GOODBYE, NORMA JEAN:

MARILYN MONROE AND THE RIGHT OF PUBLICITY'S TRANSFORMATION AT DEATH♦

I. INTRODUCTION

In *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, the U.S. District Court for the Southern District of New York refused to recognize the late Marilyn Monroe's postmortem right of publicity, as asserted by her publicity manager/licensor.[1] In the wake of the case, and at the behest of celebrity image licensing companies, New York State legislators proposed bills to create a retroactive right of publicity. The stakes are high: Monroe earned her licensing company $7 million from October 2006 to October 2007.[2] Legislation creating a postmortem right of publicity in a state like New York—which is home to countless celebrities—would have a national impact.

This Note will argue that the postmortem right of publicity is unjustified, and that New York should not pass legislation creating such a right, which would do more to protect the special interests of licensing companies than to protect celebrities' personas. Part II of this Note provides the factual background of *Shaw* and examines the opinion. Part III describes the historic development of the right of publicity in general and in New York State specifically. Part IV takes a closer look at the current right of publicity in New York and the changes that the proposed legislation would affect. Part V analyzes the leading theoretical justifications for the right of publicity—Lockean labor, unjust enrichment, incentive creation, allocative efficiency, and Kantian autonomy—and concludes that none support the creation of a postmortem right of publicity. Courts and legislators should not protect what essentially is the economic interest of licensing companies in deceased celebrities without adequate justification.

II. *SHAW FAMILY ARCHIVES LTD. V. CMG WORLDWIDE, INC.*

On May 7, 2007, the Southern District of New York held that Marilyn Monroe's estate did not possess the star's postmortem right of publicity.[3] The case was decided based on findings interpreting Monroe's will, and did not address many of the "countless disputes over purportedly material issues of fact."[4]

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[1] 486 F. Supp. 2d 309 (S.D.N.Y. 2007).
[2] Lea Goldman & Jake Paine, *Top-Earning Dead Celebrities*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/2007/10/26/top-dead-celebrity-biz-media-deadcelebs07-cz_lg_1029celeb_slide_10.html.
[3] *Shaw*, 486 F. Supp. 2d 309.
[4] *Id.* at 312.

A. *Background*

When Monroe died on August 5, 1962, her will did not mention or specifically bequeath the right of publicity.[5] The will did, however, include the following residual clause:

> SIXTH: All the rest, residue and remainder of my estate, both real and personal of whatsoever nature and whatsoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:
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> (a) To MAY REIS the sum of $40,000 or 25% of the total remainder of my estate, whichever shall be the lesser.
>
> (b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her as set forth in ARTICLE FIFTH (d) of this my Last Will and Testament.
>
> (c) To LEE STRASBERG the entire remaining balance.[6]

When Dr. Kris died, her 25% share was left to the Anna Freud Centre.[7] During probate, May Reis was paid $40,000, leaving Lee Strasberg, Monroe's acting coach,[8] with a residual interest in 75% of the remaining estate.[9] Upon Lee Strasberg's death in 1982, his share passed to his wife, Anna Strasberg.[10] With the 1989 death of Aaron Frosch, the executor of the will, the New York County Surrogate's Court appointed Anna Strasberg as Administratrix, c.t.a., of the Monroe estate.[11] In 2001, the Surrogate's Court authorized Anna Strasberg to close the estate and transfer the assets to "Marilyn Monroe LLC" ("MMLLC"), a Delaware corporation formed by Strasberg to hold and manage Monroe's intellectual property assets.[12]

The licensing agent for MMLLC is CMG Worldwide

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See* Mel Gussow, *Lee Strasberg of Actors Studio Dead*, N.Y. TIMES, Feb. 18, 1982, at D20.
[9] Marilyn Monroe, LLC's Reply Memo. in Support of Motion for Summary Judgment on Count II Against Shaw Family Archives, Ltd. and Memo. in Opposition to Consolidated Defendants' Motion for Summary Judgment at 14, Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D.N.Y. Dec. 22, 2006) (No. 05 CV 3939 (CM)) (citing Additional Material Undisputed Facts).
[10] Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 312 (S.D.N.Y. 2007).
[11] *Id.*
[12] *Id.*

("CMG"), an Indiana company that reaps between $12 and $20 million in annual revenue by representing Monroe, Babe Ruth, James Dean, and more than 250 other deceased celebrities.[13] In 2007, CMG earned more than $7 million from ventures using Monroe's identity.[14] CMG's Chief Executive Officer, Mark Roesler, is a catalyst in the rise of the right of publicity: he claims that he was the driving force behind Indiana's right of publicity statute, which he calls "the most progressive and celebrity-friendly worldwide."[15] According to *The New York Times*, Roesler's fees *begin* at one-third of the profits; by comparison, a standard agent's fee is ten percent.[16]

B. *The Case*

The right of publicity has been described as "[t]he right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit."[17] The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity," and is governed by state law.[18]

The plaintiff in *Shaw* is Shaw Family Archives ("SFA"), a New York company owned by the children of the late photographer Sam Shaw.[19] Sam Shaw was a friend of Monroe and took many well-known photographs of her, including the famous image of her skirt fluttering as she stands over a subway grate.[20] The copyright to these images and all other photos in the Shaw collection are purportedly owned by Shaw's children through SFA.[21]

In *Shaw*, MMLLC asserted that it is the holder of Monroe's

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[13] Leah Hoffman, *Agents of the Dead*, FORBES.COM, Oct. 31, 2005, http://www.forbes.com/2005/10/31/dead-celebrities-agents_cx_lh_1031deadagents_deadceleb05.html. *See generally* CMG Worldwide Home Page, http://cmgww.com (last visited Feb. 26, 2009). CMG's other deceased clients include Babe Ruth; Jackie Robinson; Diana, Princess of Wales; and Humphrey Bogart. *Id.* CMG provides marketing services for living clients as well, including Lauren Bacall and Sophia Loren. *Id.*

[14] Goldman & Paine, *supra* note 2.

[15] Memorandum of Law in Opposition to Motion to Dismiss, Stay or Transfer, Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D.N.Y. June 27, 2005) (No. 05 CV 3939 (CM)); *see also* About Mark, http://www.markroesler.com/about/bio2.htm (last visited Mar. 1, 2009).

[16] Nancy Hass, *I Seek Dead People*, N.Y. TIMES, Oct. 12, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=980CE7D91E3DF931A25753C1A9659C8B63.

[17] Estate of Presley v. Russen, 513 F. Supp 1339, 1353 (D.N.J. 1981).

[18] 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2007).

[19] Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 312 (S.D.N.Y. 2007).

[20] *Id.*; *see also* Complaint at 3-4, Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D.N.Y Apr. 19, 2005) (No. 05 CV 3939 (CM)).

[21] *Shaw*, 486 F. Supp. 2d at 312-13; *see also* Complaint, *supra* note 20, at 4. The children, Edith Marcus and Meta Stevens, are plaintiffs in *Shaw*.

postmortem right of publicity.[22] In response to SFA's suit for declaratory judgment, MMLLC countersued, asserting SFA violated Indiana's 1994 Right of Publicity Act[23] by selling in an Indiana Target department store a t-shirt bearing a Monroe photo licensed by SFA without MMLLC's permission and by maintaining a website that allegedly offered for sale photos of Monroe without MMLLC's permission.[24]

MMLLC relied on Indiana's right of publicity statute,[25] which recognizes a freely transferable and descendible right of publicity for 100 years after a personality's death.[26] MMLLC alleged that the statute applies to "an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship" and that it is therefore applicable to Monroe and the t-shirt, even though she had "absolutely no contact" with the state during her life.[27]

In its complaint, MMLLC cited In re *Hite*, 700 S.W.2d 713, 717 (Tex. App. 1985), a Texas case which permitted a residual clause to dispose of property "that the testator may have overlooked, property that lacked particular definition or property that the testatrix did not know that she was entitled to at the time the will was executed."[28] The *Shaw* court, however, distinguished *Hite*, noting that the right of publicity was not simply overlooked, lacking in definition, or unknown to Monroe at the time: rather, it simply did not exist.[29] While MMLLC argued that the residual clause stating "to which I shall in any way be entitled" included the right of publicity, the court again found that the testator may have only disposed of what she owned at the time of her death and could not make a postmortem distribution of property.[30]

In its motion for summary judgment, SFA successfully argued that "even if a postmortem right of publicity in Marilyn Monroe's name, likeness and persona exists, MMLLC and CMG cannot demonstrate that they are owners of the right because only property actually owned by the testator at the time of her death can be devised by will."[31] Under conflict of law principles, the construction of a will is determined by the domicile of the testator at the

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[22] *Shaw*, 486 F. Supp. 2d at 313.
[23] IND. CODE ANN. §§ 32-36-1-1 to -20 (West 2002).
[24] *Shaw*, 486 F. Supp. 2d at 313.
[25] CMG President, Mark Roesler, claims to be an authorial force behind the statute. Hass, *supra* note 16.
[26] IND. CODE ANN. §§ 32-36-1-1 to -20 (West 2002).
[27] *Shaw*, 486 F. Supp. 2d at 313.
[28] *Id.* at 316.
[29] *Id.* at 316-17.
[30] *Id.* at 315-16. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-3.1 (McKinney 1998); *In re* Estate of Braman, 258 A.2d 492, 494 (Pa. 1969).
[31] *Shaw*, 486 F. Supp. 2d at 313-14.

time of death.[32]

In granting summary judgment to SFA, the *Shaw* court held that Monroe could not transfer the right through her will: at the time of her death she was a domiciliary of either New York or California, not Indiana, and neither New York nor California recognized a postmortem right of publicity.[33] Neither New York nor California has adopted the Uniform Probate Code, [34] so MMLLC's argument to grant the estate a postmortem right under the Uniform Probate Code – which allows passage of "property acquired by the estate after the testator's death"[35] – gained no traction.

Finally, the *Shaw* court held that even if California's or Indiana's postmortem right of publicity statute did apply, neither statute would allow a celebrity, deceased at the time of its enactment, to dispose of her rights.[36] California's statute provides that if no transfer of a postmortem right occurred before death, then the right vests in statutory heirs, not in legatees such as MMLLC.[37] Similarly, the Indiana statute provides that if the personality has not legally transferred her right of publicity at death, then the right vests in statutory heirs, not in legatees such as MMLLC.[38] According to *Shaw*, both statutes, despite some earlier case law to the contrary, prevent someone deceased at the time of enactment from transferring the right.[39]

III. THE RIGHT OF PUBLICITY

A. *Overview*

Before looking more specifically at the descendible right of publicity, it is important to understand the history and justification behind the right of publicity. The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity."[40] Violating the right of publicity is a commercial tort of unfair competition,[41] the breadth of which varies across

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[32] White v. United States, 511 F. Supp. 570, 574 (S.D. Ind. 1981). *See also* Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 320 (2d Cir. 1982).
[33] *Shaw*, 486 F. Supp. 2d at 314.
[34] *Id.* at 316.
[35] UNIF. PROBATE CODE § 2-602 (amended 2006).
[36] *Shaw*, 486 F. Supp. 2d at 319. *See* CAL. CIV. CODE § 3344.1(b)-(d) (West 2008); IND. CODE ANN. §§ 32-36-1-16 to -18 (West 2002).
[37] CAL. CIV. CODE § 3344.1(b)-(d) (West 2008). *See Shaw*, 486 F. Supp. 2d at 319.
[38] IND. CODE ANN. §§ 32-36-1-16 to -18 (West 2002). *See Shaw*, 486 F. Supp. 2d at 319.
[39] *Shaw*, 486 F. Supp. 2d at 319. The *Shaw* court explains that earlier decisions assume the statutes allow transfer by an already-deceased personality without explicitly deciding so. *Id.* *See* Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923 (C.D. Cal. 2004); Joplin Enters. v. Allen, 795 F. Supp 349 (W.D. Wash. 1992). The *Shaw* court explains that these decisions assume the statutes allow transfer by an already-deceased personality without explicitly deciding so. *Shaw*, 486 F. Supp. 2d at 319.
[40] MCCARTHY, *supra* note 18.
[41] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995).

states – some states do not recognize it.[42] The right of publicity has a tangled developmental history, often confused with the right of privacy, copyright, trademark, and false advertising.[43] Despite courts' occasionally blurred conception of these areas of law, the right of publicity is distinct and "has its own unique legal dimensions and reasons for being."[44] Although a Second Circuit opinion played a large role in defining the right of publicity, as detailed below, New York State courts did not follow the federal lead, and New York is without a common law right of publicity.

1. Development of the Right of Privacy

The right of publicity has its origin in the right of privacy. An 1890 law review article by Samuel Warren and Louis Brandeis is credited with outlining the elements of the right of privacy.[45] Their proposal espoused a broad right of privacy, protecting against affronts to human dignity due to embarrassing public disclosures. During the first few years of the twentieth century, a patchwork of states followed the article's lead and began to recognize the right of privacy either through statute or common law.[46]

The resulting privacy law shields individuals from the "indignity and mental trauma incurred when one's identity [is] widely disseminated in an unpermitted commercial use."[47] This legal right protects unknown individuals whose identities are exploited. Courts do not enforce protections against indignity and mental trauma for celebrities, however, as their careers are built on the widespread use of their images.[48] Furthermore, right of privacy damages for unknown individuals are measured by mental distress, whereas famous plaintiffs focus on recovering the value of the use of their unauthorized image from advertisers.[49] A shortcoming of the privacy model for celebrities is privacy law's focus on the right to be left alone, which fails to protect those already well-known to the public.

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[42] MCCARTHY, *supra* note 18, § 6:8.
[43] *Id.* §§ 1:3, 1:7.
[44] *Id.* § 1:3. These "reasons for being," the theories in support of the right of publicity, will be discussed at length *infra* in Part V of this Note.
[45] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). *See* Pearson v. Dodd, 410 F.2d 701, 703 (D.C. Cir. 1969) (noting that the right of privacy originated in "the famous Warren and Brandeis article of 1890").
[46] MCCARTHY, *supra* note 18, § 1:4.
[47] *Id.* § 1:7.
[48] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941). A photograph of David O'Brien, a professional football player active in discouraging alcohol use, was included in a Pabst Blue Ribbon beer calendar. O'Brien sued under an invasion of privacy theory. The court held that his privacy was not invaded because he was a public figure, not a private one, and the calendar was the type of publicity that "he had been constantly seeking and receiving." *Id.*
[49] MCCARTHY, *supra* note 18, § 1:25.

2. The Right of Publicity Emerges from the Right of Privacy

The inability of the right of privacy to protect celebrities was addressed in the 1953 decision, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[50] In *Haelan*, the Second Circuit created a "right of publicity" that protects against the unpermitted commercial use of a person's identity and creates the right to grant exclusive use of that identity:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), 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, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled [sic] a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
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> 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.[51]

The language used in *Haelan* laid the groundwork for the right's development.[52]

In a 1954 article, Professor Nimmer further articulated the right of publicity.[53] Nimmer asserted that because privacy is a personal, nonassignable right, it is insufficient to protect against commercial abuses of identity; under a privacy regime, a personality would be unable to grant an advertiser exclusive rights that

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[50] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[51] *Id.* at 868.
[52] The decision takes up lasting divisions, including declaring that the right of publicity is distinct from trademark. The holding's use of the term "in gross" was intended to make clear that "an assignment or exclusive license of the right of publicity [is] not constrained by the rule of trademark law that requires that an assignment of a mark be accompanied by associated 'good will' symbolized by the mark." MCCARTHY, *supra* note 18, § 1:26. Yet the applicability of trademark to the right of publicity continues to be contested, see, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006), just as whether the right of publicity is a privacy or property right was debated for decades. *See, e.g.*, Contra Carson v. Nat'l Bank of Commerce Trust and Sav., 501 F.2d 1082 (8th Cir. 1974).
[53] Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

could be protected against a third party.[54] Nimmer also distinguished the right of publicity from trademark and unfair competition law, explaining that proof of confusion should not be necessary to enforce the right of publicity.[55] In Nimmer's view, the right to protect the commercial value of a person's identity is open to everyone—not just celebrities—although it is celebrities who most often make use of this protection.[56]

Development and acceptance of this newly conceived, distinct right was slow. Many courts were unwilling to "blaze the trail" by invoking the right of publicity in post-*Haelan* case law.[57] The Third Circuit's opinion in *Ettore v. Philco* exemplifies the attitude of many jurisdictions toward the right at the time:

> The state of the law is still that of a haystack in a hurricane but certain words and phrases stick out. We read of the right of privacy, of invasion of property rights, of breach of contract, of equitable servitude, of unfair competition; and there are even suggestions of unjust enrichment. . . . Concededly, the theory is a somewhat hazy one; but that is not unusual where the laboratories of the courts are working out the development of a new common law right. History shows that consistency is a rare jewel in such a process.[58]

In a 1977 article, Professor Kalven attempted to provide justification for the still-developing common law right: "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[59] The first U.S. Supreme Court case to recognize the right of publicity, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), quoted Kalven's article, but the case was narrowly decided and had little influence on right of publicity doctrine.[60] Still, *Zacchini* did "recognize the right and gave it added recognition and impetus," with the Supreme Court's seal of approval ending for many "the initial phase of questioning what the right of publicity was and why it should exist."[61]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *See* Strickler v. Nat'l Broad. Co., 167 F. Supp. 68 (S.D. Cal. 1958).
[58] Ettore v. Philco Television Broad. Corp., 229 F.2d 481 (3d Cir. 1956).
[59] Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966). See discussion *infra* in Part V.B for a discussion of why this early justification for the right of publicity is insufficient.
[60] MCCARTHY, *supra* note 18, § 1:33; *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (holding that the First Amendment did not immunize the television station from having to pay Zacchini for its broadcast of his entire performance instead of mere news coverage. Zacchini, a "human cannonball," sued a television station for damages due to their broadcast of his entire performance on the local news.).
[61] MCCARTHY, *supra* note 18, §§ 1:31, 1.34.

B. *New York State and the Right of Publicity*

New York's law on the right of publicity differs from that of most other states. Although the Second Circuit's holding in *Haelan* is largely responsible for the general development of the right of publicity,[62] New York does not have a common law right of publicity. Indeed, the right of publicity developed in New York along a much different trajectory than it did in most U.S. jurisdictions.

Following a hugely unpopular 1902 case, *Roberson v. Rochester Folding Box Co.*, which held that a child who was emotionally damaged by the unauthorized use of her image for advertising had no cause of action,[63] the New York State Legislature reacted to a "storm of public disapproval"[64] by enacting a right of privacy statute. The statute made the unauthorized use of a person's name, portrait or picture for "advertising purposes or for the purposes of trade" a misdemeanor and tort.[65] The legislature custom-tailored its law to the *Roberson* decision, encompassing "the commercial use of an individual's name or likeness and no more,"[66] thereby freezing the right of privacy into that case's factual mold.[67]

It is in this gap between case law and statute that Judge Frank boldly entered in *Haelan*. This Federal Court of Appeals opinion, ruling that "a man has a right in the publicity value of his photograph,"[68] predicted that New York State courts would develop a common law right of publicity despite New York's lack of a common law right of privacy. In fact, while most states' case law did develop along the *Haelan* model,[69] New York's courts declined to recognize a common law right of publicity.[70]

A 1984 New York Court of Appeals case, *Stephano v. News Group Publications, Inc.* definitively established that there is no common law right of publicity in New York State.[71] The New York

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[62] Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[63] Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).
[64] MCCARTHY, *supra* note 18, § 6:74.
[65] 1903 N.Y. LAWS, ch. 132, §§ 1-2 (current version at N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992)).
[66] MCCARTHY, *supra* note 18, § 6:75.
[67] *Id.* § 1:16.
[68] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[69] As of 2009, eighteen states have a common law right of publicity: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. MCCARTHY, *supra* note 18, § 6:2.
[70] *See, e.g.*, Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S.2d 828, 829 (1st Dep't 1980) ("No such nonstatutory right [of publicity] has yet been recognized by the New York State courts."). Federal courts in New York, however, followed *Haelan* for decades as precedent and predictive of how New York State would eventually rule. *See, e.g.*, Groucho Marx Prods., Inc. v. Day & Night Co., Inc. 689 F.2d 317 (2d Cir. 1982); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973).
[71] Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580, 583 (N.Y. 1984). ("the 'right of

Court of Appeals thus rejected the Second Circuit's view of New York law and blended the assignable right of publicity into the non-assignable right of privacy:

> By its terms the [right of privacy] statute applies to any use of a person's picture or portrait for advertising or trade purposes whenever the defendant has not obtained the person's written consent to do so. It would therefore apply, and recently has been held to apply, in cases where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes but has not given written consent for a particular use.[72]

By combining the property-based right of publicity with the right of privacy, the court created—and left unresolved—a theoretical conflict between assignability and descendibility, declining to address the issue because the facts of the case did not include any transfer of the right.[73] The question of descendibility has since been addressed by New York courts. These decisions limit the statutory right of privacy, and the right of publicity contained within it, to living persons.[74]

IV. NEW YORK'S EXCEPTIONAL RIGHT OF PUBLICITY AND MARILYN MONROE

A. *Introduction*

The *Shaw v. CMG Worldwide* decision highlights the unique position of New York in the right of publicity context.[75] As New York's statute is widely recognized to be inapplicable to deceased parties,[76] even if the testamentary and domiciliary hurdles had been overcome, the claim by MMLLC against SFA would fail under New York law. This result is out of step with other states,[77] and

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publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which . . . is exclusively statutory in this State."). The Second Circuit thereafter recentered its interpretation of New York law issued decisions in accord with New York law. Pirone v. MacMillan, Inc., 894 F.2d 579, 586 (2d Cir. 1990) ("The right of privacy protection, however, is clearly limited to 'any living person.'").

[72] *Id.*

[73] *Id.* at n.2.

[74] *See* Smith v. Long Is. Jewish-Hillside Med. Ctr., 499 N.Y.S.2d 167, 168 (2d Dep't 1986) (holding claim under civil rights statute brought by parents of a deceased child "belonged to the infant alone and was extinguished upon the infant's death"); James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (Sup. Ct. 1989) ("statutory rights created by [Civil Rights Law §§ 50 & 51] do not survive death"); Antonetty v. Cuomo, 502 N.Y.S.2d 902, 906 (Sup. Ct. 1986) ("The statutory right created by Civil Rights Law § 51 does not survive death."). Furthermore, section 51 currently includes the advisory that the article should not be construed to prevent sale or transfer of a person's "name, portrait, picture or voice" to a third party. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992).

[75] Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

[76] *See Antonetty*, 502 N.Y.S.2d at 906.

[77] In addition to the eighteen states with a common law right of publicity cited *supra* note

management companies have great incentive to demand changes;[78] indeed, *Shaw* reignited old efforts to alter New York's law.[79] When the proposed bills are examined, however, it becomes clear that the amendments that would overturn the result in Shaw should be stopped.

B. *The Bill*

In 1988, the New York State Legislature reacted to the *Stephano* decision by proposing a statutory right of publicity in New York.[80] The bill would have established the right of publicity as a descendible and transferable "property right" to "last for fifty years after death."[81] Before exercising the right, a successor-in-interest would have to register "legal documentation supporting the right to the claimed interest with the secretary of state" for a fee of ten dollars.[82] The bill would have applied "[r]egardless of the testamentary domicile," foreshadowing the domiciliary issue in the *Shaw* case. Despite testimony in support of the bill from children of John Wayne, W.C. Fields, and Clark Gable, the bill failed to pass due to criticism that exemptions for news media use were inadequate.[83]

New bills have been introduced in the wake of *Shaw* that seek to amend sections 50 and 51.[84] The proposed amendments are more strident than those proposed in 1988 and garner support from celebrities such as Yoko Ono and Liza Minelli and from estates such as those of Jimi Hendrix and Mickey Mantle.[85] The proposed amendments would create a statutory right of publicity in New York retroactive to January 1, 1938 and extending forever

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69, nineteen states, including some of the common law states, have rights of publicity by statute: California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.* § 6:8. Five states have a common law postmortem right of publicity: Connecticut, Georgia, Michigan, New Jersey, and Utah. *Id.* § 9:18. Fourteen states have a statutory postmortem right of publicity: California, Florida, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Nebraska, Pennsylvania, Tennessee, Texas, Virginia, and Washington. *Id.*

[78] Goldman & Paine, *supra* note 2.

[79] *See* S.B. 5053-A, 1989-90 Reg. Sess. (N.Y. 1989); Assem. B. 8050-A, 1989-90 Reg. Sess. (N.Y. 1989).

[80] *See* S.B. 5053-A, 1989-90 Reg. Sess. (N.Y. 1989); Assem. B. 8050-A, 1989-90 Reg. Sess. (N.Y. 1989); s*ee also* Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171, 186 n.95 (1990) (text of proposed New York bill and commentary); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 144, n.76 (1993).

[81] S.B. 5053-A, 1989-90 Reg. Sess. § 5B.1 (N.Y. 1989).

[82] *Id.* § 58.7(b).

[83] MCCARTHY, *supra* note 18, § 6:80.

[84] S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assem. B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).

[85] Linda J. Wank & Elisabeth H. Cavanagh, *The Lasting Effect of Star Power*, 238 N.Y.L.J., Sept. 17, 2007.

without expiration.[86] The pending bill would protect, "name, portrait, picture, signature or voice"[87] against unauthorized advertising or trade use, and if passed would take effect immediately.[88]

Critics of the proposed bill charge that it would make certain currently legal activities illegal, such as collecting Hollywood and sports memorabilia: "lawfully purchased photographs or autographs of a deceased celebrity, even with the consent of that personality, would risk costly litigation . . . if [the collector] later sold the memorabilia."[89] Media organizations in New York are among the bill's detractors, charging that it "purports to outlaw many uses protected by the First Amendment."[90] Marci Hamilton argues that creating such a retroactive right of publicity would be unconstitutional in New York as an invalid legislative interference with vested rights, and federally as a violation of due process.[91]

Due to the licensing fees at stake, licensing companies are the natural proponents of the bill.[92] Indeed, Mark Roesler, the chairman and chief executive officer of CMG, "virtually wrote" the Indiana statute at issue in *Shaw*.[93] Licensing companies treat celebrities' identities as brands[94] to be marketed for maximum profit on their investment.[95] The continuing relevance of the deceased celebrities, and the resulting wealth of their estates, is due in large part to the licensing companies. Mark Roesler successfully pitched to Thomasville Furniture the idea of using Humphrey Bogart's name to market a new Art Deco-inspired line.[96] When brought to fruition, the decision had a "significant impact" on the company's bottom line.[97] Physicist Albert Einstein's place on the

[86] S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assem.B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).
[87] S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assem.B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).
[88] S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assem.B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).
[89] Wank & Cavanagh, *supra* note 85. They would also risk criminal prosecution, but no one has ever been prosecuted. MCCARTHY, *supra* note 18.
[90] Wank & Cavanagh, *supra* note 84.
[91] Alan J. Hartnick, *N.Y. State To Examine California Publicity Law's Constitutionality*, 241 N.Y.L.J., Jan. 26, 2009, at 3.
[92] The thirteen icons in Forbes Magazine's 2007 list of top-earning dead celebrities made a combined $232 million during the course of the year. Goldman & Paine, *supra* note 2.
[93] Hass, *supra* note 16.
[94] Roesler claims that "Death isn't the end. . . . These deceased celebrities are brands." Hoffman, *supra* note 13.
[95] "[E]ntertainment mogul Robert Sillerman maneuvered CKX onto the playing field by purchasing an 85% stake in the Elvis Presley estate last February. The $100 million deal granted the company rights to Elvis' image and likeness, as well as a share in Graceland's annual intake. A new Elvis-themed attraction in Las Vegas is one of several new projects CKX hopes will drive up the King's revenue." *Id.*
[96] Hass, *supra* note 16. *See also* The Bogart Luxe Furniture Collection by Thomasville http://www.thomasville.com/Collection107/Bogart-Luxe.aspx, (last visited Mar. 12, 2009).
[97] *Hass, supra* note 16. In response to William Landes and Richard Posner's speculations about the value of Humphrey Bogart's identity absent the right of publicity, it is worth asking what his value would be absent Mark Roesler. *See* William M. Landes & Richard Pos-

list of top-earning dead celebrities is due in large part to the use of his name in the *Baby Einstein* children's DVD series.[98] Actor Steve McQueen, who died in 1980, was recently used as a spokesman in a marketing campaign for cars, watches, and coats.[99] The value of a celebrity's identity is in large part due to the marketing efforts made on behalf of his or her estate. For licensing organizations, a liberal postmortem right of publicity bill presents an opportunity to drum up revenue.[100]

In analyzing the bill, critical questions remain. What are the reasons for a right of publicity, and for potentially extending the right to include a postmortem right of publicity? Do these reasons justify the law's protection of such rights? Are there legitimate policy reasons for a legislative body to "interfere and arbitrarily provide"[101] such protection? The following sections examine the theoretical and public policy justifications for such a right.

V. THEORETICAL JUSTIFICATIONS FOR THE RIGHT OF PUBLICITY

Proponents of the New York postmortem right of publicity statute advance a number of arguments in support of the change. I argue that all of these policy arguments fail to justify the postmortem right of publicity, and that *Shaw* should remain good law in New York.

The most common theories for protecting the commercial rights of personalities fall into three categories: "the moral or natural rights story; the exhaustion or allocative-efficiency account; and the incentive-based rationale."[102] Moral theories are based on both the Lockean labor concept that one should benefit from the fruit of one's own labor, and the notion of unjust enrichment – the idea that one should not be permitted to benefit from another's work.[103] Economic arguments focus on the right of publicity's role as an incentive to do creative work, and as a method of maximizing allocative efficiency.[104] A more recent argument in support of publicity rights is based on a theory of autonomy – the idea that the persona has the right to be free of interference from others.[105]

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ner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 486 (2003).

[98] Goldman & Paine, *supra* note 2.

[99] The campaign is working: he debuted on Forbes's list with earnings of over $6 million during the year. Elisabeth Eaves, *The McQueen Resurrection*, FORBES.COM, Oct. 29, 2007, http://www.forbes.com/media/2007/10/26/steve-mcqueen-comeback-biz-media-deadcelebs07_cx_ee_1029cool.html.

[100] *See* Hoffman, *supra* note 13.

[101] Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902).

[102] Dogan & Lemley, *supra* note 52, at 1180.

[103] Madow, *supra* note 80, at 178.

[104] *Id.*

[105] *See* Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67

A. *Lockean Labor*

Nimmer's seminal article bases its justification for the right of publicity on the philosophy of John Locke.[106] Nimmer[107] writes:

> [I]n most instances a person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that *every person is entitled to the fruit of his labors* unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . . .[108]

Nimmer, writing from the Hollywood perspective,[109] believes that a celebrity is responsible for her fame and is therefore entitled to economic protection. Courts have followed this view, holding that celebrities deserve the fruit of their "long and laboriously nurtured" labor in the form of "time, effort, skill."[110] A typical justification is that "[a] name is commercially valuable as an endorsement of a product or for use for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality."[111] However, this rationale is not supported by the underlying Lockean theory or any other evidence.

Nimmer's argument that a celebrity has the right to her own publicity value above all others is based on Locke's theory of property and labor. Under Locke's theory, everyone has a property right to his own person, and the right to exclude others from possessing his body and controlling the output of his labor.[112] "When a person 'mixe[s]' his labor with a thing in its natural (that is unowned) state, he 'join[s] to it something that is his own' and 'thereby makes it his property,'" so long as "there is 'enough and as good left in common for others' and where what he appropri-

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U. OF PITT. L. REV. 225 (2005).

[106] Nimmer, *supra* note 53.

[107] Nimmer was legal counsel to Paramount Pictures at the time of writing. Madow, *supra* note 80, at 174 n.238.

[108] Nimmer, *supra* note 53, at 215-16 (emphasis added).

[109] Nimmer's chief concerns were "the needs of Broadway and Hollywood." *Id.*

[110] *Id.* at 216.

[111] Uhlaender v. Hendrickson, 316 F. Supp. 1277, 1283 (D. Minn. 1970); *see also* Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) ("[A] person has the right to enjoy the fruits of his own industry free from unjustified interference.").

[112] Madow, *supra* note 80, at 175 n.239 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690)).

ates is no more than he can use."[113]

One problem with Locke's theory is that it is unclear why mixing labor with unowned things results in gaining a property right rather than losing one. As Nozick asks, "[i]f I own a can of tomato juice and spill it into the sea . . . do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"[114] Locke's response to such a question is that the laborer may justly claim property rights because his work gives the transformed object *value*.[115] But this is an insufficient reason to allow a celebrity to monopolize publicity value because it only entitles the laborer to the proportionate value that her labor added to a thing and not to the thing's total value.[116] There are significant valuation problems inherent in Locke's theory because it is hard to determine precisely what portion of an object's value is due to an individual's labor.[117] For example, in the case of Marilyn Monroe, that would mean calculating what percentage of Marilyn Monroe t-shirts sold is attributable to the labor of Monroe, the studio, the audience, the photographer, etc. The justification for extending the right of publicity to legatees is even weaker, as the legatees may have had nothing at all to do with the creative labor that is meant to be protected. Indeed, Monroe never met the current manager of her estate, Anna Strasberg.[118] The labor justification does not explain why a legatee or management company, which may not have contributed any labor, should receive the benefit of the star's publicity value.

A second problem with Locke's theory is that fame is not attributable to the labor of the celebrity alone. The "sociological truth" of fame is that it "is a 'relational' phenomenon—something that is *conferred by others*."[119] Fame is due in large part to the audience's "needs, interests, and purposes."[120] A person's talents alone cannot make her famous, as fame is not a merit-based phenomenon.[121] The "mechanisms of renown" are "contingent and morally arbitrary," and fame, once acquired, perpetuates and feeds on itself.[122] Regarding the arbitrary and undemocratic nature of fame,

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[113] Madow, *supra* note 80, at 175 n.239.
[114] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174-75 (1974).
[115] LOCKE, *supra* note 112, at 26.
[116] NOZICK, *supra* note 114, at 175.
[117] *See, e.g.*, JAMES O. GRUNEBAUM, PRIVATE OWNERSHIP 15 (1987)
[118] Nathan Koppel, *A Battle Erupts Over the Right to Market Marilyn*, WALL ST. J., Apr. 10, 2006. (noting that Anna Strasberg did not meet Lee Strasberg, Monroe's acting coach and close friend, until after Monroe's death.)
[119] Madow, *supra* note 80, at 188, (quoting JOHN RODDEN, THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL 7, 51 (1989)).
[120] Madow, *supra* note 80, at 188.
[121] *Id.*
[122] *Id. See also* TODD GITLIN, THE WHOLE WORLD IS WATCHING 147 (1980) ("After a point, celebrity can be parlayed—by celebrity and by media—into more celebrity: it is like money or a credit rating.").

Michael Madow argues that "the state should neither actively compound these disparities nor appear to legitimate them."[123]

The news and entertainment media also play a large role in the phenomenon of fame.[124] News media companies have a "structured need" and "relentless hunger" for celebrities, selecting and promoting recognizable individuals to symbolically personify and dramatize abstract ideas and information: think of science and Albert Einstein, or gender rights and Gloria Steinem.[125] Furthermore, a celebrity's public image is often not her own. Today, attempts to manufacture celebrity involve organized and methodical "marketing science."[126] The celebrity-making industry finds success by feeding the news industry designed and manipulated "storylines" that promote fan involvement and interest,[127] as can be seen in tabloid coverage of Brad Pitt, Jennifer Aniston, and Angelina Jolie, or even in the news media's horserace coverage of presidential elections.

The labor theory fails to explain why the state should protect celebrities as the beneficiaries of work done by others. The theory's failure is even more striking when applied to the celebrities' legatees, who have an even more tenuous relationship to fame creation. This relationship grows more distant with each passing generation, and absurdly so under the proposed New York bills, which would grant a right without expiration.

In summary, the value of a celebrity's public image is the product of many forces other than the celebrity's own labor. Indeed, a celebrity who tries to control her public image is unlikely to be successful, as her fame is the aggregate product of, for example, her acting roles, magazine photos, reviews, commentary, and the way her image is referenced and manipulated by the media and fans.[128] Because "a celebrity's public image is *always* the product of a complex *social* . . . process in which the 'labor' . . . of the celebrity herself . . . is but one ingredient, and not always the main one," she cannot make a successful "moral claim to the *exclusive* ownership or control of the economic values that attach to it."[129]

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[123] Madow, *supra* note 80, at 189.
[124] *Id.*
[125] GITLIN, *supra* note 122, at 146; *see also* Leon V. Sigal, *Sources Making the News*, *in* READING THE NEWS 9, 13-14 (Robert K. Manoff & Michael Schudson eds., 1986).
[126] *See* IRVING J. REIN ET AL., HIGH VISIBILITY 33, 643-88 (1987).
[127] GITLIN, *supra* note 122, at 146.
[128] *See* RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 2-3 (2004); S. ELIZABETH BIRD, FOR ENQUIRING MINDS: A CULTURAL STUDY OF SUPERMARKET TABLOIDS 153 (1992).
[129] Madow, *supra* note 80, at 195-96.

B. *Unjust Enrichment*

Those accused of violating the right of publicity have been characterized as thieves or hitchhikers.[130] Commentators have stated that "[n]o social purpose is served by having the [right of publicity] defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay."[131] By this logic, an unauthorized appropriation of, or "free riding" on, a celebrity's identity is a moral wrong that should be prevented.

Yet, the unjust enrichment argument falters absent a valid Lockean labor argument. The shortcoming is that "[if] unjust enrichment is intended to prevent reaping where others have sown, and the celebrity has not sown (or has sown no more than others, such as the media or the public), then prevention of unjust enrichment is a rather weak rationale for publicity rights."[132] In other words, "without some other normative content, the unjust enrichment idea is essentially vacuous—in order for the enrichment to be 'unjust,' the celebrity must have some moral claim to it."[133]

Furthermore, "free riding *simpliciter* is very seldom actionable" in American law.[134] Generally, "absent some special and compelling need for protection . . . *intangible* products, once voluntarily placed in the market, are as 'free as the air to common use.'"[135] The investments of others can be taken advantage of commercially—for example, where clothing retailers copy high-fashion designs.[136] As then-Chief Judge Breyer explained in *WCVB-TV v. Bos-*

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[130] *See* Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (echoing district court's assessment of defendant's conduct as being that of "the average thief"); Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984) ("[T]here is no free ride. The commercial hitchhiker seeking to travel on the fame of another will have to learn to pay the fare or stand on his own two feet."); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (preventing "unjust enrichment by the theft of good will"); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978) (providing that unjust enrichment must be prevented in order to avoid "a windfall in the form of profits from the use of Presley's name and likeness").

[131] Kalven, *supra* note 59, at 331.

[132] Haemmerli, *supra* note105, at 412 n.117.

[133] David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 118 n.220 (2005).

[134] Madow, *supra* note 80, at 200.

[135] *Id.* (quoting Int'l News Service v. Associated Press 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

[136] *See* Societe Comptoir De L'Industrie Cotonniere v. Alexander's Dep't Stores, Inc., 190 F. Supp. 594, 602 (S.D.N.Y. 1961), *aff'd*, 299 F.2d 33 (2d Cir. 1962) ("[T]he design of a garment remains the property of the designer only until such time as the garment is sold"); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929) ("[A] man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure."); *see also* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 230 (7th ed. 2006) ("Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian

ton Athletic Association, society is built on exploiting the work of others, so that "the man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create 'value' . . . that the law permits others to receive without charge."[137] Breyer further explained that "[j]ust how, when and where the law should protect investments in 'intangible' benefits or goods" is not a matter of moral principle, but a matter of "carefully weighing relevant competing interests."[138] The interest of a deceased celebrity's legatees is not one that New York should prioritize. Unjust enrichment cannot justify a descendible right of publicity: even if free-riding were a justification, legatees themselves would be free-riding on the celebrity's work.

Finally, in addition to the role that parties other than the celebrity herself play in the creation of a celebrity's public image, the "unauthorized commercial appropriators oftentimes *add* something of their own—some humor, artistry, or wit—to whatever they 'take,' and their products may service markets different from those that the celebrity herself . . . chooses to service."[139] Even when the artistry or wit on display is mediocre, it is nonetheless "wit or artistry—and it contributes in its own way to 'building of the whole culture.'"[140]

C. *Incentive Creation*

The notion that the right of publicity provides an economic incentive for creative work is prevalent in case law[141] and commentary.[142] Under this theory, celebrities are given the right to the

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aspects of that article, the design would not by copyrightable under the bill." (quoting H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668)).

[137] WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 44 (1st Cir. 1991).

[138] *Id.* at 45.

[139] Madow, *supra* note 80, at 204 (providing examples like greeting cards of John Wayne wearing lipstick and bearing the slogan "It's a bitch being butch," among others).

[140] *Id.* at 205 (citing THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970)).

[141] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 566-67 (1977); Carson v. Here's Johnny Portable Toilets, Inc. 698 F.2d 831, 837 (6th Cir. 1983); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 287 (2d Cir. 1981); Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 705 (Ga. 1982); Lugosi v. Universal Pictures, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting).

[142] *See* Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980) ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts."); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 118 (1980) ("Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them."); David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption,* 66 CORNELL L. REV. 673, 681 (1981) ("Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public."); D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Pho-*

commercial value of their personality because such a reward encourages people to become celebrities, thereby enriching society. Chief Justice Bird's dissent in *Lugosi v. Universal Pictures* expresses this view:

> [P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition . . . . While the immediate beneficiaries are those who establish professions or identities which are commercially valuable, the products of their enterprise are often beneficial to society generally. Their performances, inventions and endeavors enrich our society.[143]

The U.S. Supreme Court also relied on the incentive creation theory in its *Zacchini* opinion, stating that the right of publicity provides the necessary incentive for performers to produce an act.[144]

No cases or scholarly works, however, offer evidence supporting the claim that the right of publicity actually creates such an incentive.[145] Perhaps would-be celebrities require a potentially high rate of return due to their uncertainty of success. But this does not lead to the conclusion that the right of publicity results in increased efforts or creativity.

The incentive to create generated by the right of publicity is minimal. Copyright arguments are not applicable, as the economics of being a celebrity personality are different from those of being an author. For an author, "the marginal cost of making the book or movie available to consumers is near zero. Marginal cost pricing, then, would lead to a price of zero, which would yield the author or producer no return on effort expended in creating the work," sapping the author of her primary source of income and ultimately leading to an underproduction of books.[146] Intellectual property rights address the danger of underproduction by giving an author the exclusive right to her work, creating "an incentive for authors . . . to create (very roughly) the optimal number of writings and inventions."[147] For celebrity entertainers and athletes, however, the right of publicity only protects only promotions and the like—collateral sources of income—while they continue to earn direct income from acting roles, sports teams, etc.[148] Enter-

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tographs, 61 IND. L.J. 697, 707 (1986) (arguing that the right of publicity serves to "maximize incentive to develop and maintain skills and talents that society finds appealing").

[143] *Lugosi*, 603 P.2d at 441.

[144] *Zacchini*, 433 U.S. at 576. But see Madow's argument about the inapplicability of *Zacchini* to right of publicity cases. Madow, *supra* note 80, at 209 n.396.

[145] Madow, *supra* note 80 at 207.

[146] Stewart Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 434 (2005).

[147] *Id.*

[148] Madow, *supra* note 80, at 209.

tainers and athletes are already very well-compensated from their direct income which has long been incentive enough to draw aspiring celebrities, even absent the collateral income protection provided by the right of publicity.[149] This remains true even for celebrities like Tiger Woods who derive as much, if not more, income from their promotional work as from the activity that created their initial fame.[150]

Further, incentive creation cannot justify a descendible right of publicity: after all, a descendible right of publicity gives legatees no incentive to develop their own talents to reap the rewards of fame—the celebrity already gathered fame and its attendant wealth, and the legatees may idly enjoy its benefits. Indeed, a descendible right of publicity may be a disincentive to creativity for the celebrity's legatees. If the incentive creation justification is meant to encourage the development of skills and achievement requisite for public recognition, the postmortem right of publicity should be avoided: marketing managers like Roesler make it clear that the deceased celebrity is used for commercial, not cultural, enterprises. The postmortem right of publicity is a commercially motivated concept that does not deserve state protection.

D. *Allocative Efficiency*

Another economic argument for the right of publicity is that if a celebrity's identity is not protected, it will be overexploited until it becomes worthless.[151] This theory is an updated tragedy of the commons—the theory that a scarce communal resource will be destroyed by overuse due to the disparate user's self-interest.[152] William Landes and Richard Posner argue that just as a public field may be overgrazed, "overexposure of a celebrity may turn people off in the short run and truncate the period in which his name or likeness retains commercial value."[153] A celebrity given exclusive control over her identity, however, may efficiently control and exploit the scarce resource that is her own fame.[154]

Even assuming that propertizing identity does lead to its efficient use, this theory nevertheless fails to justify giving a celebrity monopolistic commercial control over her identity. If efficiency is the goal, organized alternatives—such as licensing companies like Corbis, an image rights company aiming to become a one-stop rights clearinghouse,[155] or government agencies—might be more

[149] Goldman & Paine, *supra* note 2; Madow, *supra* note 80, at 210-15.
[150] Madow, *supra* note 80, at 210.
[151] *Id.* at 220.
[152] Landes & Posner, *supra* note 97, at 484.
[153] *Id.*
[154] *Id.* at 485.
[155] Hoffman, *supra* note 13.

efficient than a sea of individual rights holders.[156]

The allocative efficiency argument rests on the idea that celebrity can be depleted by overuse, but, in fact, fame tends to feed on itself.[157] For example, the economic value of trendy t-shirts bearing a celebrity's image increases as more people wear them.[158] This describes the cultural network effect, wherein "a consumer's utility associated with a good increases as others also purchase it," much as a book becomes more valuable as more people read it and are able to discuss it.[159]

While it is possible to imagine a hypothetical saturation point at which an icon becomes exhausted, that point is impossible to determine: William Shakespeare, George Washington, and the Mona Lisa all have immense value despite their lack of protection.[160] Furthermore, the point at which an identity "wears out" is not practically ascertainable, as overexposure leading to a celebrity's demise may simply be a function of competitive market capitalism.[161] Overuse—assuming it has negative effects—would be costly only to the celebrity who loses the competitive game, not to society at large.[162] When a celebrity goes out of favor, society and the media will move on to the next, more marketable one, and—unlike the town common which is reducible to barren dirt—the field of potential celebrities remains infinitely abundant.[163]

Allocative efficiency cannot justify the descendibility of the right of publicity either: assuming the terms of an allocative efficiency argument, legatees—whether they are in-fighting children and grandchildren, or even a devoted only child—are less likely to manage a deceased celebrity's identity as efficiently as a major licensing company. Furthermore, wearing out a celebrity's value after death, when she is no longer productive, is unlikely. If anything, a marketing company's questionable short-term use of a dead celebrity to digitally peddle vacuum cleaners, for example, may decrease the celebrity's image value for future generations.[164]

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[156] *See* Madow, *supra* note 80, at 220 n.442 (citing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 153-67 (1987)).

[157] Madow, *supra* note 80, at 188. *See also* GITLIN, *supra* note 121, at 147 ("After a point, celebrity can be parlayed—by celebrity and by media—into more celebrity: it is like money or a credit rating.").

[158] Madow, *supra* note 80, at 222.

[159] Sterk, *supra* note 146 (quoting Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1212 (2000) (citing Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985))).

[160] *See* McKenna, *supra* note 105, at 271; Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 961 (1999).

[161] McKenna, *supra* note 105, at 273.

[162] Madow, *supra* note 80, at 224.

[163] *Id.*

[164] *See* Caryn James, *Critic's Notebook: Raising the Dead for Guest Appearances*, N.Y. TIMES, May 14, 1998, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E07E3DC1530F937A25756C0A96E958260&sec=&spon=&pagewanted=all ("[I]t seemed like the destruction of a beloved icon

E. *Kantian Autonomy / Persona*

1. The Kantian Autonomy Theory Provides a Partial Justification for the Right of Publicity

More recently, Alice Haemmerli offered a new justification for the right of publicity based on the Kantian model of personal autonomy. Basing the right on a Kantian property theory "permits recognition of the right's moral, as well as economic, facets, and it is desirable generally because the Kantian emphasis on inherent human value resonates strongly with our political culture."[165] This argument provides a concrete justification where the Lockean labor, unjust enrichment, incentive creation, and allocative efficiency all fail. Yet this justification has not been adopted by courts.

Fundamental to Kant's philosophy is the idea that for the individual, an autonomous and moral being, freedom is an innate right: "the one sole and original right belonging to every person by virtue of his humanity" and the "attribute of a human being's being his own master."[166] Reason, freedom, and human autonomy are intertwined in Kant's moral philosophy.[167] Positive freedom is the "capacity of pure reason to be of itself practical,"[168] for the "will to be determined by reason alone and . . . to self-legislate moral action consonant with reason."[169] The will, in its "expression of positive freedom," "acts as a self-generated source of moral law, . . . 'making man a moral being and giving him dignity.'"[170] As autonomy gives an individual the right to self-control, "interference with one's person is a direct infringement of the innate right of freedom (which takes concrete form in social life as liberty or freedom from compulsion by others)."[171]

According to Kant's philosophy, property is an outgrowth of human freedom.[172] Thus, when a person possesses an object, then "anyone who touches it without my consent . . . affects and dimin-

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and a debasement of true art to watch Fred Astaire dance with that Dirt Devil when we want him to be with Ginger Rogers.").

[165] Haemmerli, *supra* note 105, at 390.

[166] *Id.* at 414 (quoting IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 44 (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797)).

[167] Haemmerli, *supra* note 105, at 415.

[168] IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 13 (John Ladd trans., Hacket Publ'g Co., 2d ed. 1999) (1797).

[169] Haemmerli, *supra* note 105, at 415.

[170] *Id.* (quoting INTRODUCTION TO IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE ix (John Ladd trans. & ed., Library of Liberal Arts 1965) (1797)).

[171] Haemmerli, *supra* note 105, at 416.

[172] *Id.* at 418.

ishes that which is internally mine (my freedom)."[173] Property is as inseparable from one's personhood as freedom is essential to personhood, and property grows out of freedom.[174] All things can be owned and used, and any and every object of will can be property; any thing has the "objective possibility of being yours or mine."[175]

If any and every object of will can be property, then a person may claim a property right in her own objectified identity.[176] The connection between a person and her physical characteristics is innate: this suggests that the possessor of the body is the priority rights-holder.[177]

We have moved from propertizing the self to propertizing the use of objectified identity, and thus "unconsented interference with [the objectified identity] will infringe the owner's innate right of freedom."[178] Under Kant's theory, any interference with the objectification of self is a violation of freedom which requires exclusive use for the self. In other words, an individual cannot be compelled by others, and the unauthorized use of identity is a compulsion that deprives the freedom of the use of will in relation to external objectification (which is also innately bound up with a person's physical characteristics). Under this conception, the right of publicity is justifiable as an exclusive right for the protection of a person's autonomy and freedom.[179]

As a justification for the right of publicity, Kant's theory succeeds where the other justifications did not, but it too fails to provide a rationale for a *postmortem* right of publicity. Simply put, a deceased subject is no longer her own master, can no longer possess an object, and her person may no longer be interfered with. These characteristics are the Kantian theory's underlying justifications, and because they are necessarily lacking in the postmortem context, the autonomy theory completely unravels.

In Kant's philosophy the soul is immortal, and thus a Kantian might argue that the soul could be interfered with after death. But freedom and immortality act on different planes of Kant's philosophy: while "freedom is a necessary presupposition of action according to a law of reason," immortality's sole purpose is that it allows "rational action to be directed at the attainment of the

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[173] KANT, *supra* note 168, at 57.
[174] Haemmerli, *supra* note 105, at 418.
[175] KANT, *supra* note 168, at 52.
[176] Haemmerli, *supra* note 105, at 418.
[177] *Id.* at 418-19.
[178] *Id.* at 419.
[179] We may accept Kant's premises not only because "his is the only, transcendent truth, but because what he says resonates with our culture and common values." *Id.* at 428. Each of the justifications for the right of publicity seems to bristle at the violation of individual autonomy, and the connection between self and image, to which this theory gives voice.

highest good."[180] An immortal soul, then, does not justify a postmortem right of publicity.

Thus, a Kantian theory of personal autonomy, which provides a workable justification for the right of publicity for the living, nevertheless fails to justify a postmortem right of publicity,[181] not only because the subject's freedom can no longer be invaded after death,[182] but also because practical and social ends overwhelm the justification once the subject dies.

2. The Deceased No Longer Need Right of Publicity Protection

A descendible right of publicity would not advance the objective that underlies a right of publicity, namely, the protection of a persona from damaging interference. This is because, first, a deceased celebrity has no more identity to protect. But consider how a deceased celebrity's identity might be protected, assuming such a need. The marketing companies that license celebrity personas are also responsible for creating value in the marketplace for that celebrity.[183] Under a descendible right of publicity, the legatee becomes the arbiter of what constitutes interference with the persona.

Can anyone other than the celebrity herself protect against or calculate the invasion of her persona? This question is important because under the Kantian autonomy theory, interference with the persona is the only workable justification for a right of publicity. A trustee who protects the economic interests of a beneficiary has a much clearer duty than a party who protects the persona of a deceased celebrity. Objective economic criteria exist which guide trustees in managing trust assets and courts in determining whether a trustee has met her duty of care. There are no similarly workable guideposts, however, for those charged with protecting a persona from interference. But if it cannot be determined how or whether a persona is protected from interference, the justification based on Kantian autonomy theory—and thus the right of publicity—fails. Kantian autonomy theory justifies the right of publicity only for the celebrity herself, because only a persona's owner can determine what protection is needed.

Recall that Anna Strasberg, who manages Marilyn Monroe's estate, never met the famed icon.[184] Immediately after Lee Strasberg died, Anna Strasberg began striking licensing deals, one of which was with Absolut Vodka.[185] Assuming a persona could be in-

[180] PAUL GUYER, KANT ON FREEDOM LAW AND HAPPINESS 91 (2000).
[181] *See supra* Part V.E.1.
[182] *Id.*
[183] *See supra* Part IV.B.
[184] Koppel, *supra* note 118.
[185] *Id.*

vaded after death, would Monroe, who died of an overdose and suffered from alcoholism,[186] consider the use of her image by Absolut Vodka, as arranged by Anna Strasberg, to be an invasion of her persona?[187] The economic motivations of the managers of the postmortem persona drive them to actively create a market for the deceased celebrity, as was seen in the Humphrey Bogart and Steve McQueen examples already cited.[188] Thus, it is likely that, in the quest to maintain the celebrity cash cow's relevance, the estate manager will make licensing decisions that would be undesirable to the celebrity were he or she alive. Granting a right of publicity to the estate of a deceased celebrity will not necessarily reduce the chances of an unwanted use of the celebrity. This fatally undermines the purported justification for the right of publicity and may, in fact, create a more concentrated opportunity for abuse.

The failure of a trustee to protect a celebrity's persona after death is especially potent in the proposed New York legislation, which would grant enormous power over a celebrity's persona to parties that the celebrity may never have considered capable of such responsibility. Marilyn Monroe did not imagine that such a right existed, and she did not select the unknown-to-her Anna Strasberg to protect it.[189] However, the most important consideration is the most basic, and it applies in any such case: the celebrity is dead, and there is no longer anyone left to protect.

3. Looking at the Bill After Theoretical Analysis

Without adequate justification, there is no reason for New York State to act to protect a deceased celebrity's right of publicity. The above analysis of theories that purportedly support the right of publicity demonstrates that only one theory justifies the right, and that theory justifies the right only during life. There is no justification under any theory for the postmortem right. Thus, the New York legislature does not have cause to "interfere and arbitrarily provide"[190] criminal and civil causes of action for "residuary or other legatees, devisees, distributees or the successors in interest" of a personality who died after January 1, 1938.[191] Therefore, the New York legislature must avoid any attempts to provide to dead celebrities—in reality, licensing companies—an unjustified postmortem right of publicity.

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[186] SARAH CHURCHWELL, THE MANY LIVES OF MARILYN MONROE 99 (2005).
[187] Koppel, *supra* note 118.
[188] *See supra* Part IV.B.
[189] Koppel, *supra* note 118. Anna Strasberg did not meet Lee Strasberg, Monroe's acting coach and close friend, until after Monroe's death. *Id.*
[190] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545 (1902).
[191] S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assem. B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).

4. Postmortem Right of Publicity and Copyright Holders

The descendible right of publicity also interferes with the operation of other important rights. An additional consideration is the treatment of copyright holders. Publicity right holders sometimes come into conflict with the Copyright Act. Copyright is a power granted to Congress by 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."[192] In 1976, Congress passed the Copyright Act,[193] under which a copyright owner is given "exclusive rights to do and to authorize" others to reproduce; distribute; perform; or display copies of particular works, and to prepare derivative works.[194] Courts adopted a fairly uniform test to determine whether state law claims are preempted under the Copyright Act: (1) the subject matter of the state law claim falls within the subject matter of copyright under 17 U.S.C. §§ 102 and 103, and (2) the rights asserted under state law are equivalent to rights created by 17 U.S.C. § 601.[195] Copyright preemption is also provided by the Supremacy Clause of the Constitution, which requires state laws to yield to federal laws when the state rights stand as an obstacle to the purposes and objectives of federal law.[196]

Despite these protections, the right of publicity is not always properly preempted.[197] Courts may improperly fail to preempt the right of publicity in copyright cases regarding derivative works and performance rights, thereby harming copyright holders and their licensees.[198] Additionally, the public may be harmed when courts fail to preempt the right of publicity in cases regarding display of copyrighted works, performance rights, the first sale doctrine, sound-alike and imitative recordings, and the use of persona.[199]

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[192] U.S. CONST. art. I, § 8, cl. 8.
[193] 17 U.S.C. §§ 101-1332 (2000).
[194] *Id.* § 106.
[195] *See* Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1137-38 (9th Cir. 2006); Brown v. Ames, 201 F.3d 654, 657 (5th Cir. 2000); NBA v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997).
[196] Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 208 (2002).
[197] *Id.* at 209-25.
[198] *Id.* (citing Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997)) (holding that a jury could find a right of publicity violation for robots that evoke an actor's persona, and that the right of publicity claim is not preempted by copyright law even though it prevents the creation of authorized derivative works).
[199] *Id.* (citing cases that constrain ideas and rights); White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993) (holding Samsung violated Vanna White's right of publicity for depicting a blonde robot turning letters on a board, evoking her persona); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (allowing singer Waits to recover damages for an advertisement's use of another singer imitating his low-register, raspy singing voice even though the song was not previously recorded by Waits, and ruling that defendant's copyright does not preempt Waits' right of publicity); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (holding that defendant's use of photo of a red race car was enough to violate a race car driver's right of publicity, even though

Such interference is present even in the *Shaw* case. Prior to the lawsuit, MMLLC, CMG, and SFA required parties who wished to use a Shaw photograph to secure the "Marilyn Monroe Intellectual Property Rights" by obtaining one license from SFA and another license from CMG.[200] This impediment to the holders of Shaw's copyright to his work for the sake of Monroe's publicity rights arguably makes sense during her life as a way to protect her persona. After death, however, when a licensing company or legatee is guiding the fortune of a celebrity's image, it no longer justifiable to hijack the copyright holder's ability to use her own work and rights. Limiting the right of publicity to living personalities will decrease the risk of improperly preempting the exclusive rights of copyright holders.

5. The Lanham Act as an Alternative Identity Protection

The postmortem right of publicity is unjustified. If legatees of a celebrity wish to exert control after her death, they will have to look to other laws. Indeed, celebrities are protected from potential infringement absent the postmortem right of publicity. Section 43(a) of the Lanham Act protects a celebrity's identity from infringement by creating liability for "[a]ny person who, on or in connection with any goods or services, . . . uses in commerce . . . false or misleading representation of fact, which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[201] This provision of the Lanham Act "is an appropriate vehicle for the assertion of claims of falsely implying the endorsement of a product or service by a real person."[202]

The elements of a false endorsement claim under the Lanham Act are that the defendant (1) in commerce (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as

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driver was not visible in the photograph and his car was altered); Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 392-93 (E.D. La. 1992) (denying a motion to dismiss a right of publicity claim where an advertisement used a fat chef); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 130 (Wis. 1979) (holding that a women's shaving gel called "Crazylegs" violated the right of publicity of a football player merely because he was nicknamed "Crazylegs"); Lombardo v. Doyle, Dane & Bernbach, Inc., 8 A.D.2d 620, 621-22 (N.Y. 1977) (holding that Lombardo's personality was wrongfully appropriated by a car commercial depicting an orchestra wearing New Year's Eve party hats and playing *Auld Lang Syne*, an image the public associates with Lombardo as a bandleader).

[200] CMG Worldwide, Inc. v. Bradford Lic. Assocs, 2006 WL 3248423, at *1 (S.D. Ind. Mar. 23, 2006).

[201] 15 U.S.C. § 1125(a)(1) (2006).

[202] Burck v. Mars, Inc., 571 F. Supp. 2d 446, 454 (S.D.N.Y. 2008) (citing Albert v. Apex Fitness, Inc., No. 97 Civ. 1151(LAK), 1997 WL 323899, at *1 (S.D.N.Y. June 13, 1997) (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 1996)).

to the origin, sponsorship, or approval of the goods or services.[203] Under a Lanham Act action where these criteria are met, for example, could force an unauthorized t-shirt from the shelves. The Act's power, however, is contextual and depends on the extent of unauthorized use of the celebrity's name and image.[204] If an image earlier lost strength as an identifying mark for a product, consumers may have no reason to believe an unauthorized product is actually endorsed by the celebrity; consequently, without the likelihood of confusion, the Act would not extend protection to benefit the celebrity.[205] Thus, because existing consumer protection laws can sufficiently deal with potential infringement issues, there is no need to involve the unjustifiable postmortem right of publicity.

VI. CONCLUSION

In *Shaw*, MMLLC and CMG tried to fashion a postmortem right of publicity to no avail. In the wake of that case, New York legislators proposed creating a retroactive right of publicity in heirs. New York should not pass any such a bill. Most purported justifications for the right of publicity fail under scrutiny, and the Kantian autonomy theory, which does justify the right for living celebrities, fails to justify a postmortem right. Furthermore, there is no reason to believe that heirs can or will protect the deceased celebrity's identity—the reason to have a right of publicity—especially because the dead lack the autonomy that requires continued protection. Ultimately, it is licensing companies that are at the heart of the battle over the postmortem right of publicity, and neither courts nor legislators should protect those companies' economic interest in deceased celebrities in the absence of other policy justifications. *Shaw* should remain the law in New York and legislative attempts to overrule it should be avoided.

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[203] *Burck*, 571 F. Supp. 2d at 455 (citing Warner Bros. Entm't Inc. v. Ideal World Direct, 516 F. Supp. 2d 261, 268 (S.D.N.Y. 2007)); Albert Furst von Thurn und Taxis v. Karl Prince von Thurn und Taxis, No. 04 Civ. 6107(DAB), 2006 WL 2289847, at *10-11 (S.D.N.Y. Aug. 8, 2006).

[204] Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149 (9th Cir. 2002).

[205] *Id.*

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