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A Slice of Immortality

Long-Term Issues for Intellectual Property Estates

Why are human beings so enthralled by fame? Is it simply part of human nature to live vicariously through those who are wealthy, powerful, popular, or respected? Or do we all seek something more? To be part of something greater and lasting, something that can transcend mortality?

The pharaohs built pyramids as a lasting legacy. Achilles waged war on Troy, not for Helen or vengeance, but to immortalize his name. And if our earthbound stars could only live on beyond death like

the stars of the firmament, then the part of us that appreciated their talents can live on as well.

Let's review several celebrity estates in the news and what they demonstrate about intellectual property issues for the modern estate plan.

The Future Is Now

"In the future, everyone will be world famous for 15 minutes," wrote Andy Warhol in 1968. By 1979, he said, "I'm bored with that line. I never use it anymore."

Presented With Our Compliments

My new line is, 'In fifteen minutes everybody will be famous.'"¹

It is only in the recent history of mankind that technology has democratized fame. Once upon a time the only record of a human's existence was passed along by word of mouth for a few generations or painted upon the wall of a cave. Even after the development of the written word, books were transcribed by hand until the advent of the printing press in 1450.

Today, almost everyone has access to write, store, and print books as well as music and video images. Anything an individual can accomplish can be posted on his or her own website for the world to see. What do Britney Spears and the former king of Cambodia Norodom Sihanouk have in common? They are already famous (or infamous) yet feel the need to express themselves right into the "blogosphere."²

**The King in a carriage may ride,
And the Beggar may crawl at his side;
But in the general race,
They are traveling all the same pace**

—Edward Fitzgerald (1809-1893)

The New Intellectual Property

The assets of an estate used to include land and livestock and a bible. An author or artist might bequeath publishing rights to a work, but the time frame for these rights was considerably shorter than today.

In the United States, the Copyright Act of 1790 established a copyright duration of 14 years with a 14-year renewal. This was doubled in 1909 and extended nine times until 1976 when the term became the life of the author plus 50 years. Even that was extended an extra 20 years by the Sonny Bono Copyright Term Extension Act of 1998. Words for hire have terms for 95 years from the year of publication or 120 years from the year of creation.³

As a result, the long-term intellectual property estate is a reality...and not just for celebrities. Anyone creating or purchasing intellectual property rights has to consider the long-term potential of such assets.

And we are not just talking about copyrights any more. The bundle of rights that goes with copyrights also involves movie rights, merchandising rights, and the right to publicity for the author's identity, i.e., any protected idea that enters the public consciousness.

George Lukas, the creator of *Star Wars*, gave up \$500,000 of his director's salary on the second *Star Wars* movie in return for merchandising rights. *Star Wars* merchandise reportedly has had sales of \$9 billion since the movies began arriving in 1977.

Business After Death

The death of a writer, artist, or other creative genius is not the end of the artist's economic potential. The rapper Tupac Shakur had recorded many unreleased tracks when he was gunned down. As a result, he's released more albums after his death than when he was alive.

In fact, some enterprises may be conceived after an artist's death. The estate of Jerry Garcia of the Grateful Dead launched a successful line of ties with the deceased musician's artwork after his death.

The estate of J.R.R. Tolkien allowed the movie rights to *Lord of the Rings* go for relatively little because making such a long movie with so many special effects would be difficult and expensive and might otherwise not happen. And with a new movie, there has been renewed interest in the books as well as all kinds of merchandise.

Ian Fleming wrote 14 books featuring the James Bond character before his death in 1964, but the Bond movie franchise will be cranking out the 21st Bond movie in 2007.

Names have value, even posthumously. In a case of first impression, a best-selling author's name was valued for estate-tax purposes. The IRS valued the name at \$1.24 million and assessed a tax deficiency of \$649,201. However, the District Court applied a 33% discount based on the speculative nature of ghostwriting books under the V.C. Andrews name after her death. The author's name was valued at \$703,500 for estate-tax purposes. *Andrews v. U.S.*, U.S. District Court, E.D., Va. (1994).

The King Is Dead...

...but his estate lives on! Elvis Presley died August 16, 1977. Elvis Presley Enterprises was founded by Priscilla Presley, his former wife, in 1980 and it not only continues to thrive, but has remained at the top of the *Forbes* magazine list of the top-earning "dead celebrities."

The Presley business endeavors reportedly grossed \$37 million in 2002, \$40 million in 2003 and \$40 million in 2004. In 2002, Elvis tunes showed up in a cartoon movie, *Lilo and Stitch*. In addition, a new version of *A Little Less Conversation* was featured in a

television ad for the World Cup and ended up as the number-one single in the United Kingdom for four weeks.

In 2003, a techno version of *Rubberneckin'* was used in a Toyota commercial and a compilation of 30 #1 hits sold more than nine million copies around the world. In 2004, Elvis appeared on Miller beer cans and had 100 other licensees for his name or image.

Yet as the fans of Elvis age and move on, the legacy and stream of revenues are threatened. The number of fans making the pilgrimage to Graceland has been declining.

In December, 2004, the sole heir of the Presley estate, Lisa Marie Presley, sold 85% of the estate to businessman Robert Sillerman in a deal worth \$100 million.

“My greatest responsibility to my father is to preserve and protect his legacy, and this is an exciting new structure that opens up an incredible array of opportunities to do just that,” Lisa Marie Presley said in a formal statement.

Still Swinging

How long can an estate market the music of a deceased star? Consider the estate of depression-era bandleader Glenn Miller.

With hits like “Tuxedo Junction,” “In The Mood,” and “Pennsylvania 6-5000,” the Glenn Miller Orchestra was on top. But in 1944, Glenn Miller’s plane went down in the English Channel. After one year he was presumed dead.

Glenn Miller’s last will and testament did not contain an express provision bequeathing his publicity rights, trademarks, or other intellectual property rights. His widow, Helen Miller, inherited the residue of his will, which would include whatever intellectual property rights he had.

In 1956, 12 years after the musician’s death there was litigation over acetate recordings of propaganda radio broadcasts made by Glenn Miller while he was in the United States Army during World War II.

Left alone, Miller’s musical legacy would have evaporated. Yet with business guidance, the Miller estate has kept the music alive.

In 1956, the Glenn Miller Productions (GMP) was founded to operate and license musical and merchandising endeavors. Miller’s widow Helen licensed the late bandleader’s name, likeness, and music to GMP for \$1.00 but GMP was paying Helen Miller \$13,000 annually.

After Helen Miller’s death in 1966, her two adopted children filed various lawsuits. A settlement netted them \$50,000 apiece. By 1983, GMP’s annual revenues had reached \$2 million. But in the 1990s, the Miller children began certain licensing activities.

Things came to a head in a 2004 lawsuit. In, *Miller v. Glenn Miller Productions*, (C.D. Cal. 2004), the Miller heirs argued that GMP’s 1956 license to use intellectual properties did not allow it to sublicense the assets to third parties. GMP successfully moved for summary judgment based on the 1980 settlement and laches.

One might correctly conclude that once something has become popular, people will fight over every scrap of the remains forever.

An Endless Sunset

Time moves on for everyone. No matter how bright the sun has shone on a career, there comes a sunset. In the grand scheme of the ages, a 20-year career on top seems like no more than...15 minutes of fame. Everything is relative.

Within the heart of the average person beats the desire to be celebrated, and if people write books, compose music, seek world records, run for public office, or come up with one great quote like Andy Warhol, they want to be remembered on their own terms. Once you’ve tasted your 15 minutes of fame, is it so wrong to want individual immortality?

Why not reach for the stars?

TECHNICAL REFERENCES

1. The original 1968 Warhol quote was in a catalogue for an exhibition of his art in Stockholm, Sweden. Today, that quote is arguably more famous than Warhol himself. The quote is used constantly in numerous forms such as “your 15 minutes are up.” One website offers to spotlight your home page for 15 minutes while another takes a daily poll of what has achieved 15 minutes of fame. In 1979, Warhol revised his original quote in describing the infamous New York nightclub Studio 54: “It’s the place where my prediction from the sixties finally came true: ‘In the future everyone will be famous for fifteen minutes.’ I’m bored with that line. I never use it anymore. My new line is, ‘In fifteen minutes everybody will be famous.’”
2. A “blog” is an online stream-of-consciousness diary. “Blogsphere” is the online community of bloggers.
3. Moshman, *Developments in Intellectual Property*, *The Estate Analyst* (May, 2003). Moshman, *Estates & Intellectual Property*, *The Estate Analyst* (April, 1998)(reprinted in *Trusts & Estates*, September, 1998). Note: Publicity rights to one’s name and face are a developing area of intellectual property. Publicity rights are marketable commodities with protections ranging from 10 to 100 years, depending on applicable state laws.

Long -Term Intellectual Property Considerations for Estates

- Identify all intellectual property (IP) rights that are owned or could be created by the testator or which could be inherited or acquired. As a practical matter, you can't plan for assets that you aren't aware of. And the value of works in the future may depend on the care with which they were authenticated early on.

- What other related assets are out there? Are there early works? Five plays by Tennessee Williams were discovered more than 20 years after he died. Just recently, a package with 32 early works by Jackson Pollock was discovered in a wainscot storage locker. Their value may be as high as \$10 million. However, in 2004, a single drip painting by Pollock, "Number 12," sold for \$11.65 million at Christie's.

- A discovery of such a cache which is then placed in the marketplace can depress the value of all works by Pollock just by the rules of supply and demand. Some authors and artists may feel that earlier works, drafts, rough sketches, etc. do not represent the artist and should therefore be destroyed or restricted from public view.

- Similarly, artifacts and memorabilia of every kind take on value over time. Ruby slippers worn by Judy Garland in the 1939 film, *The Wizard of Oz* sold for \$165,000 in 1988 but were auctioned for \$666,000 in 2000.. Three works painted in 1957 by Congo, the Cezanne of the ape world, will be auctioned by Bonham's in June, 2005.

- Consider how time may also diminish value. In the immediate aftermath of a national story about a runaway bride from Georgia, a New Jersey man sketched Jennifer Wilbanks on a piece of toast and auctioned it for \$15,400 on Ebay. But days later the buyer's enthusiasm apparently waned and he reneged on the bid.

- Consider how changing technology may affect these properties. At one time, recording artists had contracts addressing phonograph recordings, never contemplating 8-track, cassettes, MP3 players, compact discs, and whatever is coming next.

- Identify state, federal, and international laws that apply for every jurisdiction where assets are to be marketed or sold.

- Review how and where original manuscripts, photos, costumes, or other physical assets associated with intellectual property will be stored.

- Which trustees or executors will exercise the final authority over how intellectual property assets will be utilized, displayed, or performed? Discuss the testator's intentions and preferences for assets. Is the maximum commercial exploitation of the assets intended as opposed to making art accessible in museums or maintaining the quality and integrity of performances? For example, copyright owners of *Big River* (based on Twain's *Huckleberry Finn*, recently stopped a performance of a play because the racial role reversals of the main characters undermined the central message of the author's work. In conjunction with the selection of agents and representatives, clarify the owner's guidelines on the future usage of intellectual property, with particular specificity as to the commercial uses for which publicity rights may be used.

- Establish a system to maintain intellectual properties to enable those entrusted with their care to know when each trademark, patent, or copyright needs to be renewed, which contracts need to be policed, and when such properties will become part of the public domain.

- Contemplate the long-term viability of assets. Even an icon such as Elvis Presley, who led all "dead celebrities" in revenues, may require a new infusion of cash and enthusiasm to keep going.

- Confirm that trademarks remain in continuous use and are policed to avoid the abandonment doctrine.

- Identify suitable charitable donees.

- Consider the use of revocable living trusts to guide the use of IP assets yet remain flexible during the testator's lifetime.

- Consider long-term trusts to receive, manage, and distribute income generated by IP assets after death.

- Identify which family members shall own, benefit from, and/or control IP assets.

- If liquidity is needed, which works can be sold or what criteria or priorities can be used to decide?

- Establish values for assets, but more significantly, establish a valuation method that will avoid disputes, provide a fair basis for the distribution and sale of assets, and meet the requirements of tax authorities.