

“Rebel Without Good Laws: James Dean and Posthumous Publicity Rights on Social Media” (Draft)¹

It’s been 60 years since James Dean crashed his Porsche and died, but even today the *Rebel Without a Cause Star* is in trouble with the law. In 2014, an Indiana licensing company sued Twitter² over @jamesdean, a social media account that an unknown fan used to share quotes, pictures and facts about the late star.

The Dean case, filed in Indiana federal court, highlights a growing challenge over how the law should balance personality rights and freedom of expression. The task is harder still when it comes to determining the appropriate scope of protection for posthumous personality rights, which are now governed by a patchwork of very different state laws.

The question over how to protect the personality rights of Dean and other dead celebrities – or whether the law should protect them at all – takes on new dimensions in the age of digital media, when fans and others can reproduce the likeness of the dead not just on t-shirts, but across the internet where state laws and borders often carry little practical force.

To explore this problem, this paper begins with an overview of how personality rights have evolved in the United States in the last century, including recent statutory developments that have led the dramatic expansion of posthumous rights in some states, and to conflict-of-law problems.

The paper then describes how the First Amendment limits the enforcement of personality rights, as well as how tests from other areas of law, especially trademark law, inform those limits. This section also calls attention to how this balancing of rights is being tested anew as personality rights conflicts have moved from physical objects like masks and coffee mugs to the world of internet avatars and social media accounts.

This discussion sets the stage for an interpretive view of posthumous personality rights in the digital era. Specifically, it explores to what extent the normative justifications for personality rights as they apply to the living should apply to the dead, including whether property law is the right prism to evaluate claims like those of the putative owner of James Dean.

Finally, the paper concludes with a prescriptive section that points to the intellectual and public policy case for limiting posthumous personality rights on the Internet.

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² James Dean Inc et al v. Twitter Inc, U.S. District Court for the Southern District of Indiana, 2014, 1:2014-cv-00183.

From Brandeis' privacy promise to post-mortem rights "forever"

Indiana-based CMG Worldwide, the licensing company that sued Twitter over rights to control the late James Dean, promises to help clients control celebrity-related intellectual property, "then, now and forever."³

CMG's claim is perhaps a bold one given the relatively recent pedigree of personality rights. Unlike patents or copyright or even trademarks, an assignable and commercial right of publicity only became available in the second half of the 20th century. And the power to invoke these rights post-mortem only came much later, and is still not available at all in some jurisdictions.

The roots of what is today known in the U.S. as the right of publicity is commonly attributed to Louis Brandeis and Samuel Warren, who in a seminal 1890 Harvard law review article, described "the right to privacy, as a part of the more general right to the immunity of the person, the right to one's personality."⁴

That right, inchoate at the time, evolved over the course of the early 20th century into what are now regarded as four distinct rights of action⁵ at common law in the United States. For purposes of this article, it is the fourth of these that is most relevant: the right to prevent unauthorized appropriation of name or likeness.

Since the mid-20th century, the right to control one's name and likeness has evolved from a purely personal privacy-based right to one that is partly or entirely based in norms of property. This notion gained a firm foothold in jurisprudence in 1953, in a dispute over baseball cards, when the Second Circuit declared that the personality rights of the players who appeared on the cards were assignable, and that a third party company had standing to sue as a licensee of those rights.

The U.S. Supreme Court likewise confirmed the economic nature of the right to control appropriation in a 1973 case over a "human cannibal," who sued a TV station for broadcasting the entirety of his performance.⁶ The ruling, which is still the only occasion on which the court has weighed in on personality rights, sided with the performer. The majority rejected the TV station's claim of a First Amendment right to show the performance, and likened the human cannonball's right to control the spectacle as similar to a patent or a copyright.

A move to codify leads to very disparate rules

There is currently no federal statute specifically for the right of publicity. The Lanham Act, however, does confer a limited measure of protection, allowing individuals a right of action against those who use their name "on or in connection with any goods or services."⁷ The right, however, echoes the law of trademark, requiring plaintiffs to

³ www.cmgworldwide.com

⁴ "The Right to Privacy" (4 Harvard L.R. 193 (Dec. 15, 1890))

⁵ Prosser, William: *Privacy*, 48 Cal. L. Rev. 383 (1960)

⁶ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)

⁷ Lanham Act. In part, 15 U.S.C. § 1125

demonstrate a likelihood that the unauthorized use will give rise to confusion among consumers.

State legislatures, meanwhile, have been more active. More than twenty states have passed laws directed at personality rights, which expand on the common law rights already recognized in most states.

The nature and scope of these state rights, however, varies considerably. Whereas the Indiana law is clearly labeled as a property right, New York couches the right of publicity within its privacy law statute.

And when it comes to post-mortem rights, the differences can be especially stark. Indiana confers 100 years of protection, while New York denies a posthumous right of publicity entirely.

And the nature of personality rights after death, such as they exist, appear clearly founded in economic, not personal justifications; in 1983, for instance, a California appeals court ruled that the children of the late actor Errol Flynn had no standing to pursue an invasion of privacy claim against their father's biographer, on the grounds the privacy right was personal and non-descendible.⁸

The discrepancies in the state laws have already given rise to a number of high profile proceedings over how to apply the laws to deceased celebrities, who typically made their home in multiple states.

The most famous of these examples involves Marilyn Monroe. In 2007, a district court in California ruled that a licensing company had no standing to claim the image of the blonde bombshell, notwithstanding a state statute from 1985 that conferred 50 years (now 70 years) of posthumous protection for publicity rights. As the court noted, the statute didn't apply because Monroe had died in 1962 – before the law had passed. California's legislature quickly moved to apply the statute retroactively, but the Monroe licensee came up short once more; the 9th Circuit in 2012 ruled that California law did not apply at all even though the actress died in the bedroom of her home in Los Angeles. Instead, Monroe's right of publicity vested under the law of New York because that was the state she chose as her legal domicile for purposes of probating her will.⁹

The outcome of the Monroe cases show the complications that arise as a result of the very different posthumous right of publicity rules in different states. In the future, conflicts over the laws are also likely to grow more frequent as a result of states like Washington and Indiana passing expansive laws that appear intended to benefit domestic licensing concerns.

⁸ Flynn v. Higham, 149 Cal. App. 3d 677, 683 (1983)

⁹ Milton H. Greene Archives v. Marilyn Monroe LLC, 692 F.3d 983, 991-92 (9th Circ, 2012)

Washington lawmakers, for instance, expanded the scope of protection for dead celebrities in 2008, shortly after courts refused to recognize a posthumous right of publicity claimed by the heirs of Seattle-native Jimi Hendrix. The new law not only created retroactive protection for the right of publicity, but provided that the right was enforceable in other states.

After lower courts ruled that the Washington law violated parts of the U.S. Constitution, including the full-faith-and-credit clause, the 9th Circuit overruled that finding in a narrow decision. The 9th Circuit upheld the statute as it applied to a dispute between the Hendrix heirs and another party in the state of Washington, but added the caveat that the state law: “raises difficult questions regarding whether another state must recognize the broad personality rights that Washington provides.”¹⁰

Courts in the future are likely to confront these “difficult questions” because more states, as they ponder posthumous right of publicity laws, could join Washington and Indiana in declaring the laws have extra-territorial effect.¹¹ The latest state to be considering the issue is Massachusetts where actor Bill Cosby is pressing legislators to pass a bill.

A right to personality, a right to profit -- or a right to expression?

In the case of @jamesdean on Twitter, the anonymous user produced a tribute stream to the late rebel in the form of a series of quotes, observations and photographs. The Twitter account was akin to a one-person fan club, and was updated sporadically with no apparent commercial motive or claim to “official” status.

In 2013, licensing company CMG Worldwide asked Twitter to suspend the account and to identify the person behind @jamesdean. Twitter, whose terms of service appear to allow users to employ intellectual property without a license in certain situations such as parody, refused the request.

CMG responded by suing both Twitter and the “John Doe” account holder in 2014, filing federal claims under the Lanham Act and common law, as well as state law claims under Indiana’s right of publicity statute.

There was no ruling in the case, however, as court records show the dispute was discontinued for unstated reasons.

Checks on the right of publicity

CMG’s claims against Twitter amounted to one of the most aggressive assertions of the right of publicity to date: a third-party licensing company claimed rights in the likeness of a dead celebrity, notwithstanding that the use occurred on the internet and did not appear to be commercial in nature.

¹⁰ Experience Hendrix L.L.C. v. HendrixLicensing.com LTD, Nos. 11–35858, 11–35872 (9th Cir. Jan. 29, 2014)

¹¹ The handful of cases brought so far in Indiana have resulted in the cases being transferred to New York, where New York’s domicile laws were applied so for now the potential reach of Indiana’s 100-year posthumous statute out-of-state remains unclear.

The boldness of CMG's claim in turn raises the question of where the outer boundaries of the right of publicity might lie. If CMG's vision of "forever" takes roots, will internet users one day require permission of licensing companies to use the likeness of Gandhi or Shakespeare or Jesus Christ?

This is a hyperbolic example, of course, but it does prompt the question of how to define the existing limits on the rights of publicity, which have typically been invoked against living people.

More specifically, courts have primarily imposed measures to ensure that the right of publicity does not impinge on rights of free expression. As William Ford and Raizel Liebler explain in a 2012 study on the role of personality rights in games,¹² the courts have so far employed a variety of approaches and tests to do so:

The Restatement (Third) of Unfair Competition asks whether "the name or likeness is used solely to attract attention to a work that is not related to the identified person." The California courts ask whether a use is transformative. The Missouri courts disapprove of these two approaches for being too protective of speech and insufficiently protective of the right of publicity [...]. The Missouri test supposedly involves "more balanced balancing" and asks whether the predominant use of a person's identity is commercial exploitation or expressive.⁴⁹⁸

In the interest of this balance, the Second Circuit refused to permit Ginger Rogers to make a personality rights claim under the Lanham Act in order to stop the publication of the motion picture, "Fred and Ginger."¹³

More recently, a California Supreme Court ruled that two musicians could not invoke their right of publicity against a comic book artist who had depicted them as worm people.¹⁴

With such rulings, courts have expressed a clear interest in assuring that rights of publicity do not become a detriment to the right of free expression. Such cases, however, appear to be limited to those involving living celebrities; for now, it is unclear how courts would apply this balancing act to analogous situations involving the personality rights of dead celebrities.

While the existing set of limits – involving questions of transformativeness or consumer confusion – form a logical baseline for how to balance the right of publicity against free expression, there is also the question if the court should set a different bar when it comes to post-mortem rights.

¹² Games are not Coffee Mugs: Games and the Right of Publicity, Santa Clara High Technology Law Journal, Vol 29, Issue 1, 2012.

¹³ Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)

¹⁴ Winter v. DC Comics, 69 P. 3d 473 - 2003

Put another way, should courts allow the unlicensed use of a celebrity to be more extensive when the celebrity in question – like James Dean – is no longer alive? There are strong reasons why this should be the case.

Paying our respects to the dead: by letting them rest

While the ability of individuals to exercise control over their name and likeness has evolved from a privacy-based right to one based in property, the theoretical justifications for this shift are not obvious.

When Brandeis and Warren first articulated a right of privacy in the United States, their goal was to suggest a shield for individuals from a powerful and growing tabloid press. They did not declare an explicit right to commercialize one's image.

Meanwhile, even though the right of publicity is usually associated with creative individuals, discussions about its justification do not typically invoke copyright – the intellectual property regime typically associated with artistic endeavors. There is no body of debate, as surrounds the law of copyright, about whether the right of publicity derives from the ideas of Locke, or from natural rights theories.

Instead, the right of publicity appears most related to the laws of trademark. This is apparent in part from the fact that the limited statutory protections for personality rights in federal law are provided by the Lanham Act rather than the Copyright Act.

This distinction may be important in determining the scope of publicity rights that should be awarded to the heirs of dead celebrities. Unlike copyright law, which clearly aims at providing authors with a descendible right of property, the rights of heirs are less central to trademark law – whose justifications turn more on protecting consumers and checking unfair commercial competition.

Likewise, it is worth noting that the law of privacy, in which the right of publicity is rooted, does not apply post-mortem. As with the law of defamation, torts involving invasion of privacy are reserved for the living – which is sensible enough since the living are the only ones who can be harmed by such acts. This may in turn provide a further argument for restricting or even ending posthumous publicity rights.

Finally, while expanding the right of publicity may yield economic benefits to a relatively narrow constituency, especially licensing companies, doing so is also likely diminish the creative and expressive rights of a much larger segment of society.

In sum, the legal and moral case for strengthening publicity rights for dead celebrities rests on a relatively recent and perhaps shaky foundation. To the degree that courts grant recognition to such rights, they should do so sparingly while taking heed of the limitations placed on related rights such as trademark and unfair competition.

Practical approaches to limiting post-mortem rights of publicity in the Dean case

The case of the rebel @jamesdean account on Twitter did not, as noted above, result in a court decision. In the event a judge had ruled, however, it is unclear if the rebel would have prevailed.

Applying the balancing test set out in the Three Stooges and Winter case would have required the court to exam factors such as whether the Twitter account used the “sum and substance” of Dean’s celebrity, and whether the user sought simply to exploit his fame for commercial ends.

Unlike the other cases, however, the @jamesdean did not involve significant original artistic expression beyond the Twitter user’s choices in compiling different portraits and observations about Dean. As such, the court would have had to rely on the non-commercial factors more heavily in order to find the Twitter user’s free expression rights outweighed the property interests of the licensing company.

To further buttress a finding of non-liability, the court could have also decided to import the Lanham Act limitations – which call for showing of consumer confusion – into interpreting the scope of the licensing company’s purported right of publicity claims.

Finally, the court could take up the reasoning expressed by federal courts in Washington that questioned whether Indiana’s expansive state laws for the right of publicity violate the dormant commerce clause or full faith and credit clause of the Constitution.

The bottom line is that cases like the ones involving the James Dean account on Twitter present the possibility of a new, and potentially sweeping, intellectual property law regime emerging in the shadow of privacy and trademark law – one that this at times difficult to justify.

The author of this paper stresses that this version is a preliminary draft, and that the finished paper will include a much-expanded list of authorities, and further-articulated ideas. Any comments or observations are most welcome: jeff.roberts@mcgill.ca