COPYRIGHT LAW, A RIGHT TO PUBLICITY & PHOTOGRAPHS: INTELLECTUAL PROPERTY IN THE DIGITAL AGE

JEFFREY PITTMAN*

I. INTRODUCTION
CELEBRITIES WANTED – DEAD OR ALIVE

In advertising, news reporting, and music – indeed, throughout American culture - celebrity status is big. Endorsement deals return millions of dollars annually to the biggest of the celebrities. Michael Jordan's earnings often are at the top of the list. Tiger Woods is estimated to have lifetime earnings potential of at least $1 billion.[1] The use of celebrity is not limited to the living. An interesting area of increased activity is the use of dead celebrities for commercial endorsements.

Deceased celebrities have several advantages over living celebrities. Ordinarily, there will be no new scandals involving dead stars.[2] Deceased celebrities also will not be late for photo shoots, demand contract renegotiations, check into Betty Ford clinics for chemical dependency, or engage in new criminal activities. With digital imaging and other related technologies, celebrities who have gone to the great stage in the sky are able to continue acting, selling, and maintaining their fame here on Earth decades after their departure.[3]

Endorsement deals for dead celebrities are becoming more common. Consider the following recent endorsements. Alfred Hitchcock and John Lennon supported British Airways.[4] James Cagney, Humphrey Bogart, and Cary Grant promoted Diet Coke. Marylyn Monroe touted Chanel No. 5, while Elvis Presley became a fan of Pizza Hut. John Wayne charged into a football practice to endorse Coors Beer. Fred Astaire danced with a Dirt Devil.[5] Popular deceased sports personalities also are involved: Babe Ruth, Lou Gehrig, Jackie Robinson, Satchel Paige, and Vince Lombardi are prominent in recent advertisements.[6] Digital technology has opened the door to creative use of famous personalities from the past.

---

* Professor of Business Law, Arkansas State University

[1] John Gilbert, *Image Conscious*, A.B.A. J., June 1999, at 46.

[2] Dead celebrities are occasionally involved in new scandals. Thomas Jefferson, for example, has continued to be the topic of discussion regarding extramarital parenthood.

[3] Generally, deceased celebrities are used in advertising campaigns or for other limited commercial activities. At the outer edge of technology, full-length motion pictures starring dead actors have been produced. Austin Bunn, *The Dead Celebrity Who Comes Back to Life*, N.Y. TIMES MAG., June 11, 2000, at 92.

[4] Ian Darby, *BA Celebrity Ads Lead L4m Image Update for 2000*, MKTG., Apr. 27, 2000, at 4.

[5] Joseph Beard, *Digital Replicas of Celebrities: Copyright, Trademark, and Right of Publicity Issues*, 23 U. ARK. LITTLE ROCK L. REV. 197 (2000).

[6] Mark Hyman, *Dead Men Don't Screw Up Ad Campaigns*, BUS. WK., Mar. 10, 1997, at 115.

II. A RIGHT TO PUBLICITY

There have been famous individuals in America throughout our history. As the power and value of celebrity status grew, courts were called on to decide the legal parameters of applicable protection for the celebrities involved in disputes. The first court opinion to specifically recognize a "right of publicity" is believed to be *Haelen Laboratories, Inc. v. Topps Chewing Gum*.[7] In *Haelen*, the court expressed the following thoughts:

> We think that, in addition to and independent of that right of privacy, . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . ..
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[8]

The right of publicity, growing out of the right of privacy, is based on state common and statutory law. Currently, the right of publicity is recognized in a majority of states through statutory enactments and/or common law decisions.[9] The right of publicity

---

[7] 202 F.2d 866 (2d Cir. 1953). For support regarding *Haelan* as the beginning of the recognition of the right of publicity, *see, e.g.*, Steven C. Clay, *Note, Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 489 (1994); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 854 (1995); Eleanor Johnson, *Note, Henley v. Dillard Department Stores: Don Loves his Henley, and has a Right to it Too*, 45 VILL. L. REV. 169 (2000).

[8] *See Haelan*, 202 F.2d at 868.

[9] *See, e.g.*, Alicia M. Hunt, *Comment: Everyone Wants to be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U.L. REV. 1605, 1607 ("Eighteen states have statutes that embody the right of publicity. CAL. CIV. CODE 3344 (West 1997); FLA. STAT. ch. 540.08 (West Supp. 2001); 765 ILL. COMP. STAT. 1075/1-60 (West 2000); IND. CODE ANN. 32-13 (West 2000); KY. REV. STAT. ANN. 391.170 (Michie 1999); MASS. ANN. LAWS ch. 214, 3A (Law. Co-op. 1999); NEB. REV. STAT. 20-201 to 20-211 (1997); NEV. REV. STAT. ANN. 597.770-597.810 (Michie 1999); N.Y. Civ. Rights Law 50-52 (McKinney 1992 & Supp. 2001); OHIO REV. CODE ANN. 2741.01-2741.09 (West Supp. 1999); OKLA. STAT. ANN. tit. 12, 1448-1449 (West 1993) (right of publicity); Okl. Stat. Ann. tit. 21, 839.1-839.3 (West 1983 & 2001 Supp.) (right of privacy); R.I. GEN. LAWS 9-1-28 (1997 & 1999 Supp.); TENN. CODE ANN. 47-25-1101 to 47-25-1108 (1995 & 2000 Supp.); TEX. PROP. CODE ANN. 26.001-26.015 (Vernon 2000); UTAH CODE ANN. 45-3-1 to 45-3-6 (1988 & Supp. 2001); VA. CODE ANN. 8.01-8.40 (Michie 2000); WASH. REV. CODE ANN. 63.60.010-63.60.080 (West Supp. 2001); WIS. STAT. ANN. 895.50 (West 1997) . . .. In addition, nine states without statutes have recognized a common-law right of publicity: Alabama, Connecticut, Georgia, Hawaii, Michigan, Minnesota, Missouri, New Jersey, and Pennsylvania . .

allows a person to protect and control the use of his or her identity for commercial purposes. Regarding deceased celebrities, the key question regarding the right of publicity is whether such right is descendible. On that point, there is disagreement among the states.

III. DURATION OF THE RIGHT OF PUBLICITY

About half of the states that recognize the right of publicity extend protection beyond death of the celebrity.[10] The post mortem terms vary from seventy years in California, to one hundred years in Indiana, to a possible perpetual term in Tennessee.[11] The following two cases illustrate differing approaches to post mortem protection.

A. BABE RUTH & NEW YORK LAW

George Herman (Babe) Ruth remains one of the most recognizable, and commercially valuable, American baseball heroes.[12] This is true despite the fact that Babe Ruth died in New York City, August 16, 1948. Ruth's name will assuredly remain among the ranks of baseball players "that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season."[13]

Since Ruth died a New York resident, New York law governs the question of a post mortem right of publicity in his case. *Pirone v. MacMillan*[14] addressed this question. In 1987, MacMillan Publishing Company produced *The 1988 MacMillan Baseball Engagement Calendar*, a calendar supplemented by baseball trivia and pictures. Babe Ruth's picture was used three times in the calendar. This use was not authorized by Dorothy Pirone and Julia Stevens, Ruth's daughters, the Babe Ruth League, a licensee of the Babe Ruth trademark, or Curtis Management Group, the agent authorized to market the Babe Ruth trademark to third parties.

The plaintiffs/appellants argued that since "Babe Ruth" is a registered trademark, MacMillian's use of Ruth's pictures violated this trademark. The court disagreed. After providing a general analysis of trademark law, the court provided the following analysis:

> Whatever rights Pirone may have in the mark "Babe Ruth," MacMillan's use of Ruth's name and photographs can infringe those rights only if that use was a "trademark use," that is, one indicating source or origin. As the district court correctly determined, there was no "trademark use" here . . . . While these pictures of Ruth are in a sense symbols, they in no way indicate origin or represent sponsorship. . . .The . . . photographs of Ruth [are] photographs of one ballplayer among the many featured in the

---

.."); *but cf*., Eleanor Johnson, *supra* note 7, at 171-72 ("Currently, over twenty states recognize a right of publicity in some form.").

[10] Stephen R. Barnett, *The Right to One's Own Image: Publicity and Privacy Rights in the United States and Spain*, 47 AM. J. COMP. L. 555, 560 (1999).

[11] *Id*.

[12] Mark Hyman, *supra* note 6.

[13] Flood v. Kuhn, 407 U.S. 258, 262 (1972).

[14] 894 F.2d 579 (1990).

> calendar. In the context of such a compilation, an ordinarily prudent purchaser would have no difficulty discerning that these photos are merely the subject matter of the calendar and do not in any way indicate sponsorship. No reasonable jury could find likelihood of confusion.[15]

The appellants also asserted MacMillan violated Babe Ruth's right of publicity. On that point, the court looked to state law and held that, in New York the right of publicity was not descendible. The court's analysis was succinct:

> Pirone also asserts a common law "right of publicity" claim, and asks for relief under New York's statutory right to privacy. N.Y. Civ. Rights Law §§ 50, 51. The Civil Rights Law forbids the use for advertising or trade purposes of any portrait or picture without the consent of the subject. The right of privacy protection, however, is clearly limited to "any living person." N.Y. Civil Rights Law § 50.[16]

B. ELVIS PRESLEY & TENNESSEE LAW

The second example of state law involves Tennessee and the music and film star Elvis Presley. The right to use Elvis Presley's name was the basis of a dispute between two not-for-profit corporations, only one of which was licensed to use Elvis' name.[17] The plaintiff's primary assertion was that Tennessee did not recognize a descendible right of publicity and that Elvis Presley's name and image entered into the public domain upon his death.[18] The plaintiffs relied on a federal court opinion interpreting Tennessee law to deny post mortem publicity protection. The Tennessee Court of Appeals "reversed" the federal court holding, providing an extensive analysis of the need for post mortem protection of publicity rights.[19] The court made specific reference to Tennessee tradition:

> It would be difficult for any court today, especially one sitting in Music City U.S.A., practically in the shadow of the Grand Ole Opry, to be unaware of the manner in which celebrities exploit the public's recognition of their name and image. The stores selling Elvis Presley tee shirts, Hank Williams, Jr. bandannas or Barbara Mandrell satin jackets are not selling clothing as much as they are selling the celebrities themselves. We are asked to buy the shortening that makes Loretta Lynn's pie crusts flakier or

---

[15] *Id*. at 583-85.
[16] *Id.* at 585. The court was applying N.Y. CIV. RIGHTS LAW § 50 (Consol. 2001) (Right of privacy: A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.).
[17] *State ex rel*. Elvis Presley Int'l Mem. Found. v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987).
[18] *Id.* at 91-92.
[19] *Id*. at 94. ("The only reported opinion holding that Tennessee law does not recognize a postmortem right of publicity is Memphis Development Foundation v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953, 101 S. Ct. 358, 66 L. Ed. 2d 217 (1980). We have carefully reviewed this opinion and have determined that it is based upon an incorrect construction of Tennessee law and is inconsistent with the better reasoned decisions in this field.").

> to buy the same insurance that Tennessee Ernie Ford has or to eat the sausage that Jimmy Dean makes.[20]

The Tennessee court's decision to provide post mortem protection to the right of publicity is solidified by Tennessee statutory enactments. The Tennessee Code provides broad protection for the right of privacy, specifically including protection past death.[21] Commercial exploitation of the decedent's name or likeness will maintain a perpetual right of publicity for the decedent's heirs or assignees.[22]

IV. LIMITATIONS ON THE RIGHT OF PUBLICITY

As a general proposition, a celebrity's right of publicity is violated by an unauthorized use of that celebrity's likeness for commercial purposes, such as in advertising a product. However, the celebrity's right of publicity is limited by the First Amendment right of free speech.[23] The First Amendment overrides state law and allows unauthorized use of individual's name and likeness in, e.g., news reporting, film biographies, commentary, or works of fiction. In this vein, for example, the First Amendment gives authors the right to complete an "unauthorized biography" without first obtaining permission from the subject of the biography.

A fair amount of controversy exists concerning where the First Amendment stops and the right of publicity begins.[24] Consider the following commentator's thoughts:

---

[20] *State ex rel. Elvis Presley*, 733 S.W.2d 89, 94.

[21] TENN. CODE ANN. § 47-25-1103 (2001). Property right in use of name, photograph, likeness

(a) Every individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner.

(b) The individual rights provided for in subsection (a) constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

[22] *Id* § 47-25-1104. Exclusivity and duration of right

(a) The rights provided for in this part shall be deemed exclusive to the individual, subject to the assignment or licensing of such rights as provided in § 47-25-1103, during such individual's lifetime and to the executors, heirs, assigns, or devisees for a period of ten (10) years after the death of the individual.

(b) (1) Commercial exploitation of the property right by any executor, assignee, heir, or devisee if the individual is deceased shall maintain the right as the exclusive property of the executor, assignee, heir, or devisee until such right is terminated as provided in this subsection (b).

(2) The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual's death.

[23] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[24] *See, e.g.*, Alana-Seanne M. Fassiotto, *Fred Astaire Dances Again: California Passes the Astaire Celebrity Image Protection Act*, 10 J. ART & ENT. LAW 497 (2000); Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151 (2001); Solveig Singleton, *Privacy versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97 (2000).

> I continue to have trouble with the notion that if I sculpt a bust of Martin Luther King, dead or alive, I cannot sell copies of it, even when I make no false claim that it is sponsored by Dr. King or the Foundation that honors his memory. Similarly, I have trouble with the notion that I cannot recreate the Marx Brothers in my own blend of their style of comedy and that of Chekhov. I have even more trouble with the notion that I cannot do an Elvis Presley act without coming to terms with a corporate licensing enterprise.[25]

V. COPYRIGHT PROTECTION FOR PHOTOGRAPHS

Beyond the right of publicity, copyright law presents additional considerations regarding the legality of using a photograph of a celebrity. As discussed above, for example, Babe Ruth's heirs do not have a recognized right of publicity regarding photographs of Ruth. However, there may exist copyright protection for any particular photograph, protecting the copyright holder from infringing use of the picture.

The first copyright protection term, enacted by Congress in 1790, was for 14 years, with a renewal period available for an additional 14 years.[26] In 1831, Congress extended the initial protection term from 14 to 28 years.[27] In 1909, Congress extended the renewal period from 14 years to 28 years, providing for a possible protection period of 56 years.[28] Under the Copyright Act of 1976, as amended most recently by the Copyright Term Extension Act of 1998 (CTEA),[29] copyright protection extends for the life of the author or artist plus 70 years,[30] or 95 years for works created for hire and owned by corporations.[31]

Under the confusing web of copyright protection amendments, it is difficult to clearly identify the parameters of copyright protection for photographs. Generally, works published before January 1, 1923, are now in the public domain. Works created after that time, if renewed by registration or automatically, are protected for a total of 95 years from creation.[32] For works created on or after January 1, 1978, protection extends for the author's life plus 70 years, or 95 years for works for hire.[33]

---

[25] Diane Leenheer Zimmerman, *Meeting the Right of Publicity: Competing Perspectives and Divergent Analyses Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made The Pants Too Long!* 10 J. ART & ENT. LAW 283, 284-85 (2000).

[26] Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124.

[27] Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436.

[28] Act of Mar. 4, 1909, § 23.

[29] Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 101, §§ 302-305 (Supp. 1999).

[30] 17 U.S.C. § 302(a) ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.").

[31] 17 U.S.C. § 302(c) ("In the case of an anonymous work a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.").

[32] U.S. Copyright Off., CIRCULAR 15T, at 3 (1999), *available at* http://www.loc.gov/copyright/circs/circ15t.pdf.

[33] U.S. Copyright Off., CIRCULAR 15A, at 3 (2000), *available at* http://www.loc.gov/copyright/circs/circ15a.pdf.

The Supreme Court recently announced that it would hear a challenge to the power of Congress to enact CTEA. The case, *Eldred v. Ashcroft*,[34] questions whether Congress exceeded its power under the U.S. Constitution to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."[35] (emphasis added). The plaintiff's main argument is that copyright protection for an author's life plus 70 years is not a "limited" time, under the Constitution.

VI. CONCLUSION

Digital images of celebrities, whether entertainers, sports heroes, or politicians, are readily available over the Internet or elsewhere. Legal issues arise for individuals using these images without permission. In most states, living celebrities control the use of their likeness through the right of publicity. Many states recognize this right post mortem. Beyond the celebrities' right of publicity, copyright law protects the creator of a photograph or image from infringing use of that image by others. Thus, use of a celebrity image may bring legal action by the celebrity (or legal representative of the deceased celebrity's estate) and by the copyright holder for the photograph or digital image.

[34] No. 01-618, *cert. granted*, Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).
[35] U.S. CONST. art. I, 8, cl. 8.