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RIGHT OF PUBLICITY:
SURVIVABILITY RECONSIDERED

ANDREW B. SIMS*

INTRODUCTION

In the nearly three decades that have passed since the Second Circuit’s landmark decision in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,¹ the right of a celebrity to control and profit from the use of his name and likeness,² commonly referred to as his “right of publicity,”³ has been widely recognized by the courts as an intangible property right that may be the subject of an assignment in gross.⁴ On the other hand, the issue whether the right of publicity may survive the death of the celebrity so as to be assertable by his heirs or assignees continues to cause dissension.⁵ Presently, the

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2. Throughout this Article, the pronouns “he,” “his” and “him” will also mean “she” or “her” unless the context suggests otherwise.
3. The right of publicity was apparently first denominated as such by the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953). The term was also referred to earlier in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 196, 50 S.E. 69, 70 (1905).
courts are split on the issue. Two major rulings this past year have rejected the survivability of publicity rights. In *Lugosi v. Universal Pictures*, the California Supreme Court denied the heirs of the late movie actor Bela Lugosi, who had played the title role in the 1930 film "Dracula," an injunction against and an accounting for profits from the motion picture corporation that had licensed the use of the image of Lugosi as Dracula on a variety of commercial products. In *Memphis Development Foundation v. Factors Etc., Inc.*, the Sixth

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6. As used in this Article, the term "survivability" and the description of rights as "survivable" refers generally to the legal enforceability of rights after the death of the individual in whom the rights were initially vested. Publicity rights described as "survivable" without qualification would not pass into the public domain upon the initial right-holder's death, but would be enforceable against the world-at-large by those who could show that they had legally succeeded to the publicity rights of the deceased. Such successors might include (1) assignees or licensees under contracts into which the deceased right-holder had entered while alive and that by their terms or under applicable law did not terminate upon his death; (2) heirs of the deceased right-holder or the executors or administrators of his estate as determined by testamentary designation or by the laws of intestate succession; and (3) assignees or licensees of said heirs, executors, or administrators. Thus employed, the term "survivable" encompasses a number of adjectives with narrower connotations, such as "devisable" or "bequeathable" (transferable by testamentary bequest) and "descendible" or "inheritable" (transferable, and receivable, either by testamentary bequest or under the laws of intestate succession). These more specific adjectives will be used when appropriate. The issue whether rights of privacy or publicity survive the right-holder's death so as to be assertable by beneficiaries, executors, or assignees against post-mortem infringers should be distinguished from the issue whether a cause of action for infringement of such rights during the complainant's life will lapse if he dies before the suit is commenced, the trial completed, or a judgment entered. The former common law rule that causes of action for personal torts do not survive the death of either the plaintiff or the defendant is now viewed as anomalous and has been altered, to one extent or another, by statute in virtually all jurisdictions. 2 S. Speiser, Recovery for Wrongful Death § 14 (2d ed. 1975); see, e.g., N.Y. Est., Powers & Trusts Law § 11-3.2 (McKinney 1967 & Supp. 1980). See generally W. Prosser, Handbook of the Law of Torts 1126 (4th ed. 1971). The focus of this Article is on the survival of the right as opposed to the survival of the cause of action, although the legislative exclusion of defamation and other invasions of intangible personal property interests from the survival statutes in many jurisdictions may be germane to both issues.

8. Id. at 825, 603 P.2d at 431, 160 Cal. Rptr. at 329.
Circuit similarly rebuffed attempts of the assignee of the publicity rights of Elvis Presley to enjoin the sale of Presley statuettes by a non-profit corporation engaged in a fund-raising effort to build a civic memorial to the late entertainer. Conversely, in *Factors Etc., Inc. v. Pro Arts, Inc.*, the Second Circuit held that Presley's right of publicity was survivable under New York law, inasmuch as Presley had exercised those rights during his lifetime; the court granted an injunction against the unauthorized sale of a "memorial" poster bearing Presley's photograph.

Judicial resolution of the survivability issue has been stymied by the difficulty in finding instructive analogies in tort and property law and by the counterbalance of social policy considerations favoring each side of the question. The problems of judicial policy-making and line-drawing, coupled with the current division among the courts, suggest that legislative intervention, preferably by Congress under its Commerce Clause powers, would be salutar. Unfortunately, both sides to the dispute may lack the political clout to compel action.

This Article is an attempt to aid judicial and legislative consideration of this problem. First, it argues that as a general matter, the right of publicity, being essentially proprietary in nature, should be

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10. *Id.* at 957.
12. *Id.* at 219-20. The Supreme Court has declined to review the rulings in both *Memphis Dev. Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 101 S. Ct. 358 (1980) and *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), letting stand decisions that are irreconcilable as a practical matter. Technically, no conflict exists between the two decisions because the federal courts ostensibly applied the laws of New York and Tennessee, respectively. Both courts conceded, however, that little guidance was available from state decisions. See 616 F.2d at 958; 579 F.2d at 221. Moreover, it is arguable that general law should apply to right of publicity claims. Felcher & Rubin II, *supra* note 5, at 1126 n.7; cf. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1939) (general law applied to unfair competition claim).
14. *See* notes 5-12 *supra* and accompanying text.
16. State legislative intervention is also possible. To date, however, such action has been sparse and lacking in uniformity. At present, the survivability of publicity rights, enforceable by surviving relatives, heirs, or assignees through civil actions for damages and injunctions, is recognized by statute in only four states. *Fla. Stat. Ann.* § 540.08 (West 1972); *Okla. Stat. Ann.* tit. 21, § 839.2 (West Supp. 1980); *Utah Code Ann.* § 76-9-406 (1978); *Va. Code* § 8.01-40 (1977); *see* notes 48, 65 *infra*. The recent court rulings on this subject, however, may kindle state legislative interest in the problem. The advisability of legislative intervention is discussed in *Protection for Public Figures*, *supra* note 5, at 549.
survivable. Analogies are drawn to the protection of goodwill and copyright, while distinctions are made between the non-survivable right of privacy and the right to be free from defamation. Second, it considers and rejects making the lifetime exercise of a celebrity's publicity rights a precondition for survivability. Finally, the Article examines constitutional and other countervailing considerations and explores appropriate limitations on the scope and duration of a surviving right of publicity.

I. ARGUMENTS FAVORING SURVIVABILITY

A. The Property Right

If the word “property” is narrowly defined to connote rights protecting commercial or pecuniary interests of the individual,17 most property rights in our legal system are both assignable and survivable, whereas rights protecting the emotional interests of the individual are generally neither.18 The celebrity’s right of publicity is essentially “proprietary” in nature because of the commercial value inherent in his ability to control the use of his name and likeness and to prevent their misappropriation.19 Obviously, the commercial value of the celebrity’s publicity right can be considerable. In advertising, the use of a celebrity’s name or likeness attracts customers to the product and influences the purchasing decision not merely by the force of the endorsement, but also by offering the consumer the opportunity for emotional association with a public figure.20 Celebrities may be depicted on gameboards, bubble gum cards, posters, pencils, and other merchandise. They may also be the subjects of literary, dramatic, and cinematic biographies, as well as of fictional accounts.

17. See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). One court has described the term “property” as including “every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.” Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929); accord, Black’s Law Dictionary 1095 (5th ed. 1979). In Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890), the authors stated that “the term ‘property’ has grown to comprise every form of possession—intangible, as well as tangible.”


20. See, e.g., Treece, supra note 19, at 645-46.
When someone exploits a celebrity’s name or image without permission and without a tenable claim to constitutional privilege, the rightholder is deemed injured, the misappropriator unjustly enriched, and an injunction and damages are available. If the misappropriator competes directly with the celebrity or his assignees and diverts business from them, the plaintiff’s actual damages may be equated with the diverted profits. Otherwise, damages are usually in the form of reasonable royalties awarded on the quasi-contract theory that the misappropriator should have obtained a license from the rightholder.

B. Analogy to Copyright and Goodwill

The right of publicity is comparable to the protection afforded goodwill and copyright, intangible property rights that are

24. Diverted profits were apparently sought by the plaintiffs in Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090, 1093 (S.D.N.Y. 1980). This remedy is a recovery of “actual” damages on a theory that defendants have tortiously misappropriated and converted the plaintiffs’ property right. See D. Dobbs, Handbook on the Law of Remedies § 6.6 (1973). A broader remedy might be an equitable accounting for profits, which would permit the plaintiffs’ recovery of all of the profits regardless of the defendants’ contribution of time, money, and effort. Id. § 4.3, at 252-54. In New York and other jurisdictions, however, an accounting for profits is available only when a fiduciary relationship is established between the plaintiff and the defendant, id.; see, e.g., Bradkin v. Leverton, 26 N.Y.2d 192, 199, 257 N.E.2d 643, 646, 309 N.Y.S.2d 192, 198 (1970), and therefore will likely be denied in right of publicity cases when the requisite relationship is missing. E.g., Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 847 (S.D.N.Y. 1975). An award of punitive or exemplary damages will also be unlikely in jurisdictions in which proof of malicious intent is required for such recovery. Id.; D. Dobbs, supra, § 3.9, at 208-11.
25. Under the quasi-contract action traditionally available “at law,” the court implies the existence of a contract between the plaintiff and defendant under which the former will be paid by the latter for the use of the misappropriated property right. D. Dobbs, supra note 24, § 4.2, at 238-39. The value of the plaintiff’s right of publicity may be evidenced by previous endorsement fees he has received, see Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314 (Pa. C.P. 1957), or, if he has not undertaken such endorsements, by the fees received by others for such personal services. See Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970). For an excellent discussion of the benefits and weaknesses of the quasi-contract recovery theory in right of publicity cases, see Treece, supra note 19, at 648-52.
survivable, although the analogy to either of these rights is imperfect. For example, certain dissimilarities between publicity rights and goodwill should be noted. First, the transfer of goodwill by assignment or bequest can only be made in conjunction with the transfer of a business or a professional practice because goodwill is inseparable from the other assets of the enterprise. The right of publicity, however, can be transferred free of any specific business or product, and the name and likeness of the celebrity can be readily associated with new items or enterprises.


28. If the name of a celebrity is associated with a specific commercial product or commercial enterprise, it may develop a secondary meaning. As a trademark, it could be registered and protected under the Lanham Act, §§ 1-45, 15 U.S.C. §§ 1051-1127 (1976), and state statutes. As a tradename, it would be protectible under state laws of unfair competition. Like goodwill, tradenames and trademarks can be devised along with the business and products with which they are associated and to which the efforts of the deceased have added reputation. See, e.g., LePage Co. v. Russia Cement Co., 51 F. 941, 943 (1st Cir. 1892) (dicta); Southern Scrap Material Co. v. Smith, 253 Ala. 356, 358, 44 So. 2d 754, 755 (1950); In re Prtntt, 117 Pa. 401, 412-13, 11 A. 878, 881 (1888); Dilworth v. Hake, 64 S.W.2d 829, 830 (Tex. Civ. App. 1933). The same rule should apply to the devisability of “celebrity” trademarks and tradenames. Cf. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 822-23, 603 P.2d 425, 430-31, 160 Cal. Rptr. 323, 328 (1979) (court declined to decide whether anyone could build business with secondary meaning, using Lugosi's name). In rare instances, tradenames and trademarks are deemed non-assignable for fear of fraud on the public. See Messer v. The Fadettes, 168 Mass. 140, 142, 46 N.E. 407,
A second difference between goodwill and publicity rights is the longevity of surviving value. The value of transferred goodwill diminishes steadily as time passes after the assignment or bequest, while the new owner or practitioner thereafter establishes his own goodwill with the public. On the other hand, although the value of a surviving right of publicity is generally greatest in the days immediately following the celebrity’s death, its value may last for an indefinite period of time depending on the durability of the celebrity’s fame or on whether a resurgence of popularity and public interest occurs.

Despite these differences, the analogy between goodwill and the right of publicity is a strong one, inhering in the basis underlying the two concepts. Like the goodwill of a business or a self-employed professional, the value of the celebrity’s right of publicity lies in his creation of a positive or otherwise intriguing image in the public mind, with the concomitant ability to attract the public’s patronage, consumption, or support of that with which his name or likeness is associated. The celebrity usually builds his public image and fame—as a business creates its goodwill—through the expenditure of considerable time, money, and effort. The analogy to goodwill thus underscores the extent to which a misappropriator is unjustly enriched if he is permitted to exploit the celebrity’s fame without paying for the privilege.

407 (1897); Russia Cement Co. v. LePage, 147 Mass. 206, 209, 17 N.E. 304, 305 (1888); Hoxie v. Chaney, 143 Mass. 592, 593, 10 N.E. 713, 714-15 (1857). Blakely v. Sousa, 197 Pa. 305, 333-34, 47 A. 286, 288 (1900). Thus, unacceptable confusion might arise if an entertainer were to use the name of another celebrated entertainer. See, e.g., Messer v. The Fadettes, 168 Mass. 140, 46 N.E. 407 (1897). Presumably, even this narrow class of cases would not be troublesome if it were widely known that the celebrated entertainer whose name had been adopted was deceased.

29. See, e.g., Metropolitan Bank v. St. Louis Dispatch Co., 149 U.S. 436, 448-49 (1893); cf. R. Callman, supra note 27, at 32 (whether value of acquired goodwill continues depends on impetus created by purchaser).


31. See Treece, supra note 19, at 644-46.


Rights of publicity are also analogous to copyrights, despite the existence of important conceptual differences. Copyrights protect original works of authorship that are fixed in a tangible medium of expression. Although specific artistic or photographic depictions of the celebrity's name or likeness may be copyrighted, however, neither his name or likeness nor his fame in general are copyrightable. Moreover, although celebrities usually attain their fame by being the subjects or interpreters of copyrighted material, they rarely hold the copyrights thereon. The star quarterback's touchdown pass may immortalize him, but his team or league probably holds the copyright to the broadcast. An actress may invest a dramatic role with a unique and unforgettable interpretation, but the playwright likely holds the copyright on the play.

Rights of publicity are, nevertheless, analogous to copyrights in two vital respects. First, protecting the use of the celebrity's name and likeness serves a public policy of fostering creativity and enterprise in the celebrity's major field of endeavor by providing additional career incentive, much the same as the protection of copyrights stimulates intellectual creativity. Under present federal statutes, copyrights are survivable for at least fifty years beyond the death of the author. Some commentators have reasoned, by analogy, that survivability of the publicity rights for the financial benefit of heirs would provide further lifetime career incentive for the celebrity. Second, the limitation of copyright survival to a finite period after the author's death is said to reflect the counterweight of free speech and free trade considerations. These countervailing considerations are

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34. Under the Copyright Act of 1976, 17 U.S.C. app. §§ 101-810 (1976 & Supp. I 1977), copyright protection is afforded "original works of authorship" including the 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." Id app. § 102(a).
35. See id. app. § 102(a); Felcher & Rubin I, supra note 5, at 1578 n.11.
37. See note 26 supra.
40. See pt. III infra.
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equally, if not more, relevant to the issue of survivability of publicity rights and should be reflected in the limitation of survival of publicity rights to a finite period of even shorter duration.41

C. Right of Privacy

Notwithstanding the essentially proprietary nature of the right of publicity and the analogies drawn to other intangible and survivable property rights, asserting the right can also occasionally vindicate emotional interests that should in theory be personal to the celebrity. Assume, for example, that without permission a manufacturer produces and sells T-shirts bearing caricatures ridiculing the celebrity. The T-shirts are thus both unauthorized and pejorative. The celebrity can successfully assert his right of publicity to obtain damages and an injunction.42 By obtaining this relief on a theory of commercial misappropriation, the celebrity also has the emotional satisfaction of removing from the market a product that offends and embarrasses him.

Ideally, the celebrity's heirs or assignees should not use the surviving right of publicity to vindicate their own emotional interests, or what they perceive to have been the emotional concerns of the deceased celebrity. Even though this distinction is not serious enough to undermine the general rationale favoring the survivability of publicity rights, it should be weighed in considering the conditions under which the rights would survive. The courts in Lugosi v. Universal Pictures43 and Memphis Development Foundation v. Factors Etc., Inc.,44 however, questioned the rationale for the survivability of the right of publicity itself by drawing analogies to the right of privacy45 and the right to be free from defamation.46

The right of privacy has been described as the right to be left alone, to have one's personal feelings undisturbed, and to be free of emotional upset.47 Dean Prosser identified four disparate torts subsumed under the common law right of privacy:48 "Intrusion upon the

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41. See pt. IV infra.
45. 25 Cal. 3d at 819-20, 603 P.2d at 428-29, 160 Cal. Rptr. at 326-27.
46. 616 F.2d at 959-60.
47. See W. Prosser, supra note 6, § 117; Restatement (Second) of Torts §§ 652A-6521 (1977).
plaintiff's physical solitude or seclusion,"


49. W. Prosser, supra note 6, § 117 at 807; accord, Restatement (Second) of Torts § 652B (1977).

50. W. Prosser, supra note 6, § 117, at 809-12; Restatement (Second) of Torts § 652D (1977).
places the plaintiff in a false light in the public eye”; and “appropriation, for the defendant’s benefit or advantages, of the plaintiff’s name or likeness.” From the standpoint of a “non-public” figure, all of these privacy torts threaten emotional harm to the individual’s personal feelings. Accordingly, Prosser classified the four privacy torts as “personal,” and the rights thereby vindicated have been generally deemed non-assignable and non-survivable.

Prosser’s first three privacy torts appear to vindicate only emotional interests. These torts, however, may arise in contexts in which it is difficult to separate the emotional from the commercial interests vindicated by the assertion of publicity rights. An unauthorized biography, for example, may purport to be an accurate account of the life of a celebrity, but may, in fact, be heavily fictionalized to make the book more interesting. Although the treatment may be laudatory, the celebrity has a “right of privacy” action to vindicate

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51. W. Prosser, supra note 6, § 117 at 812; Restatement (Second) of Torts § 652E (1977).
52. W. Prosser, supra note 6, § 117, at 804-07; Restatement (Second) of Torts § 652C (1977).
53. W. Prosser, supra note 6, § 117 at 814. Although Prosser himself would recognize the proprietary nature of the misappropriation tort, id. at 807, his classification of the latter along with the other three “privacy” torts as rights “to be let alone” has led to confusion. See Protection for Public Figures, supra note 5, at 531. Notably, the Second Restatement of Torts has adopted this classification. Restatement (Second) of Torts §§ 652A, 652C (1977). The Restatement, however, acknowledges that the misappropriation tort “appears rather to confer something analogous to a property right upon the individual.” Id. § 652A, Comment b.
his emotional interest in not having his personality publicly displayed in a false light. Concomitantly, the celebrity has a “right of publicity” action to vindicate his proprietary interest against any unauthorized exploitation of his name that is neither statutorily nor constitutionally privileged. Although the celebrity’s commercial interest and his emotional interest are distinguishable in this situation, it is often less clear whether a court granting judgment for the celebrity has responded to the privacy claim, the publicity claim, or both.\(^{57}\)

Perhaps more troublesome is the confounding of emotional and commercial interests in Prosser’s fourth “privacy” tort—the misappropriation of name and likeness for profit. Because some people value obscurity, an individual who does not want his name and image publicly displayed may regard their commercial misappropriation as an invasion of his “privacy.”\(^{58}\) It may cause him embarrassment or other emotional discomfort in the presence of friends, family, or strangers who might now recognize him in public.\(^{59}\) Celebrities, on the other hand, do not normally seek privacy. Their primary interest in preventing unauthorized appropriations is not the emotional one of being left alone, but rather the commercial one of being paid for the privilege.\(^{60}\) The courts and numerous commentators have recognized the celebrity’s pecuniary motivation and correspondingly a distinct “right of publicity” as a proprietary right assignable in gross.\(^{61}\) Some would also conclude that a right of this nature should logically survive the celebrity’s death.\(^{62}\)

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58. See Treece, supra note 19, at 638-41.


60. Treece, supra note 19, at 641; 33 Vand. L. Rev. 1241, 1252 (1980).


Nevertheless, Prosser's original classification of commercial misappropriation as a privacy tort has undoubtedly retarded the recognition of a survivable right of publicity. Many jurisdictions have common law precedents suggesting that the interest against misappropriation is a personal and non-survivable "privacy" right. Furthermore, many state statutes grant an action for misappropriation only to living persons, which might lead courts to question why the legislature would so limit the statute if it contemplated a surviving right of publicity. Confronted with such a statute in the Lugosi case, the California Supreme Court concluded that the celebrity's inter vivos right against misappropriation was not a distinct "right of publicity," but merely a special variation of the statutory "privacy" right that was assignable during Lugosi's life but not survivable thereafter. The better approach, taken by the Second Circuit in Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., is to treat the right of publicity as a common law property right additional to and independent of the statutory right of privacy.

Some commentators have argued that the "right of privacy" and the "right of publicity" are, respectively, merely the negative and affirmative assertions of the right to be free from unauthorized appropriations. It would follow that a plaintiff who was not a celebrity or a "public person" could assert a right of publicity as well as a right of privacy. For example, Ms. Smith is photographed on a
public street without her permission, and the picture is used in a newspaper advertisement. Whether Ms. Smith is emotionally upset will depend on her personal sensitivities, but she may want to be paid for the privilege. Most states would recognize, by common law or statute, a "right of privacy" action for Ms. Smith to recover in quasi-contract what the defendants saved by not paying her as a model and to obtain an injunction against future publication of the advertisement. If Ms. Smith uses the injunction to suppress the advertisement, she is exercising her "right of privacy." If, on the other hand, she permits the defendants to republish the advertisement on the condition that they pay her for it, she is exercising her "right of publicity." If Ms. Smith takes the path of "publicity," but dies while the advertisement is still running, her heirs should succeed to her contract rights to continuing residuals. Ms. Smith's interest in the residuals is strictly a commercial one, and therefore, in theory as well as in fairness, the right should be survivable for the benefit of her heirs.

Arguments favoring the survivability of a celebrity's publicity right by the analogies to goodwill and copyright, however, lose some validity when applied to a non-celebrity's publicity right. Assume, for example, that Mr. Jones, an internationally renowned movie and television star, is a true "celebrity" in the sense that his name and image are widely recognized by a public that is familiar with his achievements. Mr. Jones' career as an actor hinges upon creating a favorable image with the public. Professional success helped to create the image, thereby facilitating further professional triumphs. In addition to his celluloid career, Mr. Jones derives income from endorsing a variety of nationally advertised commercial products ranging from bluejeans to candy bars. As with the creation of goodwill in a business or profession, Mr. Jones has thus invested valuable resources of time, money, and energy in creating a public image that is not only conducive to professional success, but also commercially valuable.

By comparison, Ms. Smith's opportunity for commercial exploitation of her image may be perceived as largely fortuitous. If Ms. Smith permits the advertisement to run, the only time, effort, and expense that she will have contributed towards achieving "publicity" for her visage would be bringing a lawsuit to establish her commercial interest in the use of the photograph. Beyond that, Ms. Smith's only "property" at issue is her face itself, an asset that would not survive Ms. Smith in the public mind but for the defendant's advertisement.

73. See note 48 supra.
74. The creation and value of his image is comparable to the establishment and value of goodwill in a business or professional practice. See notes 31-33 supra and accompanying text.
Applying the copyright analogy, the protection of Mr. Jones' right of publicity arguably serves as incentive for his commitment to further achievements in his acting career. It is Jones' career achievements in drama, rather than his successes in the realm of commercial advertising, in which society is presumed to have a significant interest and that society might want to reward. Although the right of publicity directly protects commercializations of his name and image, little societal interest exists in having Mr. Jones, as opposed to someone else, promote bluejeans and candy bars. The protection of Ms. Smith's right of publicity, however, cannot be presumed to stimulate increased achievement in a collateral field of endeavor in which there is significant societal interest. Other than advertising, Ms. Smith never engaged in enterprises in which the commercial value of her image would have been relevant.\(^{75}\)

Finally, Mr. Jones and Ms. Smith are not both "public persons" in the same sense of the term. While Mr. Jones has committed himself, perhaps irreversibly, to living and succeeding in the limelight, Ms. Smith still retains the ability to remain a "private person" even if she permits the use of her photograph in the advertisement. Few strangers will recognize her in public, and only personal acquaintances will be able to connect her name with the face in the advertisement. If Ms. Smith feels in retrospect that even this single advertisement represented too much public exposure, unlike the celebrity she can probably regain her "privacy" simply by declining future commercializations.

Therefore, despite the view that the right of publicity and the right of privacy are affirmative and negative assertions of the same right, not every private person who exercises his right of publicity thereby becomes a "public person." Moreover, the arguments favoring the survival of a private person's publicity rights are not fully comparable to those favoring the survival of a celebrity's publicity rights. The rights of publicity of both the celebrity and the non-celebrity, however, should be survivable because they vindicate interests that are principally commercial in nature and are distinguishable from the emotional interest vindicated by the right of privacy.

D. Right to be Free from Defamation

Defamation is an invasion of one's commercial interest in reputation or good name by derogatory words directed towards a third party either in writing or orally.\(^{76}\) Like the right of publicity, defamation is

\(^{75}\) Non-celebrities who commercialize their images may be "discovered" by agents or producers who give them an opportunity to achieve in other more socially significant image-oriented fields, such as acting. Society may have a limited interest in such discoveries, but the possibility of their occurrence is remote, and in any event, we know that this interest has not been served as of Ms. Smith's death.

\(^{76}\) See generally W. Prosser, supra note 6, § 111, at 737-44.
concerned not with the emotions, but with the pecuniary interests of the victim. It is irrelevant that the victim feels anger, sorrow, or humiliation as a result of the defamation, or even that he has lost the company of friends if he cannot show pecuniary loss. The common law, however, does not recognize a cause of action for defamation of the dead. Judge Merritt, in his opinion in Memphis Development, argued that, similarly, the right of publicity should not survive because

[t]he two interests that support the inheritability of the right of publicity, namely, the "effort and creativity" and the "hopes and expectations" of the decedent, would also support an action for libel or slander for destruction of name and reputation after death. Neither of these reasons, however, is sufficient to overcome the common law policy terminating the action for defamation upon death.

Indeed, when placed in the context of a post-mortem action by the victim’s successor, the analogy between actions for defamation of the dead and surviving rights of publicity poses two distinct problems. First, because the right of publicity may overlap to some degree with the right to be free from defamation, a surviving right of publicity could serve as a practical substitute for the proscribed civil action for defamation of the dead. If, for example, a biography of a deceased celebrity is both unauthorized and pejorative, perhaps even defamatory, relief could theoretically be granted to the celebrity’s heirs or assignees for commercial misappropriation of the celebrity’s name even though the plaintiffs were unable to prove that the pejorative statements were false, were known by the author to have been false,

77. Id. § 111, at 737, 760-61; see Restatement (Second) of Torts § 575 (1977).
78. W. Prosser, supra note 6, § 111, at 737, § 112, at 760-61. Prosser states that although emotional injury is insufficient to make defamation actionable, if the cause of action is established by showing "special" pecuniary damages, damages for emotional injuries can be "tacked" on. Id. § 112, at 761; accord, Restatement (Second) of Torts § 575 (1977).
79. W. Prosser, supra note 6, § 112 at 761; Restatement (Second) of Torts § 575 (1977).
80. Restatement (Second) of Torts § 560 (1977); accord, W. Prosser, supra note 6, § 111, at 745. The Restatement states that "[t]he interest of the descendants or other relatives of a deceased person in his good name is not given legal protection by the common law." Restatement, supra, § 560, Comment a, at 158.
82. Id. at 959.
or that they diminished the commercial value of the deceased celebrity's fame. From this perspective, it would seem both inconsistent and inequitable to permit a celebrity's heirs to censure and recover damages for pejorative speech that may not be defamatory, while the heirs of non-celebrities are denied a civil action for post-mortem defamation.\(^\text{84}\)

This problem can be obviated by limiting the applicability of the surviving right of publicity to commercial items only, as the courts have in fact done.\(^\text{85}\) Such a limitation recognizes the strong first amendment objections to allowing either defamation actions or the enforcement of publicity rights to obstruct or chill the reporting of newsworthy information,\(^\text{86}\) the writing of factual biography and history,\(^\text{87}\) and even the writing of creative fiction.\(^\text{88}\) In the case of a living celebrity, these constitutional free speech principles limit recovery under both defamation or publicity right infringement theories to those rare instances in which the celebrity can prove not only that the statements were false, but also that they were made with knowledge of the falsity or with reckless disregard of the truth.\(^\text{89}\) These constitutional considerations may apply with even greater force in a right of publicity action after the celebrity's death.\(^\text{90}\)

A second, conceptually broader problem raised by the defamation analogy stems from the law's refusal to permit the post-mortem vindication of commercial interests in personal reputation.\(^\text{91}\) Defamation

\(^{84}\) See notes 80, 91-93 supra and accompanying text.


\(^{86}\) See Felcher & Rubin I, supra note 5, at 1596-97, pt. III(B)(1) infra.

\(^{87}\) See Felcher & Rubin I, supra note 5, at 1596-98; pt. III(B)(2) infra.


\(^{89}\) See Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974) (persons who have "general fame or notoriety in the community" are "public-figures" who may recover for defamation only upon clear and convincing showing of defendant's knowledge or reckless disregard of defamatory nature of publication); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153-56 (1967) (football coach charged by national magazine with fixing game held to be "public figure," subject to same standard); Time, Inc. v. Hill, 385 U.S. 374, 390-97 (1967) (false-light portrayal of individual's personal life, in violation of state right-of-privacy statute, can be basis of recovery only upon showing of knowing or reckless falsehood); New York Times Co. v. Sullivan, 376 U.S. 254, 284 (1964) (defamation of public official by newspaper could not be basis for damage recovery under state libel law absent showing of knowing or reckless falsehood).

\(^{90}\) See pt. III infra.

\(^{91}\) See, e.g., Insull v. New York World-Telegram Corp., 172 F. Supp. 615, 636 (N.D. Ill.), aff'd, 273 F.2d 166 (7th Cir. 1959), cert. denied, 362 U.S. 942 (1960),
of a dead person may impair the social acceptability and popularity of close relatives, thereby reducing their own commercial opportunities. Thus, a civil action for defamation of the dead, like a survivable right of publicity action, could be perceived as protecting interests of a proprietary nature. The courts, however, have declined to recognize such commercial injury to the family of the deceased in civil defamation actions. For reasons of social policy, personal reputations are deemed independent of each other and non-transferable as a matter of law. In 1910, one court described this rule as

a necessary incident to the theory of social relations entertained here where one is supposed to stand or fall upon his own merits, and where success or failure is entirely independent of the accidents of rank or family connection. It necessarily follows that, theoretically, at least, no man's success can be aided or retarded by the character of his relative.

Because the law's idealistic position does not always comport with the realities of societal behavior, however, the practical effect of this rule may be to ignore many bona fide claims for commercial injury by close family members of the deceased. Regardless of the fairness of this rationale for denying post-mortem defamation actions, the rationale for post-mortem right of publicity actions is conceptually different. Unlike the plaintiff in the typical post-mortem defamation case, the celebrity's successor who asserts the right of publicity does not contend that his own personal reputation in the community has been either enhanced or diminished from a commercial standpoint by association with the deceased. Indeed, more often than not, an assignee whose reputation bears no conceivable relationship to that of the deceased would hold the surviving right of publicity. The successor's argument is that control over the commercial use of the name and image of a famous person is an intangible property right with commercial value that should be inheritable and assignable like other tangible and intangible property. Notably, the principal rationale for rejecting claims for defamation of the dead addresses only the social policy behind the non-transferability of personal reputations, not the

92. See cases cited note 91 supra.
94. See generally 40 Colum. L. Rev. 1267 (1940); 26 Cornell L.Q. 732 (1941).
issue of the transferability of property rights in general. Despite its broad reference to the independence of success or failure from “the accidents of rank or family connection,” the state court writing this in 1910 would not for a moment have questioned the right of the Astor and Vanderbilt offspring to succeed to the family silver.

Of course, the celebrity’s personal reputation is often an indispensable component of the fame that makes his name and image commercially valuable. If heirs or assignees succeed to the deceased celebrity’s right of publicity, the deceased’s reputation continues to have value in the hands of the transferee to the extent that reputation is an inextricable part of the right. Arguably, this result does represent a departure from the rule that neither the benefits nor the burdens of personal reputation are inheritable. Moreover, when a celebrity’s heirs assert their surviving right of publicity ostensibly to prevent commercial misappropriation, they can concomitantly vindicate their emotional interests against the denigration of their decedent’s image.

Limiting the surviving right of publicity to commercial products will largely obviate these conceptual inconsistencies between the survivability of publicity rights and the common law and statutory rejection of an action for defamation of the dead. The inconsistencies, however, cannot be eliminated entirely. If, for example, the right-holders could suppress unauthorized caricature T-shirts, they would not only prevent misappropriation, but also protect the commercial value of the publicity rights by preserving the reputation of their decedent. Less obviously perhaps, the rightholders can achieve the same purpose if they refuse to permit the name or image of the deceased celebrity to be used in the promotion of products they deem inferior, inappropriate, or harmful to the celebrity’s image. These inconsistencies may be relevant in setting appropriate limitations on survivability. Like the objection to the possible vindication of emotional interests after the celebrity’s death, however, they are too hypothetical and inconsequential to refute entirely the arguments favoring the survivability of publicity rights in general.

96. See note 42 supra and accompanying text.
97. See generally Treece, supra note 19, at 641-43.
98. See notes 42-43 supra and accompanying text.
99. Other “policy reasons” cited for rejecting civil liability for post-mortem defamation are also inapposite to the survivability of the rights of publicity. It is argued that it is impossible to determine what degree of consanguinity is needed for a relative to justifiably assert pecuniary injury from post-mortem defamation, so that the defendant is exposed to a limitless number of lawsuits. Saucer v. Giroux, 54 Cal. App. 732, 733, 202 P. 887, 888 (1921); see Lugosi v. Universal Pictures, 25 Cal. 3d 813, 822, 603 P.2d 425, 430, 160 Cal. Rptr. 323, 328 (1979). In the case of a survivable right of publicity, however, the eligible plaintiffs would be both limited and identifiable because only specific assignees or beneficiaries could assert title to the right. Another argument is that the recognition of a relative’s post-mortem action for defamation would require recognizing a similar right in the relatives when the
II. The Lifetime Exercise Requirement

A. Career Incentive Theory

Some jurists and commentators would recognize rights of publicity as survivable only on the condition that the deceased celebrity exercised his publicity rights during his lifetime. A variation of this “lifetime exercise requirement” demands that the celebrity’s contract exercising his publicity right be extant and enforceable at the time of his death.

The principal rationale advanced for the lifetime exercise requirement is the career incentive theory. This theory, as applied to publicity rights, has its major analogue in the law of copyrights, in which the protection of original works fixed in a tangible medium of expression is presumed to yield benefits to society. Similarly, it is inferred from the celebrity’s exercise of his publicity right that the right was important to him, and that the contemplation of the survivability of its benefits for his heirs provided him with additional career incentive. In turn, this incentive may have resulted in additional

100. See, e.g., Lugosi v. Universal Pictures, 25 Cal. 3d 813, 823-24, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979); Guglielmi v. Spelling-Goldberg Prods., 140 Cal. Rptr. 775, 778-79 (1977), aff'd on other grounds, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979). Contra, 33 Vand. L. Rev. 1251, 1263 (1980). In the Lugosi case some ambiguity exists as to whether the decision turns on rejection of the survivability of publicity rights generally or merely upon Lugosi’s failure to exercise his rights during his lifetime. In Guglielmi, the companion case to Lugosi, however, the California Supreme Court described its holding in Lugosi as the broader rejection of survivability. 25 Cal. 3d at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353. In Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221-22 & n.11 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979), the Second Circuit’s decision in favor of survivability turned specifically upon the fact that Elvis Presley had exercised his rights of publicity during his lifetime. The court, however, explicitly reserved the question whether non-exercised rights of publicity would survive. Id. at 222 n.11. See generally Felcher & Rubin II, supra note 5, at 1130-31; Felcher & Rubin I, supra note 5, at 1618-20.

101. See Felcher & Rubin II, supra note 5, at 1130-31; Felcher & Rubin I, supra note 5, at 1618-20 & n.188. Felcher and Rubin would apparently limit the post-mortem protection of publicity rights to unexpired contracts in which the celebrity’s heirs or beneficiaries retain a beneficial interest. See pt. II(B) infra.

102. See notes 34-39 supra and accompanying text.

103. See Felcher & Rubin II, supra note 5, at 1130-31; Felcher & Rubin I, supra note 5, at 1618-19.
career achievements from which society benefited.\textsuperscript{104} If the celebrity did not exercise his publicity right, only negative inferences are drawn, and it is reasoned that recognizing the survivability of the right cannot serve any social policy.\textsuperscript{105}

Significant differences between publicity rights and copyrights relevant to their societal impact, however, exist. Copyrights directly protect the creative intellectual work in which society is presumed to have an interest. Without the benefit of copyrights, authors might receive little remuneration for their efforts because their works could be freely copied once revealed to the public. Although pecuniary remuneration is not the only reason why creative people create, without copyrights the increased likelihood of plagiarism and contested authorship might also eliminate much of the author's personal pride incentive.

In contrast, the right of publicity does not directly protect a celebrity's noncopyrightable achievements from which society is presumed to benefit, such as the inspired dramatic interpretation, the outstanding athletic performance, or from a broader perspective, the more prodigious or prolonged career. Rather, the right of publicity protects the commercialization of fame, merely a collateral benefit of unusual individual achievement. If the career incentive theory underlies the right of publicity, therefore, it must be assumed that the desire to attain, retain, or augment commercially exploitable fame provides added career incentive in the principal fields of endeavor and results in achievements that society would not otherwise obtain.

The hope of becoming famous can, of course, be a career incentive for many who never attain fame. Nevertheless, not all those who aspire to or achieve fame perceive it in financial terms. Before it became financially lucrative for celebrities to endorse commercial products, the world did not lack people aspiring to notoriety, nor is it clear that the achievements of that day were less impressive than those of our own. Furthermore, although most writers, poets, composers, and photographers rely directly on the copyright laws to protect their primary source of income, relatively few persons attain the celebrity status to which the right of publicity becomes relevant. The right of publicity protects a collateral source of income of a small minority who become prominent, generally in the fields of entertainment and professional sports. For most people in these fields, the principal sources of income are their salary and employment contract

\textsuperscript{104} See Felcher & Rubin II, supra note 5, at 1128; Felcher & Rubin I, supra note 5, at 1615.

\textsuperscript{105} See Felcher & Rubin II, supra note 5, at 1130-31; Felcher & Rubin I, supra note 5, at 1619.
rights for their professional efforts on the stage, screen, and athletic field.\textsuperscript{106}

With respect to lifetime incentive and achievement, the analogy between copyrights and publicity rights becomes more tenuous if the focus is on the living celebrity or author contemplating that after his death his intangible property rights will continue to have value for the benefit of his heirs. The death of an author, for example, does not normally impair the commercial or societal value of his intellectual work. An author may be unable to anticipate the commercial success of his work during the creative process, and many authors and their works do not receive public recognition until after the authors’ deaths. Nevertheless, an author can foresee that his death will not itself diminish the prospect of his work remaining or becoming commercially successful, and the survival of his copyrights may be an important incentive to achievement. In contrast, many celebrities who presently enjoy commercially valuable fame might not assume that a comparable level of public interest in them will continue after their deaths. Death removes celebrities from the public view and renders many forms of commercial exploitation unfeasible.\textsuperscript{107} Usually, only the most famous continue to attract a commercially exploitable public interest after death. A celebrity rarely becomes, in this sense, an “immortal,” and the possibility of such “immortality” is usually quite speculative.

Another difference between the survivability of copyrights and publicity rights relates to the timing of the achievements they are presumed to encourage. The authors of intellectual works are often still productive in the later years of their lives. Indeed, many may reach the pinnacle of their creativity during this period.\textsuperscript{108} The sur-

\textsuperscript{106} Of course, many celebrities, such as retired athletes or those in the less remunerative sports, may actually rely far more on the commercial value of the fame and publicity generated by their activities, past or present, than on those same activities.

\textsuperscript{107} For example, product endorsements by celebrities on television and in print, which have noticeably increased in the last several years, see Feinberg, Madison Avenue’s Cast of Famous Faces, N.Y. Times, Nov. 16, 1980, § F, at 7, col. 1, would have little or no value to the advertisers or the royalty-recipients if the celebrity died. Indeed, such advertisements would most likely be pulled from the media in the event of the celebrity’s death to avoid offending public sensitivities and creating an adverse consumer impact.

vival of copyrights ensures that the prospect of imminent death will not eliminate the financial incentive for these "late-life" works. By comparison, the more significant achievements of celebrities enjoying commercially valuable publicity rights are likely to be those accomplished at a younger age, when the possibility of a commercially exploitable "immortality" may have been given little thought in view of the more immediately available financial rewards. Even if an entertainer remains professionally productive in his later years, the image in which post-mortem publicity value inheres has usually been established in the prime of his career. Although late-life professional work may serve to keep the celebrity in the public view, its effect upon the value of the surviving right of publicity is often insignificant, if not adverse. Thus, while the survivability of copyrights is a direct financial incentive for significant late-life works, a surviving right of publicity may not serve a comparable social purpose.

A final difference between copyrights and publicity rights inheres in the legal grounds for contemplating the survivability of the rights. Copyrights have been a part of the Anglo-American legal system since 1710. Significantly, both professional intellectuals and the public are generally aware of the availability and the survivability of copyrights, although they may be unfamiliar with the specific statutory terms. Those who aspire to fame probably also assume that they will be able to control and profit from its commercialization. Yet, notwithstanding the notoriety of the recent Elvis Presley decisions,

585, 610 (1952); and Alfred Lord Tennyson wrote "Idylls of the King" at age 83, 4 Moulton's Library of Literary Criticism 204-05 (1966).

109. This is almost invariably true in the case of professional athletes, with exceptions found in such sports as golf, billiards, and bowling. Although many actors opt for early retirement, a number, such as Ethel Barrymore, Helen Hayes, Katharine Hepburn, Henry Fonda, Lawrence Olivier, and James Stewart, have been successful in prolonged careers. Old age does not seem to impair either the skill or popularity of leading instrumentalists such as Arthur Rubinstein, Vladimir Horowitz, or Isaac Stern, or conductors such as Leonard Bernstein, Karl Böhm, or Arturo Toscanini. On the other hand, few dancers or vocalists can similarly prolong their careers and most will "peak" at an earlier age.

110. Particularly in the case of movie and television stars, the mystique memorialized by the public after their deaths is usually that created in the prime of their careers, which rarely occurs in later life. The immortalized Bela Lugosi "Dracula" was a characterization created over 25 years before his death. If Mae West's image has surviving value, it will be for her portrayal in "I'm No Angel" or "My Little Chickadee," not for her septuagenarian efforts in "Myra Breckinridge." Similarly, the post-mortem publicity rights of Lawrence Olivier will probably stem from his image in "Hamlet" or in "Wuthering Heights" rather than in "The Boys from Brazil" or "The Jazz Singer."


the survivability of publicity rights remains a rather esoteric legal point on which it is unlikely that most celebrities would receive any specific advice until after their careers had already reached fairly respectable plateaus. Until recently, the survivability of publicity rights has been universally rejected by the courts and has yet to be recognized in most jurisdictions. It is thus problematical to hypothesize that many deceased celebrities were seriously motivated in their careers by the contemplation of their descendants enjoying the benefits of those rights.

Consequently, when applied to publicity rights, the career incentive theory is far more speculative than in the case of copyrights. Rather, this theory is properly viewed as only one argument supporting the survivability of publicity rights, along with the recognition of the essentially proprietary nature of the right, analogous to goodwill, and the unjust enrichment of the misappropriators. Because the lifetime exercise requirement makes the career incentive theory the lynchpin for survivability, however, this requirement is neither realistic nor fair, particularly with respect to cases now before the courts.

Thoughtful investigation reveals that only the rare fact pattern convincingly demonstrates a relationship between lifetime exploitation and the career incentive theory. To illustrate, the assignment contract


114. Professor Gordon endorsed the principle of survivability in 1960 and cited an earlier, unreported decision implicitly upholding it. Gordon, supra note 5, at 600 & n.195, 611-13. The first widely-publicized decision upholding survivability, however, was the 1972 lower court decision in Lugosi v. Universal Pictures Co., 172 U.S.P.Q. (BNA) 541, 548-49 (Cal. Super. Ct. 1972), that was subsequently reversed in 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977), aff’d, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). Survivability was not recognized in the New York federal district courts until 1975, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844-47 (S.D.N.Y. 1975), and not by the Court of Appeals for the Second Circuit until 1978. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 220-22 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). To date, the Second Circuit remains the only circuit that recognizes survivability and that recognition is predicated on an “interpretation” of New York law that has not yet been endorsed by the New York state courts. Although the legislatures of several states have recognized the survivability of publicity rights, see notes 16, 48 supra, these were not jurisdictions upon whose actions celebrities would have focused. In any event, none of these statutes require lifetime exercise for the publicity rights to survive. See note 143 infra. Lifetime exercise as a prerequisite to survivability of publicity rights was suggested in Guglielmi v. Spelling-Goldberg Prods., 140 Cal. Rptr. 775 (1977), aff’d on other grounds, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979), although it is unclear from the appellate court’s decision whether a mere assignment of publicity rights in gross would have sufficed. See note 100 supra.
will be used to examine the four predicate assumptions of the career incentive theory: (1) the celebrity’s belief that his publicity rights would be legally enforceable, hence valuable, after his death; (2) the celebrity’s desire that the rights should survive in the hands of assignees, heirs, or other successors; and (3) that the celebrity’s contemplation of survivability created added career incentive, which (4) may have resulted in additional career achievements from which society benefited.

Regarding the first two assumptions, different types of assignments permit different inferences. If a fixed-term contract assigning publicity rights expressly states that the parties can enforce their contract rights notwithstanding the celebrity’s death while the contract is extant, this proviso suggests that the celebrity was at least contemplating the survivability of his publicity rights. In the absence of an explicit proviso, such inferences are difficult to draw from the mere existence of a fixed-term contract, particularly in view of court decisions rejecting survivability. Elvis Presley, for example, assigned his rights by a series of fixed-term contracts, the last of which had less than seven years to run at the time of his death. Presley’s knowledge of the present value of his right of publicity is properly inferrable from these contracts. It is more speculative to infer from the mere existence of contracts that Presley believed that his publicity rights were survivable, as well as to make the additional assumptions respecting career motivation and achievement.

By comparison, an *inter vivos* assignment of publicity rights in perpetuity permits a strong inference that the celebrity was considering the value of his publicity rights after his death, whether or not his beliefs were legally well founded. Most celebrities, however, would be reluctant to make an assignment of publicity rights in perpetuity during their active careers, when the magnitude and duration of their fame, and therefore its future commercial value, remain conjectural. Rather, assignments in perpetuity are probably made by celebrities at advanced ages or after retirement. Thus, the types of assignments that most clearly evidence the celebrity’s active contemplation of survivability are ironically those least likely to be made during the stage of the celebrity’s life at which they would evidence the third and fourth assumptions of additional career incentive and additional career achievement.

The case of the famous comedy team, Stan Laurel and Oliver Hardy, is illustrative. Hardy died in 1957. In March 1961, Hardy’s widow joined Laurel in making an assignment in perpetuity of the


116. See notes 102-14 *supra* and accompanying text.
publicity rights of both actors to a corporation that produced and distributed films and licensed toys and games. Thinking the rights of neither celebrity survivable after Laurel's death in 1965, the assignee reneged on the contract, and the widows of both men sued. Commentators who favor the lifetime exercise requirement criticize the federal district court for holding this contract enforceable by both widows because Hardy had never made an *inter vivos* assignment in gross. Yet, Laurel made an assignment in perpetuity at the age of seventy-one, only four years prior to his death, and more than ten years after the comedy team's last cinematic ventures. It is difficult to see how his assignment shows career incentive. The argument that Laurel "might" have been more highly motivated in an active career that effectively ended in 1945 because he lived to make an assignment in 1961, while Hardy "could not" have been so motivated because he failed to do so, underscores the dubious logic of the lifetime exercise requirement as applied in many contexts.

Advocates of the lifetime exercise requirement emphasize the negative presumption of the theory. If the celebrity exercises his publicity rights during his lifetime, they concede that his contemplation of the survivability of those rights might not have led to greater career incentive and achievement. They argue, however, that

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118. Id. at 845-47.
121. See sources cited note 120 *supra*.
122. Commentators Felcher and Rubin, who favor the lifetime exercise requirement, suggest that a celebrity's "last-minute" assignment of publicity rights could be voided by a court on "public policy" grounds. Such an assignment, they suggest, might be a *pro forma* act designed to insure the survivability of the rights and not related to genuine career incentive, being in that respect no better than a specific devise of publicity rights in the celebrity's will. Felcher & Rubin I, *supra* note 5, at 1619. Notably, both the specific testamentary bequest and the "last-minute" assignment of rights would at least evidence the celebrity's intention to bequeath the rights for the benefit of heirs. Yet, apparently neither is deemed sufficient for purposes of the career incentive theory. It is difficult to see why a different result should be reached if the specific testamentary devise were made in a will that the celebrity signed and had witnessed 20 years before his death. Conversely, if a "last-minute" assignment is presumed to be a mere stratagem, it is doubtful that any late-life assignment separated by many years from the celebrity's active career, such as that which Stan Laurel made (and which Felcher and Rubin imply sufficed, see note 81 *supra* and accompanying text), would sufficiently evidence added career motivation and achievement.
123. See note 105 *supra* and accompanying text.
without lifetime exercise, no additional incentive, achievement, or societal benefit would have resulted.\textsuperscript{125} The validity of this negative presumption in every instance is questionable. Under common law or statute, publicity rights are deemed conceptually complete and enforceable in the living celebrity's hands regardless of whether he has affirmatively exercised them for profit.\textsuperscript{126} Furthermore, many celebrities have no desire to commercially exploit their names and likenesses during their lifetimes for reasons of personal sensitivity or professional judgment.\textsuperscript{127} A celebrity may perceive his fame as predicated in part on the projection of a public image that might be undermined by promoting commercial products.\textsuperscript{128} The same celebrity may not have similar objections regarding post-mortem exploitations and may hope that his children can profit from his fame in any way possible.

Furthermore, many celebrities who are not averse to lifetime exploitations of their fame may simply miss the opportunity to effect such transactions. This is particularly true if a celebrity dies suddenly and prematurely at a stage in his career when he had not yet thought it appropriate to enter into contracts for commercial exploitation, or before the right offer had come along. If Rudolph Valentino had survived, for example, it is probable that he would have ultimately made the same kind of late life assignment in gross as did his cinematic contemporary, Stan Laurel.\textsuperscript{129}

Assuming \textit{arguendo} that the absence of a lifetime exercise precludes the possibility of additional career incentive, the final assumption of the career incentive theory—that additional incentive translates into additional career achievements that would not otherwise occur—is extremely speculative. Even if Laurel were more talented than Hardy,\textsuperscript{130} it is doubtful that the members of the public, who presumably benefit under the career incentive theory, would conclude that Hardy failed to perform up to his potential or that any difference between Laurel and Hardy's cinematic achievements

\begin{thebibliography}{130}
\bibitem{125} Felcher & Rubin II, \textit{supra} note 5, at 1130-31. Felcher & Rubin I, \textit{supra} note 5, at 1619.
\bibitem{126} See note 48 \textit{supra}.
\bibitem{127} Although celebrity interest in doing commercials has increased in the past decade, many stars, such as Paul Newman, Liza Minnelli, Dustin Hoffman, and Robert Redford, still decline to do commercial advertising. \textit{See generally} Feinberg, \textit{Madison Avenue's Cast of Famous Faces}, N.Y. Times, Nov. 16, 1990, \S F, at 7, col. 1.
\bibitem{128} See Treece, \textit{supra} note 19, at 644-45.
\bibitem{129} See Treece, \textit{supra} note 19.
\bibitem{130} For a case involving the question of a surviving right of publicity with respect to Valentino, see Guglielmi \textit{v.} Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).
\end{thebibliography}
would justify a financial reward to the heirs of one and not the other.\textsuperscript{131}

At the heart of the issue, perhaps, is the assumption implicit in the lifetime exercise requirement—that there is no societal interest in recognizing descendible property rights other than those that directly stimulate economic and intellectual enterprise through prospective incentives, as opposed to rights that merely reward such enterprise retrospectively. A discussion of this theory is beyond the scope of this article. It is sufficient to note, however, that descendible property rights in our present legal system are not so limited. For example, the law permits tangible personal and real property to be transferred from generation to generation in perpetuity, far in excess of any duration necessary to encourage the original entrepreneur to create or acquire it. More relevant to the question of publicity rights, a beneficiary under state intestacy statutes can succeed to the goodwill of the decedent's business even though the decedent had worked to establish that goodwill and died believing that no legal heirs survived him and that the property would escheat to the state.\textsuperscript{132}

In any event, neither the exercise nor the failure to exercise publicity rights by the celebrity is conclusive with respect to his expectations, incentives, or achievements. The relationship among survivability of publicity rights, lifetime exercise, and incremental career achievement is quite speculative, particularly because survivability is not yet recognized in most jurisdictions. Most celebrities devote time, money, and energy to achievements from which society benefits, and collaterally, to the creation of a commercially exploitable fame comparable to goodwill. Yet, the lifetime exercise requirement purports to vindicate only a social policy respecting achievement incentives, while it ignores the common law preference for the survival of commercially valuable goodwill-type assets.\textsuperscript{133} The logic of the life-

\textsuperscript{131} Moreover, to apply the lifetime exercise requirement so as to deny the inheritance of publicity rights to the heirs of Hardy or other celebrities who have made substantial societal contributions in their careers would seem illogical in view of the survivability of the publicity rights of Ms. Smith, our involuntary model, under the very same standard. As previously discussed, the survivability of Ms. Smith's publicity rights serves no career incentive purpose outside of the field of commercial advertising itself, wherein there is little societal interest in Ms. Smith's "achievements." See notes 73-75 supra and accompanying text.

\textsuperscript{132} See notes 26-27 supra and accompanying text.

\textsuperscript{133} The lifetime exercise requirement does have the advantage of keeping in the public domain the names and images of the vast majority of celebrities presently deceased. Generally, this is because the survivability of publicity rights under common law has only been recently recognized, and because the financial incentives for commercial exploitation of fame were not once what they are now. It is less certain whether the lifetime exercise requirement would continue to serve this "function" in the future were that standard formally adopted by courts or legislatures and publicized in the legal community. Other rationales suggested for the lifetime exercise
time exercise requirement is sufficiently tenuous that fairness requires that any doubts be resolved in favor of the survivability of the celebrity’s publicity rights for the benefit of his heirs.

B. Identification of Harm

The “identification of harm” approach, proposed by Felcher and Rubin, requires that bequeathed publicity rights be “translated into concrete form through the medium of a contract.” The rationale is that the existence of a contract entered into by the celebrity during his lifetime enables courts to identify harm to the beneficiaries consequential to a post-mortem infringement. In the absence of such a contract, the injury asserted is considered too vague or remote to constitute a basis for relief. This approach may represent a stricter lifetime exercise requirement for survivability by appearing to limit post-mortem protection to unexpired contracts in which the celebrity’s heirs retain a beneficial interest.

requirement, in addition to the career incentive theory, are also not compelling. The requirement could, for example, be perceived as formalizing, crystallizing, or reifying the celebrity’s publicity rights, see Felcher & Rubin II, supra note 5, at 1131, comparable to the requirement that copyrights, patents, and trademarks be registered in order to be protected under federal or state statutes. See, e.g., Lanham Act, §§ 1-45, 15 U.S.C. §§ 1051-1127 (1976); Copyright Act of 1976, 17 U.S.C. app. §§ 101-810 (1976 & Supp. I 1977); N.Y. Gen. Bus. Law § 368-b (McKinney 1968), note 220 infra. To require that the celebrity exercise his publicity rights as a precondition to devising them is, however, asking much more of him than mere registration. Again, the property interest assigned or devised by the celebrity is the public image that he has sacrificed time, money, and personal effort to create. The celebrity’s image and its potential value exist notwithstanding the absence of lifetime commercial exploitations, although those exploitations may add or detract therefrom. Most significantly, under common law or statute, publicity rights are deemed conceptually complete and enforceable in the living celebrity’s hands even if he had not affirmatively exercised them for profit, inasmuch as he can seek an injunction and a judgment for damages against any infringer. See, e.g., Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975); Grant v. Esquire, Inc., 367 F. Supp. 876, 880 (S.D.N.Y. 1973); N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1976 & Supp. 1980).


135. See Felcher & Rubin I, supra note 5, at 1609-16, 1618.

136. Id. at 1619 n.188. The authors state that “[t]he crucial question is . . . whether a person has actually developed a bona fide way to profit from his attributes, and then left the instrumentality for doing so to his heirs.” Id. If post-mortem protection is thus limited, publicity rights “survive” only insofar as a contract for their exploitation is extant and effective at the time of the celebrity’s death. If, on the other hand, a celebrity never exploited his publicity rights while alive, or exploited them only under fixed-term contracts that expired prior to his death, his publicity rights would not “survive” his death. In this regard, Felcher and Rubin’s comment requires some clarification. Presumably, the “instrumentality” for profiting from his attributes, which the deceased celebrity “left . . . to his heirs,” is an assignment or
The "identification of harm" approach affirms Felcher and Rubin's view that the career incentive theory for survivability is compelling and should be dispositive of the issue. It is questionable, however, whether the ability of the parties to point to specific contracts adds anything in favor of the lifetime exercise requirement beyond a presumption of career incentive. Certainly, no contract is necessary for a court to identify harm to a living celebrity due to misappropriation of his right of publicity. Moreover, courts are usually quite capable of identifying harm once they know the legal rights they are supposed to protect. To reverse this process and in effect have the courts create rights by first "identifying harm" is tautological. There may be a certain jurisprudential satisfaction in limiting the courts' role to protecting existing contracts and thereby protecting what might be described as "settled expectations." The expectations embodied in the contract, however, are those of the deceased celebrity; whether his heirs can succeed to these expectations is the very issue at hand. To say that impairment of the value of the contract by infringement "harms" the heirs merely begs the question whether the heir has a legally cognizable right.

That the heirs can point to their rights under a specific contract is not intrinsically significant. Otherwise, the "identifiable harm" approach could not be the basis for concluding, as do Felcher and Rubin, that, in the Price case, Laurel's widow should have recov-

licensing agreement under which the celebrity received a specified percentage of the assignee's or licensee's revenues as a form of royalty or license fee. Felcher and Rubin's statement presumably refers to a stipulation common to such agreements that in the event of the celebrity's death, his heirs would "step into his shoes" in the contract and succeed to his rights to continuing payments. Thus, both the heirs and the assignee/licensee would have financial incentive to protect the value of their contract against misappropriators of the deceased's publicity rights. Assume, however, that the living celebrity made an assignment in gross in perpetuity of his publicity rights for a single fixed sum. At the celebrity's death, only the assignee will be interested in protecting the value of this exclusive contract against misappropriators. The celebrity's heirs would have no continuing interest in the contract, although, of course, the lump sum payment received by their testator may have substantially augmented the testamentary estate to which they have succeeded. This situation would not seem to fit Felcher and Rubin's description of an instrumentality to profit from the celebrity's attributes "left . . . to his heirs." Nevertheless, it is probable that Felcher and Rubin would deem such a lump sum assignment in perpetuity contract survivable. Indeed, inasmuch as the living celebrity receives and can enjoy advance payments for future post-mortem uses of his publicity rights, this type of contract arguably provides the strongest case for applying the career incentive theory in support of Felcher and Rubin's proposed lifetime exercise requirement.

137. Id. at 1618-22.
erected and Hardy's widow should not have. Both widows had the benefit of a specific contract, the value of which was being diminished by breach. Both Hardy's widow and the assignee had settled expectations when they entered into the agreement, and arguably the assignee would be unjustly enriched if he could renege on the royalty payments to which he had agreed. Arguably, Hardy's widow had the more settled expectations of the two widows because she herself was a party to the contract that had been repudiated. Without reference to the lifetime exercise requirement or the preclusive view of the career incentive theory—the latter, notably, focusing on hypothesized benefit to the public rather than "harm" to the rightholder—no basis can be found for granting recovery only to Laurel's widow.

If publicity rights were recognized as survivable generally, neither the fact of injury nor the measurement of damages therefor would be "vague" or "remote" or difficult to identify. Although it may appear to represent an alternative conceptual approach to the problem, Felcher and Rubin's concept of identifiable harm does not take us beyond the career incentive theory. Fairer and more rational principles support the public interest in limiting the extent of survivability of publicity rights.

140. See Felcher & Rubin I, supra note 5, at 1618-19 & n.186, notes 80-86 supra and accompanying text. Indeed, in Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir.), cert. denied, 101 S. Ct. 358 (1980), the plaintiffs had the benefit of a contract made with Elvis Presley during his life. Despite the resulting settled expectations, the court concluded 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. at 958.

141. Damages for the infringement of the surviving right of publicity would normally be either: (1) an award of profits that the infringers are found to have diverted from the rightholders, under a theory of tortious misappropriation of intangible property; (2) an accounting of profits under equitable principles; or most likely, (3) an award of royalties that the rightholders should in fairness have received for granting a license, on quasi-contract theory. See Trecce, supra note 19, at 648-54, Protection for Public Figures, supra note 5, at 533; notes 21-25 supra and accompanying text. See generally D. Dobbs, supra note 24, ch. 6. In all of these cases, notably, the measurement of damages need not be specifically keyed to the terms of an unexpired contract entered into by the celebrity during his lifetime; such a contract, however, might be of evidentiary value with respect to the third type of damages. D. Dobbs, supra note 24, § 6.6, at 496-99.

142. Felcher & Rubin I, supra note 5, at 1618, 1608-22.

143. In accordance with the view that the lifetime exercise of publicity rights should not be required for the rights to survive, see Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975); Pilpel, supra note 5, at 257, Protection for Public Figures, supra note 5, at 549. Notably, the four state statutes currently recognizing the survivability of publicity rights, see notes 16, 48, supra, all implicitly reject the necessity of lifetime exercise by the deceased. See Fla. Stat. Ann. § 540.08 (West 1972) (if the deceased did not assign or license his rights, civil action maintainable "by any one from among a class composed of his surviving spouse and surviving children"); Okla. Stat. Ann. tit. 21, § 839.2 (West Supp. 1980) (action for unautho-
III. Appropriate Limitations on Survivability

Social policies favoring free trade and free speech mandate the limitation of the survivability of publicity rights with respect to both scope and duration. Moreover, some limitations on the survivability of publicity rights are necessary to eliminate, or at least to minimize, conceptual inconsistencies with the non-survivability of the right to privacy and the right to be free from defamation. The use of surviving publicity rights should basically be confined to vindicating the successor's commercial interest against the misappropriation of the deceased celebrity's name or likeness. These rights should not be used as substitutes for post-mortem false light or defamation actions, or for analogous purposes whereby the emotional interests of the deceased or his successors or even the pecuniary interests of the successors in upholding the character reputation of the deceased are vindicated.

A. Free Trade and the Commerce Clause

The free trade interest in keeping the names and likenesses of deceased celebrities in the public domain is an important policy consideration for limiting the survivability of publicity rights. From the time that "George Washington slept here" until quite recently, American entrepreneurs could capitalize without restriction upon the fame of deceased celebrities. Such exploitations have undoubtedly become an essential part of our national system of advertising and promotion. It is doubtful, however, that the commerce clause of the United States Constitution protects such commercializations against the enforcement of surviving publicity rights under state law. Apparently, Congressional enactment of copyright and patent statutes pursuant to constitutional authorization was not intended to preempt state laws recognizing rights of publicity. Therefore, unless the Supreme Court determines that the enforcement of survivable publicity rights under widely varying state laws impedes interstate com-

rized misappropriation maintainable by the "surviving spouse, personal representatives or a majority of the adult heirs of a deceased person"; Utah Code Ann. § 76-9-406 (1978) (heirs of the deceased may sue); Va. Code § 8.01-40 (1977) (action maintainable by the "surviving consort and if none, . . . the next of kin").

144. See Protection for Public Figures, supra note 5, at 549; note 85 supra and accompanying text; note 99 supra.

145. See pt. I(C)&(D) supra.


merce and requires either uniform national regulation by Congress or no restriction at all.\textsuperscript{149} the free enterprise problem must be weighed as a policy consideration only.\textsuperscript{150}

**B. First Amendment Limitations and the Media**

Rights of publicity, whether asserted by the celebrity while alive or by heirs or assignees after his death, are subject to first and fourteenth amendment\textsuperscript{151} constraints that neither Congress nor the states shall abridge freedom of speech or of the press. In applying the first amendment, the Supreme Court's present tendency is to balance the societal interest in the speech for which protection is sought against the competing interests that favor its restraint.\textsuperscript{152} The nature of the constitutional interest in free speech has been the subject of much

under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.\textsuperscript{149} 17 U.S.C. app. § 301(b)(3) (1976 & Supp. I 1977). Until shortly before the passage of the new Copyright Act, the bill enumerated various state doctrines that were not considered to be the equivalent of copyright. S.22, § 301(b)(3), 94th Cong., 2d Sess., 122 Cong. Rec. 3841, 3849 (1976). Although this list was deleted in the final enactment, the House Report indicated that "[t]he evolving common law rights of 'privacy,' 'publicity,' and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement." House Report, supra at 132, reprinted in [1976] U.S. Code Cong. & Ad. News at 5748. In Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), the district court on remand denied defendant's motion to vacate the preliminary injunction and held that federal copyright law did not preempt the state law right of publicity. Id. at 1097-1100. Defendant's "memorial" poster of Elvis Presley was held to have violated plaintiff assignee's right of publicity, notwithstanding the fact that the defendant's poster and the photograph incorporated therein were copyrighted. Id. at 1104.


\textsuperscript{150} Cf. Goldstein v. California, 412 U.S. 546 (1973) (upholding California law making the commercial reproduction of sound recordings a misdemeanor, in the absence of congressional action to prevent such "record piracy").

\textsuperscript{151} U.S. Const. amends. I & XIV.

\textsuperscript{152} See, e.g., Elrod v. Burns, 427 U.S. 347, 360 (1976) ("[T]he prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons."). Notably, state protection of publicity rights does not represent a suppression of ideas by government motivated by fear of their communicative impact on the listener—the type of regulation that the Court has voided under rationales in which this "balancing process" may have been less obvious. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc., 425 U.S. 748, 770 (1976); Police Dep't of Chicago v. Mosley, 409 U.S. 92, 95-98
debate. Some views emphasize the importance of the personal fulfillment of the speaker, others emphasize the value to society of the interchange of ideas. Although both purposes may be served without necessarily deprecating the importance of free speech to the speaker, the Court has emphasized the social purposes of the guarantee.

1. Newsworthy materials

Foremost among the social functions of the first amendment is the maintenance of the democratic process itself. Speech that conveys information or ideas necessary for the public to make intelligent political decisions must be protected. This principle has been extended in favor of virtually all dissemination of news or other information of public interest. Therefore, if a cogent argument can be made that a media presentation respecting a celebrity is newsworthy or of public interest, the right of publicity cannot be successfully asserted to obtain either injunctive prior restraint or recoupment of commercial profits except in the most blatantly exploitative and injurious situations. In Current Audio, Inc. v. RCA Corp., a forthcoming news magazine contained, in addition to the traditional format, a stereo phonograph record of interviews and comments by most of the persons mentioned in its articles. Two and a half of the forty-five minutes on the phonograph record consisted of portions of a taped press conference given by Elvis Presley as part of the promotion of the popular singer’s upcoming live performance at Madison Square Garden. RCA, which was planning a record release of these performances and which had an exclusive contract to make and sell phono-
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graph records of Elvis' performances, sought a preliminary injunction against the sale of Current Audio magazine. Although the record itself could have been viewed as a mere commercial product, the court perceived it as a novel variation of traditional news-disseminating media. The court deemed the newsworthiness of the press conference by the prominent singer to be "self-evident," and denied the injunction.

Zacchini v. Scripps-Howard Broadcasting Co. represents the seemingly rare case in which the traditional media so exceed their constitutional license to depict newsworthy events that a state-recognized right of publicity is held to prevail. Zacchini was an entertainer who, as a "human cannonball," was shot from a cannon into a net some 200 feet away. Against Zacchini's explicit request, a reporter for the defendant broadcasting company filmed the entire act, which lasted about fifteen seconds, and the film was shown on the defendant's television news program. Ohio's supreme court recognized Zacchini's right to the publicity value of his performance, but denied his action for damages on the ground that the broadcast was privileged under the first amendment. The United States Supreme Court, by a narrow majority, reversed and upheld Zacchini's right of publicity over the television station's first amendment claim. The Court emphasized that the unauthorized broadcast of Zacchini's entire act drew off Zacchini's potential customers and thus went "to the heart of petitioner's ability to earn a living as an entertainer." Moreover, the Court emphasized that Zacchini was not seeking to enjoin the broadcast of his performance, but only seeking payment for it. Although upholding an entertainer's right of publicity in the face of a first amendment defense, the Zacchini decision may be limited to circumstances in which a performer's entire act is appropriated and only compensation is sought, as opposed to a prior restraint. Furthermore, the Court's concern that the media's appropriation would destroy the performer's ability to earn a living would obviously be irrelevant in the post-mortem context.

159. Id. at 837, 337 N.Y.S.2d at 955-56.
160. Id. at 836, 337 N.Y.S.2d at 955.
161. Id. at 837, 337 N.Y.S.2d at 956.
164. 433 U.S. 562, 578-79.
165. Id. at 576.
166. Id. at 578.
2. Biographies and fiction

Beyond the dissemination of news and information, the first amendment also protects the public’s interest in being entertained and culturally stimulated, as well as the individual’s interest in expressing his creativity. Except for obscenity, therefore, both fictitious and factual communications enjoy a presumption of constitutional protection. This protection is particularly relevant when rights of publicity are asserted against unauthorized biographies and fictitious accounts depicting the celebrity. The “factual biography” is essentially accurate, though it may contain inadvertent or minor inaccuracies. Alternatively, true fiction may depict the celebrity as a central or incidental character, but is clearly recognizable as fiction only. Somewhere between biography and fiction lies the “purported biography,” which appears to be a factual biography, but nevertheless contains substantial, presumably deliberate, fictionalizations.

Precedents suggest that the purported biography, being neither accurately informative nor creatively fictitious, may fall outside the ambit of constitutional protection and be subject to right of publicity claims. In Spahn v. Julian Messner, Inc., for example, the famous baseball pitcher Warren Spahn obtained a judgment for an injunction and damages against the publishers of an unauthorized biography that had been dramatized and fictionalized to appeal to a juvenile readership. Although the treatment was laudatory, it in-

168. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Winters v. New York, 333 U.S. 507, 510 (1948). In Winters, the Court stated that “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right, Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” Id. See generally Felcher & Rubin 1, supra note 5, at 1598.


172. See Felcher & Rubin 1, supra note 5, at 1596-1605.


cluded substantial distortions, imagined dialogue, and fabrications of events. On remand, the New York Court of Appeals held that public figures can recover for the publication of unauthorized biographies if they can show that the presentation is infected with material and substantial falsification, and that the work was published with knowledge of such falsification or with a reckless disregard for the truth.\(^{175}\)

Spahn can be viewed as vindicating both the celebrity’s “privacy” interest in being free from false light depiction, and his “publicity” interest in being free from commercial misappropriation, despite the defendants’ assertion of first amendment privilege.\(^{176}\) It is difficult, however, to determine which of Spahn’s “interests”—the emotional one of “privacy” or the commercial one of “publicity”—was paramount in the minds of the judges. From the standpoint of false light depiction, Spahn may reflect the traditional judicial reluctance to recognize constitutional protection for deliberately false and misleading speech about other persons, even “public persons.”\(^{177}\) From the standpoint of misappropriation, Spahn may imply, in the words of one commentator, that “the purported biography is just another commercial product that uses the name of its subject to attract attention, \(i.e.,\) for purposes of trade.”\(^{178}\) Any unauthorized but factual biography, or any fictionalization capitalizing on the celebrity’s name, however, might be similarly characterized. The distinction has been justified on the theory that the purported biography, lacking the informativeness of the factual biography and the creativity of true fiction, serves no purposes warranting first amendment protection.\(^{179}\) Yet the Spahn defendants may have been extremely creative in their invention of dialogue and their work may have been generally informative. It therefore appears that if the false light depiction—emotional disturbance element of the Spahn case—was not the primary factor in the court’s decision, it was certainly an indispensable

175. 21 N.Y.2d at 127, 233 N.E.2d at 842, 286 N.Y.S.2d at 834. The United States Supreme Court vacated the first judgment of the New York Court of Appeals and remanded the case for reconsideration in light of its decision in Time, Inc. v. Hill, 385 U.S. 374 (1967). In Hill, the Court had held that damages for false-light depiction of an individual’s personal life could be recovered under a state right-to-privacy statute only upon a showing of knowing falsehood or reckless disregard for the truth. 385 U.S. at 387-88. On reargument, the New York court held that Spahn had met this standard, and affirmed. 21 N.Y.2d at 127, 233 N.E.2d at 842, 286 N.Y.S.2d at 834.

176. See pt. II(C) supra.


178. Protection for Public Figures, supra note 5, at 554.

179. See Felcher & Rubin I, supra note 5, at 1604-05.
the decision could not have rested on the misappropriation theory alone.

Applying New York law, the federal court in *Hicks v. Casablanca Records* assumed that the *Spahn* rule might apply to a post-mortem assertion of publicity rights. The heirs and assignees of the late mystery writer Agatha Christie sought to enjoin the distribution of a motion picture and a book that presented a fictionalized account of a true incident in Mrs. Christie's life—her unexplained disappearance for eleven days in 1926. Although the reasons for Mrs. Christie's disappearance and her whereabouts during this period remain a mystery to this day, the defendants' book and movie suggested that an emotionally unstable Mrs. Christie had used her disappearance to plot the murder of her husband's mistress in an effort to regain his affections. The *Hicks* plaintiffs brought their action on a theory of infringement of the right of publicity. Relying on the Second Circuit's decision in *Factors Etc., Inc. v. Pro Arts, Inc.*, the district court recognized the right as survivable because Mrs. Christie had exercised it during her lifetime. The court, however, indicated that the princi-

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180. See *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 329, 221 N.E.2d 543, 545, 274 N.Y.S.2d 877, 880 (1966), vacated, 387 U.S. 239, aff'd, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967). Judge Keating stated that "it is erroneous to confuse privacy with 'personality' or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected. Thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his 'personality' may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography." *Id.* at 328, 221 N.E.2d at 545, 274 N.Y.S.2d at 879 (citations omitted). In the lower court opinion, *Spahn v. Julian Messner, Inc.*, 23 A.D.2d 216, 221, 260 N.Y.S.2d 451, 456 (1965), aff'd, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), vacated, 387 U.S. 239, aff'd, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), Judge Breitel stated "that a public figure is subject to being exposed in a factual biography, even one which contains inadvertent or superficial inaccuracies. But surely, he should not be exposed, without his control, to biographies not limited substantially to the truth. The fact that the fictionalized treatment is laudatory is immaterial, except perhaps as it may influence the assessment of damages, for three reasons. In the first place, a laudatory treatment may make one appear more ridiculous than a factual one, at least to those who know enough of the truth. In the second place, one may have strong feelings about not being portrayed in any exaggerated light. Lastly, there may be serious difficulties in determining what is laudatory. So long as it is not the truth, the subject of the distorted biography ought to have the right to permit or prevent its being published."


183. 464 F. Supp. at 429-30. The court found the requisite lifetime exploitation in various assignments of literary rights that Mrs. Christie had made during her lifetime and by testamentary disposition. *Id.* Felcher and Rubin suggest that these actions should not have sufficed. *See* Felcher & Rubin I, *supra* note 5, at 1620 n.190.
ple limiting the Spahn rule was that of University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.184 In Notre Dame, the New York Court of Appeals had suggested that the first amendment might prevent enjoining a clearly fictitious movie satirizing a collegiate football program.185 The Hicks court concluded that in light of Notre Dame, the Spahn rule should apply only if deliberate falsifications had been made by the defendants and if it was not evident to the public that the events depicted in the media were fictitious.186 The court then denied the injunction to the Hicks plaintiffs because they failed to allege that the falsifications had been made deliberately, and because the appearance of the words “A Novel” on the cover of the book made it evident to the public that the events depicted were fictitious.187

Hicks properly narrows Spahn’s category of “purported” and constitutionally unprivileged biographies to those works whose fictional aspect is neither self-evident nor clearly labelled. Its implication that Spahn could be relevant to purported biographies of deceased celebrities, however, seems incorrect. The false light depiction of the living celebrity, with its ramifications for the latter’s personal feelings, was at least an indispensable element in the Spahn ruling.188 After the celebrity’s death, however, his emotional interests against false light or defamatory depiction can and should no longer be vindicated.189 With these elements missing, the right of publicity action against the purported biography of a deceased celebrity presents only a bare misappropriation claim balanced against the defendant’s claim of first amendment privilege. In this context, the first amendment should invariably prevail.190

Indeed, the Hicks decision treated the misappropriation aspect of the case as virtually irrelevant. The defendants’ use of Mrs. Christie’s fame to “package” their fiction was certainly as egregious as any actions taken by the Spahn “biographers,” particularly inasmuch as the Hicks defendants used a pejorative, if not defamatory, depiction to arouse public interest. Nevertheless, the Hicks court, finding the most minimal labelling and making the very tenuous assumption that the public would recognize this work as fictitious, upheld the constitutional defense. Moreover, the Spahn standard, adopted by the Hicks court, requiring that the defendants deliberately falsify the

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185. Id. at 954, 207 N.E.2d at 517, 259 N.Y.S.2d at 843.
187. Id. at 433.
188. See note 180 supra and accompanying text.
189. See pts. I(C), (D) supra.
190. See notes 144-45, 151-55, 168-72 supra and accompanying text.
account has nothing to do with misappropriation at all. Rather, it is merely the "malice" standard for false light depiction by which the Spahn court conformed to the United States Supreme Court's ruling balancing the right to privacy against the first amendment in Time, Inc. v. Hill.191

Consequently, even if a Spahn-type biography of a deceased celebrity is someday found, no reason justifies subjecting it to surviving right of publicity claims if both unauthorized but more accurate, biographies and unauthorized, but more blatantly fictitious, accounts are deemed constitutionally protected. If there is a public interest in having fictionalizations of the lives of historical personages clearly identified as such, the right of publicity is not the proper mechanism to enforce that interest. It follows that the surviving right of publicity should be limited to misappropriations respecting commercial products or merchandise.

C. First Amendment and Commercial Items

Commercial speech, such as advertising, is no longer deemed to be totally devoid of first amendment protection, particularly when that speech is of an informative nature.192 In contrast to the media, however, commercial products or merchandise are not generally considered to represent a mode of expression,193 and constitutional interests in this area are deemed to be low.194 The unauthorized use of a celebrity's name or likeness for portrayal on or promotion of a piece of merchandise is considered the very essence of commercial

191. 385 U.S. 374 (1967); see note 175 supra.
In the absence of a first amendment counter-weight, the right of publicity has been successfully asserted to prevent and obtain damages for sale of such "celebrity merchandise."

Courts have peremptorily rejected the idea that posters, games, or other celebrity memorabilia convey speech of constitutional significance, perhaps because the commercial motivation of the merchandisers is so apparent that the courts seriously doubt whether any message, other than "buy me," is intended. Except in the unusual case like the magazine record in Current Audio v. RCA Corp., the courts do not perceive mere merchandise as comparable to the traditional media with which the dissemination of constitutionally protected speech is associated.

An exception to the general rule is the political poster, a type of "celebrity merchandise" that has been accorded first amendment protection in the face of right of publicity claims. In Paulsen v. Personality Posters, Inc., Pat Paulsen, a well-known television performer and comedian who had entered the 1968 presidential race for satiric purposes, sought unsuccessfully to enjoin the unauthorized issuance of a poster depicting him in comical garb over the caption "For President." Noting that Paulsen's candidacy had already drawn much attention from the media and the public, the court concluded that the poster conveyed a message of public interest, even if satirical, like the movie in the Notre Dame case. The poster was, moreover, deemed political commentary, which is usually accorded the highest first amendment protection.

The holding in Paulsen, however, has been limited to its facts. In Factors Etc., Inc. v. Pro Arts, Inc., a defendant, seeking to take advantage of the popular demand for Elvis Presley memorabilia immediately following the death of the popular entertainer, published and marketed a poster bearing a copyrighted photograph of Presley

195. See Felcher & Rubin I, supra note 5, at 1606.
196. See cases cited note 193 supra.
197. Id.
198. Current Audio, Inc. v. RCA Corp., 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. 1972); see notes 158-60 supra and accompanying text.
199. See pt. III(B) supra.
201. Id. at 449-50, 299 N.Y.S.2d at 507-08.
203. 59 Misc. 2d at 449-50, 299 N.Y.S.2d at 507-08.
204. See pt. III(B)(1) supra.
purchased from a newspaper reporter and the caption "IN MEMORY, . . . 1935-1977." Pro Arts asserted that its "memorial poster informed the public of and commemorated a newsworthy event, conveying a message about Elvis' life by depicting him in his prime. The Second Circuit rejected outright the analogy to Paulsen and affirmed the district court's grant of a preliminary injunction to the assignee of Presley's publicity rights.

Similarly, manufacturers of unauthorized "celebrity games" exploiting well-known professional golfers and billionaire recluse Howard Hughes have been unsuccessful in defending publicity infringement suits on the theory that games are constitutionally privileged because they are comparable to biographies in communicating information about the celebrity. In these cases the courts in effect conceded that the games did disseminate biographical data. Nevertheless, in upholding the celebrity's right of publicity against the purported constitutional interest of the public in such "education," the courts appear to have been swayed by the blatant commercial misappropriation by the manufacturers and by the untraditional conception of board games as media.

Unfortunately, the courts have difficulty recognizing the special and distinct contribution that posters, games, and other celebrity memorabilia make to the "marketplace of ideas." To appreciate this contribution, a different perspective on merchandise as "media" is required. Within the traditional media, newspaper editors, television broadcasters, book authors, and movie directors are perceived as the "speakers" who are trying to convey their message or information to the members of the public, the "listeners." The constitutional significance of mass-merchandised celebrity memorabilia, however, is better perceived by identifying the important "speakers" to be the.

207. Id. at 217.
208. Id. at 221.
209. Id. at 219, 222.
213. See 72 Misc. 2d at 790, 340 N.Y.S.2d at 146. See generally Treece, supra note 19, at 665-68. The holding in Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 295 N.Y.S.2d 501 (Sup. Ct. 1968), implies that games might be privileged if the subject is a political figure. See notes 200-04 supra and accompanying text.
memorabilia-purchasing public, rather than the merchandisers or retailers.

The purchase and display of a poster or other form of celebrity memorabilia is a statement by the individual of esteem for—or, in some cases, ridicule of—the celebrity subject. Each purchaser is in this sense a "speaker," and for most individuals, only the human voice offers a comparable medium of personal expression. The display of celebrity memorabilia not only serves the important purpose of emotive fulfillment, but also makes a statement to those with whom one comes in contact. It is an invitation to discussion that might clarify an otherwise ambiguous expression. In the case of mass-merchandised memorabilia such as the Elvis Presley posters, the collective impact of thousands, perhaps millions, of such personal statements may represent a significant statement to contemporary society as well as to later generations because of the sentimental and financial value of such "collectibles." The purchase and display of celebrity memorabilia does not, therefore, represent public access to media-disseminated information or entertainment as much as it becomes a form of public expression through a "media" of its own.

The first amendment's a priori concern for the protection of politically oriented speech, reaffirmed in the Paulsen decision, has broader implications when viewed from the perspective of the memorabilia-purchaser as "speaker." Many athletes and entertainers who have never tossed their hats into the political arena are associated in the minds of their admirers and critics with ideas that in addition to being of public interest, are often distinctly political in nature. Some, like Jane Fonda and Vanessa Redgrave, have deliberately associated themselves with specific political causes. Others, such as John Wayne, Jesse Owens, and the 1980 United States Olympic Hockey Team, have willingly or unwillingly become associated with patriotism by virtue of their exploits, celluloid or otherwise. Countless celebrities, from Muhammed Ali to Frank Sinatra, are for many admirers symbolic of racial or ethnic pride. Indeed, it is arguable that any generation's choice of heroes and villains is a statement of political significance as well as a commentary about the times.

The Supreme Court has already recognized the first amendment's protection of "symbolic speech" by the individual. What is often

overlooked, however, is the special role of mass-merchandised memorabilia as the “media” that facilitates this symbolic speech, or even makes it possible initially. People wishing to express themselves in this manner could be expected to make their own posters, or stencil their own T-shirts, but obviously this would not be a practical alternative. Most individuals lack the talent or the means for such personal expression, and the societal impact of “mass expression” would be diluted if not eliminated.

Often the celebrity’s heirs or assignees will be happy to authorize for manufacture and sale all of the memorabilia that the public needs, and the only issue is whether they should receive the financial benefit from these enterprises. The would-be merchandisers, however, may be unable to come to terms with the celebrity’s successors. Moreover, the heirs or assignees may seek to suppress certain types of memorabilia for reasons of personal sentiment or financial judgment. Again, the right of publicity can be used to suppress critical or unflattering commentary about the celebrity on a misappropriation theory alone. In Rosemont Enterprises, Inc. v. Choppy Productions, Inc., for example, Howard Hughes successfully enjoined the unauthorized manufacture and sale of T-shirts and sweatshirts depicting him in a comical and satirical manner. The defendants’ first amendment defenses were rejected. Although the “message” of the Howard Hughes T-shirts might have been somewhat ambiguous, most of us would have gotten its drift. The idea that the accumulation of vast sums of money does not necessarily mean happiness or social ease is, like the myth of Midas, a pertinent statement within our free enterprise society. This message does not seem less significant from the standpoint of the first amendment than the blatantly appropriative “Agatha” accounts deemed constitutionally immune to both injunction and damages in the Hicks case. Nor is it clear that fewer people would have been exposed to the message on the T-shirts than those who took the time and expense to read the unauthorized biography of Howard Hughes, which the courts in another case refused to enjoin on first amendment grounds.

Significantly, if the result in Choppy Productions was not ideal when Hughes was alive, it would be even more troublesome if an analogous result were reached after Hughes’ death. Hughes’ emotional interest in preventing pejorative depictions of himself is a per-

217. Id. at 1005, 347 N.Y.S.2d at 85.
sonal one and should not be vindicated after his death by the assertion of surviving publicity rights. Moreover, it is in the period immediately following the celebrity's death that his contemporaries have a prime opportunity to make a judgment of their own for the benefit of history. In this respect, other forms of commercial exploitation are also part of the societal dialogue and can be instructive to succeeding generations. The omnipresence of commercial enterprises and apartment complexes trading on the names of Washington, Lincoln, Roosevelt, and Kennedy, and the absence of similar "memorials" to Arthur, Harding, and Coolidge, is a collective statement of sorts.

Emphatically, the preceding discussion is not intended to suggest that state or federal recognition of publicity rights enforceable against purely commercial appropriations during the celebrity's lifetime or thereafter would violate the first and fourteenth amendments. Rather, it is only intended to suggest that aside from the free enterprise interests previously discussed, more constitutional interest in "mere" commercial appropriations of the celebrity's name and image exists than has been previously suggested. Moreover, this interest may be more acute when the celebrity is dead and history passes judgment on him for the benefit of our descendants.

IV. SUMMARY AND PROPOSALS

The right of publicity should be survivable generally in the hands of heirs, beneficiaries, and assignees because of its essentially proprietary nature, comparable to other intangible property rights that are survivable, such as goodwill and copyrights. Survivability also ensures continued prevention of unjust enrichment by those who would capitalize without charge on the fame that the celebrity established through the expenditure of time, money, and effort. Survivability, moreover, may also serve as additional career incentive during the celebrity's lifetime, perhaps leading to achievements of which society would otherwise have been deprived. On the other hand, neither the relationship between career incentive and the celebrity's exercise or failure to exercise his publicity rights, nor the relationship between added incentive and added achievement, is sufficiently clear or established to justify discrimination against the heirs of celebrities who did not exercise their rights.

In any event, the survivability of publicity rights must be circumscribed to vindicate societal interests in and constitutional guarantees of free enterprise and free speech, as well as to minimize possible conceptual discrepancies with the non-survivability of the rights to

220. See pts. I(C), (D) supra.
privacy and to be free of defamation. Survivable publicity rights should be assertable only against purely commercial exploitations of the celebrity's name and image. Because there are free trade and free speech interests even in these appropriations, an optimal solution would be a mandatory license comparable to that required for several types of copyrights under federal statute. Unfortunately, a mandatory licensing scheme would be unfeasible without legislation and a formal registration system.

Like copyrights, surviving publicity rights should also be limited as to duration. It has been suggested that the same free enterprise and free speech considerations weighed in limiting the duration of copyrights are pertinent to the survivability of publicity rights, and that courts can look to the present fifty-year post-mortem duration of copyrights under the 1976 statute for legislative guidance. With respect to providing additional career incentive and stimulating additional career achievement, however, it is doubtful that publicity rights have the same impact as copyrights. Additionally, in the case of many celebrities, the commercial value of their publicity rights declines fairly rapidly after death.

The survivability period for publicity rights should therefore be significantly shorter, perhaps between five and ten years. A five-year
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period of survivability would adequately protect assignees who wish
to enter fixed-term agreements with the celebrity; such agreements
can be routinely renewed. Moreover, if it is not feasible to imple-
ment a mandatory licensing scheme or a judicial counterpart, a short
survivability period would recognize the important societal interests
in bringing the vast majority of historical personages to the public
domain within a reasonably brief period following their deaths.

Legal Essays 213, 226-28 (1934); see 14 Ga. L. Rev. 831, 839 n.77 (1980). Chief
Justice Bird in Lugosi observed that "[i]n fashioning common law rights and rem-
edies in the past, this court has often considered federal and state statutory schemes
for guidance." 25 Cal. 3d at 847, 603 P.2d at 446, 160 Cal. Rptr. at 344. see, e.g., In
re Estate of Mason, 62 Cal. 2d 213, 216-17, 397 P.2d 1005, 1008, 42 Cal. Rptr. 13,
16 (1965) (adoptions of statutory rule governing abatement of testamentary gifts). In re
Walter, 62 Cal. 2d 218, 222-24, 397 P.2d 1001, 1004, 42 Cal. Rptr. 9, 12 (1965)
(adoptions of federal criminal rule on production of prosecution witness' testimony);
Decorative Carpets, Inc. v. State Bd. of Equalization, 58 Cal. 2d 252, 255-56, 373
P.2d 637, 639, 23 Cal. Rptr. 589, 591 (1962) (use of tax statute governing reimburse-
ment of sales taxes intentionally computed on amounts not taxable in case enforcing
retailer's obligation to return taxes erroneously paid). This principle no doubt
accounts for the popularity with jurists and commentators of the 50 year post mortem
shorter period of survivability were deemed appropriate, as is herein urged, its
establishment would not be beyond judicial competence. Two state legislatures that
have considered the problem have set shorter periods. One such provision, for exam-
ple, is the Virginia statute granting an action for commercial misappropriation of a
deceased's name or image. Va. Code § 8.01-40 B (1977). The action is specifically
limited to 20 years after the person's death. Id. The Florida statute provides a max-
§ 540.08(4) (West 1972). If a descendible right of publicity is recognized as a matter
of common law, it would appear reasonable that courts could also appropriately limit
the duration of the newly recognized right.