



CMG WORLDWIDE

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Celebrities' Goodwill and Right of Publicity

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Hollywood's Creation of Celebrities

The motion picture industry is a century old.

“Players” who performed in early, silent motion pictures, were not given screen credit and were NOT even identified by name.

Audiences came to see "the picture show," but not any particular performers in the movie.



Hollywood's First Celebrity: Mary Pickford

- Despite the Movie Industry's desire to NOT have "stars", it became impossible to suppress them.
- Her appearance in 1914's "Tess of the Storm Country" propelled her to stardom.
- Pickford became Hollywood's biggest female star, earning the right to not only act in her own movies, but produce them and supervise their distribution.
- She was the first female actor to receive more than a \$ 1 million per year



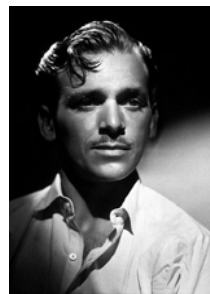
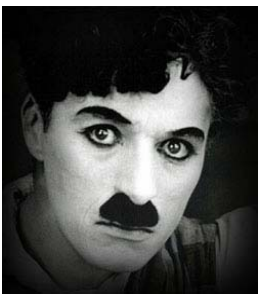
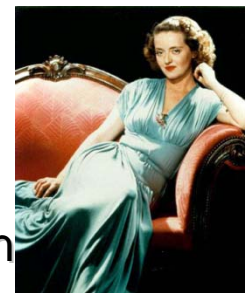
Mary Pickford Opened the Doors for Others to be “Movie Stars”



- Others came along and followed suit.
- Charlie Chaplin was one, and Douglas Fairbanks was another.



- Pickford married Fairbanks and together with Chaplin and D.W. Griffith they formed their own motion picture production company called United Artists.
- In their wake came the likes of Clara Bow, Gary Cooper, Jean Harlow, Humphrey Bogart, Marilyn Monroe, James Dean and the world has been star struck by Hollywood Royalty ever since.



Thereafter the definition of a “Star” came to mean someone whose name appears on screen ahead of the film title



The Sporting World's First Celebrity....and Celebrity Endorser

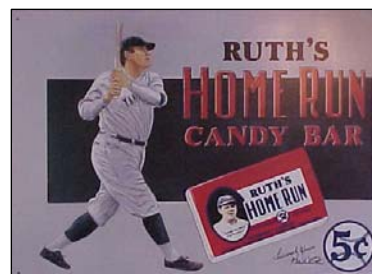
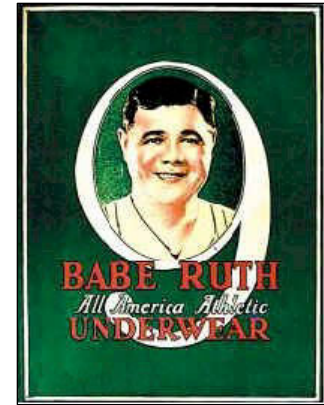
- He made countless radio appearances and appeared in numerous newspapers across the country.
- He became the sports world's first endorser.
- He was the spokesperson for chewing tobacco, underwear and candy over half a century before Michael Jordan was endorsing underwear.





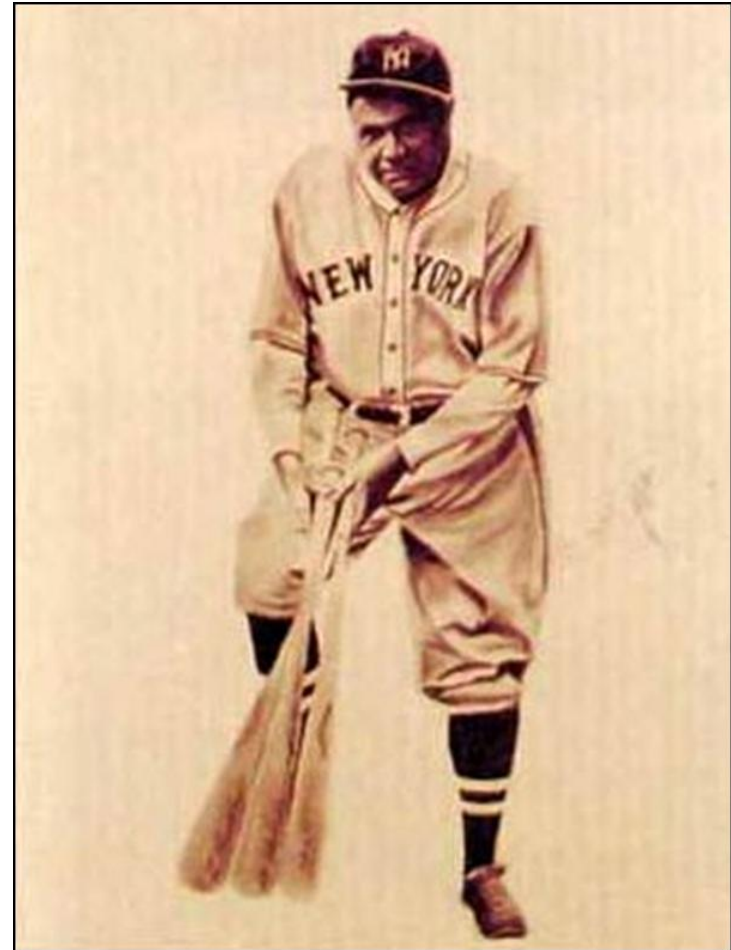
Babe Ruth Endorsed Products

And it never seemed to stop for “The Babe.” He continued to endorse automobiles to food products until he died in 1948. Despite being deceased for the past 62 years, “The Babe” continues to be one of the top earning sports celebrities in the world. In 1999, Babe Ruth was called the “Athlete of the Century” by the Associated Press.



The Legend Lives On

“The Babe” has topped over a million dollars per year in endorsements as a testament to the fact that the goodwill associated with a celebrity can not only carry on through their lifetime, but for many decades after they are deceased.





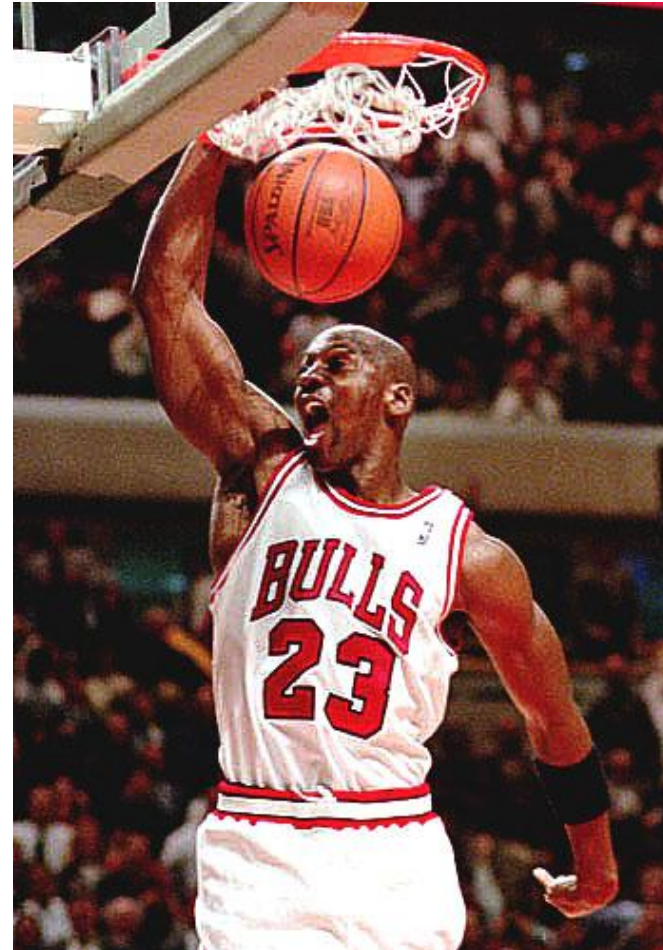
Two Types of Goodwill

1. The value of goodwill associated with the **personal performance or appearances** of that particular celebrity
2. The value associated with the **enterprise or business** that is **created by the celebrity** that has the ability to continue or **exist** even **without** the **celebrity's personal involvement**.

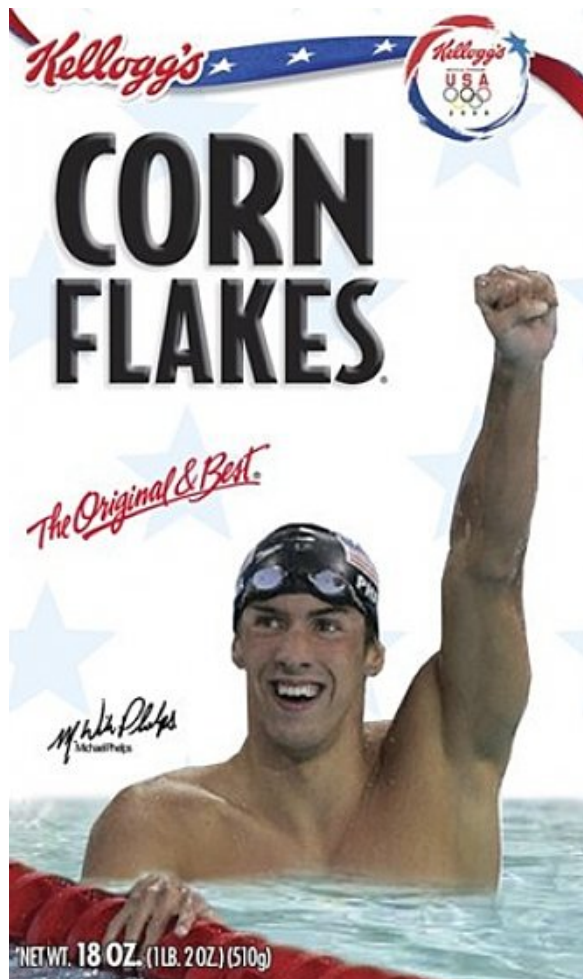
The Jordan Effect

FORTUNE Magazine Study (1998)
Michael Jordan

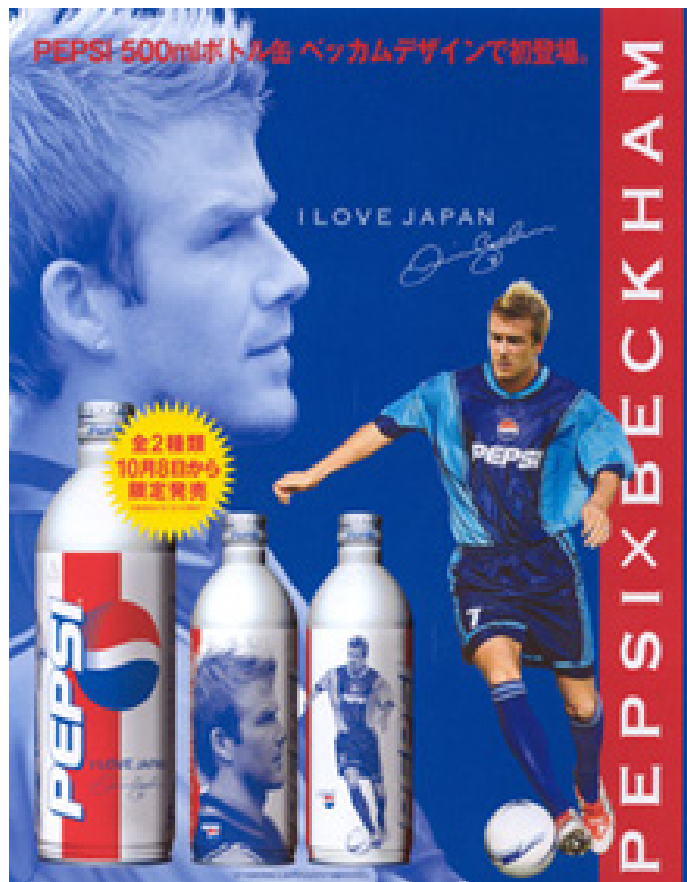
- \$10 billion positive effect on U.S. economy
- \$3.1 billion based solely on growth sales of NBA licensed products
- Study conducted 5 yrs. prior to Jordan's retirement



Athlete Endorsements / Brand Promotion



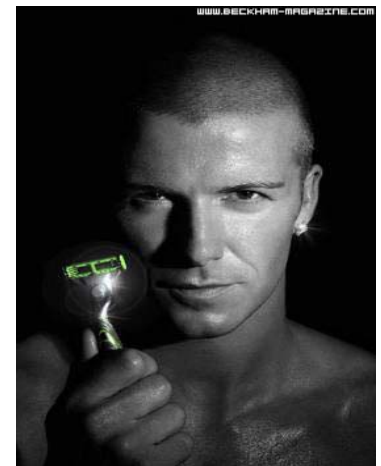
Athlete Endorsements / Brand Promotion



Celebrity Endorsers

- ¼ of U.S. commercials
- 1 in 5 U.K. commercials

(U.S athletic sponsorships neared \$11.3 billion in 2009)



Athlete Endorsements / Brand Promotion

Forbes Magazine Jan. 2010 Article

- Nike spent around \$4.2 billion in total endorsements for the 2009 fiscal year – an increase by 11% from 2008.
- For each fiscal year in this past decade, Nike has been spending over a billion dollars per year in athlete endorsements and those numbers have been increasing each year for Nike.



Anita Elberse Study

- Studied Effects of Athlete Endorsements
- Company sales grew an average of 4%
- Company stocks increased (average one-quarter percent)




Athlete Endorsements / Brand Promotion



Athlete endorsements are a valuable method of increasing a brand's worth and profitability, thus causing an only increasing amount of money invested in this marketing strategy each year by a number of companies.





This extensive goodwill that emanated from the celebrity is the reason celebrities can earn such significant amounts of money during their careers, their life and then their “afterlife”.

Tiger Woods: The Brand



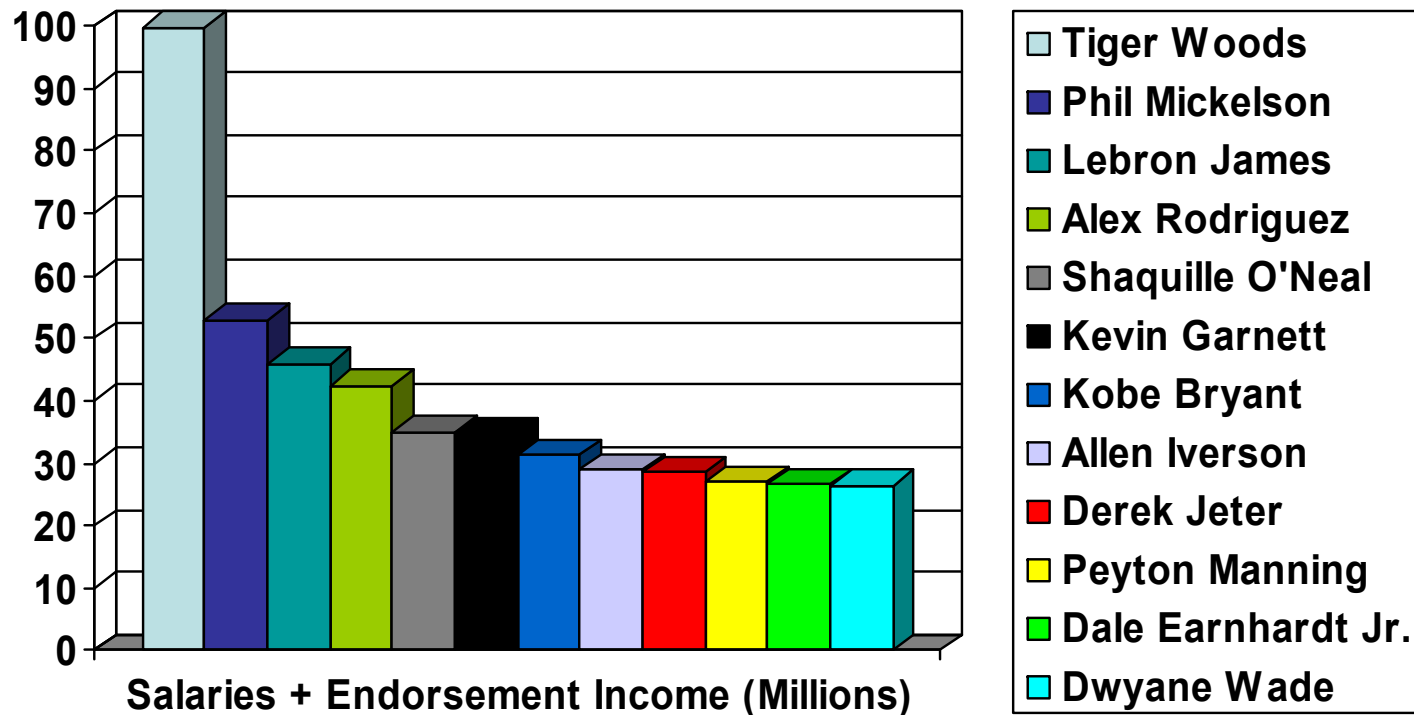
- Exceeded \$1 billion in lifetime earnings so far (1st athlete to do so)
- Over 85% of his earnings are made off the golf course
- Forbes estimated the “brand” will earn over \$6 billion dollars during his lifetime
- Even more potential postmortem



But the “brand” can more quickly diminish in value than increase in value



Fortune's 50 Highest-Earning American Athletes (2009)





Celebrity Forms of Goodwill

- The skill and recognition of a celebrity are only part of the reason that they are able to generate significant revenue and have significant value. That skill that is reflected in their careers and their specific personal involvement such as personal appearances is often referred to as their “personal goodwill”.
- While Enterprise goodwill is considered to be the excess earning capacity of an individual that is attributed to the individual’s celebrity status or fame beyond the revenue generated from the celebrity’s personal or professional skills.



Recognition ≠ Goodwill

Recognition is not the same as goodwill and needs to be distinguished. O.J. Simpson has recognition, but not a significant amount of goodwill at this point in his life in prison. Tiger Woods and Jesse James have recognition for their marital infidelity but both of their respective values of their goodwill have plummeted. Their *personal goodwill* may not have suffered to the same extent, but their *enterprise goodwill*, at least temporarily, has dramatically fallen in value.

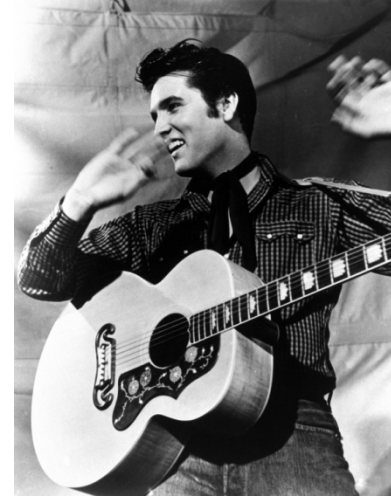
Goodwill Can Rise and Fall

- Michael Vick's involvement with animal cruelty resulted in him declaring bankruptcy and losing all of his endorsements and his playing contract
- Good will diminished to nothing
- Still has a level of personal goodwill
- Endorsement or enterprise goodwill will not recover for a period of time



Deceased Celebs Have Enterprise Goodwill

- There are no new scandals like dog fighting, marital infidelity, or arrests that loom on the horizon that will result in a dramatic decrease in their goodwill.
- Their goodwill can continue to drive a business that has significant value even beyond their lifetimes.





Recent Developments...

Recently there has been an even more dramatic change in this dynamic. **Celebrities who were typically just licensing their names and likeness or goodwill are now actually selling them outright.** There have been a number of such transactions in recent years for living personalities and also for deceased personalities that we will study in this report. **Such transactions have allowed us the opportunity to quantify financially the value of the goodwill of those celebrities.** It is those transactions that provide us with a framework for how we can value the goodwill associated in a marital dissolution that involves a celebrity.



Right of Publicity

An individual's publicity rights typically only have value after he or she has obtained some prominence or level of celebrity. However, a number of state statutes provide for statutory minimum damages, ensuring proper compensation in the case of minor infringements or infringements involving individuals who have not obtained a level of prominence sufficient to make their persona valuable.



Evolution of ROP

The evolution of the Right of Publicity as a distinct legal doctrine has spanned more than 100 years. Although it had its roots in privacy law, the **Right of Publicity is clearly intellectual property.**



The Right of Privacy as Compared to the Right of Publicity

As the concept applies to intellectual property, the **Right of Privacy** is a **personal right** specifically applying to “**the indignity and mental trauma incurred when one’s identity [is] widely disseminated in an unpermitted commercial use.**” The requirement of “mental trauma” clearly places the concept well within the context of tort law and, as such, is clearly distinct from intellectual property.



The Brandeis and Warren Article

In 1890, Louis D. Brandeis and Samuel D. Warren authored an article for the Harvard Law Review, arguably one of the most influential legal articles ever written. In the article, the authors expressed concern that an individual's photograph could be taken and used without his consent. **“Thus, Brandeis and Warren were the first to recognize an individual's own likeness constitutes his unique property.”**



The New York Statute

- New York was the first state to address by statute the concepts introduced in the Brandeis and Warren article.
- Introduced in 1903 (and amended in 1995), Civil Rights Law §§ 50 – 51 makes the unauthorized use of a living individual's name, portrait or picture a misdemeanor.
- New York incorrectly views the rights in name, portrait or picture as a personal right and has demonstrated unwillingness throughout the years to correct the error.
- Nevertheless, it is possible for living individuals to recover compensation for the “commercial loss” resulting from the unauthorized use of their name, portrait, or picture.



“Official” Birth of the Right of Publicity

The phrase "right of publicity" was coined by Judge Jerome Frank in ***Haelean Laboratories, Inc. v. Topps Chewing Gum, Inc.*** 202 F.2d 866 (2nd Cir. 1953).

Following New York law, Judge Frank delineated the distinction between the "*right of publicity*" and the "*right of privacy*." Judge Frank thereby recognized an independent common law right protecting economic interests rather than the personal, emotional interests associated with the right of privacy.



The Florida Statute

In 1967, Florida enacted section 540.08 which adopted a transferable right of publicity, extending 40 years after the death of the individual.



The Massachusetts Statute

In 1974, Massachusetts adopted two statutes, sections 3A and 1B, which collectively incorporated Brandeis and Warren's concepts of privacy and the emerging concept of publicity. Section 3A applies to "any person" without indication as to living or deceased. Therefore, Massachusetts does not expressly reject a post mortem right of publicity.

The Human Cannonball case

The Court held:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.





The Emerging Right of Publicity Statutes

In the years that followed *Zacchini*, more and more states passed legislation addressing the Right of Publicity.



Virginia

In 1904, Virginia enacted a statute which was divided into two sections in 1977: 8.01-40 being a civil statute which provides for a Right of Publicity extending 20 years after death, and 18.2-216.1 being a criminal statute addressing criminal penalties for the knowing unauthorized use of a Virginia resident's name, portrait, or picture.



Rhode Island

Rhode Island had two relevant statutes: section 9-1-28 adopted in 1972 and section 9-1-28.1 adopted in 1980. Section 9-1-28 addresses the unauthorized use of a name, portrait, or picture for advertising purposes or for purposes of trade. The latter statute addresses a right to privacy.



Wisconsin

Wisconsin passed section 895.50 in 1977 entitling it “*Right of Privacy*.” The statute defines the right of privacy in a number of ways, including “the use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.” Thus, Wisconsin recognizes a right akin to the Right of Publicity.



Nebraska

In 1979, Nebraska passed sections 20-201 through 20-211 prohibiting the invasion of privacy and the commercial exploitation of a natural person's name, picture, portrait, or personality. The statute allows for post mortem actions related to the exploitation of a person's name or likeness as addressed in section 20-202.



Utah

Utah originally passed a privacy statute in 1909 which was amended several times to its current form as sections 45-3-1 through 45-3-6. In substance, the statute applies to instances in which an advertisement is published that uses an individual in a manner that implies endorsement or approval.



Tennessee

One of the better Right of Publicity statutes exists in Tennessee as sections 47-25-1101 through 47-25-1108. In section 47-25-1103(a), it states “every individual has a property right in the use of his name, photograph or likeness in any medium in any manner.” Subsection (b) further makes these property rights freely assignable and licensable. A post mortem right exists for at least 10 years, but potentially forever, unless continuous nonuse for a period of two years following the initial 10 year term can be proven.



Oklahoma

Oklahoma passed its version of right of privacy legislation in 1955, which was amended twice to include Right of Publicity in 1986. Post mortem rights extend to 100 years.



Kentucky

- Kentucky passed statute in 1984 which is carefully worded to ensure the clear understanding of the legislature. Section 391.170(1) states:
- The general assembly recognizes that a person has property rights in his name and likeness which are entitled to protection from commercial exploitation. The general assembly further recognizes that although the traditional right of privacy terminates upon death of the person asserting it, the right of publicity, which is a right of protection from appropriation of some element of an individual's personality for commercial exploitation, does not terminate upon death.
- Thus, the Kentucky legislature recognized the origins of the Right of Publicity and was explicit in their explanation that the rights which are created by virtue of the statute are property rights distinct from personal rights. Subsection (2) of the statute provides post mortem protection for 50 years.



Texas

Sections 26.001 through 26.015 of the Texas Property Code (also known as the “Buddy Holly Bill”) became effective in 1987. The statute created property rights in name, photograph, and likeness but is notable for specifically including voice and signature in this grouping of publicity rights. Further, Texas recognizes post mortem rights for 50 years.



Nevada

Nevada enacted Right of Publicity legislation in 1989 (amended in 1995). Sections 597.770 through 597.810 create a protectable property right in name, voice, signature, photograph or likeness of every person during his or her lifetime and for 50 years thereafter. Nevada is noteworthy in that it is the only Right of Publicity statute to expressly exempt celebrity impersonators from liability. Whereas other Right of Publicity statutes exempt only activities which clearly fall within the First Amendment, Nevada exempts “an attempt to portray, imitate, simulate or impersonate a person in a live performance.” Notice below that this language is contrary to the “gestures, mannerisms, and distinguishing characteristics” which Indiana includes in its grant of rights.



Indiana

(Most Comprehensive)

Indiana enacted its statute in 1994, which is considered by many to be the most broad and sweeping of the right of publicity statutes. Indiana's law protects a deceased individual's right of publicity for a period of 100 years. Ind. Code Ann. §§32-36-1 et seq. (Michie 2002). The Indiana statute is very similar to California's Section 3344.1, and contains many similar exemptions for First Amendment purposes. The most notable additional coverage in Indiana is the fact that it applies to “any act or event that occurs in the state”, regardless of domicile.



Washington

In 1998, Washington enacted sections 63.60.010 through 63.60.080 of its Personal Property code, expressly recognizing property rights in name, voice, signature, photograph, and likeness and further making those rights freely transferable. Washington provides post mortem rights to individuals for 10 years unless he or she assigned or licensed their rights during life, upon which the duration shall be for 75 years.



California

California's publicity rights are perhaps the preeminent models for right of publicity laws. California protects against unauthorized uses of a deceased celebrity's persona for the purpose of advertising or selling, and for the unauthorized use of a celebrity's persona on or in a product. California began establishing publicity rights for living personalities in 1972 through section 3344 of the Civil Code. When California enacted Section 990 in 1985, it thereby allowed the celebrity's publicity rights to pass to a successor in interest, who can then prevent the unauthorized use of the decedent's name and likeness for a period of fifty (50) years. In 1999, the California legislature amended Section 990 and incorporated it into 3344; hence, Section 990 became Section 3344.1. By virtue of the amendment, the post-mortem duration was extended to seventy years, consistent with the copyright term extension as effectuated by the Sonny Bono Copyright Term Extension Act in 1998. In addition to these statutory provisions, California's common law publicity rights can also be useful in providing protection to a celebrity.



Illinois

In 1999, Illinois passed Right of Publicity legislation in the form of various sections of the Miscellaneous Property Act 1075. A Right of Publicity is expressly recognized under section 10 of the Act and section 30(b) sets post mortem duration of 50 years.



Ohio

Ohio is the final newcomer in the list of states formally recognizing a Right of Publicity, enacting sections 2741.01 through 2741.09 in 1999. Ohio provides protection in the name, voice, signature, photograph, image, likeness, or distinctive appearance during life or for 60 years thereafter, “if any of these aspects have commercial value.”



International recognition of the Right of Publicity

- **Canada** - “Canadian courts have recognized that a person ‘has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right if it is invaded.’”
- **Germany** - Has a statutory right of publicity with 10 yrs. postmortem protection
- **Japan** - Recognized a right of publicity in 1976



Recent Developments in California Right of Publicity Case Law

Comedy III - The reproductions were entitled to protection under the United States Constitution but the intellectual property rights of the “Three Stooges” outweighed the rights of the artist to make commercial reproductions of his art.



Comedy III

- In reaching this decision, the court formulated a balancing test to determine whether the artwork is “sufficiently transformative” and therefore worthy of absolute constitutional protection.
- “[I]n determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?”
- Applying this balancing test, the California Supreme Court concluded that Mr. Saderup’s work had artistic merit. However, the marketability of the merely faithful rendition of the Three Stooges was derived primarily from their fame and not the fame and skill of the artist. Thus, a violation of the “Three Stooges” Rights of Publicity had occurred.



Edger and Johnny Winter Case

At issue was the unauthorized depiction of the Winter brothers as the "Autumn brothers" in three out of a series of five comic books which loosely parodied the genre of singing Wild West cowboys who were battling with worm-like creatures from below the surface of the earth. The series depicts the Winter brothers as villainous half-worm half-human characters.



Edger and Johnny Winter Case

The court determined that the use was not a parody and therefore subject to the standards of *Comedy III*. The court discussed in detail the “sufficiently transformative” test as adopted in *Comedy III* and determined that triable issues of fact exist whether or not the comic books meet the criteria of that balancing test.



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