THE EVOLVING DOCTRINE OF RIGHT OF PUBLICITY: JUDICIAL PROTECTION OF CELEBRITY'S PECUNIARY INTEREST FROM COMMERCIAL EXPLOITATION OF HIS OR HER IDENTITY AND THEATRICAL STYLE

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INTRODUCTION

While the populace writhes in conjecture as to whether Elvis Presley has been seen recently at "Heartbreak Hotel" in this earthly galaxy, reliance need not be placed on socratic speculation as to whether a 1987 Tennessee Court of Appeals decision has protected the estate of Elvis by holding that the "King's" right of publicity survived his death and remained enforceable by his estate and those holding licenses from the estate.1 In this context, the Tennessee court also held that a celebrity's right of publicity can be descendible at death. By way of contrast, a federal court held in 1980 that under Tennessee law the exclusive right of publicity of Elvis did not survive his death and after such death, the opportunity for gain in the exploitation of his fame shifted to the public domain where it is equally open to all.2 In short, after his untimely death, the court concluded that Elvis and his illimitable fame belonged to the "cosmos." These two antipodal cases relative to the judicial protection of the post-death fame of Presley will be juxtaposed later in this paper.

The plethora of court decisions addressing the right of publicity doctrine may be segmented into two categories. The first category involves judicial recognition that a celebrity or famous person has during their life the exclusive legal right to control and profit from commercial use of their name, identity and personality.3 Substantial

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unanimity exists among the courts that conceptually the “right of publicity” protects the celebrity’s pecuniary interest from commercial exploitation of his or her identity because such right is valuable in the promotion of products and that remedies by way of damages or injunctive relief are available in the judicial system to thwart the unauthorized commercial exploitation of such identity. The courts have referred to the right of publicity as the celebrity’s “proprietary interest” or as a species of intangible personal property.

In the second category of decisions, the judicial scenario changes when the issue addressed is whether the post-death fame ensconced in the right of publicity is judicially protectible on behalf of will beneficiaries, heirs or assignees of the celebrity. The resultant divergent caselaw reflects ambivalent and esoteric judicial views as to whether the right of publicity should be confined to the lifetime of the celebrity or famous person. This latter category is analyzed under three distinct judicial approaches.

One view expressed in prior court decisions concludes that the right of publicity does not survive a celebrity’s death and after such death the public is free to commercially exploit the identity and fame of the celebrity. The proffered reason for such conclusion was that “[a] whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right.” Other courts in adhering to the view that post-death fame of a celebrity is not judicially protected, have noted that since the artist did not commercially exploit or protect the right of publicity during his or her lifetime, this was sufficient reason to hold that such right was not descendible. Judicial precedent is developing, however, that extends judicial protection to the right of publicity as a right that is descendible and assignable even though such right was not commercially exploited by artists during their lifetime. In this context, the cynosure of attention will be focused on the Martin Luther King, Jr., Center For Social Change v. American Heritage Products case, the 1987 State ex rel. Elvis Presley International Memorial Foundation

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6. Elvis Presley, 733 S.W.2d at 97.
8. Memphis Dev., 616 F.2d at 959.
10. 694 F.2d 674 (11th Cir. 1983).
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v. Cromwell\textsuperscript{11} decision and the 1983 *Acme Circus Operating Co. v. Kuperstock*\textsuperscript{12} case.

JUDICIAL PROTECTION OF THE PROPRIETARY RIGHT OF PUBLICITY OF THE CELEBRITY DURING LIFETIME

While the public may not equate the violation of the celebrity's right of publicity as "blazing new trails in human deprivation," the courts with consistency have held that the talents, diligence and energy of the athlete, entertainer or celebrity in developing a public identity is a valuable proprietary right that warrants judicial protection from the abuse of commercial exploitation of such identity. The Supreme Court of the United States, in *Zacchini v. Scripps-Howard Broadcasting Co.*,\textsuperscript{13} held that the first and fourteenth amendments did not immunize the news media from committing a violation of a performer's right of publicity when the media televised the performer's entire act (being shot out of a cannon). The Court readily perceived that televising the performer's entire act constituted a substantial threat to the economic value of his cannonball performance.\textsuperscript{14}

Empathetic concern for reader patience and printing costs warrant only a sampling of the myriad of court decisions. Set out below are five cases which afford proper remedies to the celebrity when such person's valuable right of publicity has been commercially exploited without his or her permission.

Typical of court decisions in the incipient stages of judicial development of the right of publicity doctrine is *Uhlaender v. Henrickson*,\textsuperscript{15} a 1970 case involving the unauthorized use by a manufacturer of Major League Baseball games which utilized the names and professional statistical information, uniform numbers and playing positions of major league baseball players. It was clear to the court that the use of baseball players' names and statistical information was intended to and did make the games more salable to the public. The major league baseball players who had not consented to the use of their names and other data were granted injunctive relief. The conceptual essence of the courts rationale was stated as follows:

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[i]t is this court's view that a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and com-
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\textsuperscript{11} 733 S.W.2d 89 (Tenn. Ct. App. 1987).
\textsuperscript{12} 711 F.2d 1538 (11th Cir. 1983).
\textsuperscript{13} 433 U.S. 562 (1977).
\textsuperscript{14} Id. at 575.
\textsuperscript{15} 316 F Supp. 1277 (D. Minn. 1970).
petition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property.\textsuperscript{16}

The federal district court noted previous decisions where courts had protected the right of publicity of major league baseball players and the professional golfer, Arnold Palmer, from the unauthorized use of their names, photographs and statistics because the courts felt that these athletes had a right in the publicity value of these personal items.\textsuperscript{17}

The popular entertainer, Johnny Carson, became understandably piqued when the defendant, a Michigan corporation, rented and sold "Here's Johnny" portable toilets. In \textit{Carson v. Here's Johnny Portable Toilets, Inc.},\textsuperscript{18} in which Carson sought to protect his "right of publicity," the court noted that Carson's association with the "Here's Johnny" portable toilets did not appeal to Carson's sense of humor. It held that the unauthorized use of the phrase "Here's Johnny" violated Carson's common law right of publicity.\textsuperscript{19} The legal basis for its conclusion was described as follows:

\[\text{[t]he theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity. . . . The famous have an exclusive right during life to control and profit from the commercial use of their name and personality.}\textsuperscript{20}

In this context the Sixth Circuit concluded that Carson's identity may not be exploited even if his name, Johnny Carson, or his picture is not used. On remand, both damages and injunctive relief were afforded Carson.\textsuperscript{21}

A frequently cited case germane to the right of publicity, \textit{Hirsch v. S.C. Johnson \\& Son, Inc.},\textsuperscript{22} involved Elroy Hirsch, a former college and professional football superstar. Later, Hirsch was the athletic director of the University of Wisconsin.

Hirsch was not enthralled when he discovered the unauthorized

\textsuperscript{16} \textit{Id.} at 1282.


\textsuperscript{18} 698 F.2d 831 (6th Cir. 1983).

\textsuperscript{19} \textit{Id.} at 837.

\textsuperscript{20} \textit{Id.} at 835. (citing Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980)).

\textsuperscript{21} Carson v. Here's Johnny Portable Toilets, Inc., 810 F.2d 104, 105-06 (6th Cir. 1987).

\textsuperscript{22} 90 Wis. 2d 379, 280 N.W.2d 129 (1979).
use of his earned nickname “Crazylegs” on a shaving jel for women manufactured by the defendant, S.C. Johnson & Son, Inc. During his legendary football career at the University of Wisconsin, Hirsch’s unique running style drew the attention of a sportswriter who tagged Hirsch with the nickname “Crazylegs.” The evidential court record showed that during his career, Hirsch authorized various commercial endorsements, in all of which he was identified as “Crazylegs.” Hirsch testified that he had been protective of the name and the type of product he endorsed for compensation. He stated that he had refused to do cigarette advertising. He also had declined to do any advertising for liquor and had a beer commercial withdrawn after he became the athletic director of the University of Wisconsin. In all of his product endorsements, his nickname “Crazylegs” was used to identify him. Evidence was introduced to show that a movie of his life was made in the 1950s named “Crazylegs All American.”

The court concluded that it was undisputed that Hirsch was a sports figure of national prominence. The court further concluded that the fact that “Crazylegs” was a nickname rather than the actual name of Hirsch did not preclude his action for violation of his common law right of publicity since it was not disputed that the nickname clearly identified Hirsch.

The court noted that the record established that Hirsch had, over a period of years, assiduously cultivated a reputation not only as a skilled athlete but as an exemplary person whose identity was associated with sportsmanship and high qualities of character. Hence, the court concluded that the use of his nickname on shaving jel for women would create a likelihood of public confusion as to sponsorship by Hirsch. Accordingly, the court referred to its felicitous statement in a 1974 decision that “[i]t is a form of commercial immorality to ‘reap where another has sown.’”

The Supreme Court of the United States (that tribunal that is not final because it is infallible but is infallible only because it final) has added a new dimension to the evolvement of the right of publicity doctrine in its 1977 decision, Zacchini v. Scripps-Howard Broadcasting Co. Hugo Zacchini, a human cannonball, was performing his feat at the Geauga County Fair in Burton, Ohio, which

23. Id. at 385, 280 N.W.2d at 131-32.
24. Id. at 386, 280 N.W.2d at 132.
25. Id. at 401, 280 N.W.2d at 139.
26. Id. at 391-92, 280 N.W.2d at 135. (citing Mercury Records Prod. v. Economic Consultants, Inc., 64 Wis. 2d 163, –, 218 N.W.2d 705, 710-11 (1974)).
performance probably did not give Zacchini the national prominence enjoyed by Elroy Hirsch.

In his act at the county fair, Zacchini was a human cannonball in which he was shot from a cannon into a net some 200 feet away. Every performance lasted 15 seconds. Members of the public attending the fair were not charged a separate admission fee to observe the Zacchini act although he performed in a fenced area, surrounded by the grandstands, at the fair grounds.29

A freelance reporter for Scripps-Howard Broadcasting Company attended the fair carrying a small camera. Zacchini noticed the reporter and asked him not to film the performance. Yet, on the instructions of his producer, the reporter returned to the county fair on the next day and videotaped the entire act of Zacchini. This film clip, about 15 seconds in length, was shown on the 11 o'clock news program that night with favorable commentary about the uniqueness of Zacchini's spectacular performance.30

The Ohio Supreme Court based Zacchini's cause of action on his right to publicity value of his performance. The court, however, rendered judgment for Scripps-Howard, because, "[h]ere the TV station was privileged to report the facts of Mr. Zacchini's performance in a newscast, because the performance was a matter of legitimate public interest. No abuse appears which would defeat that privilege."31

The Supreme Court of the United States granted certiorari to consider an issue that the Court had not resolved: that is whether the first and fourteenth amendments immunized Scripps-Howard from damages for its alleged infringement of Zacchini's state-law "right of publicity." The Court concluded that: "[i]nsofar as the Ohio Supreme Court held that the [f]irst and [f]ourteenth amendments of the United States Constitution required judgment for Zacchini, we reverse the judgment of that court."32

In rejecting the contention that the first and fourteenth amendments immunized news media from violation of Zacchini's state-law right of publicity, the Court noted that the state's interest in permitting a "right of publicity" is closely analogous to the goals of patent and copyright laws which focus on the right of the individual to reap the rewards of his or her endeavors. The Court further observed that the transcendent concern of the state in the "right of publicity" doctrine is to protect the proprietary interest of the individual in his

29. Id. at 563.
30. Id.
or her act which in part is designed to encourage such entertainment.  

The Court found that Zacchini's right of publicity had been violated by the broadcast of his "entire act" without his consent. The Court reasoned that the filming of the entire act of Zacchini posed a substantial threat to the economic value of that performance because if the public could view the act free on television they would be disinclined to pay to see the act at the fair; and secondly, the televised broadcast would strike at the heart of Zacchini's ability to earn a living as an entertainer.

The Zacchini case was recently cited in a 1987 decision, San Francisco Arts & Athletics, Inc. v. Olympic Committee, where the Court held that a federal statute granted the United States Olympic Committee (the "USOC") exclusive use of the word "Olympic" and that the first amendment did not prohibit Congress from granting exclusive use of the word. In the Olympic Committee case, the Court concluded that Congress might determine that the promotional value of the word "Olympic" was "the product of USOC's own talents and energy, the end result of much time, and effort, and expense." In balancing the vital first amendment protection and the performer's right of publicity to protect the economic value of his act, the Court stated:

"but it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it."

Thus definitive statement by the Court weighs heavily in having first amendment rights yield to the economic value of the performers act and his or her right of publicity.

The redoubtable "Cher" has added to the precedent for recognition of the right of publicity of an entertainer in Cher v. Forum Inter-

33. Id. at 573.
34. Id. at 575-76.
36. Id. at 2979. (citing Zacchini, 433 U.S. at 575).
37. Zacchini, 433 U.S. at 578.
38. Id. (emphasis added).
The right of publicity transcended the first amendment protection when a magazine appropriated Cher’s right of publicity. The magazine falsely indicated that Cher had made revelations to the interviewer and had endorsed the magazine. The first amendment protected the publication of the interview with Cher but did not immunize the magazine for damages because of their usurpation of her right of publicity.

**JUDICIAL DISTINCTION BETWEEN LEGAL THEORIES OF RIGHT OF PUBLICITY AND INVASION OF PRIVACY**

In the numerous cases recognizing the legal remedy of right of publicity, the courts have usually made a clear distinction between that cause of action and the theory of invasion of privacy. A myriad of court decisions recognizing this distinction between the two legal theories may be synthesized by the observation that invasion of privacy is based upon the tort rationale of the “right to be let alone” based upon injury to feelings while the right of publicity stems from the celebrity’s legitimate proprietary interest in his or her public personality or identity which has potential economic value to such person.

As was said aptly in *Zachman*, the celebrity wants to be paid for the commercial exploitation of the right of publicity. As related to the right of publicity, the celebrity is not cavilling about “being left alone,” rather the celebrity wants publicity but wants to be compensated for it when that commercial exploitation usurps the celebrity’s right of publicity. The right of publicity remedy does not involve the “bruised feelings” or unwanted intrusion into one’s private life. This was demonstrated in *Galella v. Onassis* when a photographer’s continued harassment of Jacqueline Onassis resulted in injunctive relief from this unwarranted intrusion into her daily life.

That there is substantive importance to the attorney representing athletes, entertainers and celebrities who seek a remedy for the misappropriation of their right of publicity to not veer into the “right to be let alone” rationale of invasion of privacy is illustrated in

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39. 692 F.2d 634 (9th Cir.), cert. denied, 462 U.S. 1120 (1982).
40. 692 F.2d at 638.
42. *Zachman*, 433 U.S. at 578.
43. 487 F.2d 986 (2d Cir. 1973).
44. Id. at 998.
O'Brien v. Pabst Sales Co. In this 1941 decision, a famous football player sought damages for the alleged use of his photograph by a beer company without his permission. O'Brien's complaint alleged damages for invasion of privacy. A directed verdict for the beer company was affirmed because O'Brien failed to establish direct injury to his personal feelings.

Failure to meticulously separate the respective legal theories of right of publicity and invasion of privacy seems evident in another Johnny Carson case. In Carson v. National Bank of Commerce Trust and Savings, Carson brought suit against a bank and its wholly owned subsidiary travel agency for damages based upon the travel agency's unauthorized use of Carson's name and picture in promoting a trip. The Eighth Circuit, in applying Nebraska law, centered attention on the theory of invasion of privacy and denied relief to Carson on that theory. The action by Carson was based upon the theory of misappropriation of Carson's name and image but the court concluded that the misappropriation theory could not escape the Nebraska rule of no recovery for invasion of privacy. It was noted by the Eighth Circuit that Carson would have had a cause of action in most jurisdictions.

It is suggested that to fuse or confuse violation of a client's right of publicity with invasion of privacy is to defuse the impact of the judicial protection of the right of publicity and is tantamount to presenting a legal solution which is seeking a problem. In Zacchini, the Supreme Court of the United States made a typically concise judicial distinction between the right of publicity doctrine and invasion of privacy. The Court observed that the media had usurped Zacchini's right of publicity by filming his entire act. In this context, the Court found inapposite to that theory its prior decision in Time, Inc. v. Hill, which involved an alleged invasion of privacy which the Court in Zacchini viewed as an entirely different tort from the "right of publicity." Other courts have made similar distinctions in clarifying the legal nature of the right of publicity versus invasion of privacy.

JUDICIAL LIMITATIONS ON THE RIGHT OF PUBLICITY

While a spate of court decisions have established that a celebrity
has a proprietary right to possess and control his or her public image and identity to the exclusion of others and that the celebrity can enjoy the economic benefits therefrom, some possible limitations on the evolving right of publicity need to be recognized. The following are perceived limitations embedded in the decisional law. First, must the plaintiff be a national celebrity or a famous person to gain judicial protection of the public identity? Second, concerning the requisite of secondary meaning—does the public identify the artist with a specific song, style or other creative effort? Third, must the exploitation of the right of publicity be for commercial gain? Finally, can the right of publicity proprietary right be preempted by the federal copyright law, and is the celebrity's right of publicity descendible at death? The post-death status of the fame and public identity of the celebrity will be reviewed separately later on in this paper because of the sharply divergent judicial reaction to this topic.

WHO MAY CLAIM A RIGHT OF PUBLICITY

Does the right of publicity protect only the famous celebrity, entertainer, athlete or performer? It is submitted that the doctrine is equally applicable to the famous and the obscure person, who by effort and diligence has created a public image or identity. Of course, many of the court decisions involve persons of national prominence whose names are veritable household words. But it is to be expected that famous persons will be more sensitized to the economic value of their endorsement of products and their public identity. The point was aptly discussed in Lerman v. Flynt Distributing Co., where the court noted that actions for violation of the right of publicity are most frequently invoked by public figures or celebrities who have expended substantial time and effort to create a public image or identity. The plaintiff, Jackie Collins Lerman, was denied a cause of action for alleged violation of her right of publicity because she took umbrage at being misidentified as the subject of nude photographs in a magazine. While Lerman was a successful writer, she expressed alarm at being misidentified as the subject of the nude photographs because of her insistence that she was a very “private person.” The Second Circuit, concluding that her insistence of being a “private person” did not square with her claim that her right of publicity had been appropriated, noted, “[s]he has never exploited the value of her nude appearance and obviously cannot claim to have developed a property interest in the subject matter of this alleged

52. 745 F.2d 123 (2d Cir. 1984).
53. Id. at 134.
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However, the courts have protected the exploitation of athletes and entertainers who concededly had not achieved national prominence or had any such aspirations. In *Ettore v. Philco Television Broadcasting Corp.*, a professional boxer of only regional acclaim successfully sought judicial protection of the economic value of a prize fight. Philco televised a film of Ettore's boxing match engaged in some 13 prior years with the incomparable Joe Louis in which Louis knocked out Ettore in the fifth round. A film was made of the fight and Philco televised it without the knowledge or consent of Ettore as part of a television series called "Greatest Fights of the Century." Ettore was awarded damages for this unauthorized invasion of his right of publicity without any indicated requisite by the court that he had to be a boxer of national prominence. Ettore was a professional boxer and the unauthorized filming and televised showing of his bout with a famous champion, Joe Louis, was held to be actionable.

In *Zacchini*, no claim was made that Zacchini, the human cannonball, was a performer of national renown. He was earning a living doing his act at the Geauga County Fair in Burton, Ohio. The judiciary recognized the economic value to Zacchini not to have his entire act televised and this was reflected by the Supreme Court of the United States when it stated: "[m]oreover, the broadcast of [Zacchini's] entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of [Zacchini's] ability to earn a living as an entertainer."

In the *Hirsch* case, the court noted that Hirsch's national prominence as a sports figure was undisputed because he had achieved superstar status in both college and professional football. His professional football career with the Los Angeles Rams extended from 1949 until 1957. However, his litigation against S.C. Johnson & Son, Inc. for misappropriation of his nickname "Crazylegs" took place in 1979 when Hirsch was athletic director at the University of Wisconsin. Whether Hirsch was still in 1979 a sports figure of national prominence, what with the fleeting retention of memory by the sports public, is conjectural. But, it must be conceded that the nick-

54. *Id.*
56. *Id.* at 495-96.
58. *Id.* at 576.
name "Crazylegs" had been closely identified with Hirsch in his college and professional careers and in his various commercial endorsements.

It is submitted that national prominence does not seem to be a judicial requisite for the person whose earned right of publicity has been misappropriated. However, it is evident in the court decisions that being a national figure such as Johnny Carson facilitates the right of publicity action in the judicial arena.

SECONDARY MEANING REQUISITE

A formidable prerequisite to actionable appropriation of the right of publicity is found in the requirement that the celebrity establish a secondary meaning with the alleged song, name or other creative endeavor which some one has used without the permission of the entertainer or celebrity. It must be shown that the thing allegedly misappropriated was closely identified by the public with the particular celebrity.

Illustrative of this idea is Sinatra v. Goodyear Tire & Rubber Co. Nancy Sinatra sought damages and injunctive relief from Goodyear Tire & Rubber Co., because of advertising commercials for radio and television centered around the musical background and revised lyrics from the song, "These Boots Are Made For Walking," along with the voice of a female singer. Nancy Sinatra contended that this song had been so popularized by her that her name is closely identified by the public with it and that the song has acquired a secondary meaning or association with her. She further asserted that because of this close identification of the song with her, the public would be misled as to whether Nancy Sinatra was being compensated for this particular endorsement of a product.

The court rejected the singer's arguments and concluded that she had no cause of action because the public would not be deceived into believing that Sinatra was a participant in the commercials. The court reasoned that the commercials were anonymous and there was no indication by Goodyear that such commercials embodied the performance or voice of any particular performer.

The well known singing group, The Fifth Dimension, also encountered the requisite of a song having secondary or close public identity to that group. In Davis v. Trans World Airlines, Trans World, in a commercial, had used the music, lyrics and arrangement of a then popular song, "Up, Up and Away," to which it had acquired

60. 435 F.2d 711 (9th Cir.), cert. denied, 402 U.S. 906 (1970).
61. Id. at 713.
rights from the copyright proprietor. The Fifth Dimension had made a very successful recording of the same song. The singing in the TWA commercial was anonymous. The singing group was denied recovery for it was concluded that mere imitation did not give rise to a cause of action.\textsuperscript{63}

The courts have found the required uniqueness of style to satisfy the secondary meaning or close public identity with a particular song or creative effort where the entertainer had a singular style. In \textit{Lahr v. Adell Chemical Co.},\textsuperscript{64} there was also a television commercial in which a cartoon duck was used to speak with a voice alleged to be the simulated voice of Bert Lahr, a successful professional entertainer. The court noted that Lahr had achieved stardom because, "in substantial measure... his ‘style of vocal delivery which, by reason of its distinctive and original combination of pitch, inflection and comic sounds,’ has caused him to become ‘widely known and readily recognized... as a unique and extraordinary comic character.’"\textsuperscript{65} It was held that the television commercial was "stealing the thunder" of Bert Lahr and that on the face of his allegations he was entitled to have his complaint go to trial.\textsuperscript{66}

Peter Blair Noone, the Herman of Herman’s Hermits, convinced the District Court for the Southern District of New York in \textit{Noone v. Banner Talent Associates},\textsuperscript{67} that he had established a secondary meaning and close identity with Herman’s Hermits as the lead singer of this English musical rock and roll group. Noone sought to enjoin other original members of the group from using the name Herman’s Hermits because even though he left the group to pursue his own individual career, he contended that his name was so closely associated with Herman’s Hermits that the continued use of that name after his departure would cause the public to conclude that Noone was still active with such group.\textsuperscript{68} Accordingly, the court denied a defense motion to dismiss the complaint of Noone.

\textbf{COMMERCIAL EXPLOITATION REQUISITE}

It seems to be implicit and quite explicit in the numerous court decisions involving exploitation of a celebrity’s right of publicity that such usurpation without the permission of the celebrity be for commercial purposes. The essence of the remedy is that the celebrity has a propriety interest in his or her public identity and that the eco-

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 1146-47.
\item \textsuperscript{64} 300 F.2d 256 (1st Cir. 1962).
\item \textsuperscript{65} \textit{Id.} at 257.
\item \textsuperscript{66} \textit{Id.} at 257.
\item \textsuperscript{67} 398 F. Supp. 260 (S.D.N.Y. 1975).
\item \textsuperscript{68} \textit{Id.} at 263.
\end{itemize}
nominal value thereof warrants judicial protection from those who seek to make money from the image and identity of others. A brief sampling of the decisions will suffice.

In *Hirsch*, it was held that Hirsch had the right to control and to profit from the commercial misappropriation of his nickname "Crazylegs" on a shaving gel for women.69 The commercial theme is reflected in a statute enacted by the Wisconsin legislature in 1977 which became operative after *Hirsch* was decided.70 The Wisconsin statute provides a cause of action when for advertising or for purposes of trade, use is made of the name, portrait or picture of any living person without having first obtained the written consent of such person.

A second judicial decision protecting the economic value of a performer's identity involved the commercial stake of the human cannonball performer in *Zacchini*.71 Further, in *Carson* it was held that the celebrity's right of publicity protected him from commercial exploitation of the sale of "Here's Johnny" portable toilets.72 Finally, the unjust enrichment theme germane to commercial exploitation of a celebrity's right of publicity was reviewed and various cases cited in the 1987 *Elvis* decision which held that the right of publicity is descendible.73

**Federal Copyright Law Preemption of Right of Publicity**

A novel issue was presented to the Seventh Circuit in 1986 by the Major League Baseball Players Association. In *Baltimore Orioles, Inc. v. Major League Baseball Players Association*,74 litigation resulted from a long-standing dispute between the Major League Baseball Clubs and the Players Association regarding the ownership of the broadcast rights of the players performances during major league baseball games. The players contended that telecasts were being made without the player's consent and that such telecasts misappropriated the player's alleged property rights in their performance on the baseball diamonds. In sum, the players argued that their on the diamond performances constituted a proprietary right encompassed by the right of publicity. The court held, however, that the players had no cause of action because the telecasts of baseball games, which are videotaped at the same time they are broadcast, are fixed in tangible form, and thus, simultaneously recorded live broad-

69. *Hirsch*, 90 Wis. 2d at 403, 280 N.W.2d at 140.
71. *See supra* notes 28-34 and accompanying text.
72. *See supra* notes 18-21 and accompanying text.
73. *See supra* note 1 and accompanying text.
casts are copyrightable under the federal copyright law. It was concluded that telecasts of baseball games involve ample creative labor for copyrightability. Hence, the court held that the players' state law rights of publicity in their game time performances were preempted by the federal copyright law.

CELEBRITY MAY REGRET THE RELEASE OF THE RIGHT OF PUBLICITY

Court decisions reflect that the proprietary rights of a celebrity in his or her right of publicity may be released for consideration. Such waiver of these rights will preclude any legal action by the celebrity against the licensee who was granted the release.

Illustrative is Cepeda v. Swift and Co. This famous major league baseball player entered into a contract with Wilson Sporting Goods Company which granted Wilson the exclusive world right and license to use Cepeda's name, facsimile signature, initials, portraits, or any nickname popularized by him, in connection with its sales of baseballs, baseball shoes, baseball gloves and baseball mitts and to license others to do the same. Cepeda contended that his rights were violated when pursuant to such contract, Wilson entered into an agreement with Swift and Company by terms of which Wilson sold baseballs to Swift and agreed that Swift could conduct an advertising campaign employing Cepeda's name and picture with the promotion and sale of Swift's meat products. The court held that Cepeda had contracted away his right of publicity and that his contract with Wilson authorized Wilson to grant such rights to other licensees.

In Shields v. Gross, the nationally known actress and entertainer, Brooke Shields, received a rather traumatic learning lesson relative to giving a release of her right of publicity to a commercial photographer. The mother and legal guardian of the then minor, Brooke Shields, signed a release for a rather modest sum of money which release gave the defendant photographer the unlimited right and license to use in any manner photos which such photographer had taken of Brooke Shields when she was 10 years old. The injunctive relief sought by the actress was denied by the Court of Appeals of New York because of the illimitable waiver of her rights in the release granted to the photographer. The consummate caveat of the
Cepeda and Shields cases is to either limit the use authorized in the release of rights of publicity or prepare for judicial rejection.

RIGHT OF PUBLICITY DOES NOT SURVIVE DEATH OF ITS OWNER—IS THIS VIEW JUDICIAL MYOPIA?

While there is virtual judicial unanimity relative to the right of publicity of a celebrity to control the commercial exploitation of his or her public identity and to prevent others from unfairly appropriating the value of such identity for their commercial profit, the courts have reached antithetical results as to whether this salutary judicial protection is available to transferees of the celebrity after death.81 Focus will now center on court decisions holding that the exclusive right of publicity does not survive a celebrity's death and after such death, the opportunity to profit from the photograph, name, replicas, likeness, and other facets of the celebrity's public identity is equally open to all gamseekers. This judicial refusal to protect the post-mortem fame and identity of the celebrity has led to names and photographs of such celebrity being associated with a myriad of oftentactless memorabilia which are marketed gleefully without the financial participation by the heirs, will beneficiaries or assignees of the celebrity.

Reactive legislation to counteract the judicial enigma holding that the right of publicity is limited to the lifetime of the celebrity has been sought in numerous states. For example, the State of California has adopted a statute which prohibits any person or company from using without permission, the name, voice, signature, photograph or likeness of any deceased person to make or advertise a product or service within 50 years after the death of that person.82

The theory that the right of publicity does not survive the death of its owner is paradoxical in view of the near unanimity in support of the lifetime legal remedies of the celebrity which has more than a modicum of judicial espousers. The salient cases reflecting the refusal to protect post-death fame of the celebrity will be reviewed.

Two separate federal court decisions have held that the post-death fame of Elvis Presley was not the exclusive right of Colonel Tom Parker, Presley's manager, because after the death of Elvis his right of publicity belonged to the public domain where it was equally open to all persons. Prior to his death, Presley had conveyed the exclusive right to exploit his name and likeness to a corporation controlled by Parker in exchange for royalties.

81. See supra notes 7, 10, 11 and accompanying text.
82. CAL. CIV. CODE § 990 (West Supp. 1988).
RIGHT OF PUBLICITY

After the death of Elvis in 1977, a Memphis foundation developed plans to erect a large statue of Presley in downtown Memphis. Public contributions were solicited to pay for the sculpture. Donors of $25 or more received an eight-inch pewter replica of the proposed statue. The district court, in *Memphis Development Foundation v. Factors, Etc., Inc.*, held that the exclusive right to exploit the name and likeness of Elvis was held by the assignee corporation controlled by Colonel Parker and accordingly, the court enjoined further distribution of the replicas by the Memphis Foundation.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court and held that the post-death fame of Elvis was not inheritable or assignable. The proffered rationale by the court for this view seems esoteric and perhaps even transcends reality.

The Sixth Circuit initially joined the judicial stream in concurring in the theory that at common law there is a cause of action for the appropriation or unauthorized commercial use of the name or likeness of another because an individual is entitled to control the commercial use of these personal attributes during life. The court further noted that other courts have recognized that publicity rights exist apart from and independently of privacy rights.

In shifting its attention to whether the right of publicity survives its owner, the court noted that recently a few cases, including a Second Circuit decision, have characterized the right of publicity as property which may be passed on to heirs or assigns. However, as will be discussed below, the Second Circuit’s 1978 decision was reversed by that court in 1981.

When the court focused on the post-mortem status of the right of publicity, which it conceded Elvis could control in his lifetime, the Sixth Circuit found in a recondite manner that this lifetime remedy from commercial exploitation has an evanescent quality at the death of Elvis and somehow now belongs to the public domain. The court did concede that recognition of the post-mortem right of publicity would vindicate two possible interests: the encouragement of effort and creativity; and, the hopes and expectations of the decedent and

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84. *Id.* at 1330-31.
86. *Id.* at 958 n.1.
the contracting parties, that they are creating a valuable capital asset.

However, the court concluded that there are a myriad of reasons for declining to recognize that the right of publicity survives the owner. The court noted a prolix set of problems of judicial line-drawing which surround recognition of the right of publicity as a descendible or assignable right. The problems the court identified are: the duration of the property interest; the tax consequence of this interest; conflicts with the right of free expression; and the applicability of the interest to public sector employees.

The court concluded, after having posed this series of problems in the consummate socratic manner, that the post-mortem fame of Elvis could not be assigned to Colonel Parker. The court stated as rationale in an ethereal tone: "[f]ame falls in the same category as reputation; it is an attribute from which others may benefit but may not own." 88

Thus, the court held that Colonel Parker, as assignee of the post-mortem fame of Elvis Presley, was not entitled to injunctive relief which would prevent the sale of the replicas of the "King." Certiorarí was denied.

There was additional appellate review of the Elvis scenario. In 1978, in Factors Etc. Inc. v. Pro Arts, Inc., 89 the United States Court of Appeals for the Second Circuit held that the right of publicity did survive the death of Elvis. Accordingly, Colonel Parker as the assignee from the estate of Elvis was entitled to injunctive relief to prevent others from commercially selling posters of Elvis. The assignment to Colonel Parker, the court concluded, gave Parker the exclusive right to print and distribute Elvis Presley memorabilia, a right which had validly been assigned to Parker by the executor of the estate of Elvis. The court further made the laconic conclusion that the right of publicity of Elvis, which was assignable after his death, prevailed over any contention that the publication of the Elvis poster was privileged as a newsworthy event. 90 Again certiorarí was denied.

However, in 1981 the Second Circuit again addressed the issue of whether the post-mortem fame of Elvis was assignable to Parker when its prior 1978 decision was again before it after decision was rendered on remand to federal district court. 91 The Second Circuit reversed its prior holding that the right of publicity did survive the

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88. 616 F.2d at 959.
90. Id. at 221.
death of Elvis and concluded that the Sixth Circuit's decision in *Memphis Development*, which refused to protect the assignment to Colonel Parker, was controlling under Tennessee law. The esoteric issue before the Second Circuit was whether special deference needed to be given to a decision of another circuit when that circuit applied the law of the state in which it sits. It was concluded that since the State of Tennessee was within the Sixth Circuit, conclusive deference should be given to the decision of the Sixth Circuit that the right of publicity under Tennessee law did not survive Elvis; hence Colonel Parker, the assignee, was not entitled to injunctive relief from commercial exploitation of the name and likeness of Elvis.

Judge Mansfield, in a cogent dissenting opinion, stated that the post-mortem fame of Elvis should be treated similarly to any other property owned by him and should be descendible at his death. Judge Mansfield referred to the Sixth Circuit's refusal to protect the assignee of the post-mortem fame of Elvis in the following charitable terms: "[t]he parade of horrors conjured by the Sixth Circuit in *Memphis Development* to resist this reasoning is unreal." Certiorari was again denied.

Colonel Parker, the assignee of the post-mortem fame of Elvis, persisted in being litigious to protect his obvious valuable rights to market the fame of the departed entertainer. In *Factors Etc. Inc. v. Pro Arts, Inc.*, Colonel Parker asked the Second Circuit to recall the mandate of its 1981 decision which followed the view of the Sixth Circuit that the post-mortem fame of Elvis did not survive him. The motion to recall the mandate was denied. The Second Circuit expressed the belief that two conflicting decisions of the Tennessee Chancery court on the descendibility issue did not afford a basis for considering that the law of Tennessee had authoritatively changed since the 1981 decision of the Second Circuit.

In 1985, the Sixth Circuit affirmed its view in the *Memphis Development* case that the right of publicity does not survive the owner. In *Estate of Reeves v. United Artists Corp.*, the widow of a deceased professional boxer, Jimmy Reeves, brought action against a motion picture producer for violation of the boxer's right of publicity. One of Jimmy Reeves professional bouts was against Jake Lamotta in

92. *Id.* at 283.
93. *Id.* at 282-83.
94. *Id.* at 284. (Mansfield, J. dissenting).
95. *Id.* at 287. (Mansfield, J. dissenting).
96. 701 F.2d 11 (2d Cir. 1983).
97. *Id.* at 12-13.
98. *Id.* at 12.
99. 765 F.2d 79 (6th Cir. 1985).
Cleveland, Ohio in 1941. This fight was recreated and included in the opening scenes of the movie “Raging Bull,” a biographical account of the life of boxer Jake LaMotta. The widow sought damages against United Artists Corporation “for appropriating the name, identity, likeness, character, ability, achievement and performance of J.R. Jimmy Reeves.”

The court held that the widow had no cause of action because under Ohio law, the right of publicity was not descendible and lapsed upon the death of the boxer. Much of the court’s opinion referred to the decision in Zacchini, which is inappropriate because the right of publicity of Zacchini was protected during his lifetime and the post-mortem descendibility thereof was not in issue. Since the Reeves court concluded that the right of publicity was not descendible under Ohio law, it decided that it need not consider the first amendment issues.

In 1982, the Second Circuit in Groucho Marx Productions v. Day and Night Co. applied what it deemed to be California law and held that the right of publicity of the Marx Brothers did not survive their deaths; accordingly, assignees of the Marx Brothers had no cause of action against producers of a musical play for interference with such right. The Second Circuit applied California law as interpreted in two 1979 decisions of the Supreme Court of California that the post-mortem fame of Rudolph Valentino and Bela Lugosi did not survive their deaths. However, the Groucho decision seems to have no continued viability because, in 1984, the California legislature adopted a comprehensive statutory remedy to give a cause of action to successors-in-interest of the post-death right of publicity of any “deceased personality” for unauthorized use of a “deceased personality’s name, voice, signature, photograph, or likeness.” This salutary California statutory remedy will be further explored in the concluding portion of this paper where reference will be made to codification of the right of the publicity.

RETURN TO REALITY AND CONCEPTUAL TRUTH—
JUDICIAL RECOGNITION OF THE DESCENDIBILITY OF
RIGHT OF PUBLICITY

A discernible trend in judicial recognition of the descendibility of

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100. Id.
101. Id. at 80.
102. 689 F.2d 317 (2d Cir. 1982).
104. CAL. CIV. CODE § 990(a) (West Supp. 1988).
the right of publicity is apparent in the following selected court decisions. In 1983, it was held by the Eleventh Circuit in Martin Luther King, Jr. Center for Social Change v. American Heritage Products\textsuperscript{105} that under Georgia law the right of publicity survives its owner and is inheritable and devisable. The plaintiffs, Coretta Scott King, the widow and administratrix of the estate of Martin Luther King, Jr., and Motown Record Corporation, the assignee of various copyrighted speeches of Dr. King sought injunctive relief against a defendant who was selling busts of Dr. King.

The court found ample precedent in Georgia court decisions which recognize the right of publicity remedy and its survival of the death of the owner which right under Georgia law is viewed as distinct from the right to privacy. It was further held that the owner of the right of publicity need not have commercially exploited that right during lifetime before it can survive his or her death. Prior court decisions had viewed the exploitation of the right of publicity by a person during his or her lifetime as a condition present to the descendibility thereof.\textsuperscript{106} This arcane rationale was rejected by the Eleventh Circuit, and germane to Dr. Martin Luther King, Jr., the court stated:

\begin{quote}
[a] well known minister may avoid exploiting his prominence during life because to do otherwise would impair his ministry. Should his election not to take commercial advantage of his position during life ipso facto result in permitting others to exploit his name and likeness after his death? In our view, a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.\textsuperscript{107}
\end{quote}

This significant decision protecting the post-mortem fame of Dr. Martin Luther King, Jr. from commercial exploitation should have cogent force as future precedent.

Elvis returned, at least in litigation. In 1987 in Elvis Presley International Memorial Foundation v. Crowell, the Tennessee Court of Appeals held without reservation that Elvis Presley's right of publicity survived his death and remained enforceable by his estate and those holding licenses from the estate.\textsuperscript{108} Perhaps the following statements of the court in this decision warrant being included in the

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\item \textsuperscript{105} 694 F.2d 674 (11th Cir. 1983).
\item \textsuperscript{107} 694 F.2d at 683.
\item \textsuperscript{108} State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987).
\end{itemize}
Elvis memorabilia: “Elvis Presley’s career is without parallel in the entertainment industry. . . Elvis Presley’s death on August 16, 1977 did not decrease his popularity. If anything it preserved it. Elvis Presley is now an entertainment legend, somewhat larger than life, whose memory is carefully preserved by his fans, the media and his estate.” 109

This litigation began when a corporation which had not been granted permission to use the Presley name by the estate of Elvis filed an unfair competition action against the defendant corporation that had been licensed by such estate to use the name of Elvis. Presley’s estate intervened on behalf of the defendant corporation and asserted that the estate had granted such corporation appropriate permission. The trial court determined that the right of publicity of Elvis descended to his estate and that the Presley estate had the right to control the commercial exploitation of the name and image of Elvis Presley. The Tennessee Court of Appeals affirmed the holding of the trial court that the right of publicity survived Elvis. The trial court had also granted summary judgment for the defendant corporation that was licensed by the state of Elvis to use his name. In this context, the Court of Appeals vacated the summary judgment and remanded the case for further proceedings because it was held that genuine issues of material fact existed relative to the plaintiff corporation’s laches defense so as to preclude summary judgment.

The Elvis opinion of the Tennessee Court of Appeals is a veritable in-depth review of the judicial treatment and development of the common law right of publicity. Many court decisions are cited for the proposition that the right of publicity should be considered as a separate right independent from the right of privacy. 110 The court noted a 1984 statutory enactment in Tennessee which recognizes that an individual has a “property right” in the use of his name, photograph or likeness in any medium in any manner and that such right is descendible; however, the court did not apply this statute in order to avoid retroactivity. 111 With commendable candor, the court rejected the theory of the Sixth Circuit that the right of publicity did not survive Elvis. In this context the court stated:

The United States Court of Appeals for the Sixth Circuit appears to believe that there is something inherently wrong with recognizing that the right of publicity is descendible. We do not share this bias. Like the Supreme Court of Georgia, we recognize that the trend since the early com-

109. Id. at 92.
110. Id. at 95.
mon law has been to recognize survivability, notwithstanding the legal problems which may thereby arise.\textsuperscript{112}

The court concluded that to recognize that the right of publicity is descendible promotes important policies ingrained in Tennessee jurisprudence. According to the court it is consistent with an individual's right of testamentary disposition. Since the right of publicity has been viewed by the courts as an intangible property right in life, it should be no less a property right at death. Further, it recognizes one of the basic principles of Anglo-American jurisprudence that "one may not reap where another has sown nor gather where another has strewn."\textsuperscript{113} In addition it is consistent with a celebrity's expectation that he or she is creating a valuable capital asset that will benefit death transferees and assignees. Finally, the court recognized the value of contract rights of persons who have acquired the right to use a celebrity's name and likeness.

It would now seem from this Tennessee decision that the right of publicity is descendible under Tennessee law and that the estate of Elvis Presley and licensed assignees can control the commercial exploitation of the departed and legendary entertainer. It will be interesting to see if in future federal court diversity cases, this Tennessee Court of Appeals case will be found to be the law of Tennessee on the descendibility of the right of publicity.

In 1981 the United States District Court for the District of New Jersey held in \textit{Estate of Elvis Presley v. Russen}\textsuperscript{114} that the right of publicity of Elvis Presley was descendible. The court held that the singer's death did not prohibit a finding that the defendant's impersonation of the "King" was an infringement upon Elvis's estate's right of publicity.\textsuperscript{115}

Persuasive precedent for the position that the right of publicity is descendible is found in a 1983 decision of the United States Court of Appeals for the Eleventh Circuit in \textit{Acme Circus Operating Co. v. Kuperstock}.\textsuperscript{116} There it was held that the right of publicity in the use of the name of Clyde Beatty, the circus animal trainer, survived his death and his widow had a cause of action for infringement of such right.\textsuperscript{117}

\textsuperscript{112} Elvis Presley, 733 S.W.2d at 97 (citation omitted).
\textsuperscript{113} Id. at 98.
\textsuperscript{115} Id. at 1354-55.
\textsuperscript{116} 711 F.2d 1538 (11th Cir. 1983).
\textsuperscript{117} Id. at 1543-44.
STATUTORY PROTECTION OF THE RIGHT OF PUBLICITY

Increasingly, state legislative bodies have enacted pervasive statutory provisions to protect a person's right of publicity from unauthorized commercial exploitation. It appears that the basic purpose of legislative protection of this right which the courts have equated to property status is to bring more certitude to the owners of their public identity rather than to place reliance on the vagaries of the common law. A sampling of responsive legislative reaction to the commercial unjust enrichment by the unauthorized use of one's right of publicity will reflect this statutory concern about and remedies for the infringement of such right.

In Hirsch, the court utilized the common law to award damages to the former superstar college and professional football player for unauthorized use of his nickname on a commercial product. However, the court noted that in 1977 the Wisconsin Legislature enacted statutory provisions prohibiting the commercial use of the portrait or picture of any living person. It is enigmatic as to why the Wisconsin Legislature limited such protection only to the portrait or picture of a living person when the right of publicity encompasses more than portraits, and to be effective the statute should provide that such right is descendible.

In 1984, the California Legislature adopted a comprehensive statutory plan to protect the post-mortem right of publicity. The statutory scheme provides that any person who, without prior consent, uses a deceased personality's name, voice, signature, photograph or likeness in any manner for commercial purposes shall be liable for any damages sustained by the person or persons so injured. Statutory damages of $750 or actual damages are available to the injured party. Punitive damages may also be awarded and the statutory remedies are cumulative and are in addition to any other remedies provided by law. Successors-in-interest to the descendible and assignable right of publicity, per the statutes, are given the right to register the successors claim with the Secretary of State for a modest fee and such registration is protective of those interests for a period of fifty years after the death of the deceased personality.

119. Id. at 386-87, 280 N.W.2d at 132. The Wisconsin statute noted by the court was Wis. Stat. Ann. § 895.50(2)(b) (West 1983).
121. Id. It is interesting to note that the federal copyright law uses the fifty year duration for copyright work created after January 1, 1978 by providing that, with certain exceptions, the copyright shall endure for the life of author and fifty years after the author's death. 17 U.S.C.A. § 302 (West 1977).
The term "deceased personality" in the statute is broadly defined as any natural person whose public identity and image has commercial value at the time of his or her death. First Amendment rights are recognized by an exemption from the statutory prohibitions for material that is of a political or newsworthy nature.

In the 1987 Elvis case, when the Tennessee Court of Appeals held that the right of publicity of Elvis Presley survived his death, the court noted that the Tennessee Legislature had enacted, in 1984, a "Personal Rights Protection Act" which recognizes that an individual has a property right in the use of his or her name, photograph or likeness in any medium or manner and that such right is descendible. This statutory provision was not applied by the court because it concluded that the statute could not constitutionally be applied retroactively to impair vested rights prior to the effective date of the legislation. Injunctive relief and award of damages to the injured person or persons are provided for in the statute when the right of publicity under the statutory scheme is usurped for commercial purposes. A first amendment exemption is also included in the Tennessee statute.

A New York State statute which prohibits the nonconsensual use of a person's name, portrait or picture for advertising or trade purposes has often commanded the attention of New York and federal courts. The full perusal of this legion of cases is beyond the intended scope of this paper with its primary focus on the common law right of publicity and, hence, only a few of the more illustrative New York decisions interpreting the much-used New York statute will be referred to below.

The Court of Appeals of New York, in Welch v. Mr Christmas, Inc., affirmed the award of exemplary damages to an actor against an advertising company for the non-consensual use of the actor's performance in a commercial. The statute afforded the injured person both injunctive relief and damages.

122. CAL. CIV. CODE § 990(h).
123. Id. at § 990(i).
125. TENN. CODE ANN. § 47-25-1107 (1988). The first amendment implication is raised by the exception of the property right in cases involving the use of a name, photograph, or likeness when connected with public events. Id.
126. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976). The statute provides for an injunction and damages for any person whose name, portrait or picture is used within the state of New York for advertising purposes or for the purposes of trade without the written consent of such person. Id.
128. Id. at 151, 440 N.E.2d at 1332, 454 N.Y.S.2d at 975.
In 1985, the Court of Appeals of New York in Freihofer v. Hearst Corp., held that under the New York statute a husband in a divorce action did not have a cause of action against a newspaper for publication of articles relating to the matrimonial action. The court concluded that because of the newsworthiness of publication of files of matrimonial action concerning the prominent area family, the statute was not violated.

In Onassis v. Christian Dior-New York, Inc., Jacqueline Kennedy Onassis was granted injunctive relief to prohibit the use and distribution of a commercial advertisement containing a picture of a look-alike model. The court held that the advertisement constituted an appropriation which was without the consent of Mrs. Onassis and thereby constituted a violation of the New York statute.

In Stephano v. News Group Publications, Inc., the court held that the right of publicity remedy was encompassed under the New York Civil Rights statutory provision and that there was no independent common law right of publicity. No statutory cause of action was found for a professional male model when a magazine showed a picture of the plaintiff wearing a "bomber jacket" containing information as to the price of the jacket and the names of three stores where the jacket could be purchased. The court held the defendant's publication of plaintiff's picture was protected by the newsworthiness exception.

In Ali v. Playgirl, Inc., Muhammad Ali, former heavyweight boxing champion of the world, employed the protection of the New York statute to gain injunctive relief prohibiting Playgirl Magazine from distributing an issue of the magazine containing a portrait depicting a nude black man seated in the corner of a boxing ring. It was contended by Ali that the portrait is unmistakably recognizable as Ali. The court issued a preliminary injunction restraining the distribution of that issue of the magazine because it was held that the New York statute protects an athlete who chooses to bring himself to public notice from unauthorized use of his likeness.

In Allen v. National Video, Inc., Woody Allen was granted injunctive relief to prevent further use of a commercial advertisement
using a look-alike actor. It was held that the look-alike seemed indistinguishable from Woody Allen and the context of the advertisement clearly implied that the look-alike was the real celebrity. The court concluded that a violation of the New York statute is made out for unauthorized use of a person's name, portrait or picture when plaintiff satisfies three distinct elements: "use of his or her name, portrait or picture;" "for commercial or trade purposes;" and, "without written permission." Woody Allen met these conditions and was granted injunctive relief because the court held that the look-alike's face was a portrait or a picture of Allen.

CONCLUSION

A growing body of court decisions give recognition to a common law right of a person who has created a public identity of value to the exclusive legal right to control and profit from any commercial use of names, portraits, photographs, identity and other aspects of personality. The precise legal contours of this common law right which is equated by the courts to a property or proprietary status are being developed in a plethora of caselaw. The courts have granted injunctive relief and damages to the owners of the right of publicity to thwart unjust enrichment from unauthorized commercial exploitation of a person's public identity or image. Judicial recognition has been repeatedly given to the pecuniary interest which the owner possesses in his or her public identity. The courts have usually made a clear distinction between the right of publicity cause of action and that for invasion of privacy.

Courts have, however, expressed antithetical views as to whether the right of publicity is descendible. The esoteric views stated by some courts to confine the right of publicity to the life of the owner seem to transcend legal reality and negate the purpose of preventing unjust enrichment by exploiters of another's fame and public identity. It seems salutary that well-analyzed court decisions do protect the post-mortem right of publicity by taking the logical view that since it is well established that there is a protectible interest in the right of publicity during the owner's lifetime, that this right should be descendible and assignable and should not evanesce into the cosmos at the death of such owner.

Some states where apparently the vagaries of the common law protection of the right of publicity are deemed lacking in desired certitude have enacted statutes relative to protection of such right during the life of the owner and to provide that such right is freely

138. Id. at 621.
descendible, assignable and licensable by post-mortem successors-in-interest. Statutory developments in the area of the right of publicity should be considered by persons seeking judicial protection of this commercially valuable proprietary interest.