

# Is It Now Or Never? A Performer's Right Of Publicity May Endure Although He Has Left The Stage Forever



By David R. Ellis, Attorney at Law, Largo, Florida and Sharon R. Ellis, University of Florida Law School, Gainesville

Once upon a time, we were called upon to render an opinion on whether a set of photographs taken of an entertainer who had died over twenty-five years before could be used to produce calendars, posters, individual photographs, and other items for sale to the public. The photos were taken of the entertainer when he was a teenager in the mid-1950s by a well-known photographer, and the question was whether the pictures could be exploited commercially by the photographer or his assignees through the publication and sale of printed items and reproductions of the images, as well as through displays in museums, galleries, and other public places.

The entertainer had died in the late 1970s (although there were occasional reports that he was seen alive years later). At the time of his death, he was a resident of Tennessee, although he died in another state. The question was one of post-mortem rights, namely whether his estate could assert the right of publicity he admittedly had during his lifetime to prevent the publication and use of his image and likeness after his death.

First there was the question of who owned the right to publish the photographs. Under §106 of the U.S. Copyright Act, 17 U.S.C. §106, the photographer owned the copyright in the photographs, and thus the exclusive right to reproduce, adapt, distribute, and publicly display the images. However, that did not necessarily give him or his assignees or successors the right to do so in contravention of the right of publicity of the subject of the photos, or of his heirs or successors, which in this case was the estate of the performer.

Since he was domiciled in Tennessee at the time of his death, the governing law was Tennessee's right of publicity statute, enacted in 1984 and entitled "Protection of Personal Rights." Tenn. Stat. §47-25-1101 thru 1108. In the statute, §1105(a) provides:

Unauthorized use prohibited. Any person who knowingly uses or infringes upon the use of another individual's name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of dona-

tions, purchases of products, merchandise, goods, or services, without such individual's prior consent, or, in the case of a minor, the prior consent of such minor's parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs, or devisees of such deceased individual, shall be liable to a civil action.

Remedies for violation include injunctions, money damages, and disgorgement of profits of the violator. §1106.

In Tennessee, the right of publicity exists throughout a person's lifetime and for at least ten years thereafter. The post-mortem right then continues indefinitely as long as it is commercially exploited by the person's heirs or successors. §1104. In this case the performer's publicity rights were still being commercially exploited twenty-five years after his death and could be expected to be exploited for the foreseeable future. In fact, his estate had been aggressive in protecting the publicity rights and had brought numerous lawsuits to enforce them over the years.

By way of comparison, in Florida, the post-mortem provisions of the right of publicity statute, §540.08, entitled "Unauthorized publication of name or likeness," limits those who may assert the decedent's right of publicity to entities authorized in writing to license the commercial use of the decedent's name or likeness, or if no entity is so authorized, then by "any one from among a class composed of her or his surviving spouse and surviving children." §540.08(1)(c). The decedent's estate, therefore, is not automatically entitled to assert the decedent's publicity right. See *Southeast Bank v. Lawrence*, 489 N.E.2d 744; 498 N.Y.S.2d 775 (NY 1985) (involving the estate of the playwright Tennessee Williams), citing *Loft v Fuller*, 408 So.2d 619 (Fla. 4th DCA 1981).

Moreover, post-mortem rights under the statute in Florida are limited to a period of forty years after the death of the decedent. §540.08(4). (For more on Florida's right of publicity statute, see "The Court's Gone Wild! - Keeping Abreast of Developments in Florida's Publicity and Privacy Laws," by David R. Ellis, in the Florida Bar EASL Newsletter, July 2003, pp. 12-13. <http://www.easl.net/Documents/EASL0603f.pdf>)

In these circumstances, it appeared that the proposed use of the entertainer's photographs would be an unauthorized commercial exploitation within the meaning of §1105 of the Tennessee statute, enforceable by his estate under §1104. Mere display in a museum, art gallery, or other venue without charging admission or advertising their showing probably would not have been considered commercial exploitation under the statute, but if money were received, other than perhaps for the mere reimbursement of expenses, the estate might have brought legal action against the users, seeking injunctive relief and perhaps money damages and profits.

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David Ellis is a Largo, Florida attorney practicing copyrights, trademarks, patents, trade secrets, and intellectual property law; computer and cyberspace law; business, entertainment and arts law; and franchise, licensing and contract law. A graduate of M.I.T. and Harvard Law School, he is a registered patent attorney and the author of the book, *A Computer Law Primer*. He has taught Intellectual Property and Computer Law as an Adjunct Professor at the Law Schools of the University of Florida and Stetson University.

Sharon Ellis is a second year law student at the University of Florida Levin College of Law, graduating in December 2004. She is a graduate of Cornell University.

Please direct comments to: [ellislaw@alum.mit.edu](mailto:ellislaw@alum.mit.edu) or [sre5@cornell.edu](mailto:sre5@cornell.edu) <http://www.lawyers.com/davidrellis>

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