a different type of appropriation. *Southeast Bank, N.A. v. Lawrence*¹²⁰ concerned a theater in Manhattan that had been renamed for Tennessee Williams.¹²¹ Defendants claimed that their actions were meant to honor the deceased playwright; however, the court found that defendants were motivated by financial gain.¹²² The Appellate Division of the New York Supreme Court, affirming the grant of a preliminary injunction, commented:

The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.¹²³

More recently, the Tennessee Court of Appeals ruled that Tennessee recognized a descendible common law right of publicity.¹²⁴ In *State ex rel. Elvis Presley Int'l Memorial Found. v.*

114. 572 F. Supp. 1231 (N.D. Ohio 1988).

115. *Id.* at 1231.

116. *Id.* at 1232.

117. 47 Ohio St. 2d 224, 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

118. *Reeves*, 572 F. Supp. at 1235.

119. *Id.*

120. 104 A.D.2d 213, 483 N.Y.S.2d 218 (N.Y. App. Div. 1984).

121. *Id.*

122. *Id.* at 219-20, 483 N.Y.S.2d at 223.

123. *Id.* at 218, 483 N.Y.S.2d at 222 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977)).

124. *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

Crowell,¹²⁵ plaintiff, a corporation not licensed to use the Presley name, alleged unfair competition by defendant corporation which was licensed by the Presley estate.¹²⁶ The Tennessee court affirmed the trial court's finding that Presley's right to control the commercial exploitation of his publicity had descended to his estate,¹²⁷ rejecting the Sixth Circuit's holding in *Memphis Development*.¹²⁸ The court explained that the Sixth Circuit's decision was "based upon an incorrect construction of Tennessee law and [was] inconsistent with the better reasoned decisions in this field."¹²⁹

The Tennessee court also discussed the pecuniary value of the right of publicity, observing the widespread practice of celebrities' exploitation of their public recognition.¹³⁰ The court acknowledged its acute sensitivity to this because of its situs—Nashville: "There are few every day activities that have not been touched by celebrity merchandising. . . . These endorsements are of great economic value to celebrities and are now economic reality."¹³¹

Based on this Tennessee decision, the Sixth Circuit chose not to follow its *Memphis Development* ruling in yet another Presley case. In *Elvis Presley Enter. v. Elvisly Yours*,¹³² plaintiff, an assignee of various rights of the Presley estate, brought suit to enjoin defendant from selling products containing the logo "Elvisly Yours."¹³³ The Sixth Circuit noted that the district court had not addressed the issue of a descendible right of publicity except to recognize defendants' reliance on *Memphis Development*.¹³⁴ Acknowledging that its *Memphis Development* decision was based on policy and equity and not on Tennessee cases,¹³⁵ the Sixth Circuit reversed the district court's judgment and remanded the case for further consideration in light of the state court decision recognizing a descendible right to publicity.¹³⁶

In *Gracey v. Maddin*,¹³⁷ a Tennessee appellate court relied, in

125. 733 S.W.2d 89 (Tenn. Ct. App. 1987).

126. *Id.* at 91.

127. *Id.*

128. See *supra* notes 53-67 and accompanying text for a discussion of the *Memphis Development* case.

129. *Crowell*, 733 S.W.2d at 97.

130. *Id.* at 94.

131. *Id.*

132. 14 Media L. Rptr. (BNA) 1053 (6th Cir. 1987).

133. *Id.* at 1053.

134. *Id.* at 1055.

135. *Id.*

136. *Id.*

137. 769 S.W.2d 497 (Tenn. App. 1989).

part, on the *Crowell* opinion. *Gracey* arose when plaintiff, a deceased attorney's widow, brought suit to prohibit defendants' use of the decedent's name as part of the name of a law firm in which decedent had been a practicing partner.¹³⁸ The trial court granted plaintiff's motion for summary judgment, entering judgment prohibiting defendants' use of decedent's name.¹³⁹ The appellate court affirmed, and in noting the fundamental nature of individual property rights, declared that "[u]nquestionably, a celebrity's right of publicity has value."¹⁴⁰ Finding a sufficient basis to classify the right of publicity as an intangible property right,¹⁴¹ the court concluded that a person has an assignable property right in the use of his name.¹⁴² In *Gracey*, the court found that the partnership did not have the right, absent a voluntary agreement between the decedent or his estate and the partnership, to the continued use of decedent's name.¹⁴³

In sum, the right of publicity "recognizes one of the basic principles of Anglo-American jurisprudence that 'one may not reap where another has sown nor gather where another has strewn.'"¹⁴⁴ With the exception of the *Reeves* decision,¹⁴⁵ the case law today indicates that the judicial system appreciates the pecuniary value of the right of publicity, associating it with the legal doctrine of unjust enrichment to provide post-mortem protection. The right is increasingly being aligned with property rights rather than personal rights.

IV. LEGISLATION

The modern trend evidences the recognition by individual states of the right of publicity either at common law or by statute. To date, nearly one-half of the states have done so.¹⁴⁶ Courts in California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michi-

138. *Id.* at 498.

139. *Id.* at 497.

140. *Id.* at 500.

141. The court noted that the right of publicity "can be possessed and used, it can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property." *Id.* at 500-01.

142. *Id.* at 501.

143. *Id.* at 500. The court recognized that "an individual's name may become so associated with a partnership as to strip it of its individuality, thereby transforming it into part of the partnership good will." *Id.* No such transformation occurred in *Gracey*. *Id.*

144. Dewey, *supra* note 4, at 61.

145. See *supra* notes 114-19 and accompanying text.

146. McCARTHY, *supra* note 19, at § 6.1. See also, Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179-80 (1987).

gan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Wisconsin have recognized a common law right of publicity.¹⁴⁷ Of those states, California, Florida, and Texas also have statutes expressly recognizing a post-mortem right of publicity.¹⁴⁸ In addition, Kentucky, Massachusetts, Oklahoma, Tennessee, and Utah expressly recognize a right of publicity.¹⁴⁹ Five states have impliedly recognized a right of publicity within their privacy statutes: Nebraska, New York, Rhode Island, Virginia, and Wisconsin.¹⁵⁰

While the statutes vary in some particulars, a common thread exists throughout—the prohibition of unlawful appropriation of another's property for commercial purposes. The language of the Florida statute is representative: "No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without [] express written or oral consent. . . ."¹⁵¹ The Kentucky, Tennessee, and Texas statutes go further in stating that an individual's interest in their name or likeness is a property right: "The general assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation."¹⁵²

Although the general principle is the same throughout these legislative enactments, potentially troublesome differences exist. Of those states acknowledging some statutory right of publicity, nine provide for post-mortem rights: California, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas, and Virginia.¹⁵³ Of these nine, seven furnish a definite duration,¹⁵⁴ and only Cali-

147. MCCARTHY, *supra* note 19, at § 6.1[B]. *But see supra* notes 114-19 and accompanying text concerning the *Reeves* decision and Ohio state law.

148. MCCARTHY, *supra* note 19, at § 9.5[A]. *See* CAL. CIV. CODE § 990 (West Supp. 1991); FLA. STAT. ANN. § 540.08 (West 1988); TEX. PROP. CODE ANN. § 26.002 (Vernon Supp. 1991).

149. MCCARTHY, *supra* note 19, at § 9.5[A]. *See* KY. REV. STAT. ANN. § 391.170 (Baldwin 1989); MASS. ANN. LAWS ch. 214, § 3A (Law. Co-op. 1986); OKLA. STAT. ANN. tit. 12, § 1448 (West Supp. 1991); TENN. CODE ANN. § 47-25-1103 (1988); UTAH CODE ANN. §§ 45-3-1 to -6 (1988).

150. MCCARTHY, *supra* note 19, at § 6.3[A]. *See* NEB. REV. STAT. §§ 20-201—211 (1987); N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1991); R.I. GEN. LAWS § 9-1-28—28.1 (1985); VA. CODE ANN. § 8.01-40 (1984); WIS. STAT. ANN. § 895.50 (West 1983 & Supp. 1988).

151. FLA. STAT. ANN. § 540.08(1) (West 1988).

152. KY. REV. STAT. ANN. § 391.170(1) (Baldwin 1989). The Tennessee and Texas statutes include an individual's photograph. *See* TENN. CODE ANN. § 47-25-1103 (1988); TEX. PROP. CODE ANN. § 26.002 (Vernon Supp. 1991).

153. MCCARTHY, *supra* note 19, at § 6.3[A].

154. *Id.* Those states are California, Florida, Kentucky, Oklahoma, Tennessee, Texas, and Virginia. *Id.* Nebraska provides no definite term. *See* NEB. REV. STAT. § 20-208 (1987).

fornia, Kentucky, and Texas maintain a duration of fifty years.¹⁵⁵ Oklahoma provides the most extensive protection of 100 years.¹⁵⁶ California, Oklahoma, and Texas require that a person claiming to be the successor-in-interest to the rights of a deceased personality must register that claim with the Secretary of State before any damages may be recovered.¹⁵⁷

The extent of the statutory protection varies among jurisdictions. While all of the statutes cover an individual's name and likeness,¹⁵⁸ only California, Oklahoma, and Texas protect the voice.¹⁵⁹ California, Florida, Oklahoma, Tennessee, and Texas protect a photograph.¹⁶⁰ Additionally, statutory remedies differ.¹⁶¹ Massachusetts and Rhode Island, for example, provide for treble damages.¹⁶² California and Texas are the only states that do not maintain injunctive relief.¹⁶³ Kentucky and Nebraska provide no definitive statutory relief.¹⁶⁴ Finally, only California and Tennessee expressly address the lifetime exploitation requirement by rejecting it.¹⁶⁵

While the notion of unlawful appropriation is seen consistently, interstate variation in the framework of the right of publicity is obvious. Concomitant with this are problems of notice, choice

155. *McCarthy*, *supra* note 19, at § 6.3 [A]. See CAL. CIV. CODE § 990(g) (West Supp. 1991); KY. REV. STAT. ANN. § 391.170(2) (Baldwin 1989); TEX. PROP. CODE ANN. § 26.012(d) (Vernon Supp. 1991). Florida provides forty years of protection. FLA. STAT. ANN. § 540.08(4) (West 1988). Tennessee provides ten years of protection whether or not the right is exercised. If the publicity right is commercially exploited, the protection will be maintained as long as the exploitation is maintained. TENN. CODE ANN. § 47-25-1104(a)—(b)(1) (1988). Virginia provides twenty years of protection. VA. CODE ANN. § 8.01-40(B) (1984).

156. OKLA. STAT. ANN. tit. 12, § 1448(G) (West Supp. 1991).

157. See CAL. CIV. CODE § 990(f)(1) (West Supp. 1991); OKLA. STAT. ANN. tit. 12, § 1448 (F)(1)—(4) (West Supp. 1991); TEX. PROP. CODE ANN. § 26.006 (Vernon Supp. 1991).

158. *McCarthy*, *supra* note 19, at § 6.3[A]. "Likeness" is defined as including a picture. *Id.*

159. See CAL. CIV. CODE § 990(a) (West Supp. 1991); OKLA. STAT. ANN. tit. 12, § 1448(A) (West Supp. 1991); TEX. PROP. CODE ANN. § 26.002 (Vernon Supp. 1991).

160. See CAL. CIV. CODE § 990(a) (West Supp. 1991); FLA. STAT. ANN. § 540.08(1) (West 1988); OKLA. STAT. ANN. tit. 12, § 1448(A) (West Supp. 1991); TENN. CODE ANN. § 47-25-1103(a) (1988); TEX. PROP. CODE ANN. § 26.002 (Vernon Supp. 1991).

161. *McCarthy*, *supra* note 19, at § 6.3[A].

162. See MASS. ANN. LAWS ch. 214, § 3A (Law. Co-op. 1986); R.I. GEN. LAWS § 9-1-28 (1985).

163. See CAL. CIV. CODE § 990(a) (West Supp. 1991); TEX. PROP. CODE ANN. § 26.013 (Vernon Supp. 1991).

164. See KY. REV. STAT. §§ 391.170 (Baldwin 1989); NEB. REV. STAT. §§ 20-208—209 (1987).

165. See CAL. CIV. CODE § 990(h) (West Supp. 1991); TENN. CODE ANN. § 47-25-1103(b) (1988).

of law, and forum shopping.¹⁶⁶ An example is *Southeast Bank, N.A. v. Lawrence*,¹⁶⁷ where both the trial court and the appellate court applied New York law and ruled in favor of the plaintiff, granting a preliminary injunction. However, the New York Court of Appeals reversed, finding that Florida law applied. The court explained that governing choice of law principles required application of "the substantive law of the decedent's domicile."¹⁶⁸ Because decedent was a Florida domiciliary when he died, under Florida law, plaintiff did not have a cause of action.¹⁶⁹

Similar situations occur among the federal and state systems. For example, the Tennessee appellate court in *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*¹⁷⁰ declared that the Sixth Circuit, in its *Memphis Development* decision,¹⁷¹ incorrectly construed Tennessee law.¹⁷² Thus, a party's subsequent reliance on *Memphis Development* would be misplaced. Likewise, the formidable history of *Factors Etc., Inc. v. Pro Arts, Inc.* provides a good example of the difficulties encountered by the federal courts in applying state law.¹⁷³ Given the interstate nature of most products, potential parties face confusion as to what is necessary to protect themselves. Can the licensee of the Presley estate prohibit the commercial appropriation of Elvis' likeness in Kentucky, but not in neighboring Ohio? The Presley licensee can prevent third party appropriation for as long as the licensee commercially exploits the property right in Tennessee, for fifty years in bordering Kentucky, and for only twenty years in neighboring Virginia.¹⁷⁴ This "legal wilderness" is further complicated in those states that have not yet addressed the right of publicity and its descendibility. For example, what protection could the Presley licensee, who commercially exploits the publicity right in Tennessee, expect from the courts in the adjoining state of Alabama? These uncertainties equate to disincentives: "The current patchwork of state regulation adversely affects creation incentives. . . ."¹⁷⁵ Entertainment producers face higher costs in protecting their publicity assets in multiple law-

166. Note, *supra* note 146, at 1180.

167. 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S. 2d 775 (N.Y. 1985).

168. *Id.* at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776.

169. *Id.*

170. 733 S.W.2d 89 (Tenn Ct. App. 1987).

171. See *supra* notes 53-67 and accompanying text.

172. See *supra* text accompanying note 129.

173. See *supra* notes 68-94 and accompanying text.

174. See *supra* note 155 and accompanying text.

175. Note, *supra* note 146, at 1185.

suits.¹⁷⁶ Additionally, producers can expect lowered financial returns as a result of inadequate legal protection.¹⁷⁷ Our society values productivity and creativity¹⁷⁸ as well as individual property rights.¹⁷⁹ While efforts by individual states to provide protection are highly commendable, more complete protection is needed which will foster incentive, ultimately benefitting the public.

V. SOLUTIONS

Proposed solutions to the current variation in protection of publicity rights include an absolute rule against descendibility, analogies to trademark or copyright rather than to privacy or property, and a federal statute recognizing a descendible right of publicity. A lengthy analysis published in 1985 argued against the descendibility of the right of publicity.¹⁸⁰ The authors acknowledged that their position was "unusual."¹⁸¹

The case against an inheritable publicity right is based on strict legal analysis. The right of publicity has its roots in the right of privacy, or liberty. It has no property interests flowing from it because it fails to satisfy both descriptive and theoretical aspects of property. Therefore, inheritability is inconsistent with the right of publicity.¹⁸² The discussion of descriptive property factors centered on specificity, or "thingness." The commentators assert that the right of publicity is "a general claim against the world involving some general personal characteristic or ability. . . . [S]uch non-specific, free-floating claims are precisely the 'rights' which comprise liberty."¹⁸³

The theoretical discussion springs from the specificity requirement, and employs economic theory. Because it lacks specificity, the right of publicity is incommensurable and thus inalienable. The authors conceded that, in today's market, publicity rights are a valuable commodity. The authors differentiate between *inter vivos* and *post-mortem* rights, resolving that rights ending at death would carry a correspondingly smaller risk of mismeasure of in-

176. *Id.* at 1186. A prime example of this concern is evidenced by the multitudinous suits brought and defended by the Presley estate.

177. Note, *supra* note 146, at 1185-86.

178. *Id.* at 1186 n.45 (citing the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976)).

179. See, e.g., *Gracey v. Maddin*, 769 S.W.2d 497 (Tenn. App. 1989).

180. Terrell & Smith, *supra* note 5, at 2.

181. *Id.*

182. *Id.* at 5.

183. *Id.* at 32.

commensurable values.¹⁸⁴ In sum, the authors' view the right of publicity as an aspect of liberty allowing a person to waive his or her right of privacy,¹⁸⁵ concluding that the right of publicity must undergo significant transformations to support inheritability.¹⁸⁶

Another solution to the problem involves an analogy to trademark law, as opposed to privacy or property law analogies.¹⁸⁷ Certain provisions of the federal trademark law could provide a cause of action for advancing publicity rights.¹⁸⁸ Trademark statutes, however, may not provide the answer to protection of publicity rights.¹⁸⁹ In general, claims under federal trademark law must meet three elements for success: 1) involvement of goods or services; 2) in interstate commerce; and 3) misrepresentation concerning some component of the goods or services.¹⁹⁰ The focus is on consumer and competitor protection from misrepresentation of interstate goods or services. A potential infringer of publicity rights could elude liability by including a disclaimer within the infringing activity.¹⁹¹

Others suggest that the proper theoretical basis for the right of publicity is an analogy to copyright.¹⁹² Copyright and the right of publicity share a similar purpose—"to provide an incentive for enterprise and creativity by allowing individuals to benefit from their personal efforts"¹⁹³—which one author has called "one pea in two pods."¹⁹⁴ Certain limits are put on copyright to prevent conflicts with the first amendment; similar limitations could be applied to publicity rights. Some authors assert that the right should be limited to commercial products where free speech interests are lessened.¹⁹⁵ Publicity rights could be manifested in a contract before they would be held devisable,¹⁹⁶ thereby ensuring the fulfillment of the social policy of encouraging enterprise.¹⁹⁷ This analogy affords a solution to the problem of perpetual publicity rights be-

184. *Id.* at 6-7, 50-53.

185. *Id.* at 6.

186. *Id.* at 64.

187. McCARTHY, *supra* note 19, at § 6.16[A].

188. *Id.*

189. *Id.* The noted trademark provisions are 15 U.S.C. §§ 1052(a),(c), 1125 (1982).

190. See Lanham Act § 43(a) (codified at 15 U.S.C. § 1125 (a) (1982)).

191. Note, *supra* note 146, at 1196-97.

192. See Felcher & Rubin, *supra* note 3, at 1129-32.

193. *Id.* at 1129.

194. R.F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 134, 153 (1987).

195. Felcher & Rubin, *supra* note 3, at 1130.

196. *Id.* at 1131.

197. *Id.* at 1130-31.

cause federal copyright law provides for a limited duration of post-mortem rights.¹⁹⁸

This proposed analogy has also been criticized.¹⁹⁹ Copyright protects expression "fixed in any tangible medium."²⁰⁰ To extend this copyright protection to publicity rights requires an acceptance of some form of the lifetime exploitation doctrine. As noted, most courts and all state legislatures which have acted have expressly or impliedly rejected this notion.²⁰¹

The remaining proposed solution offers the most promise—a federal statute that is consistent in duration, remedies, requirements, and extent of protection. At least one author, however, warned that "such a proposal seems at present to stand outside the realm of probability."²⁰² Discussion of a specific federal law must begin with the congressional authority to enact such a statute. The Constitution provides Congress with the authority to legislate in the area of copyright;²⁰³ furthermore, the commerce clause could also be a source of power.²⁰⁴

A federal statute would need to eliminate the disincentive attributed to the current variations in state law.²⁰⁵ The exclusive right to control all commercial aspects of publicity would define the extent of protection, thus enhancing incentive while providing latitude for free speech.²⁰⁶ The statute should also include a fixed duration.²⁰⁷ One author suggested a fifty year limitation that would parallel the copyright statute.²⁰⁸ Additionally, the statute should acknowledge the right as survivable and transferrable, as have the majority of judicial and legislative bodies addressing the issue.²⁰⁹

Moreover, a federal statute should include provisions for dam-

198. *Id.* at 1131-32.

199. See Note, *supra* note 146, at 1187; HIXSON, *supra* note 194, at 153.

200. 17 U.S.C. § 102(a) (1982).

201. Copyright law has been held to preempt state law publicity rights. In 1986, the Seventh Circuit held that telecasts of baseball players which were videotaped and aired simultaneously were fixed in tangible form. As a result, the telecasts were proper subject matter for copyright. Thus, federal law preempted state law. *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 668 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). Under this analysis, state publicity claims would always be subordinate to federal copyright claims. A return to the premise that copyright and publicity rights protect different property interests would remedy this situation. Note, *supra* note 146, at 1187-89.

202. MCCARTHY, *supra* note 19, at § 6.16[A].

203. See U.S. CONST., art. I, sec. 8, cl. 8.

204. See U.S. CONST., art. I, sec. 8, cl. 3.

205. Note, *supra* note 146, at 1193.

206. *Id.* at 1194.

207. *Id.* at 1204. See *supra* note 154 and accompanying text.

208. Note, *supra* note 143, at 1204.

209. *Id.*

ages; declaratory relief, injunctive relief, damages, and punitive damages have been suggested.²¹⁰ The statute should cover all individuals, not restrict its protection to only entertainers and athletes. Finally, an express preemption provision, stating that all publicity right actions grounded in state and common law would be expressly preempted, has been suggested.²¹¹ One author described the current need by stating: "[When] we've got 'grave robbers from Memphis, Tennessee,' Congress must come forth to eliminate unauthorized evils."²¹²

The right of publicity is a confusing area of law. Even a cursory look at the case law evidences the cloudy nature and state of the right. The only point agreed upon is that the right of publicity has its genesis in the right of privacy.²¹³ This apparent consistency has led to much of the difficulty encountered today. The right of publicity is founded in privacy law, yet the right of publicity focuses on pecuniary interests, not personal interests. Because of the confusion between the right of privacy and the right of publicity, the law in this area has been characterized as a "haystack in a hurricane."²¹⁴ The theoretical discussion is also mired in, as Justice Cardozo said, a "tyranny of labels."²¹⁵

The strength of an analogical approach is that once the equivalence is established, previously developed rationales and conclusions can be brought to bear on the new situation. . . . But a major difficulty with analogies, derived from precisely the same source as their strength, is that they tend to impose a mature, elaborated system on what may well be an unformulated situation.²¹⁶

A legal framework is necessary to formulate a cause of action, and to provide certainty to the public as well as notice to potential parties. One commentator suggested that operating without this underlying legal support is like "throwing a bunch of mud at the

210. *Id.* at 1205-06.

211. *Id.* at 1206-07.

212. *Id.* at 1207 (quoting Elvis Costello, *Worthless Thing*. Copyright, 1984, Plangent Visions Music, Inc.).

213. See *supra* notes 11-13 and accompanying text.

214. *State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 93 (Tenn. Ct. App. 1987) (citing *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956)).

215. *McCarthy*, *supra* note 19, at § 5 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934)).

216. *Felcher & Rubin*, *supra* note 3, at 1127. See also S. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 614 (1988).

[opponent] and seeing what sticks.”²¹⁷ While some consistencies are seen in the relevant case law, most of the decisions are couched in indefinite terminology. The dedicated reader who labors through various opinions is left with a feeling of uncertainty. Exactly what would a well-pleaded complaint look like? What elements of law need to be established? The defendant’s lot seems much simpler—merely claim that plaintiff has not stated a cause of action. A plaintiff’s attorney must also keep in mind the Federal Rules of Civil Procedure. Specifically, Rule 8 provides that a pleading “shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . .”²¹⁸ Additionally, Rule 11 mandates sanctions against an attorney unless, “to the best of the [attorney’s] knowledge . . . [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .”²¹⁹ A party asserting a right of publicity is better served by an organized legal structure rather than a “mud slinging,” case-by-case, state-by-state approach.

One commentator wrote that “[t]he person trained in the law is taught from the beginning to think of the law as a series of discrete legal ‘theories’ or subsets of rules.”²²⁰ However, the right of publicity simply does not conform to any established legal precept. Property principles, specifically intellectual property, most closely approximate the factors that compose the right of publicity, but the commonly accepted roots in privacy law are difficult, if not impossible, to divorce when trying to classify publicity rights. The right of publicity requires its own statement of legal theory, and the obligatory consideration of privacy should be discarded.

VI. CONCLUSION

In modern western society, the right of publicity is a valuable commodity. This form of intellectual property should be recognized as descendible, and its value determined by economic factors.²²¹ Increasing numbers of judicial systems and legislatures recognize the pecuniary value which individuals create in their personality. Additionally, the fundamental tenet of unjust enrichment is incompatible with the idea of the property of another fall-

217. MCCARTHY, *supra* note 19, at § 5-4.

218. FED. R. CIV. P. 8(2).

219. FED. R. CIV. P. 11.

220. MCCARTHY, *supra* note 19, at § 5-4.

221. See *supra* note 131 and accompanying text.

ing into the public domain for commercial appropriation. A comparison may be drawn to the individual who invests his energy in the stock market and the individual who invests his labor in his name. The assets developed in the stock market are unquestionably devisable. Yet, the assets developed in the marketing of a personality may not be. Because these assets are not devisable, the property interests of the heirs to this property are eliminated. One commentator characterized this result as "rather harsh" treatment for an individual investing efforts in the development of his name, and "a rather heavy burden to impose on creativity."²²²

An individual is entitled to protection of his property and creativity. The unjust enrichment of third persons, who unfairly appropriate the property of another for commercial purposes, is ruinous to society. The right needs to be balanced with the other fundamental rights of our society, particularly the freedom of speech. Federal legislative action is needed to stop the "grave robbers,"²²³ while remaining mindful of the social importance of preventing the monopolization of the memories of those who, because of their celebrity status, became part of our public identity.

222. Felcher & Rubin, *supra* note 3, at 1132.

223. See *supra* note 212 and accompanying text.