

ENDORISING AFTER DEATH

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ABSTRACT

An endorsement is an act of giving one's public support to a person, product, service, or cause; accordingly, it might seem impossible for someone to make an endorsement after they have died. Nevertheless, posthumous endorsements have become commonplace in social media marketing and have been increasingly embraced by trademark and unfair competition laws. Entities representing Marilyn Monroe, for example, have successfully brought trademark claims for the unauthorized use of Monroe's name, have successfully brought false endorsement claims under section 43(a) of the Lanham Act, and regularly have promoted products through the Instagram-verified "@marilynmonroe" page. Marilyn Monroe survives today as a highly paid celebrity endorser even though she died almost sixty years ago and her "estate" is controlled by individuals without any personal connection to her.

This Article closely examines the growing body of posthumous endorsement law and sets forth a new framework that better respects both the agency of the deceased as well as the continuing bonds between the deceased, their fans, and their families. Intellectual property (IP) scholars have critiqued other forms of postmortem IP, such as copyright and publicity rights, but this Article shows that

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posthumous endorsement rights pose unique and largely unaddressed concerns.

First, these rights frequently pose a continuity problem: courts have allowed endorsement rights to shift from the decedent, to their heirs, to unrelated third parties without acknowledging just how differently situated each of these entities is with respect to the communicated endorsement. Second, these rights pose discursive problems: they allow rightsholders to speak in the “official” voice of the decedent, leveraging the individual’s continuing cultural influence into commercial and political endeavors that emerge long after their death. Third, these rights pose dignitary concerns: individuals are often symbolically brought back from the dead without their consent and forced to speak on behalf of entities that have purchased their goodwill on the open market.

Nonetheless, there are some important reasons for IP laws to recognize at least some form of posthumous endorsement rights. Marketing scholarship has shown that posthumous endorsements are often material to consumers, and there is a shared interest among the decedent, their fans, and their families in shutting down false suggestions that a good or service received the decedent’s blessing. Accordingly, this Article proposes that courts only recognize posthumous endorsement rights where there is both “privacy and power.” An entity can only meaningfully endorse goods or services on behalf of a decedent—or affirmatively disclaim their approval—when they (1) own the image, word, or symbol that is signaling endorsement and (2) are empowered to make legal decisions on the decedent’s behalf. Only when an individual is empowered to step into the shoes of a decedent, and required to act in the decedent’s best interests, can the individual fairly and accurately speak for the dead.

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INTRODUCTION

The dead were extremely vocal in 2020. In January, fresh off her first gold-certified single in twenty years, Whitney Houston promoted an international hologram tour,¹ which was sadly cut short by the COVID-19 pandemic.² Throughout the pandemic, Houston³ and other deceased celebrities such as Tupac Shakur,⁴ Bob Marley,⁵ Bob Ross,⁶ and Jimi Hendrix⁷ actively promoted branded face masks through their official, checkmark-verified Instagram pages.⁸ As Black Lives Matter protests arose throughout the United States, the official Instagram accounts of Amy Winehouse, Marilyn Monroe, Muhammad Ali, Elvis Presley, The Notorious B.I.G., and John Lennon participated in #BlackoutTuesday, posting black squares meant to publicly signal solidarity with the movement.⁹ And as the

1. Whitney Houston (@whitneyhouston), INSTAGRAM (Jan. 22, 2020), <https://www.instagram.com/p/B7oG59NDveF/> [<https://perma.cc/HD5Q-MQCZ>].

2. See Daniel S. Levine, *Whitney Houston Hologram Las Vegas Show Slammed by Fans as “Morally Wrong,”* POPCULTURE (July 22, 2021, 11:49 PM), <https://popculture.com/music/news/whitney-houston-hologram-las-vegas-show-slammed-fans-morally-wrong/#:~:text=The%20show%20was%20originally%20supposed,in%20February%20and%20March%202020> [<https://perma.cc/D24G-K5P5>].

3. Whitney Houston (@whitneyhouston), INSTAGRAM (Aug. 28, 2020), <https://www.instagram.com/p/CEb4FEvoRcz/> [<https://perma.cc/QV7P-ZDVU>] (“The light purple Whitney masks are selling fast! Don’t wait—click the link in bio to get yours today!”).

4. Tupac Shakur (@2pac), INSTAGRAM (May 12, 2020), <https://www.instagram.com/p/CAGG3GNg0fZ/> [<https://perma.cc/4KUY-EYX8>] (“New face coverings available now.”).

5. Bob Marley (@bobmarley), INSTAGRAM (May 21, 2020), <https://www.instagram.com/p/CAAdjGaTp70S/> [<https://perma.cc/34M9-7J6D>] (“We’ve got you covered!”).

6. Bob Ross (@bobross_thejoyofpainting), INSTAGRAM (Aug. 14, 2020), <https://www.instagram.com/p/CD38YMBgOIg/> [<https://perma.cc/YJ9V-N8K3>] (“Let’s put a happy little mask ... there.”).

7. Jimi Hendrix (@jimihendrix), INSTAGRAM (May 16, 2020), <https://www.instagram.com/p/CAQWjUVINKz/> [<https://perma.cc/9UFR-Q3W8>] (“Stay safe. Look good staying safe.”).

8. A checkmark on an Instagram account indicates that “Instagram has confirmed that an account is the authentic presence of the public figure, celebrity or global brand it represents.” See Altnai Alamanova, *How to Get Verified on Instagram?*, SOCIALITY.IO, <https://sociality.io/blog/how-to-get-verified-on-instagram/#:~:text=It%20means%20Instagram%20has%20confirmed,or%20global%20brand%20it%20represents.%E2%80%9D> [<https://perma.cc/3B9S-VXZQ>]. See *supra* notes 3-7 and accompanying text for examples of the verified deceased celebrity accounts selling COVID-19 face masks through such accounts.

9. *E.g.*, Muhammad Ali (@muhammadali), INSTAGRAM (June 2, 2020), <https://www.instagram.com/p/CA77o6sp1KL/> [<https://perma.cc/6FQB-HY2X>]; Marilyn Monroe (@marilynmonroe), INSTAGRAM (June 2, 2020), <https://www.instagram.com/p/CA77kVmgF6t/>

presidential election approached, disputes ignited around whether deceased individuals such as Ronald Reagan and Tom Petty would have supported the Trump Campaign.¹⁰ Throughout all the major upheavals of 2020, endorsements by the deceased proved to be commercially, culturally, and politically valuable.

Intellectual property (IP) scholars have largely assumed that any exclusive sponsorship or endorsement rights granted to a person during their life must logically expire upon their death. For example, Professor Mark Lemley recently observed, “it is hard to argue with a straight face that a dead person is endorsing a product.”¹¹ This widely shared intuition reflects an understandable logic: dead people cannot affirmatively put their stamp of approval on a product, service, or cause that postdates them. Ordinarily when we think of an individual endorsing a product, it involves some voluntary act of association or approval,¹² but this definition is hard to square with endorsements that occur long after that person has died.

Trademark and unfair competition laws, however, increasingly diverge from these scholarly intuitions and instead reflect the growing commercial and cultural practices of posthumous endorsement. Even if an individual has died, those who inherit their trademark

[<https://perma.cc/Q6HB-XET4>]; Amy Winehouse (@amywinehouse), INSTAGRAM (June 4, 2020), <https://www.instagram.com/p/CBA55r5Jd4i/> [<https://perma.cc/7ZS3-WYHB>]; Elvis Presley (@elvis), INSTAGRAM (June 2, 2020), <https://www.instagram.com/p/CA77hyYjQmB/> [<https://perma.cc/UA47-X2KB>]; The Notorious B.I.G. (@thenotoriousbig), INSTAGRAM (June 2, 2020), <https://www.instagram.com/p/CA7M2MZhDAp/> [<https://perma.cc/U57W-HJSJ>]; John Lennon (@johnlennon), INSTAGRAM (June 2, 2020), <https://instagram.com/p/CA7aUN4JL34/> [<https://perma.cc/2GX6-G282>].

10. See Karen Tumulty, *Reagan Foundation to Trump, RNC: Quit Raising Money off Ronald Reagan's Legacy*, WASH. POST (July 25, 2020), <https://www.washingtonpost.com/opinions/2020/07/25/reaganfoundation-trump-rnc-quit-raising-money-off-ronald-reaganslegacy/> [<https://perma.cc/LD9J-2W9J>]; Tom Petty (@tompetty), TWITTER (June 20, 2020, 10:22 PM), <https://twitter.com/tompetty/status/1274527971513004033> [<https://perma.cc/YJX3-AP2B>] (“Tom Petty would never want a song of his used for a campaign of hate. He liked to bring people together.”).

11. Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1173 (2019).

12. See, e.g., William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1127 (“The baseline of a true endorsement should be defined as an accurate and voluntary declaration of support.” (emphasis omitted)); see also FTC Guide Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1 (2020) (“Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.”).

rights retain the exclusive rights to control indications of endorsement by the deceased and to enter into lucrative endorsement deals in their name.¹³ Numerous courts have allowed federal Lanham Act claims in which there is a likelihood of confusion as to sponsorship or endorsement by the decedent, their estates, or their successors in interest.¹⁴ These three entities are often materially different from each other, but trademark law collapses them together in service of a thriving industry of posthumous endorsement.¹⁵

This Article evaluates the growing body of posthumous endorsement law and shows numerous ways in which this area of law risks misleading consumers, distorting discourse, and degrading the legacy of the deceased. First, posthumous endorsement law presents a continuity problem.¹⁶ Lanham Act case law often overlooks the significance of property transfers from the decedent to their direct heirs to unrelated third parties and obscures just how differently situated each of these entities may be with respect to the decedent's surviving fans, family, and friends.

For example, the Estate of Marilyn Monroe, LLC—a successful posthumous endorsement litigant¹⁷—is owned and operated by

13. See, e.g., David Rowell, *The Spectacular, Strange Rise of Music Holograms*, WASH. POST MAG. (Oct. 30, 2019), <https://www.washingtonpost.com/magazine/2019/10/30/dead-musicians-are-taking-stage-again-hologram-form-is-this-kind-encore-we-really-want/> [<https://perma.cc/6NBE-ZUL8>]; Ed Christman, *Primary Wave Acquires Share of Bob Marley's Music Catalog*, BILLBOARD (Jan. 13, 2018), <https://www.billboard.com/articles/news/8094231/primary-wave-acquires-share-bob-marley-publishing-catalog-blackrock-blue-mountain-music> [<https://perma.cc/SQ6A-CKC4>] (describing \$50 million deal); *The Estate of Michael Jackson and ABG Partner to Expand the Michael Jackson™ Brand Worldwide*, PR NEWSWIRE (Apr. 29, 2015), <https://www.prnewswire.com/news-releases/the-estate-of-michael-jackson-and-abg-partner-to-expand-the-michael-jackson-brand-worldwide-300074050.html> [<https://perma.cc/AWZ7-AFCZ>].

14. See, e.g., *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 304 (S.D.N.Y. 2019); *Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 913 (E.D. La. 2017); *Experience Hendrix, LLC v. Tiger Paw Distribs., LLC*, 119 U.S.P.Q.2d 1004, 1013 (S.D. Ga. 2016), *order amended by* No. CV 416-107, 2016 WL 3963079 (S.D. Ga. July 21, 2016); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1067 (9th Cir. 2015); *Erickson Beamon Ltd. v. CMG Worldwide, Inc.*, No. 12 Civ. 5105, 2014 WL 3950897, at *8 (S.D.N.Y. Aug. 13, 2014); *Branca v. Mann*, 103 U.S.P.Q.2d 1993, 1999 (C.D. Cal. 2012); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1011 (3d Cir. 2008); *Experience Hendrix, LLC v. Elec. Hendrix, LLC*, 90 U.S.P.Q.2d 1883, 1889-90 (W.D. Wash. 2008); *Ferrer v. Maychick*, 69 F. Supp. 2d 495, 502 (S.D.N.Y. 1999).

15. See, e.g., *A.V.E.L.A., Inc.*, 364 F. Supp. 3d at 301-02.

16. See *infra* Part III.A.

17. See *A.V.E.L.A., Inc.*, 364 F. Supp. 3d at 327.

individuals with no personal connection to Monroe.¹⁸ Accordingly, her current rightsholders have little insight into what she would have thought about mask-wearing during a pandemic, Black Lives Matter, or the highly gendered commercial endeavors that she continues to be associated with.¹⁹ When Marilyn Monroe's name officially appears on goods and services today, there is nothing to indicate to consumers who precisely is pulling the strings of posthumous endorsement or who benefits from the products she is urging customers to buy.²⁰ Trademark law typically prohibits transfers of a mark in gross—in other words, without the goodwill associated with the original owner²¹—but in the posthumous endorsement context, courts repeatedly lump together the decedent, heirs, and assignees where there is suggestion of endorsement by an undefined and nebulously labeled “estate.”²²

Second, posthumous endorsement laws present a variety of discursive problems—that is, they give rightsholders substantial control over the decedent's legacy and public meaning.²³ Posthumous assertions of trademark law allow a successor in interest to control the “official” statements of the decedent about a particular topic, and such official messaging has a tendency to produce a white-washed, oversimplified, and maximally marketable portrait of the decedent. For example, in promoting the Whitney Houston hologram tour, the marketing company that purchased 50 percent of her estate emphasized that “Whitney was America's sweetheart, and the

18. See *The Entrepreneur Keeping Marilyn Monroe Alive*, FORBES (Oct. 31, 2018, 9:00 AM), <https://www.forbes.com/video/5855494792001/#4e4115e451aa> [<https://perma.cc/92ES-C7UH>].

19. See *id.*

20. See *id.*

21. See 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:3 (5th ed. 2021) (“If one obtains a trademark through an assignment in gross, divorced from the good will of the assignor, the assignee obtains the symbol, but not the reality. Any subsequent use of the mark by the assignee may be in connection with a different business, a different good will and a different type of product. The continuity of the thing symbolized by the mark is broken.”).

22. See, e.g., *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1073 (9th Cir. 2015) (“[T]his court already treats a celebrity's persona as identifiable intellectual property protectable under the Lanham Act. This property exists whether the holder is the celebrity or a successor in interest. Thus, the fact of the celebrity's death does not preclude a § 1125(a) claim.” (citation omitted)); *Branca v. Mann*, 103 U.S.P.Q.2d 1993, 1998-99 (C.D. Cal. 2012) (“Nor is it relevant to this analysis that Jackson is deceased and that his estate is therefore asserting his rights.”).

23. See *infra* Part III.B.

idea now is to remind people that that is what her legacy is.”²⁴ Fans of Houston are certainly aware of alternative, less-than-sweet legacies associated with the singer.²⁵

Moreover, where a decedent has a devoted base of political supporters, such as Ronald Reagan or Martin Luther King, Jr., whoever obtains that person’s endorsement rights can hold a lot of leverage in political discourse moving forward.²⁶ Reagan’s and King’s legacies are both highly prized and highly contested, but trademark law allows family members and affluent assignees to weigh in on such legacies in their official voices.²⁷ In other areas of IP, in particular copyright and publicity rights, scholars have been critical of post-mortem rights for allowing successors in interest to squelch celebrations, critical discussions, and academic research about a decedent.²⁸ Much less attention has been given to inherited trademark rights, which, unlike time-limited copyright and trademark rights, give rightsholders potentially perpetual control over the decedent’s cultural voice.²⁹

Third, posthumous endorsement rights present significant dignitary concerns. Through inherited endorsement rights, rightsholders can culturally resurrect a decedent with ongoing commercial value and give them a voice in connection with activities that they might have had little interest in supporting.³⁰ Legal scholars in other contexts have increasingly recognized that the dead retain autonomy, dignitary, and reputational interests after they pass.³¹ These

24. Ben Sisario, *Whitney Houston’s Estate Plans a Hologram Tour and a New Album*, N.Y. TIMES (May 20, 2019), <https://www.nytimes.com/2019/05/20/business/media/whitney-houston-hologram-album.html> [https://perma.cc/QVL4-W2WF].

25. See, e.g., *New Documentary Explores Whitney Houston’s Sexuality, Drug Use*, ABC NEWS (Aug. 22, 2017, 8:17 AM), <https://abcnews.go.com/Entertainment/documentary/documentary-explores-whitney-houstons-sexuality-drug/story?id=49343037> [https://perma.cc/MH45-ZKEN].

26. See Tumulty, *supra* note 10; Mike Masnick, *Tarnishing The History of Martin Luther King Jr.: Copyright Enforcement Edition*, TECHDIRT (Feb. 5, 2018, 3:38 PM), <https://www.techdirt.com/articles/20180205/14355439159/tarnishing-history-martin-luther-king-jr-copyright-enforcement-edition.shtml> [https://perma.cc/X2YR-Y6CD].

27. See, e.g., Masnick, *supra* note 26; Tumulty, *supra* note 10. Reagan and King’s names and distinctive phrases are subject to numerous registered trademarks. See, e.g., RONALD REAGAN, Registration No. 5,167,497; I HAVE A DREAM, Registration No. 75,019,950.

28. See generally Andrew Gilden, *IP, R.I.P.*, 95 WASH. U. L. REV. 639 (2017) (summarizing critiques).

29. See *infra* Part III.C.

30. See, e.g., FORBES, *supra* note 18.

31. See, e.g., Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471,

interests appear to be highly salient in certain forms of posthumous endorsement, in which rightsholders hold out the decedent as affirmatively supporting a product or cause.

In the #BlackoutTuesday context, deceased celebrities are being conscripted into a highly polarized political debate in a way they might have objected to, based upon the rightsholder's perception that their participation would increase the value of their brand.³² In the COVID-19 face mask context, the deceased celebrity's name is being used to commercialize public health needs in a manner that potentially exploits both the decedent and the vulnerabilities of their fans. For example, in response to an Instagram post promoting Bob Ross face masks, one user commented, "[t]his seems very non Bob Ross. Profiteering during a pandemic using a deadman's [sic] likeness."³³ Posthumous endorsements risk reanimating and giving voice to the deceased, without their consent, in contexts that they may have objected to.

Although there are serious problems with posthumous endorsement rights, there are at least two compelling reasons not to completely abolish this growing body of law.³⁴ First, advertising and marketing scholarship has demonstrated that posthumous endorsements can be material to consumers. A substantial body of scholarship has shown that through consuming endorsed products, fans of the decedent can process their grief, maintain a sense of connection with the deceased, reconnect with cherished memories of their youth, and support the decedent's charitable causes and surviving family members.³⁵

Second, posthumous endorsement rights in certain contexts can *prevent* exploitation of the deceased. Although posthumous endorsements do often reanimate the deceased without their consent, posthumous endorsement rights have been asserted in order to stop third parties from capitalizing on the commercial value of

1491 (2020); DON HERZOG, DEFAMING THE DEAD 103-05 (2017).

32. For example, in response to Elvis Presley's June 2 post, one of his Instagram followers commented, "[t]his should be deleted. Elvis kept his politics to himself but he loved our police officers and our country. He would not have supported the defund the police/destroy America movement." Elvis Presley, *supra* note 9 (comment by user @ryanmoore).

33. Bob Ross, *supra* note 6 (comment by user @cooperbcarr).

34. See *infra* Part III.D.

35. See, e.g., Gilden, *supra* note 28, at 691-92.

decedents. False endorsement claims have been brought on behalf of decedents of color who were the victims of various forms of lifetime discrimination and who continue to be exploited postmortem without attribution or compensation.³⁶

This Article accordingly proposes a new framework for recognizing the potential value of posthumous endorsement rights while reining in their excesses. Rather than recognize endorsement rights in whatever entity inherits or purchases the decedent's trademarks and/or persona rights, courts should only recognize endorsement rights where there is both "privity" and "power."³⁷ A putative rights-holder should be required to show not just that they are the successor in interest to the name, image, or symbol being used to signal endorsement (that is, the privity requirement), but also that they are legally empowered to make binding decisions on behalf of the deceased, for example as the decedent's personal representative or trustee.³⁸ Most of the dangers of posthumous endorsements occur when there is no formal estate plan and no ongoing fiduciary obligation to the decedent. A "privity and power" framework would both strongly nudge the living to plan for posthumous decision-making and impose obligations on transferees to consider the ongoing interests of the decedent alongside their own financial interests.

An endorsement is a voluntary exercise of an individual's agency, and such exercise can only meaningfully occur after a person's death when there is someone authorized to stand in their shoes and make decisions on their behalf. By ensuring that rightsholders are acting in some form of fiduciary capacity, the transition from the decedent

36. See, e.g., *Brooks ex rel. Est. of Bell v. Topps Co.*, 86 U.S.P.Q.2d 1361, 1362-63 (S.D.N.Y. 2007); *Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 911-12 (E.D. La. 2017); see also Josh Peter, *Cashing in on George Floyd: T-Shirts, Pillows, Running Shoes and Even Underwear Are Being Sold, Some of It Through Amazon*, USA TODAY (June 26, 2020, 11:55 AM), <https://www.usatoday.com/story/money/2020/06/15/george-floyd-death-protests-lead-merchandise-sales-amazon/5337489002/> [<https://perma.cc/HAQ2-XLFZ>]; Lori Jane Gliha, *"Elijah McClain" Trademarked in Colorado*, FOX 31 KDVR (July 17, 2020, 12:16 PM), <https://kdvr.com/news/local/elijah-mcclain-trademarked-in-colorado/> [<https://perma.cc/6LY3-PM6L>].

37. See *infra* Part IV.B.

38. Analogous decision-making frameworks exist in the contexts of attorney-client and doctor-patient privileges, HIPAA, and the Stored Communications Act. See *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 776 (Mass. 2017) ("[P]ersonal representatives provide consent lawfully on a decedent's behalf in a variety of circumstances under both Federal and common law.").

to their successors is less likely to represent a qualitative break from the decedent's prerogative and more likely to represent a meaningful transfer of the decedent's goodwill. Posthumous endorsement law in its current form places far too much emphasis on *ownership* of the decedent's name or image and far too little emphasis on the *stewardship* necessary to meaningfully respect both the dignity of the deceased as well as the vulnerability of living individuals who retain strong attachments to them.

The case law surrounding posthumous endorsements focuses on endorsements by celebrities and other public figures, but the challenges of posthumous agency and stewardship revealed in these cases apply much more broadly. Due to the pervasive use of social media accounts that typically outlive their creators, nearly everyone today will at some point experience a "social afterlife" that is controlled by the individuals that survive them.³⁹ And emerging technologies, such as personalized holograms and Artificial Intelligence (AI)-driven chatbots, increasingly allow everyday individuals to reanimate the dead and put them to whatever sentimental or economic use they choose.⁴⁰ It is therefore becoming increasingly important for scholars to conceptualize the ongoing cultural role of the deceased and for the legal system to put in place mechanisms for responsible stewardship of the social afterlife. The law and practices of posthumous endorsement highlight these emerging challenges.

Part I introduces the commercial practices of posthumous endorsement. Drawing from existing scholarship on endorsement, largely from advertising and marketing literature, it summarizes the appeal of posthumous endorsements for both brands and consumers, as well as the potential perils of posthumous endorsements gone wrong. Part II provides an overview of posthumous endorsement law. It juxtaposes IP scholars' dismissal of posthumous endorsement with a growing body of case law that expressly embraces

39. See Andrew Gilden, *The Social Afterlife*, 33 HARV. J.L. & TECH. 329, 346 (2020).

40. See, e.g., Tamara Kneese, *Death, Disrupted*, 8.1-2 CONTINENT 70, 70-71 (2019); Timothy Geigner, *Microsoft Patent: Chatbots Made from the Online Habits of Dead People*, TECHDIRT (Jan. 29, 2021, 7:39 PM), <https://www.techdirt.com/articles/20210128/09252046141/microsoft-patent-chatbots-made-online-habits-dead-people.shtml> [https://perma.cc/NTD2-YHJY]; *Kayne West Gives Kim Kardashian Birthday Hologram of Dead Father*, BBC NEWS (Oct. 30, 2020), <https://www.bbc.com/news/entertainment-arts-54731382> [https://perma.cc/4VN4-4MN5].

posthumous endorsement claims. These cases involve (1) Lanham Act claims based on the unauthorized use of personal name trademarks, such as JIMI HENDRIX,⁴¹ that have been transferred via will, trust, or intestacy; (2) Lanham Act claims based upon the use of a decedent's persona to confusingly suggest that the decedent or their estate sponsored or endorsed the defendant's goods or services; and (3) proceedings to cancel trademark registrations in the name of entities who are not the decedent's heirs. Part III sets forth the Article's main criticisms about the current state of posthumous endorsement law—namely, the potential for continuity, discursive, and dignitary problems. It then sets forth countervailing reasons for maintaining at least a narrow version of posthumous endorsement rights. Part IV proposes a “privity and power” framework for posthumous endorsement rights. It limits exclusive endorsement rights to those entities that are empowered to stand in the shoes of the decedent and bound to act in their best interests.

I. THE PRACTICES OF POSTHUMOUS ENDORSEMENT

Although the dead have played a role in commercial, cultural, and political enterprises for centuries, technological advances over the past thirty years have resulted in a substantial increase in the prominence of deceased celebrities in mass marketing and popular culture. These technological resurrection strategies have taken several forms. For example, improvements in video and photo editing software have enabled the repurposing of archived footage of deceased celebrities to meet contemporary commercial needs: footage of Steve McQueen driving a classic Mustang was edited to make him appear in a commercial for the (less-than-classic) Ford Puma;⁴² footage of Fred Astaire dancing with Ginger Rogers was edited to make him appear to dance with a Dirt Devil vacuum

41. See *infra* note 208 and accompanying text.

42. See Ben Hodges, *When Steve McQueen Made the Ford Puma “The King of Cool,”* DRIVE TRIBE (2017), <https://drivetribe.com/p/when-steve-mcqueen-made-the-ford-XRURwVbP SumBez8s5SoPtA?iid=JfBAXyiZRkymcXMntk9qpQ> [<https://perma.cc/458H-NKXJ>].

cleaner;⁴³ and John Wayne's face was digitally superimposed on a body double for a Coors advertisement.⁴⁴

In the early 2000s, advanced text-to-speech software was developed to inventory recordings of a person's speech and rearrange those recorded sounds in order to "put words in someone else's mouth" and "allow the dead to speak."⁴⁵ Such text-to-speech software, combined with advances in CGI "morphing" technologies, enabled the creation of entirely new footage of deceased celebrities.⁴⁶ Perhaps the most prominent example is actor Peter Cushing, who died in 1994, reprising his role of Grand Moff Tarkin in the 2016 film *Star Wars: Rogue One*.⁴⁷ Using similar technology, Bruce Lee has appeared in Johnnie Walker whiskey advertisements,⁴⁸ and James Dean has been recently cast in the movie *Finding Jack*.⁴⁹ Such recreations need not be entirely two-dimensional; deceased artists including Tupac Shakur, Michael Jackson, and Whitney Houston have all performed live via digital hologram technologies.⁵⁰

Social media has provided another substantial vehicle for the dead to continue influencing commercial and cultural activity

43. See Skip Wollenberg, *Fred Astaire Dances with Vacuums in Commercials Set for Super Bowl Debut*, ASSOCIATED PRESS (Jan. 8, 1997), <https://apnews.com/article/253758edc00908fc9f65d30cd7e6c4b2> [<https://perma.cc/V4GZ-QTNW>].

44. See Kara Kovalchik, *8 Dead Celebrities Brought Back to Life to Sell Stuff*, MENTAL FLOSS (Apr. 30, 2018), <https://www.mentalfloss.com/article/20659/dead-celebrities-brought-back-sell-stuff> [<https://perma.cc/X7MM-84G8>].

45. Denver D'Rozario & Frank K. Bryant, *The Use of Dead Celebrity Images in Advertising and Marketing—Review, Ethical Recommendations and Cautions for Practitioners*, 5 INT'L J. MKTG. STUD. 1, 4 (2013).

46. See *id.* at 3-4.

47. See Andrew Pulver, *Rogue One VFX Head: "We Didn't Do Anything Peter Cushing Would've Objected to,"* THE GUARDIAN (Jan. 16, 2017, 9:13 AM), <https://www.theguardian.com/film/2017/jan/16/rogue-one-vfx-jon-knoll-peter-cushing-ethics-of-digital-resurrections> [<https://perma.cc/27NX-WE47>].

48. See John Reynolds, *Bruce Lee Resurrected for Johnnie Walker Whisky Ad*, THE GUARDIAN (July 10, 2013, 9:26 AM), <https://www.theguardian.com/media/2013/jul/10/bruce-lee-johnnie-walker-whisky-ad> [<https://perma.cc/2LLR-WPF3>].

49. See Alex Ritman, *James Dean Reborn in CGI for Vietnam War Action-Drama*, HOLLYWOODREP. (Nov. 6, 2019, 6:10 AM), <https://www.hollywoodreporter.com/movies/movie-news/afm-james-dean-reborn-cgi-vietnam-war-action-drama-1252703/> [<https://perma.cc/YE6A-TYH6>].

50. See, e.g., Lulu Garcia-Navarro & Jason King, *"An Evening with Whitney" Hologram Tour Trades on the Image of a Complicated Star*, NPR (Feb. 23, 2020, 7:19 AM), <https://www.npr.org/2020/02/23/808322471/an-evening-with-whitney-hologram-tour-trades-on-the-image-of-a-complicated-star> [<https://perma.cc/G6KF-5YLW>].

postmortem. Just as living celebrities like Madonna and Kim Kardashian regularly post on Twitter or Instagram about everything from their children to politics to beauty products,⁵¹ the social media accounts of a wide range of celebrities remain active long after they have passed. Amy Winehouse's Instagram account posts messages in support of Black Lives Matter and showcases artwork created by devoted fans.⁵² Muhammad Ali's Instagram account similarly posts ongoing support for Black Lives Matter⁵³ and promotes commercial goods like Gatorade sports drinks.⁵⁴ Bettie Page's Instagram account promotes the sale of a wide range of merchandise, including lingerie and pandemic-era cloth face masks,⁵⁵ and Marilyn Monroe promotes everything from Snickers bars, to Zales jewelry, to gemstones, to teeth-whitening solutions, interspersed with holiday wishes, old photos, and, once again, support for Black Lives Matter.⁵⁶ Many of these deceased celebrity social media accounts are accompanied by prized blue check marks, indicating that these are authentic, verified accounts of the individual or brand they represent.⁵⁷

Accompanying the growing presence of deceased celebrity endorsers has been the emergence of a new industry of deceased celebrity agents, managers, and public relations specialists.⁵⁸

51. See Madonna (@madonna), INSTAGRAM, <https://www.instagram.com/madonna/> [<https://perma.cc/T4JK-EAWK>]; Kim Kardashian West (@KimKardashian), TWITTER, https://twitter.com/KimKardashian?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/GY8J-8CQF>].

52. See Amy Winehouse (@amywinehouse), INSTAGRAM, <https://www.instagram.com/amywinehouse/> [<https://perma.cc/Z69M-SDRV>].

53. See Muhammad Ali (@muhammadali), INSTAGRAM (June 11, 2020), <https://www.instagram.com/p/CBTI-NYjxDx/> [<https://perma.cc/545L-J2VR>].

54. See Muhammad Ali (@muhammadali), INSTAGRAM (June 2, 2021), <https://www.instagram.com/p/CPooSVYA7ut/> [<https://perma.cc/2T8X-F3UU>].

55. See Bettie Page (@bettiepage), INSTAGRAM, <https://www.instagram.com/bettiepage/> [<https://perma.cc/9RSZ-JYN9>].

56. See Marilyn Monroe (@marilynmonroe), INSTAGRAM, <https://www.instagram.com/marilynmonroe/> [<https://perma.cc/X5UU-W263>].

57. See *Instagram Help Ctr., Verified Badges*, FACEBOOK (2021), <https://www.facebook.com/help/instagram/854227311295302> [<https://perma.cc/4CB5-2XDX>]; see also Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851, 864 (2010).

58. See Steve Kroft, *How Celebs Make a Living After Death*, CBS NEWS (Sept. 25, 2009, 6:57 PM), <https://www.cbsnews.com/news/how-celebs-make-a-living-after-death-25-09-2009/> [<https://perma.cc/PHH4-JWQH>].

Licensing agents have worked with the families of deceased celebrities since the 1980s to navigate commercialization opportunities, such as authorizing tribute bands, releasing archived recordings, and licensing merchandise with the decedent's image.⁵⁹ Although the clients working with licensing agents are technically the decedents' families or other assignees of the decedent's trademark, copyright, and/or publicity rights, the commercial relationships presented to the public are framed as being between the agents and the deceased celebrities themselves. For example, the website of CMG Worldwide states that the R&B artist Aaliyah, who died in a plane crash in 2001, has been a "[c]lient since 2014."⁶⁰

In addition to entities like CMG, which work on behalf of celebrities and their estates,⁶¹ the past decade has seen a noticeable shift in the industry towards licensing companies outright purchasing the IP rights of deceased celebrities and accordingly gaining control over their "official" posthumous lives. The Authentic Brands Group has purchased the rights to Marilyn Monroe, Muhammad Ali, and Elvis Presley,⁶² and licensing entity Primary Wave Music has purchased James Brown's estate,⁶³ a controlling stake in Whitney Houston's estate,⁶⁴ and a substantial stake in Prince's estate.⁶⁵ With an increased financial stake and legal control over deceased celebrities, entities like Authentic Brands Group have entered into partnerships with "digital human technology" companies, like the Facebank Group, in order "to identify opportunities to license Facebank's

59. See Jake Halpern, *An Agent for Dead Celebrities*, NPR (Aug. 29, 2005, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=4822573> [<https://perma.cc/BS7L-RGGA>].

60. Aaliyah, CMG WORLDWIDE, <https://www.cmgworldwide.com/aaliyah/> [<https://perma.cc/3PQ4-3PVM>].

61. See *id.*

62. Paul Bond, *Elvis Presley's Rights Sold to Authentic Brands Group*, HOLLYWOOD REP. (Nov. 19, 2013, 3:47 PM), <https://www.hollywoodreporter.com/news/general-news/elvis-presleys-rights-sold-authentic-657924/> [<https://perma.cc/5HJE-N3M6>].

63. Cathy Applefeld Olson, *James Brown's Estate Sold to Primary Wave Music in Deal Estimated at \$90 Million*, FORBES (Dec. 13, 2021, 12:30 PM), <https://www.forbes.com/sites/cathyolson/2021/12/13/james-browns-estate-sold-to-primary-wave-music-in-deal-estimated-at-90-million/> [<https://perma.cc/8NY2-VL4Z>].

64. See Sisario, *supra* note 24.

65. See Ethan Millman, *Primary Wave Partners with Prince Estate!*, PRIMARY WAVE MUSIC (Aug. 2, 2021), <https://primarywave.com/primary-wave-partners-with-prince-estate/> [<https://perma.cc/PUP4-V25S>].

photo and hyper-realistic, computer-generated technology to third parties and bring ABG's iconic intellectual properties to life."⁶⁶

The explosion in commercial activities surrounding deceased celebrities suggests quite strongly that posthumous endorsements are perceived as being both persuasive and worthy of substantial financial investment. For purposes of evaluating the growing body of law that has emerged to support these posthumous endorsement practices, it is important to gauge why posthumous endorsement might be effective at motivating consumer activity. In addition to the small, but growing, body of advertising and marketing literature addressing posthumous endorsement, there is a larger body of scholarship that is useful in explaining why endorsements by celebrities—living or dead—can be so effective.

A. Theories of Celebrity Endorsements

The term “celebrity endorsements” has been defined in a few different ways within advertising and marketing scholarship. The most common definition posits the celebrity endorser as “any individual who enjoys public recognition and who uses this recognition on behalf of a consumer good by appearing with it in an advertisement.”⁶⁷ Other scholars view this definition as too narrow in that it both fails to account for endorsement activities in the political and nonprofit sectors and underemphasizes the contractual negotiation between celebrity and endorsee that precedes the endorsement.⁶⁸ Accordingly, a more recent definition of celebrity endorsement is “an agreement between an individual who enjoys public recognition (a celebrity) and an entity (e.g., a brand) to use the celebrity for the purpose of promoting the entity.”⁶⁹

66. *Facebook Announces Strategic Partnership with Authentic Brands Group*, INTRADOGLOBE NEWSWIRE (Feb. 11, 2020, 8:00 AM), <https://www.globenewswire.com/news-release/2020/02/11/1982990/0/en/Facebook-Announces-Strategic-Partnership-with-Authentic-Brands-Group.html> [<https://perma.cc/ZVB4-BKUT>].

67. Lars Bergkvist & Kris Qiang Zhou, *Celebrity Endorsements: A Literature Review and Research Agenda*, 35 INT'L J. ADVERT. 642, 643 (2016) (quoting Grant McCracken, *Who Is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 14 J. CONSUMER RSCH. 310, 310 (1989)).

68. *See id.* at 643-44.

69. *Id.* at 644.

Consumer endorsements have repeatedly been shown to be effective in motivating sales of consumer goods and in increasing consumer engagements with the endorsed brand. There are two schools of thought, however, on the mechanisms through which endorsements become effective.

Under “source models” of endorsement, a celebrity’s messages to consumers are persuasive based largely on the positive characteristics associated with the celebrity.⁷⁰ Credibility and authenticity are the most salient characteristics.⁷¹ If a celebrity is generally seen as being trustworthy and as having some basis for evaluating a particular good or service—for example, expertise in a domain or real-world usage—then the celebrity’s decision to associate themselves with that product signals to consumers that the endorsed good or service is worth consuming.⁷² For example, Michael Jordan is a credible endorser for athletic footwear, and Kylie Jenner is a credible endorser for a skincare line that visibly improved her complexion.⁷³ Another variant on the source model of endorsement emphasizes the likability and physical attractiveness of an endorser; if a consumer is attracted to a celebrity, for example Jennifer Aniston, they are more likely to purchase a product she is endorsing, for example Aveeno soap and lotions.⁷⁴

The source models, conversely, predict that endorsements are likely to fail where there is a mismatch between celebrity and endorsee or where a well-publicized scandal makes the celebrity appear less honest or attractive.⁷⁵ When there is no obvious reason to connect the celebrity with a particular product—for example,

70. See B. Zafer Erdogan, *Celebrity Endorsement: A Literature Review*, 15 J. MKTG. MGMT. 291, 297-302 (1999).

71. See *id.* at 297-98.

72. See *id.*

73. The FTC’s guidelines draw a distinction between an “endorsement,” in which an individual acts as a (typically paid) spokesperson for a particular brand, and a “testimonial,” in which an individual shares their own personal experience using a product. See *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N (Aug. 27, 2020), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [https://perma.cc/GG3M-3WGH]. Neither the scholarship on the psychology of effective celebrity marketing nor the false endorsement case law appear to draw a sharp distinction between these two scenarios.

74. See Erdogan, *supra* note 70, at 299, 301-02.

75. See *id.* at 302-04.

Ozzy Osbourne and I Can't Believe It's Not Butter⁷⁶—the source model literature hypothesizes that the celebrity will be viewed as bought off, and their endorsement will not motivate purchasing behavior or consumer engagement.⁷⁷ Similarly, the value of a celebrity endorsement may decrease substantially when they have engaged in some behavior seen as dishonest or unappealing.⁷⁸ Accordingly, following revelations of Tiger Woods' extramarital affairs, numerous brands distanced themselves from their former endorser.⁷⁹

The second major conceptual model of celebrity endorsement is the “Meaning Transfer Model” developed by cultural anthropologist Grant McCracken.⁸⁰ This model sees the celebrity endorser as representing a constellation of cultural meanings distilled from their professional exploits (for example, songs they have sung or characters they have played) and their personal activities (for example, charitable giving or adopting children).⁸¹ The goal of the endorsement process, in this model, is to include the endorsed brand in this constellation of meaning, thereby symbolically transferring qualities associated with the celebrity onto the product.⁸² When consumers purchase the endorsed product, the Meaning Transfer Model views this act as an attempt by consumers to transfer those qualities onto themselves, thereby constituting both consumption and a form of self-definition.⁸³ For example, when consumers purchase Air Jordans, they want to “Be Like Mike,” at least symbolically.⁸⁴ The Meaning Transfer Model emphasizes that the power of celebrity endorsements stems not just through credible, authentic pushing

76. See Weston Gardner, *Celebrity Endorsements Are the Worst. Why Do So Many Companies Use Them?*, BETTER COPY (Aug. 13, 2015), <https://bettercopy.org/2015/08/13/celebrity-endorsements-are-the-worst-why-do-so-many-companies-use-them/> [<https://perma.cc/5ZH3-SRK8>].

77. See Erdogan, *supra* note 70, at 303.

78. See *id.* at 299.

79. See Chris Hackley & Rungpaka Amy Hackley, *Marketing and the Cultural Production of Celebrity in the Era of Media Convergence*, 31 J. MKTG. MGMT. 461, 472 (2015).

80. See generally McCracken, *supra* note 67, at 312.

81. See *id.* at 313-14.

82. See *id.* at 316.

83. See *id.* at 317.

84. See Gavin Evans, *'Be Like Mike': The Story Behind Michael Jordan's Iconic Gatorade Commercial Song*, COMPLEX (May 6, 2016), <https://www.complex.com/sports/2016/05/be-like-mike-michael-jordan-gatorade-commercial-song> [<https://perma.cc/M7J3-NQSS>].

of a product in front of consumers, but also by building up a broad range of positive associations with the celebrity.⁸⁵ This means that charitable or political work is not peripheral to the commercial value of a celebrity identity; it is deeply connected.

The Meaning Transfer Model highlights a range of pitfalls for celebrity endorsements. The constellation of cultural meaning of a celebrity is often highly dynamic and contested, and may mean different things to different people. For example, when Donald Trump appears to publicly endorse Goya food products,⁸⁶ the Goya brand may absorb a wide range of cultural meanings depending upon the political persuasion of particular consumers. In the eyes of Trump's detractors, his endorsement may not just be ineffective at motivating purchases, as the source models might conclude, but it may contaminate the Goya brand with negative characteristics often associated with him.⁸⁷ Or when J.K. Rowling makes public statements hostile to transgender people, public perceptions of transphobia can contaminate the book, movie, and merchandise franchises associated with her.⁸⁸

Moreover, recent examinations of the Meaning Transfer Model have shown that transference is bi-directional. The cultural meanings associated with the endorsed product, or even of the consumers of the endorsed product, can transfer "back" onto the celebrity.⁸⁹ For example, celebrity chef Jamie Oliver was a prominent endorser of the British grocery store company Sainsbury's.⁹⁰ Although he was

85. See McCracken, *supra* note 67, at 313.

86. Marc Caputo, *Struggling with Latinos, Trump Hypes Goya Food Fight*, POLITICO (July 15, 2020, 7:27 PM), <https://www.politico.com/news/2020/07/15/trump-latino-support-goya-2020-364856> [<https://perma.cc/N3HF-NUFY>].

87. See McCracken, *supra* note 67, at 316.

88. See Emma Pocock, *U.S. Harry Potter Book Sales Underperforming, According to Recent Industry Figures*, FORBES (July 19, 2020, 2:48 PM), <https://www.forbes.com/sites/emmapocock/2020/07/19/us-harry-potter-book-sales-underperforming-according-to-recent-industry-figures/?sh=409ef549464b> [<https://perma.cc/PRQ7-WEWS>].

89. Elina Halonen-Knight & Leila Hurmerinta, *Who Endorses Whom? Meanings Transfer in Celebrity Endorsement*, 19 J. PROD. & BRAND MGMT. 452, 459 (2010). Legal scholar Professor David Tan has examined the Meaning Transfer Model in the context of the right of publicity, emphasizing that the celebrity's fame, and the associative economic value that accompanies it, is constructed by the celebrity individual, their consuming fans, and the corporate intermediaries that develop and market the celebrity's image. See David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 916 (2008).

90. See Simon Bowers, *Jamie Oliver's Partnership with Sainsbury's Ends*, THE GUARDIAN

brought on board to signal both refinement and sustainability, the company's environmentally questionable supply chain altered public perceptions of both Oliver personally—he was described as a “culinary whore” who had been “selling his soul”—as well as his restaurants and other business pursuits.⁹¹

B. The Risks and Rewards of Posthumous Endorsements

After considering the dominant theoretical approaches to celebrity endorsements, the appeal, and potential perils, of deploying endorsements by *deceased* celebrities becomes more apparent. Under the source models of endorsement, deceased celebrities are in a position to be highly persuasive.⁹² Deceased celebrities like Marilyn Monroe, John Wayne, or Whitney Houston were highly cherished figures during many consumers' youth, and nostalgia for these bygone days has been shown to be an especially powerful motivator of consumer activity—particularly for the Baby Boomer generation.⁹³ If a childhood crush or celebrity idol appears to stand behind a product, then that association will resonate strongly for many consumers.

This persuasiveness may seem strange, given the widespread knowledge of that person's death, but scholars have shown that consumers often engage in a suspension of disbelief and rather enjoy embracing the fiction of imagining the celebrity still alive.⁹⁴ Because a celebrity's fans rarely actually knew the human being

(July 12, 2011, 1:33 PM), <https://www.theguardian.com/lifeandstyle/2011/jul/12/jamie-oliver-sainsburys> [<https://perma.cc/TSQ5-NSM2>].

91. Halonen-Knight & Hurmerinta, *supra* note 89, at 456.

92. See *supra* notes 70-72 and accompanying text.

93. See D'Rozario & Bryant, *supra* note 45, at 1 (“Many of these ageing baby-boomers drive the demand for Deleb imagery through their continuing emotional connection to the celebrity as fans, even long after the celebrity has passed away.”); Subhadip Roy & Jyoti Sharma, *Dead or Living: Which Celebrity to Endorse?*, 13 GREAT LAKES HERALD 1, 6 (2019) (“As for expertise and attractiveness, theory of nostalgia suggests that dead celebrities are often glorified after their deaths by their fans resulting in enhanced regard for their abilities and charm.” (citation omitted)).

94. See Denver D'Rozario, *Dead Celebrity (Deleb) Use in Marketing: An Initial Theoretical Exposition*, 33 PSYCH. & MKTG. 486, 493 (2016) (examining how dead celebrity marketing triggers the “[p]leasure of [i]magination”); see also Sean Hannon Williams, *Gossip and Gore: A Ghoulish Journey into a Philosophical Thicket*, 116 MICH. L. REV. 1187, 1198 (2018) (“[W]e have trouble turning off our powerful connections to others.”).

when they were alive, but instead only knew them as mediated through agents, publicists, and popular culture depictions, the transfer to death of the human being does not necessarily change the day-to-day experience of fandom once the initial shock of death has subsided.⁹⁵ As a result of the highly mediated nature of celebrity, if the endorser was credible, authentic, and attractive while they were alive, then those persuasive traits can effectively carry over into the commercial afterlife.⁹⁶ Social media campaigns facilitate both the suspension of disbelief and the mediated nature of celebrity endorsements by creating the appearance of an interactive relationship between the verified, authentic celebrity and their many followers.⁹⁷

Death may in some circumstances make a celebrity *more* persuasive than they were during life. Numerous studies have shown that the death of a celebrity, even one plagued by scandal, substantially increases demand for items associated with them.⁹⁸ When a celebrity dies, there is a cultural tendency to sacralize them by focusing on their positive impact on the world they left behind and to downplay messier attributes that might undermine the persuasiveness of living celebrities.⁹⁹ Amy Winehouse, Whitney Houston, and Michael Jackson have become highly valuable commercial entities in their digital afterlives, even though their substance use and chaotic personal lives made them less-than-ideal spokespeople towards the end of their lives.¹⁰⁰ Moreover, due to the perceived sacredness of spaces and items associated with the deceased celebrity, consumers are primed to consume goods and services that are

95. Cf. Joli Jensen, *Introduction—On Fandom, Celebrity, and Mediation: Posthumous Possibilities*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* xvii, xix (Steve Jones & Joli Jensen eds., 2005).

96. See Alexandra Sherlock, *Larger than Life: Digital Resurrection and the Re-Enchantment of Society*, 29 *INFO. SOC'Y* 164, 168 (2013).

97. See Benjamin Boeuf & Jessica Darveau, *Posting from Beyond the Grave: An Autopsy of Consumer Attitudes Toward Promotional Communication in a Posthumous Context*, 34 *INT'L J. RSCH. MKTG.* 892, 898 (2017).

98. See, e.g., Ruth Penfold-Mounce, *Value, Bodily Capital, and Gender Inequality After Death*, 25 *SOC. RSCH. ONLINE* 490, 496-97 (2020); Steve Jones, *Better Off Dead: Or, Making It the Hard Way*, in *AFTERLIFE AS AFTERIMAGE*, *supra* note 95, at 3-4.

99. See Scott K. Radford & Peter H. Bloch, *Grief, Commiseration, and Consumption Following the Death of a Celebrity*, 12 *J. CONSUMER CULTURE* 137, 140 (2012).

100. See Penfold-Mounce, *supra* note 98, at 496-97; *supra* note 25 and accompanying text.

perceived as supporting the decedent's families or causes associated with the decedent.¹⁰¹ In short, sacredness is highly persuasive.

There are also some practical advantages for brands in employing a deceased spokesperson. Deceased endorsers are far less likely to have new scandals emerge that would undermine their credibility or attractiveness.¹⁰² Although new information can of course be unearthed about a decedent, they are not going to have a new affair or express new controversial political opinions. Moreover, many prized deceased endorsers, like Marilyn Monroe or Bruce Lee, will never grow old or gain weight, and as a result their physical attractiveness will remain crystallized in the minds of consumers. And finally, a dead person is much, much cheaper to hire than a living person and makes far fewer demands.¹⁰³

The source models also signal some potential dangers of posthumous endorsements. Although the sacred status of a dead celebrity can prime certain consumption behavior, consumers respond quite negatively to commercial messages that appear largely profit-motivated.¹⁰⁴ When consumers sense that a posthumous promotion is exploitative rather than commemorative, they are not likely to be persuaded to support the promoted good, service, or cause.¹⁰⁵ This suggests that those who control the messages emanating from the decedent's estate and/or their official media pages need to be careful about the timing of commercial promotions, their choice of brand partnerships, and overusing the goodwill associated with the decedent.

101. See Radford & Bloch, *supra* note 99, at 140-41.

102. See D'Rozario, *supra* note 94, at 489 tbl.1.

103. See D'Rozario & Bryant, *supra* note 45, at 1-2; D'Rozario, *supra* note 94, at 489 tbl.1.

104. Benjamin Boeuf & Jessica Darveau, *Don't Disturb the Dead: Consumers' Attitude Toward Promotional Messages on Post-Mortem Facebook Pages*, 8 *ADVANCES ADVERT. RSCH.* 71, 77 (2017).

105. See Radford & Bloch, *supra* note 99, at 150 (observing consumer disdain toward profiteering following the death of Dale Earnhardt, but embrace of officially licensed merchandise coming from Earnhardt's family and other Earnhardt-related sources); RUTH PENFOLD-MOUNCE, *DEATH, THE DEAD AND POPULAR CULTURE* 31-32 (2018) (describing criticism of the James Dean and Fred Astaire estates for perceived profiteering); Benjamin Boeuf & Jessica Darveau, *An Ethical Perspective on Necro-Advertising: The Moderating Effect of Brand Equity*, 155 *J. BUS. ETHICS* 1077, 1080 (2019) ("By explicitly mentioning that the brand concluded an agreement with the decedent's estate, the brand reassures consumers that the use of the image is not illegal or unconsented.").

Under the Meaning Transfer Model, posthumous endorsements are effective because dead celebrities often have positive cultural associations that fans want to incorporate into themselves, and this hunger for the decedent's cultural meaning can be amplified by feelings of grief and nostalgia.¹⁰⁶ For example, consumers may want to associate themselves with Marilyn Monroe's glamorous sex appeal or with James Dean's rebellious masculinity, and consumption of goods associated with these individuals might symbolically bring the consumer closer to these idealized forms of 1950s/60s gender and sexuality. According to Professor Denver D'Rozario, "[t]oday's superheroes are too sensitive for some, who long for the alpha-male heroes of yesteryear."¹⁰⁷

Moreover, the death of a celebrity does induce a real, though often stigmatized, form of mourning in their fans, and consumption of endorsed or "official" goods can be a way of maintaining a continuing bond with them.¹⁰⁸ Through posthumous endorsements, accordingly, today's consumers can maintain an association with a particular decedent as well as with a nostalgized set of cultural values present in their youth. Posthumous endorsements might be said to "Make Advertising Great Again";¹⁰⁹ by symbolically associating with the stars of the past, consumers can keep the past alive.

The Meaning Transfer Model does, however, suggest that the cultural meaning of a long-deceased celebrity remains dynamic.¹¹⁰ Although, as discussed above, many consumers are drawn to a lost, cherished past, this same past is potentially viewed unsavorily by many others.¹¹¹ If those representing posthumous endorsers wish to update the constellation of meanings associated with them to reflect changing social mores, the Meaning Transfer Model indicates that new meanings are possible.¹¹² If a deceased celebrity can somehow produce new work product, for example by releasing archived music

106. See McCracken, *supra* note 67, at 313.

107. D'Rozario, *supra* note 94, at 491 tbl.2.

108. See Gilden, *supra* note 28, at 641.

109. See Emma Margolin, "Make America Great Again"—Who Said It First?, NBC NEWS (Sept. 9, 2016, 2:17 PM), <https://www.nbcnews.com/politics/2016-election/make-america-great-again-who-said-it-first-n645716> [<https://perma.cc/RE2G-5KKU>].

110. See McCracken, *supra* note 67, at 312.

111. See Boeuf & Darveau, *supra* note 97, at 898.

112. See McCracken, *supra* note 67, at 315.

or starring in new films via CGI technologies, these new releases can help shift the decedent's present-day cultural associations.¹¹³ Moreover, by associating with contemporary charitable or political causes, such as climate change or racial justice, a star of the 1950s can appear to be in touch with the views of younger consumers today.¹¹⁴

The drawbacks of posthumous endorsements under the Meaning Transfer Model mirror the drawbacks with living endorsements. Miscalculated brand alliances can contaminate the endorser, and consumers of the endorsed brands can transfer negative cultural associations back onto the deceased celebrity.¹¹⁵ New digital technologies and social media can help moderate these effects to some degree, but the absence of the living individual does make it harder for agents to actively steer this meaning-making process.

In sum, endorsers—dead or alive—are effective when seen as appealing and credible, or when they maintain a set of positive cultural associations. But there are numerous obstacles to successful posthumous endorsement. With every effort to capitalize on the sacred status of the deceased comes a serious risk that the managers of the deceased will be seen as exploiting their memory. And as much as brands, endorsers, and their agents may try to tightly control the messages communicated to consumers, the cultural meaning of the endorser and their messaging is always dependent to a large extent on the diverse perspectives of consumers.

C. Legal Scholarship on Celebrity Endorsement

Legal scholars have written relatively little about the rights of individuals to control indicia of endorsement, let alone the rights to control such indicia posthumously. Although there is a significant body of scholarship that has examined the postmortem right of publicity, which (in many states) allows a person's heirs and devisees to control the use of a person's likeness in commercial or advertising uses,¹¹⁶ publicity rights do not require consumers to believe that the

113. *See id.*

114. *See id.*

115. *See supra* Part I.A.

116. *See* Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of*

decedent or the estate *affirmatively* stands behind the good or service in question.¹¹⁷ The rights to control commercial use of a deceased person's image are broad enough to cover perceptions of both involuntary and voluntary associations between that individual and a good or service, but little scholarship has examined the unique concerns around the voluntary associations built into the concept of endorsement.

Legal scholars who have directly considered questions of endorsement have emphasized concerns that map onto the source models and Meaning Transfer Model dominant in advertising and marketing literature. Professor William McGeeveran has emphasized that endorsements in the social media context are useful so long as they are voluntary and accurate.¹¹⁸ Consumers want to know that the endorser has indeed had some firsthand exposure to the endorsed good or service and that they are in fact choosing to stand behind it.¹¹⁹ Without these hallmarks of voluntariness and accuracy, false endorsements can corrode the quality of information made available to consumers.¹²⁰ Given that official endorsements are material to many consumers, corroded information surrounding endorsements has the potential to mislead consumers into purchasing products they would otherwise avoid.¹²¹

Professors Laura Heymann, Mark Lemley, and Mark McKenna have also expressed concerns about false endorsements relating back to the endorser. They note that in addition to deceiving consumers, false endorsements have the effect of usurping other

Testation, 44 GA. L. REV. 1, 19-20 (2009) (surveying literature supporting and opposing a postmortem right of publicity); JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 6-7, 123-26 (2018) (same).

117. See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1195 (2006).

118. See McGeeveran, *supra* note 12, at 1127.

119. See *id.* at 1127-28.

120. See *id.* at 1127.

121. See *id.* at 1128; see also Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 84 (2020) (noting that because of trust placed in social media influencers, social media followers may be materially deceived when influencers endorse products they never actually used); Matthew B. Kugler, *The Materiality of Sponsorship Confusion*, 50 U.C. DAVIS L. REV. 1911, 1947 (2017) (empirically showing materiality of officially licensed merchandise to a large subset of consumers); Laura R. Bradford, *Trademark Law and Agency Costs*, 55 IDEA 193, 201 (2015) ("A wealth of empirical literature suggests that consumers find clear sponsorship and affiliation information useful in making purchasing decisions.").

people's voices, painting an incorrect portrait of the values they hold, and undermining their ability to define themselves publicly.¹²² Given this repeated concern for voluntariness in the endorsement process, a few scholars have accordingly expressed skepticism that there should be a legal right to control posthumous endorsements, which, due to the nature of death, do not involve voluntary decision-making by the endorser.¹²³

II. THE LAW OF POSTHUMOUS ENDORSEMENT

Notwithstanding the skepticism by some scholars towards the need to control posthumous endorsements, trademark and unfair competition case law increasingly gives deceased celebrities' heirs, devisees, and other successors in interest the ability to prevent others from falsely suggesting that the deceased celebrity posthumously endorsed a particular good or service.¹²⁴ Trademark and unfair competition laws generally protect against the commercial use of a symbol, or other commercial statements, that are likely to cause confusion about the origin of a particular good or service.¹²⁵ Although historically the relevant consumer confusion involved perceptions about who *produced* a particular good or service, contemporary trademark and unfair competition law proscribes confusion about who *sponsored*, *approved*, or *endorsed* that good or service.¹²⁶

Accordingly, trademark and unfair competition laws have developed several doctrines that facilitate the posthumous endorsement

122. See Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1421 (2011); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 281-82 (2005); Lemley, *supra* note 11, at 1172 ("Both private and public figures should be entitled to decide whether and when to endorse products. Deceiving the public about whether someone has done so hurts both that person and the public.").

123. See Lemley, *supra* note 11, at 1173 ("[I]t is hard to argue with a straight face that a dead person is endorsing a product."); Dogan & Lemley, *supra* note 117, at 1196 n.161 ("We can imagine only limited circumstances in which a confusion-based right of publicity might survive death, such as use of digital technology to make it seem that an actor appeared in a movie in which he did not.").

124. See Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 393-96 (2019).

125. See *id.* at 393.

126. See *id.* at 393-94.

industries examined in the previous Part. This Part will examine three areas of trademark law¹²⁷ that have come to constitute the laws of posthumous endorsement: (1) false endorsement claims under section 43(a) of the Lanham Act; (2) trademark infringement claims in which the registered mark is the name or image of a deceased individual; and (3) cancellations and opposition proceedings by celebrity estates against individuals who try to register as a trademark the name or image of the decedent.

Despite the intuitive strangeness of dead people endorsing goods and services postmortem, trademark law conceptually maps quite well onto the theories of posthumous endorsement outlined in the previous Part. The primary motivations for trademark law are to protect consumers from deception and to reduce the costs of finding desired goods and services.¹²⁸ Whenever consumers see a particular name or symbol—for example, ARMANI—in connection with a product, they are informed that this product is produced, sponsored, or endorsed by the same entity that produced, sponsored, or endorsed other products bearing the same name or symbol.¹²⁹ If a consumer has a satisfying experience with ARMANI business suits or fragrances, the ARMANI mark can signal to that consumer that they can expect a similar experience with ARMANI shoes, scarves, or gowns.¹³⁰ Or if ARMANI shoes disintegrate after a single use, the

127. This Part does not focus on the postmortem right of publicity provided in many states, except where it expressly intersects with other doctrines. Postmortem publicity rights generally allow a rightsholder to prevent the unauthorized use of the decedent's name, image, or likeness for trade or advertising purposes. See ROTHMAN, *supra* note 116, at 3, 5-7. As a practical matter, a celebrity's estate and other successors in interest can assert publicity rights when a third party falsely suggests that a decedent endorsed their good or service, because such a suggestion will almost always involve displaying the decedent's name or image. See Gilden, *supra* note 28, at 641-42. Nevertheless, this Article brackets the right of publicity for three reasons. First, there are important conceptual differences between using someone's image without their consent and suggesting that they are voluntarily placing their stamp of approval on a product through endorsement. Second, most states do not have postmortem publicity rights, and those that do place some temporal limitation on the right. See *id.* at 647. Rights created by trademark and unfair competition law, by contrast, are potentially perpetual. See *id.* at 646-7. Third, a substantial body of scholarship has analyzed postmortem publicity rights. See, e.g., *id.* at 642. But little scholarship has discussed the case law below.

128. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995).

129. See *id.* at 162-64.

130. See *id.*

consumer knows whom to hold accountable.¹³¹ By giving a single entity control over the ARMANI mark in the fashion market, that entity can build credibility and accountability with consumers over time.¹³² This consumer goodwill justification corresponds quite well to the source models of posthumous endorsement.¹³³ If consumers found Giorgio Armani to be a credible authority on fashion during his life, the continued use of Armani's name postmortem signals a continuity in credible endorsements, notwithstanding the death of the designer-endorser himself.

Trademark law's bolstering of consumer goodwill also contains an important semiotic dimension. Brand names like ARMANI or DISNEY or WALMART or PORSCHE signal much more than just a relationship of production or licensing between a commercial entity and a particular good or service. These names also signify a complex bundle of cultural meanings, and consumers purchase branded goods and services at least in part for the values embedded in—and communicated by—a particular brand.¹³⁴ Trademark law, though subject to important free speech limitations,¹³⁵ can help maintain the stability of meanings associated with a mark by preventing third parties from associating it with vastly different and/or inferior offerings.¹³⁶ This semiotic justification maps quite neatly onto the Meaning Transfer Model of posthumous endorsements.¹³⁷ Celebrity endorsers are associated with a set of cultural values that fans wish to emulate through consumption, and meaning transfer can still take place even if the signifier of such values is deceased.¹³⁸

As the following Sections show, despite its potential promise to instantiate the theory and practices of posthumous endorsement, trademark law largely has not lived up to such promise. It has failed to ensure meaningful continuity in the goodwill associated with a particular deceased celebrity and moreover has allowed third

131. *See id.*

132. *See id.*

133. *See supra* Part I.A.

134. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 646 (2004).

135. *See* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 383-86 (2008).

136. 15 U.S.C. § 1125(c) (prohibiting dilution by blurring and tarnishment).

137. *See supra* Part I.A.

138. *See* McCracken, *supra* note 67, at 312-14.

parties with thin connections to the decedent to both co-opt and fossilize the cultural meaning associated with them. More fundamentally, the law of posthumous endorsement largely fails to grapple with how an individual's death might impact the extension of trademark laws into the postmortem context. The following three Sections set forth the pertinent details of posthumous endorsement law before turning to a fuller critique in Part III.

A. Lanham Act Section 43(a) False Endorsement Claims

Section 43(a) of the Lanham Act prohibits the use in commerce of any “name, symbol, or device ... which ... is likely to cause confusion ... as to the origin, sponsorship, or approval of ... goods, services, or commercial activities.”¹³⁹ It is widely accepted that a celebrity's “persona” is a protectable “symbol” under section 43(a) and that the statute's reference to “sponsorship or approval” can encompass a claim for false suggestions of a celebrity endorsement.¹⁴⁰ As stated by the Sixth Circuit, “courts routinely recognize a property right in celebrity identity akin to that of a trademark holder under § 43(a).”¹⁴¹ Accordingly, numerous living public figures, including Woody Allen,¹⁴² Vanna White,¹⁴³ Tom Waits,¹⁴⁴ Jesse Jackson,¹⁴⁵ and

139. 15 U.S.C. § 1125(a)(1).

140. *See, e.g., Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1068 (9th Cir. 2015) (“[A] celebrity whose endorsement of a product is implied through the imitation of a distinctive attribute of the celebrity's identity, has standing to sue for false endorsement under section 43(a) of the Lanham Act.” (quoting *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992))); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1014 (3d Cir. 2008) (citing *Waits*, 978 F.2d at 1106-07) (“The NFL does not deny that courts broadly interpret the terms ‘name, symbol, or device’ in § 43(a)(1) to include other indicia of identity, such as a person's voice.... [n]or ... that Facenda's voice is distinctive and generally protectable as an unregistered mark.”). *See generally* MCCARTHY, *supra* note 21, § 28:15.

141. *Parks v. LaFace Recs.*, 329 F.3d 437, 447 (6th Cir. 2003).

142. *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 617, 625 (S.D.N.Y. 1985) (video retailer used Woody Allen look-alike Phil Boroff in an advertising photograph).

143. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (Samsung used robot facsimile of Vanna White in an electronics ad).

144. *Waits*, 978 F.2d at 1096 (advertisement for Doritos chips used a soundalike performer of Tom Waits).

145. *Jackson v. MPI Home Video*, 694 F. Supp. 483, 483-87 (N.D. Ill. 1988) (unauthorized sale of a videotape of presidential candidate Jesse Jackson's speech at the 1988 Democratic National Convention with packaging suggesting that he approved of the sale).

50 Cent¹⁴⁶ have brought successful claims in which uses of their image—or close approximations of their image—have falsely suggested that they sponsored or approved of the defendant’s offerings.

Because a celebrity’s persona is treated as a trademark-like property interest under the Lanham Act, this property interest is increasingly recognized as alienable and descendible.¹⁴⁷ Accordingly, those who inherit a deceased celebrity’s persona or otherwise acquire persona rights from the deceased celebrity’s heirs or devisees can stand in the celebrity’s shoes and assert false endorsement claims against posthumous users of the decedent’s persona. Most commonly, posthumous endorsement claims have been asserted by the executors of the decedent’s estate or by the decedent’s surviving family members.¹⁴⁸ For example, in *Branca v. Mann*, the executors of Michael Jackson’s estate successfully brought a false endorsement claim against individuals who had launched websites such as “michaeljacksonsecretvault.com” and “MJgives.com” shortly after Jackson’s death.¹⁴⁹

Other surviving family members have asserted false endorsement claims far longer after the celebrity’s death. For example, in *Bruce Lee Enterprises, LLC v. A.V.E.L.A., Inc.*, the court observed that actor Bruce Lee died intestate in 1973 and that the rights to his name, image, and likeness passed to his wife, Linda, and his two children, Brandon and Shannon.¹⁵⁰ Those rights eventually transferred to Shannon’s wholly owned LLC, named Bruce Lee Enterprises, which was allowed to assert a false endorsement claim almost forty years after Lee’s death against a company that sold t-shirts and other merchandise featuring Lee’s image.¹⁵¹

146. *Jackson v. Odenat*, 9 F. Supp. 3d 342, 348-49 (S.D.N.Y. 2014) (photographs of 50 Cent displayed on hip hop website).

147. *See* *Dogan & Lemley*, *supra* note 117, at 1166.

148. *See, e.g.*, *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1066 (9th Cir. 2015) (“Plaintiff Hope Road is an entity owned by Marley’s children, formed for the purpose of acquiring and exploiting assets, rights, and commercial interests in the late Bob Marley.”); *Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 911 (E.D. La. 2017) (denying motion to dismiss false endorsement claim brought by sister and personal representative of deceased rapper Messy Mya, whose voice was featured in the Beyoncé song “Formation”).

149. No. CV 11-00584 DDP, 2011 WL 13218028, at *1-2 (C.D. Cal. Apr. 19, 2011).

150. No. 10-CV-2333, 2013 WL 822173, at *2 (S.D.N.Y. Mar. 6, 2013).

151. *Id.* at *3, *19. As demonstrated throughout this Section, much of the recent posthumous endorsement litigation features the company A.V.E.L.A., which specializes in producing and licensing merchandise featuring famous pop culture images, including the images

In order to assert a posthumous false endorsement claim, an entity need not, however, be a surviving family member or a personal representative.¹⁵² Most notably, in *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, the court allowed a false endorsement claim by an entity that had complete ownership over Marilyn Monroe's intellectual property but zero personal connection to the late actress.¹⁵³ Marilyn Monroe died in 1962, and her will devised 75 percent of the residue of her estate (which included her intellectual property rights) to her acting teacher, Lee Strasberg, which then passed to Strasberg's wife upon his death in 1982.¹⁵⁴ The remaining 25 percent went to Marianna Kris, Monroe's psychiatrist, who passed her portion to the Anna Freud Center when she died in 1980.¹⁵⁵ Strasberg became the administrator of the Monroe estate from 1989 until 2001, when the estate finally closed.¹⁵⁶ At that point, the estate transferred all its assets to a newly formed company, Marilyn Monroe, LLC, which was owned by Ms. Strasberg and the Freud Center until 2010.¹⁵⁷

In 2010, the Authentic Brands Group purchased a controlling interest (and later the entire interest) in Marilyn Monroe, LLC, and established a new subsidiary, the Estate of Marilyn Monroe, LLC, to manage the assets it had acquired.¹⁵⁸ The defendants in the *Estate of Marilyn Monroe* litigation argued that "the Estate ha[d] no connection to the actual person of Marilyn Monroe" and that the plaintiff "[was] not Monroe's family, heir, estate, or assignee."¹⁵⁹ The court rejected this argument in light of the "unbroken chain of title [that] extend[ed] from the decedent to the Estate."¹⁶⁰ Pointing to the *Bruce Lee Enterprises* decision, the court noted that the plaintiff in that case "was not Bruce Lee's nuclear family, but a corporation

of famous deceased celebrities. *See id.* at *3.

152. *See id.* at *3.

153. 364 F. Supp. 3d 291, 327 (S.D.N.Y. 2019).

154. *Id.* at 308.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.*; *see also Marilyn Monroe's Estate—Learn from Her Mistakes*, KAHN L. FIRM (Apr. 30, 2018), <http://www.thekahnlawfirm.net/advice-answers-advocacy/marilyn-monroes-estate-learn-from-her-mistakes> [https://perma.cc/9GQ8-9XYW].

159. 364 F. Supp. 3d at 302, 307.

160. *Id.* at 308.

formed by his heirs, that was permitted to pursue the claims. The Court s[aw] no reason why, if that corporation had been purchased by others, the claims would disappear.”¹⁶¹

Although the section 43(a) case law now seems to allow a posthumous endorsement claim by anyone with an unbroken chain of title to a deceased celebrity,¹⁶² there are at least two oddities with this pure chain-of-title approach. First, it is not clear which intellectual property interest the plaintiff needs title to in order to assert a false endorsement claim.¹⁶³ Most of the 43(a) litigation refers to a property right in a plaintiff’s “persona,”¹⁶⁴ which is a concept typically covered by state law rights of publicity; indeed, the right of publicity chain of title is the focus of several cases.¹⁶⁵ At the same time, there is no postmortem right of publicity in many states, including, until recently,¹⁶⁶ New York, meaning that posthumous endorsement claims based upon a New York domiciliary’s publicity rights have been founded upon a chain of title that had extinguished.¹⁶⁷ Nonetheless, courts have allowed posthumous endorsement claims for New York domiciliaries such as Marilyn Monroe.¹⁶⁸ Other decisions seem to focus on the chain of title of the decedent’s trademark rights,¹⁶⁹ which is understandable given the Lanham Act cause of action, while others have based false endorsement claims

161. *Id.* at 309 (citation omitted).

162. *See, e.g., id.*

163. Professor Jennifer Rothman has recently described the confusing overlap between rights of publicity and personal trademarks as the “identity thicket.” Jennifer Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3949826 [<https://perma.cc/72YU-P6YR>].

164. *See, e.g., Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 941 & n.308 (E.D. La. 2017).

165. *See, e.g., Est. of Marilyn Monroe*, 364 F. Supp. 3d at 308.

166. James P. Flynn, *Le Morte d’Elvis: The Birth of New Claims as New York Statute Recognizes Post Mortem Right of Publicity*, NAT’LL REV. (Jan. 19, 2021), <https://www.natlawreview.com/article/le-morte-d-elvis-birth-new-claims-new-york-statute-recognizes-post-mortem-right> [<https://perma.cc/KD8H-Y6WH>].

167. In *Avalos v. IAC/Interactivecorp.*, the court denied a false endorsement claim by the transferee of the decedent’s Nebraska publicity rights, which are inalienable. No. 13-CV-8351, 2014 WL 5493242, at *1-4 (S.D.N.Y. Oct. 30, 2014). Nonetheless, the *Estate of Marilyn Monroe* court refused to read that decision as holding that “the false endorsement claim requires a right of publicity.” 364 F. Supp. 3d at 308.

168. *See Est. of Marilyn Monroe*, 364 F. Supp. 3d at 309.

169. *See Est. of Barré*, 272 F. Supp. 3d at 941 (“[C]ourts have consistently recognized false endorsement claims brought by the estate of deceased celebrities who have sufficiently alleged ownership of the celebrity’s persona and marks.”).

upon a combination of intellectual property rights.¹⁷⁰ It is therefore unclear whether the false endorsement claim follows the chain of title of any particular intellectual property right or is instead *sui generis*.

Second, to the extent that a false endorsement claim is a type of descendible trademark right, the posthumous endorsement cases strangely disregard a core principle of trademark law: the assignment-in-gross rule.¹⁷¹ Trademark rights are triggered by the use in commerce of a symbol in conjunction with a particular set of goods and services in such a way that consumers come to associate that symbol with a consistent source.¹⁷² Because trademarks signal the source of goods and help the trademark owner build goodwill with consumers, trademarks cannot be transferred to third parties “in gross”—that is, without the accompanying transfer of the physical or human capital in which consumer goodwill has come to reside.¹⁷³ If trademarks are transferred without any accompanying goodwill, they may no longer serve the source and quality signaling functions that benefit consumers.¹⁷⁴ Although the assignment in gross doctrine has at times extinguished certain transfers of personal name trademarks,¹⁷⁵ this doctrine has never been invoked when false endorsement rights have transferred from a decedent to their estate to their heirs to third-party assignees.¹⁷⁶ Part IV of this Article will examine in greater depth why the failure to invoke the assignment-in-gross doctrine is particularly problematic in this context, but for now it is important to simply note the doctrine’s glaring absence.

170. See *Erickson Beamon Ltd. v. CMG Worldwide, Inc.*, No. 12 Civ. 5105, 2014 WL 3950897, at *8 (S.D.N.Y. Aug. 13, 2014) (“As an initial matter, defendants maintain that they own all intellectual property affiliated with Bette Davis; based on this averment, it is plausible that defendants own the exclusive right to use the ‘Bette Davis’ name in commerce.”).

171. See MCCARTHY, *supra* note 21, § 18:3.

172. See *supra* Part II.A.

173. See *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999) (“A trademark is merely a symbol of goodwill and has no independent significance apart from the goodwill that it symbolizes. Therefore, a trademark cannot be sold or assigned apart from the goodwill it symbolizes.” (citations omitted)).

174. See *id.* (“Use of the mark by the assignee in connection with a different goodwill and different product would result in a fraud on the purchasing public who reasonably assume that the mark signifies the same thing.”).

175. See MCCARTHY, *supra* note 21, § 18.35.

176. See *infra* Part IV.A.

Even assuming that a successor in interest to something has standing to assert a false endorsement claim, the case law signals further uncertainties as to what precisely triggers liability under section 43(a). First, false endorsement claims generally need to show that an appreciable number of consumers would likely be confused as to whether the celebrity individual endorsed the product, but in the postmortem context, courts expand the focus to the potential perception of endorsement by the celebrity *or* their estates *or* their successors in interest.¹⁷⁷ These entities, although linked through some chain of title, are very different from the consumers' perspective; nonetheless, courts conflate them within the likelihood of confusion analysis.¹⁷⁸

Although successors in interest are entitled to bring false endorsement claims, some courts have held that the decedent needed to have exploited endorsement rights to some degree during their lifetime in order for the court to find that consumers would likely be confused about a posthumous endorsement. For example, the successors to Princess Diana's intellectual property rights were unable to show a likelihood of consumer confusion postmortem because unauthorized commercial uses of her image were ubiquitous during her life.¹⁷⁹ Accordingly, posthumous use of her image would not

177. See *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 309 (S.D.N.Y. 2019) (“[T]he Estate Parties must demonstrate that a reasonable jury would always find that AVELA’s products mislead or confuse consumers into believing that Ms. Monroe *or her Estate* endorsed the products. To prevail on their cross-motion, the AVELA Parties must demonstrate that no reasonable jury could find that consumers believe Ms. Monroe, *or the holders of the rights to Ms. Monroe’s persona*, endorsed the product.” (emphasis added) (citation omitted)); *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, No. 10-CV-2333, 2013 WL 822173, at *21 (S.D.N.Y. Mar. 6, 2013) (“Plaintiffs have not established that consumers would believe Bruce Lee *or his estate* endorsed AVELA’s products.” (emphasis added)); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1070 (9th Cir. 2015) (accepting survey that asked whether merchandise received permission from “Bob Marley/the person on the shirt or his heirs, estate, or agents”).

178. See *Fifty-Six Hope Rd. Music*, 778 F.3d at 1070.

179. See *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149-50 (9th Cir. 2002) (“Between 1981 and 1997, many products, including some that were largely indistinguishable from Franklin Mint products, bore the name and likeness of Princess Diana Consumers, therefore, had no reason to believe Franklin Mint’s Diana-related products were endorsed by the Princess. This did not change when, following Princess Diana’s death in 1997, the Fund endorsed approximately twenty products—but not Franklin Mint’s—amidst a flood of *unendorsed* Diana-related memorabilia.”).

signal the existence of an endorsement deal to consumers.¹⁸⁰ Conversely, where an individual had not made any commercial use of their likeness during their lifetime, courts have held that consumers would be unlikely to perceive a compensated endorsement deal postmortem. For example, in *Brooks v. Topps*, the court denied a false endorsement claim against a baseball card manufacturer that was brought by the daughter of a deceased Negro League baseball player who had not garnered any significant commercial sponsorships while he was alive.¹⁸¹

Finally, it is far from clear what types of posthumous activities are likely to trigger consumer confusion as to endorsement activity—putting the decedent’s image on a t-shirt?¹⁸² Launching a tribute website to the celebrity?¹⁸³ Sampling the decedent’s music?¹⁸⁴ Naming jewelry after the decedent?¹⁸⁵ Using the decedent’s voice in documentary footage?¹⁸⁶ To assess a likelihood of confusion, courts employ a multifactor, fact-intensive inquiry that is difficult to resolve before trial, and the uncertainty about the outcome of such an inquiry may justifiably make many potential users of a decedent’s name, image, or likeness hesitant to engage in any activity that might conceivably be perceived as a posthumous endorsement.¹⁸⁷ Given the explosion in digitized commercial, political, and social media activities officially authorized by a celebrity’s estate, the right to control posthumous endorsement increasingly creates, as a practical matter, a perpetual right to control conspicuous commercial uses of a decedent’s persona.

180. *See id.*

181. *Brooks ex rel. Est. of Bell v. Topps Co.*, 86 U.S.P.Q.2d 1361, 1367-68 (S.D.N.Y. 2007).

182. *See, e.g., Bruce Lee Enters.*, 2013 WL 822173, at *1.

183. *See, e.g., Branca v. Mann*, 103 U.S.P.Q.2d 1993, 1995 (C.D. Cal. 2012).

184. *See, e.g., Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 911 (E.D. La. 2017).

185. *See, e.g., Erickson Beamon Ltd. v. CMG Worldwide, Inc.*, No. 12 Civ. 5105, 2014 WL 3950897, at *1 (S.D.N.Y. Aug. 13, 2014).

186. *See, e.g., Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1011 (3d Cir. 2008).

187. *See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 908 (2007); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1949 (2007).

B. Infringement of Inherited Trademarks

A decedent's successors in interest can also prevent false suggestions of posthumous endorsements when they can show infringement of a trademark comprising the decedent's name or image.¹⁸⁸ Professor William McGeveran has recently set forth a useful taxonomy of the circumstances in which personal names or images have been registered as trademarks—what he characterizes as “selfmarks.”¹⁸⁹ First, an individual may have registered their name or image in the classic scenario in which they are the producer or provider of a particular set of goods or services—for example, FORD for cars or CALVIN KLEIN for clothing.¹⁹⁰ Second, an individual may have registered their name or image when they license out their name or image as the brand for third-party goods or services—for example, TRUMP for steaks, ties, or universities.¹⁹¹ Third, individuals are increasingly registering their names for “endorsement services”—for example, KIM KARDASHIAN provides endorsements for goods and services that are branded entirely independently of her.¹⁹²

The alienability and descendibility of the first category of selfmarks is not particularly remarkable, as consumers are used to business concerns continuing without their founder. The second, and especially the third, categories of selfmarks, however, raise concerns paralleling those associated with section 43(a) posthumous endorsement claims. The value of licensing and endorsement emerges from the credibility and likability of the decedent,¹⁹³ yet trademark law allows trademark rights to become separated from the deceased individual. For example, in several cases courts have

188. Under section 32 of the Lanham Act, it is unlawful to “use in commerce ... a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services ... which ... is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1)(a).

189. See William McGeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 339 (2018).

190. See *id.*

191. See *id.* at 341.

192. See *id.* at 343-44.

193. See McCracken, *supra* note 67, at 310-11.

held that the death of the trademark owner does not strip the mark of enforceability.¹⁹⁴ Accordingly, the estate of Elvis Presley successfully sued the producers of an Elvis impersonation show for infringing its trademark covering entertainment services,¹⁹⁵ and the successors in interest of Jimi Hendrix were able to shut down the sales of alcoholic beverages featuring Hendrix's signature.¹⁹⁶ Both courts allowed consumer perceptions of a connection with the decedent to transfer into a connection with the decedent's successors.¹⁹⁷

The primary limitation on using trademarks to control posthumous endorsements is that trademark rights are limited to the actual uses of particular marks in connection with particular sets of goods and services.¹⁹⁸ Accordingly, if, after the celebrity's death, their estate wishes to develop new marks related to the decedent or establish trademark rights in a new market, the estate must start the clock anew to establish priority in that market.¹⁹⁹ As an illustration, Elvis Presley established lifetime rights in the trademark ELVIS for "entertainment services."²⁰⁰ His estate could continue to exploit this trademark in the entertainment field, for example by sponsoring official impersonation bands and claiming priority over other Elvis bands who entered the field after the singer's death.²⁰¹ If, by contrast, his estate wished to enter a new, unrelated market, such as kitchen appliances, the estate could only establish rights in ELVIS toasters as of the date it entered the

194. *See, e.g., Est. of Presley v. Russen*, 513 F. Supp. 1339, 1365 (D.N.J. 1981) ("We find that after Presley's death, the rights to use the service marks and trademarks identifying the entertainment services of Elvis Presley and the merchandise licensed by him passed to Presley's legal representative as a part of the assets of his estate.... [A]s long as these marks continue to be used to identify Elvis Presley entertainment services, which are still available in such forms as records, video tapes, movies, and television performances, the marks will continue to exist and will not be considered abandoned." (citations omitted)).

195. *Id.* at 1370-71 ("The public, realizing that an actual Elvis Presley live stage show is now impossible, might assume that the plaintiff's only alternative in order to enter this specific area of the entertainment field was to produce or sponsor an imitation of a real Elvis Presley performance.").

196. *See Experience Hendrix, LLC v. Tiger Paw Distribs. LLC*, 119 U.S.P.Q.2d 1004, 1013 (S.D. Ga. 2016), *order amended* by No. CV 416-107, 2016 WL 3963079 (S.D. Ga. July 21, 2016).

197. *See id.; Est. of Presley*, 513 F. Supp. at 1371.

198. *See McGeveran, supra* note 189, at 347.

199. *See id.*

200. *Est. of Presley*, 513 F. Supp. at 1345.

201. *See id.* at 1371-72.

toaster market.²⁰² Although this might appear to place estates on a level playing field with other potential stakeholders in exploiting new ELVIS markets postmortem, the following Section demonstrates one major advantage held by estates even as to new, previously unexploited markets.

C. Lanham Act Section 2(a) and Marks that Suggest a Connection to a Dead Person

Although a celebrity's estate technically needs to compete with other entities to establish trademark rights in a deceased celebrity's name (at least where such rights were not established during the celebrity's life),²⁰³ as a practical matter the estate may be the only entity entitled to do so. Under section 2(a) of the Lanham Act, a trademark may not be federally registered if it comprises matter which may "falsely suggest a connection with persons, living or dead."²⁰⁴ The false connection prohibition can be used by the U.S. Patent and Trademark Office to deny a trademark application, or by third parties seeking to oppose an application or cancel a trademark registration post-issuance.²⁰⁵ The Federal Circuit has observed that this provision evolved out of, and embraced, the concepts of the rights of privacy and publicity,²⁰⁶ and the Trademark Trial and Appeals Board (TTAB) has interpreted section 2(a) as barring registration when there is "someone (this may be a natural person, estate, or juristic entity) with rights" in a deceased person's name.²⁰⁷

Section 2(a) is not technically about the endorsement rights of a deceased celebrity's estate, but it does give successors in interest a substantial leg up over third parties in establishing control over posthumous endorsements. If an entity can establish that it is the successor in interest to the decedent's publicity rights, it is free to

202. See McGeveran, *supra* note 189, at 347.

203. See Gildea, *supra* note 28, at 647.

204. 15 U.S.C. § 1052(a). For a thorough overview of this provision of section 2(a), see Anne Gilson LaLonde, *Giving the Wrong Impression: Section 2(a)'s False Suggestion of a Connection*, 110 TRADEMARK REP. 877, 879 (2020).

205. See *Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1375-76 (Fed. Cir. 1983).

206. See *id.* at 1376 ("It is a right of this nature, a right to control the use of one's identity, which the University also asserts under § 2(a).").

207. *In re MC MC S.r.l.*, 88 U.S.P.Q.2d 1378, 1380 (T.T.A.B. 2008).

register a trademark in the decedent's name,²⁰⁸ and it has standing to oppose or cancel equivalent registrations by others.²⁰⁹ For example, in permitting the heirs of Martin Luther King, Jr. to oppose the registration of WE HAVE A DREAM in connection with sports and event promotion, the TTAB observed that "the heirs of Dr. King, by virtue of their status as heirs, have a demonstrable interest in this proceeding ... the statutory ground of 'false suggestion of a connection' is akin, in part, to the right of publicity, which is an inheritable right."²¹⁰ Moreover, the false connection with "persons, living or dead" has been interpreted to mean a false connection not just with a deceased person, but also their heirs and/or their estate.²¹¹

Although doctrinally linking decedents with their heirs might make sense in light of the (usually) close interpersonal bond between a person and their surviving family members, rights under section 2(a), like rights under section 43(a), are nonetheless determined by chain of title and not kinship. For example, in the *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, litigation, the defendant attempted to cancel the plaintiff's MARILYN MONROE trademarks on the grounds that it was not technically the juridical entity created in Marilyn Monroe's probate proceedings.²¹² Echoing its chain of title reasoning in the false endorsement context, the court rejected this argument, noting that "the connection between the Estate and Monroe is not false or fraudulent."²¹³ By contrast,

208. See *Experience Hendrix, LLC v. Elec. Hendrix, LLC*, 90 U.S.P.Q.2d 1883, 1889-90 (W.D. Wash. 2008) (observing that Jimi Hendrix's sister, Janie Hendrix, was able to overcome a section 2(a) denial to registering the HENDRIX trademark by explaining that her father was Jimi's sole heir and transferred his inherited intellectual property to the LLC controlled by Janie).

209. See *Ass'n Pour La Def. et la Promotion De L'oeuvre De Marc Chagall Dite Comite Marc Chagall v. Bondarchuk*, 82 U.S.P.Q.2d 1838, 1838 (T.T.A.B. 2007).

210. See *King v. Trace Publ'g Co.*, No. 74/475,017, 1999 WL 546877, at *2 (T.T.A.B. July 15, 1999).

211. See *In re MC MC S.r.l.*, 88 U.S.P.Q.2d at 1378 (examining whether mark falsely suggested a connection to "Maria Callas, the famous, deceased opera singer, her heirs and/or her estate"); *Ass'n Pour La Defense*, 82 U.S.P.Q.2d at 1838 ("[R]espondent is not connected with the painter Marc Chagall or his heirs.").

212. 364 F. Supp. 3d 291, 314 (S.D.N.Y. 2019).

213. See *id.*; see also *In re Jackson Int'l Trading Co.*, 103 U.S.P.Q.2d 1417, 1421 (T.T.A.B. 2012) (denying registration where "CMG Worldwide holds itself out as the exclusive business representative for the estate of Benny Goodman and the sole entity designated with the legal authority from his estate to grant permission to use his name").

other types of relationships, such as a close friendship with the decedent, are insufficient; a “financial or ownership interest” and a “commercial connection” are required instead.²¹⁴

Finally, notwithstanding the repeated emphasis that section 2(a) mirrors the decedent’s postmortem publicity rights, and that the chain of title determines rights under section 2(a), courts nonetheless have rejected or cancelled trademark registrations even where publicity rights have expired and rights in the decedent’s image have otherwise entered the public domain.²¹⁵ Accordingly, just as in the section 43(a) false endorsement context, trademark law gives successors in interest to a nebulously articulated property interest the ability to control commercial exploitations of a decedent’s image long after any publicity rights have expired.²¹⁶ The TTAB has suggested that once a decedent becomes a “historical figure,” they may no longer be subject to section 2(a); it observed that Ernest Hemingway “who died just under 40 years ago, is a figure—and celebrity—of our own times,” while Leonardo Da Vinci is “historical” and thus can be evoked in a registered trademark.²¹⁷ Nonetheless, the TTAB has given little additional guidance as to how far into the future the decedent needs to wait until they are no longer under the control of a particular individual or entity.

III. THE PERILS OF POSTHUMOUS ENDORSEMENT LAW

The growing bodies of trademark and unfair competition law surveyed in Part II have facilitated the growing industries of post-humous endorsement surveyed in Part I. Nonetheless, there are numerous problems with these bodies of law. They largely fail to

214. See *In re Sloppy Joe’s Int’l, Inc.*, 43 U.S.P.Q.2d 1350, 1353-54 (T.T.A.B. 1997) (“Hemingway’s friendship with the original owner of Sloppy Joe’s bar, his frequenting the bar and his use of the back room as an office is not the kind of ‘connection’ contemplated by Section 2(a).”).

215. See *id.* at 1352 (rejecting applicant’s argument that “because the right of publicity terminates upon the death of the individual, the Section 2(a) false suggestion of a connection ground may not be asserted with respect to Ernest Hemingway”).

216. See, e.g., *Experience Hendrix, LLC v. Elec. Hendrix, LLC*, 90 U.S.P.Q.2d 1883, 1889-90 (W.D. Wash. 2008).

217. See *id.*; *In re Sloppy Joe’s*, 43 U.S.P.Q.2d at 1354.

incorporate the insights of advertising and marketing scholarship about why posthumous endorsements are effective and why consumers are willing to suspend disbelief and act as if their favorite deceased celebrity continues to promote goods, services, and political causes. To the extent that trademark law aims to protect consumers from deception, to help ensure consistency across consumption experiences, and to provide transparent accountability around commercial offerings, posthumous endorsement law largely fails on all accounts. Additionally, posthumous endorsement law does little to respect the agency and dignity of deceased endorsers themselves. This Part first provides three sets of critiques of existing posthumous endorsement law. It then cautiously sets forth some reasons for nonetheless not scrapping this area of law completely.

A. *Continuity Problems*

Posthumous endorsement law mistakenly conflates perceptions of endorsement by the decedent, the decedent's estate, and third party assignees, and it fails to account for the qualitative changes that occur when rights transfer between these entities. As outlined in Part I, when consumers are confronted with promotional messages related to the decedent, for example on their official social media pages, they care whether the message reflects an authentically held belief by the decedent or perhaps by those who were personally close to them.²¹⁸ By contrast, they bristle at profiteering—exploiting the goodwill surrounding a deceased celebrity solely for financial gain.²¹⁹ For example, in one of the trademark lawsuits initiated by Experience Hendrix, LLC, the plaintiff's evidence suggested that consumers were upset about the defendant's sale of

218. See *supra* Part I.A.

219. See Ross D. Petty & Denver D'Rozario, *The Use of Dead Celebrities in Advertising and Marketing: Balancing Interests in the Right of Publicity*, 38 J. ADVERT. 37, 43 (2009) ("Many people, particularly Fred Astaire fans, felt this use [of Astaire in Dirt Devil Vacuum Cleaner Advertisement] was neither dignified nor intended to preserve his celebrity goodwill."); Steve Olenski, *The Branding of Dead Celebrities*, FORBES (June 12, 2017, 10:00 AM), <https://www.forbes.com/sites/steveolenski/2017/06/12/the-branding-of-dead-celebrities/?sh=611b4e9a6d80> [<https://perma.cc/HQ76-7LSC>].

Purple Haze Liqueur and blamed it on the Hendrix estate.²²⁰ The court quoted several angry Facebook users:

- “The Hendrix estate are a bunch of f***** vultures.”
- “So the Hendrix estate wouldn’t license music for a biopic, but they’ll stick his face on this purple s****? Oh, ok.”
- “I wouldn’t give the Hendrix estate my p***. Do you think I’m going to buy this f***** drink. Another disgusting money-making scheme from a bunch of vultures.”
- “Little tasteless and tacky on the Hendrix family to market something like this considering his death was associated with barbiturates and Alcoholl [sic].”²²¹

Fans care about respectful commercial uses of the decedent’s image and responsible stewardship of their legacy by their successor.²²² Accordingly, transparency about who is behind a particular communication is important for consumers trying to ferret out the source of a posthumous message. The case law nonetheless only creates more opacity in this area.

Courts repeatedly interchange the decedent and their “estate,” but an “estate” is not a clearly defined entity that provides much in the way of useful consumer information. Black’s Law Dictionary defines an “estate” as simply “[t]he property that one leaves after

220. See *Experience Hendrix, LLC v. Tiger Paw Distributions, LLC*, 119 U.S.P.Q.2d 1004, 1011 (S.D. Ga. 2016), *order amended by* No. CV 416-107, 2016 WL 3963079 (S.D. Ga. July 21, 2016).

221. *Id.* The court nonetheless downplayed this evidence of confusion because “the Court has no evidence indicating that these Facebook users know—or would be likely to know—that Al Hendrix ‘transferred all rights from Jimi’s estate into [Plaintiffs].’” *Id.* Although the court’s reasoning here is somewhat opaque, this lawsuit was technically based upon the infringement of the plaintiff’s registered marks in the JIMI HENDRIX name and signature, which did not appear anywhere on the defendant’s product packaging. See *id.* (“Plaintiffs have not produced any evidence indicating that members of the public have confused Tiger Paw’s product with Plaintiffs or their trademarks.”).

222. See *Petty & D’Rozario*, *supra* note 219, at 43-44 (explaining that possible harms caused by dead celebrity advertising include “disrespect of legacy,” “cheapening of image,” and “dilution of image” for fans that “share the concerns of heirs” regarding the decedent’s rights to publicity).

death; the collective assets and liabilities of a dead person”²²³ and defines “probate estate” as “[a] decedent’s property subject to administration by a personal representative.”²²⁴ Although the IRS defines an estate as “[a] legal entity created as the result of a person’s death.... [that] exists until the final distribution of the assets [is] made to the heirs and other beneficiaries,”²²⁵ numerous courts have held that an estate is *not* a natural or artificial person who can sue or be sued in its own right.²²⁶ Courts in other contexts will often use “estate” as a shorthand for “[Entity X] as the personal representative of the Estate of [Entity Y],”²²⁷ but none of these definitions of an estate reflect the usage present throughout posthumous endorsement law: a deceased person’s heirs or the corporate assignees of those heirs.

Even if an estate is used more colloquially by consumers to refer to a decedent’s surviving family members, as appears to be the case in the Jimi Hendrix example above,²²⁸ posthumous endorsement law largely fails to facilitate this understanding. The estates that are lumped together with the deceased celebrity endorser sometimes include more distant relatives, such as James Dean’s cousin, who administers his estate,²²⁹ or individuals with no relationship at all to the decedent, such as the wife of Marilyn Monroe’s acting coach, who administered her probate estate until 2001 and sold her rights to the Authentic Brands Group.²³⁰ Furthermore, family members’ inheritances can be alienated to third parties even prior to the closing

223. *Estate*, BLACK’S LAW DICTIONARY (11th ed. 2019).

224. *Probate Estate*, BLACK’S LAW DICTIONARY (11th ed. 2019).

225. I.R.S. IRM 3.12.14.1.6 (Jan. 1, 2020).

226. *See, e.g.*, *Spradley v. Spradley*, 213 So. 3d 1042, 1045 (Fla. Dist. Ct. App. 2017) (“[I]t is well-settled that ‘an “Estate” is not an entity that can be a party to litigation. It is the personal representative of the estate, in a representative capacity, that is the proper party.” (quoting *Ganske v. Spence*, 129 S.W.3d 701, 704 n.1 (Tex. App. 2004))); 31 AM. JUR. 2D *Executors and Administrators* § 1141 (2012) (“Since estates are not natural or artificial persons, and they lack legal capacity to sue or be sued, an action against an estate must be brought against an administrator or executor as the representative of the estate.”).

227. *See, e.g.*, *Ganske*, 129 S.W.3d at 704 n.1.

228. *See* *Experience Hendrix, LLC v. Tiger Paw Distributions, LLC*, 119 U.S.P.Q.2d 1004, 1011 (S.D. Ga. 2016), *order amended* by CV 416-107, 2016 WL 3963079 (S.D. Ga. July 21, 2016).

229. *See* Sean F. Driscoll, *James Dean’s Cousin Preserving His Legacy*, THE SPOKESMAN-REV. (Sept. 23, 2005), <https://www.spokesman.com/stories/2005/sep/23/james-deans-cousin-preserving-his-legacy/> [<https://perma.cc/252V-9AV4>].

230. *See* *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 308 (S.D.N.Y. 2019).

of probate,²³¹ for example, at least one-third of Prince's estate is controlled by a licensing company that purchased the inheritance rights of other surviving siblings.²³² Courts nonetheless treat an entity named (deceptively, in this author's view) "The Estate of Marilyn Monroe, LLC" as an "Estate" equivalent to the surviving spouse or children of a decedent.²³³

Moreover, even when the postmortem rightsholder is in fact a close family member, the "estate" label often covers up major disagreements within the family about whether and how to commercially exploit the decedent. The families of Jimi Hendrix and Martin Luther King, Jr., for example, have engaged in significant, prolonged in-fighting.²³⁴ To the extent that consumers see surviving family members as standing in for the decedent's beliefs and values, labeling the successors in interest to the decedent's trademarks as their "estate" masks the true identity of the relevant decision maker and papers over a far more contested set of relationships behind the scenes. Although in other trademark contexts consumers also have no idea what is happening behind the scenes at the mark owner's company, in the endorsement context consumers care especially about the personal attributes and beliefs that motivate communications by the endorser.²³⁵

The conflation of the decedent, their family members, and third party successors within posthumous endorsement laws is mirrored in the social media context. For example, the verification rules for Instagram, whereby an account holder receives a coveted blue checkmark, state that the account will be verified when Instagram

231. See David Horton & Reid Kress Weisbord, *Heir Hunting*, 169 U. PA. L. REV. 383, 385 (2021).

232. See Cori A. Robinson, *Estate-Within-an-Estate: Navigating Prince's Complicated Estate Administration*, ABOVE THE LAW (Feb. 25, 2020, 1:02 PM), <https://abovethelaw.com/2020/02/estate-within-an-estate-navigating-princes-complicated-estate-administration/> [<https://perma.cc/PAR3-WQ8H>].

233. See *Est. of Marilyn Monroe*, 364 F. Supp. 3d at 308.

234. See Peter Sheridan, *Jimi Hendrix: Family Feud over Guitar Legend's £130 Million Estate*, EXPRESS (Nov. 25, 2017, 9:56 AM), <https://www.express.co.uk/celebrity-news/884185/Jimi-Hendrix-guitar-songs-death-family-feud-130-million-estate-fortune> [<https://perma.cc/5PYK-Z44K>]; Jenny Jarvie, *Legal Feud Among Martin Luther King's Children on Display in Court*, L.A. TIMES (Jan. 13, 2015, 6:03 PM), <https://www.latimes.com/nation/la-na-mlk-children-lawsuit-hearing-20150113-story.html> [<https://perma.cc/6SHF-4TVN>].

235. See McGeveran, *supra* note 12, at 1129.

“ha[s] confirmed that an account is the authentic presence of the creator, public figure, celebrity, or global brand it represents.”²³⁶ In practice, it is often impossible to know who is pulling the strings of the verified account of a deceased celebrity.

For example, the account of James Dean is labeled as “The Official Instagram of James Dean Managed by Representatives of the James Dean Estate,”²³⁷ and the account of Aaliyah is labeled as “The Official Instagram Account of Aaliyah Haughton Honoring Her Beautiful Life and Legacy Managed by Representatives of the Haughton Estate.”²³⁸ It is entirely unclear whether the estate “representatives” are the surviving family members who own rights in the decedent or the licensing companies who work with rights-holders.²³⁹ Other Instagram accounts simply label themselves as memorial sites to the decedent: for example, “Remembering Whitney—The greatest voice of our time”²⁴⁰ and “Paying tribute to the life & legacy of Muhammad Ali,”²⁴¹ without any indication to what extent the contemporary commercial messages that frequently appear on those pages are coming from the licensing companies that own significant stakes in the decedents’ intellectual property.²⁴² Other verified pages, like those of Marilyn Monroe²⁴³ or Kobe

236. *Verify Your Accounts on Facebook and Instagram*, FACEBOOK, <https://www.facebook.com/business/learn/lessons/verify-facebook-instagram-account> [<https://perma.cc/U88K-6BE9>].

237. James Dean (@jamesdean), INSTAGRAM, <https://www.instagram.com/jamesdean/> [<https://perma.cc/UE96-U4PG>].

238. Aaliyah Haughton (@aaliyah), INSTAGRAM, <https://www.instagram.com/aaliyah/> [<https://perma.cc/D7HN-CZMN>].

239. An example of a verified Instagram account that *is* clearly labeled is Bruce Lee’s, which discloses “Bruce Lee’s daughter here, @therealshannonlee + The Bruce Lee Family Company on behalf of Bruce Lee’s legacy.” Bruce Lee (@brucelee), INSTAGRAM, <https://www.instagram.com/brucelee/> [<https://perma.cc/2BSC-Z29H>].

240. Whitney Houston (@whitneyhouston), INSTAGRAM, <https://www.instagram.com/whitneyhouston/> [<https://perma.cc/2XKL-7GH5>].

241. Muhammad Ali (@muhammadali), INSTAGRAM, <https://www.instagram.com/muhammadali/> [<https://perma.cc/E75A-XCMF>].

242. See Murray Stassen, *Primary Wave Music Publishing Acquires 50% Stake in Whitney Houston Estate*, MUSIC BUS. WORLDWIDE (May 20, 2019), <https://www.musicbusinessworldwide.com/primary-wave-music-publishing-partners-with-whitney-houston-estate/> [<https://perma.cc/ZL5V-HXBG>]; Press Release, Authentic Brands Grp., LLC, Authentic Brands Group, LLC Completes the Purchase of Muhammad Ali Enterprises (Nov. 19, 2013, 8:30 AM), <https://www.prnewswire.com/news-releases/authentic-brands-group-llc-completes-the-purchase-of-muhammad-ali-enterprises-232486531.html> [<https://perma.cc/L8BP-PNQW>].

243. See Marilyn Monroe (@marilynmonroe), INSTAGRAM, <https://www.instagram.com/marilynmonroe/> [<https://perma.cc/X5UU-W263>] (“The Official Instagram page of #Marilyn

Bryant,²⁴⁴ do not even prominently indicate that the celebrity is deceased and appear to post on contemporary issues as any living celebrity might.

The persistent conflation, in both case law and social media, of a decedent and their various categories of successors falsely suggests to consumers that the decedent's commercial goodwill has continued postmortem when it very well may not have. As mentioned above, trademark law's assignment-in-gross doctrine is meant to make sure that when rights have been transferred to a new owner, consumer associations between the mark and the core features of the original source carry over.²⁴⁵ Such consumer protection concerns are highly salient with respect to posthumous endorsement. The value of a celebrity endorsement, as explained in Part I, comes from some combination of their personal characteristics (such as authenticity, credibility, and expertise) and their voluntary associations with certain characters, music, or political causes.²⁴⁶ Whether these values can seamlessly transfer over to some third party is highly doubtful, and certainly not likely without transparent disclosure concerning who is speaking on behalf of the decedent.²⁴⁷ As Professor Laura Heymann has observed, although consumers are used to some alterations to the person or entity standing behind a name, this assumes that "the essential qualities of the referent remain consistent."²⁴⁸ With celebrity endorsements, the essential qualities of the referent are tied to the endorser's particular authenticity,

Monroe").

244. See Kobe Bryant (@kobe Bryant), INSTAGRAM, <https://www.instagram.com/kobe Bryant/> [<https://perma.cc/BC28-Z47P>] ("Writer. Producer. Investor @granity @bryantstibel @drink bodyarmor @mambamambacitasports").

245. See *supra* Part II.A; see also Heymann, *supra* note 122, at 1357 ("[G]oodwill is deemed to have been transferred along with a trademark only if consumers have the same general perceptions about the offerings and level of quality associated with the mark after the assignment as before.").

246. See McGeveran, *supra* note 12, at 1129 ("Recipients of these trusted referrals rely on them in part precisely because of their voluntariness.").

247. See Yvette Joy Liebesman, *When Selling Your Personal Name Mark Extends to Selling Your Soul*, 83 TEMP. L. REV. 1, 43-44 (2010) ("It is most likely impossible to completely disconnect a person from their personal identity through contract."); see also Rothman, *supra* note 163, at 1277 (supporting limits on transferability of some personal marks "when they are inseparable from the underlying person").

248. Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 435, 438 (2011) (observing that the "Dear Abby" advice column has featured multiple Abby's).

credibility, and expertise—qualities that cannot be easily inherited or transferred to third parties.

Other scholars have critiqued the alienability of the right of publicity because of the necessary connection between an individual and their name, image, or likeness.²⁴⁹ The arguments against the alienability, and especially the descendibility, of endorsement rights are even stronger. The affirmative, voluntary decision for an endorser to be associated with a third party is even more difficult to extricate from the individual making that decision. Professor Mark Lemley has observed that allowing the assignment of endorsement rights to a third party makes no sense “because only the celebrity, not an assignee, could be perceived as and confused for an endorser.”²⁵⁰ Having a third party control someone’s endorsements, particularly a dead person’s endorsements, is both difficult to conceptualize and at the very least carries the risk of consumer confusion.²⁵¹ Even if fans are willing to suspend their disbelief concerning the source of endorsements after a celebrity’s death, there is a qualitative difference from fans’ perspectives between those communications emanating from a decedent’s close family members and those emanating from private equity-backed brand management companies.²⁵² Trademark law muddles the meaning of posthumous endorsement practices for the benefit of assignees and to the detriment of consumers.

B. Discursive Problems

Posthumous endorsement rights give successors in interest substantial power over shaping the memory of the deceased as well as their ongoing cultural meaning. As recognized by the Meaning

249. See, e.g., Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 189-90 (2012).

250. See Lemley, *supra* note 11, at 1173-74; see also Dogan & Lemley, *supra* note 117, at 1216 (arguing that third parties exercising endorsement rights are “more likely to confuse than to inform”).

251. See Heymann, *supra* note 248, at 439 (“Legal intervention thus seems appropriate ... when the individual or good has been altered so significantly that the denotation is no longer accurate.”).

252. See Annie Massa, *Blackrock Acquires \$875 Million Stake in Company Behind Sports Illustrated and Juicy Couture*, BRUDIRECT (Aug. 12, 2019, 10:21 AM), <https://brudirect.com/news.php?id=74100> [<https://perma.cc/G4JB-VZN3>].

Transfer Model,²⁵³ as well as by numerous cultural studies of contemporary celebrity, celebrity is a co-construction of the celebrity individual, their fans, and a range of professional, corporate, and institutional intermediaries.²⁵⁴ By centralizing endorsement rights in whomever acquires trademark, publicity, or other intellectual property rights from the decedent, posthumous endorsement law places its thumb heavily on the corporate intermediary end of the scale. This dynamic—corporate control over cultural meaning—has been addressed by others in the context of postmortem publicity rights,²⁵⁵ but discursive control is especially problematic here. Owners of posthumous endorsement rights control not just the use of the deceased celebrity’s name or image; they are able to control their official “voice.” Through digital technologies and verified social media accounts, rightsholders can communicate support for goods, services, and causes in a way that appears to emanate from the decedent themselves.

A celebrity’s fans often carry strong emotional and psychological attachments to the celebrity, and the primary way fans express such attachment is through consumption of goods, services, and causes associated with the celebrity.²⁵⁶ Public identification with prominent celebrities is broadly understood to be both an act of self-definition and a reflection of an authentic, if sometimes stigmatized, bond with the celebrity.²⁵⁷ This is particularly true with members of marginalized communities that bond to certain celebrities who publicly embrace values, such as sexual empowerment or gender fluidity, that are otherwise hard to find in the public sphere.²⁵⁸ Accordingly, those who have control over the official messaging surrounding a deceased celebrity (particularly a recently deceased one) have the

253. See McCracken, *supra* note 67, at 310.

254. See, e.g., Tan, *supra* note 89, at 916.

255. See generally Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125 (1993).

256. See Marcela Moraes, John Gountas, Sandra Gountas & Piyush Sharma, *Celebrity Influences on Consumer Decision Making: New Insights and Research Directions*, 35 J. MKTG. MGMT. 1159, 1171 (2019).

257. See *id.* at 1172-75 (reviewing literature on parasocial relationships between audiences and media personalities).

258. See Tan, *supra* note 89, at 949.

ability both to shape the identities of the fans attached to them and to commercially exploit those attachments.²⁵⁹

Because the death of a celebrity can be extremely financially lucrative, rightsholders have a strong incentive to frame the decedent's memory in marketable ways.²⁶⁰ For example, the official messaging around many deceased celebrities often whitewashes the struggles and trauma that often followed them during life.²⁶¹ Whitney Houston, Marilyn Monroe, Michael Jackson, Amy Winehouse, Prince, and many other celebrities all battled different forms of addiction,²⁶² yet their official posthumous personae are stripped of these demons. For example, Whitney Houston becomes "America's sweetheart,"²⁶³ and Marilyn Monroe becomes a timeless sex symbol—an "icon of seductive beauty."²⁶⁴ Deceased celebrities,

259. See McCracken, *supra* note 67, at 317 ("The celebrity is supplying not just an example of self-creation, but the very stuff with which this difficult act is undertaken.... This makes the celebrity very powerful indeed.").

260. See Penfold-Mounce, *supra* note 98, at 494 ("The productivity of the celebrity dead is driven by the living (family or professional management groups) who possess the celebrity as a brand and use them as a catalyst for the production of wealth through a posthumous celebrity career."); Carl Öhman & Luciano Floridi, *The Political Economy of Death in the Age of Information: A Critical Approach to the Digital Afterlife Industry*, 27 MINDS & MACHS. 639, 648 (2017) ("[D]igital afterlife services have an incentive to shape one's digital remains, the product of one's work and online identity, according to what is profitable.").

261. See Peggy J. Bowers & Stephanie Houston Grey, *Karen: The Hagiographic Impulse in the Public Memory of a Pop Star*, in AFTERLIFE AS AFTERIMAGE, *supra* note 95, at 97-99, 103-07 (discussing the saint-like presentation of Karen Carpenter, and the downplaying of her severe anorexia); Loren Cheri Shokes, *Life After Death: How to Protect Artists' Post-Mortem Rights*, 9 HARV. J. SPORTS & ENT. L. 27, 34 (2018) ("One of the most hotly debated aspects of digitally recreating Tupac for Coachella is that, in addition to interpolating words into the performance that the actual Tupac never uttered, the masterminds that erected the show purposefully expurgated Tupac's more controversial lyrics.... Censoring Tupac's lyrics without explanation intentionally distorts and extinguishes the very aspects of his identity that made him a household name.").

262. See, e.g., Alan Light, *How a Director Uncovered Whitney Houston's Secret Pain*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/movies/whitney-houston-documentary.html> [<https://perma.cc/SK5U-VDSM>]; Jordan Zakarin, *Inside Amy Winehouse's Downward Spiral and Tragic Death*, BIOGRAPHY (July 17, 2020), <https://www.biography.com/news/amy-winehouse-death> [<https://perma.cc/UD8N-2RGL>].

263. See Sisario, *supra* note 24 ("Whitney was America's sweetheart, and the idea now is to remind people that that is what her legacy is.").

264. See Penfold-Mounce, *supra* note 98, at 499; see also Andrew Adam Newman, *Marilyn Monroe's Star Still Shines in Ad Campaigns*, N.Y. TIMES (Aug. 5, 2013), <https://www.nytimes.com/2013/08/06/business/media/marilyn-monroes-star-still-shines-in-ad-campaigns.html> [<https://perma.cc/Y3HA-HFJH>] ("A new campaign — with the slogan 'Styles change. Sexy is forever.'— features photos of Monroe with quotations from her.").

particularly those celebrities who have become valuable commodities, are flattened into character archetypes whose “official” stories will make the most money for their rightsholders.²⁶⁵

The commercial incentives surrounding a deceased celebrity also shed new light on the political causes that deceased celebrities appear to be associated with. For example, Authentic Brand Group’s most prominent celebrity assets—Marilyn Monroe and Elvis Presley—have both posted support for the Black Lives Matter movement by posting black squares on their account in June 2020 with the hashtag #BlackoutTuesday.²⁶⁶ Such posts reflect smart brand management strategy; reflecting the insights of the Meaning Transfer Model, the managers of these accounts are able to actively associate Monroe and Presley with democracy and social activism in a way that is likely to appeal to audiences that long postdate them.²⁶⁷ However, such posts are not necessarily a representation of *truth*.²⁶⁸ We ultimately cannot know precisely what Monroe or Presley would think about the deaths of George Floyd or Breonna Taylor or about how to resolve today’s voting rights disputes.²⁶⁹ The Marilyn Monroe and Elvis Presley that exist today are the products of decades of deliberate posthumous marketing, yet both are presented to the public as active cultural voices, speaking from a nebulous cultural purgatory in service of their rightsholders’ ongoing commercial needs.²⁷⁰

265. See Chloe Preece, *The Authentic Celebrity Brand: Unpacking Ai Weiwei’s Celebritised Selves*, 31 J. MKTG. MGMT. 616, 627 (2015) (“[A]rchetypal characters and storylines are attractive because they are so resonant of meanings; however, they are also inherently ideological.”).

266. See Monroe, *supra* note 9.

267. See Hackley & Hackley, *supra* note 79, at 463.

268. See Öhman & Floridi, *supra* note 260, at 650 (“[C]ommercial enterprises have economic incentives to display digital remains of the dead, their informational bodies, primarily in accordance with what is profitable and not necessarily what is accurate.”).

269. To be fair to Monroe, the historical record does suggest that she was supportive of the civil rights movement and made efforts to boost the careers of Black artists such as her friend Ella Fitzgerald. See, e.g., Sara Kettler, *Ella Fitzgerald and Marilyn Monroe: Inside Their Surprising Friendship*, BIOGRAPHY (Sept. 15, 2020), <https://www.biography.com/news/marilyn-monroe-ella-fitzgerald-friendship> [<https://perma.cc/D4VX-48MQ>]. Elvis Presley’s legacy on issues of race is more contested. See, e.g., Peter Guralnick, *How Did Elvis Get Turned into a Racist?*, N.Y. TIMES (Aug. 11, 2007), <https://www.nytimes.com/2007/08/11/opinion/11guralnick.html> [<https://perma.cc/9YBW-JKSP>].

270. See Hackley & Hackley, *supra* note 79, at 464.

C. Dignitary Problems

In addition to potential harms to consumers stemming from both the opacity of endorsements and discursive manipulation by rightsholders, posthumous endorsement rights can pose harms to decedents themselves. Traditionally, the U.S. legal system has been dismissive of posthumous harms. According to the Fifth Circuit Court of Appeals, “[a]fter death, [an individual] is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.”²⁷¹ Under what has been variously labeled the “oblivion” or “annihilation” thesis, once an individual is dead, they cannot subjectively experience injury, so they lack the ability to be injured in a judicially cognizable way.²⁷² Along these lines, numerous courts have dismissed postmortem civil claims, such as for invasion of privacy or defamation, that were “personal” to them and accordingly expired at death.²⁷³

Several legal scholars and philosophers, however, have argued that the dead retain legally cognizable dignitary interests, both descriptively and normatively. Professor Don Herzog, for example, has challenged the oblivion thesis, observing that “[o]n one side, we have ongoing social practices, centuries of legal doctrine, and endless writing by countless thoughtful figures approving of at least some claims of the dead. On the other, we have a metaphysical objection.”²⁷⁴ Professor Fred Smith strongly supports posthumous legal rights, emphasizing that they can “promote uniquely human pursuits by protecting individuals’ memory, enforcing their will, and accommodating their spirituality after death.”²⁷⁵ Privacy scholars, in particular, have noted that a data subject need not be a living human being to warrant protections against unfettered disclosure

271. *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979).

272. *See generally* Smith, *supra* note 31, at 1503-05 (surveying literature on oblivion thesis); HERZOG, *supra* note 31, at 58 (discussing oblivion thesis).

273. *See, e.g.*, *Lugosi v. Universal Pictures*, 603 P.2d 425, 429 (Cal. 1979) (“[T]he plaintiff’s right is a personal one, which does not extend to members of his family, unless, as is obviously possible, their own privacy is invaded along with his.” (quoting WILLIAM L. PROSSER, *LAW OF TORTS* 814-15 (4th ed. 1971))).

274. HERZOG, *supra* note 31, at 225. As evidence of legal doctrines supporting posthumous claims, Herzog points to the enforceability of testamentary interests, proscriptions against corpse desecration, and copyright claims by certain deceased artists. *See id.* at 58-59, 64-65, 191-92.

275. Smith, *supra* note 31, at 1475.

and use of personal information.²⁷⁶ Even if a dead person cannot feel pain or be emotionally scarred by posthumous events, they nonetheless retain interests in professional, personal, and cultural projects that can be thwarted after they die.²⁷⁷ For example, a decedent's once-successful business might be ruined postmortem, a surviving child might squander a carefully saved inheritance, or a publisher might lose a 1000-page manuscript on its way to publication.²⁷⁸ In other words, dead people cannot be *hurt*, but they can be *harmed*.²⁷⁹

Even if an individual's corporeal existence has ended, they nonetheless often retain a symbolic existence deserving of moral—and legal—standing within the communities that continue in their wake.²⁸⁰ As Professor Daniel Sperling explains, human existence can persist in a nonmaterial form so long as that human subject is recognized as being part of a continuing human community.²⁸¹ He

276. See Jannice Käll, *A Posthuman Data Subject? The Right to Be Forgotten and Beyond*, 18 GERMAN L.J. 1145, 1148, 1151, 1157 (2017); Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 220-24 (2016); Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 929-30, 949 (2016). The European Union's General Data Protection Regulation expressly leaves to each member state whether to extend privacy protections to deceased individuals. See Regulation 2016/679, of the European Parliament and of the Council of 27 Apr. 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Council Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, 27 ("This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons.")

277. See HERZOG, *supra* note 31, at 231; Martha C. Nussbaum, *The Damage of Death: Incomplete Arguments and False Consolations*, in *THE METAPHYSICS AND ETHICS OF DEATH: NEW ESSAYS* 25, 35 (James Stacey Taylor ed., 2013) ("[I]n many cases, events that happen after a person's death can—in a special way related to the interruption argument—be bad for a person."); see also FLORIS TOMASINI, *REMEMBERING AND DISREMEMBERING THE DEAD: POSTHUMOUS PUNISHMENT, HARM AND REDEMPTION OVER TIME* 29 (2017) ("Transcendent desires surpass the timing of our own death and, in a search for meaningfulness outside ourselves, we go beyond the self-satisfaction of meeting our needs and personal preferences in the present moment.")

278. See Sean Hannon Williams, *Lost Life and Life Projects*, 87 IND. L.J. 1745, 1748, 1773-74 (2012).

279. See TOMASINI, *supra* note 277, at 31.

280. See Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 764 (2009) ("Recognition of posthumous legal rights gives the dead significant moral standing within our legal system, as would be expected if lawmakers are driven by a desire to treat the dead with dignity.")

281. DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* 36 (2008).

provocatively suggests that when a living person professes to “love Socrates,” the human subject bearing the interests of Socrates “still exists to be loved.”²⁸² In other words, it is not biological existence that provides moral (and potentially legal) standing to an individual; it is the ongoing existence of human relationships.²⁸³ In the celebrity-fan context, the living maintain increasingly interactive relationships with the dead, and decedents such as Marilyn Monroe, Whitney Houston, and Muhammad Ali very much “exist to be loved” on social media, in movies, and via hologram performances.²⁸⁴ Given that posthumous rightsholders hold out deceased celebrities as commercially and culturally relevant in contemporary life—and that today’s consumers interact with these individuals as if they were still living—many dead people accordingly retain a *de facto* social existence worthy of being taken seriously. If biological death does not extinguish the dead’s cultural and economic force within living communities, it becomes harder to deny the dignitary interests potentially implicated by posthumous activities.

Several scholars in the field of death studies have similarly argued that new technologies are giving the dead a new form of agency that outlives their physical bodies.²⁸⁵ These scholars have argued that, through an ongoing “informational body,” the deceased are able to maintain a contemporary cultural presence.²⁸⁶ Within this framework of posthumous agency, posthumous endorsements have been framed as a form of unauthorized “resurrection” or modern “necromancy.”²⁸⁷ Deceased individuals have been revived

282. *Id.* at 39.

283. *See id.* at 42 (“The only criterion for symbolic existence is that its existing subject must belong to the human community.... [T]he association with the human community is not restricted by time so that both subjects who will join this community and those who have departed from it may be potential subjects for symbolic existence.”).

284. *See id.* at 39; *supra* Part III.A.

285. *See, e.g.,* Tero Karppi, *Death Proof: On the Biopolitics and Noopolitics of Memorializing Dead Facebook Users*, 14 *CULTURE MACH.* 1, 15 (2013) (“[M]emorialized user accounts and memorial pages are Facebook’s way of utilizing the dead and of granting them agency.”); David Giles, *The Immortalisation of Celebrities*, in *POSTMORTAL SOCIETY: TOWARDS A SOCIOLOGY OF IMMORTALITY* 97, 98 (Michael Hviid Jacobsen ed., 2017) (“If, then, the possibility of symbolic immortality is one of the fundamental driving forces behind individuals’ desire for fame, celebrity may well be regarded as a strategy for achieving that goal.” (emphasis omitted)).

286. *See, e.g.,* Öhman & Floridi, *supra* note 260, at 642; PENFOLD-MOUNCE, *supra* note 105, at 1 (“The dead can, and do, have agency.”).

287. *See* Brady Simenson, *The Picture of Marilyn Monroe: How Oscar Wilde Predicts the*

and their agency has been co-opted without their consent in order to sell a product or promote a cause.²⁸⁸ If we are to take seriously the ongoing agency of the deceased, then posthumous endorsement practices place them in a position in which they are unable to assess the risks of associating with a particular offering and are compelled to speak on someone else's behalf without regard to their ongoing interests.²⁸⁹

By resurrecting individuals for commercial purposes without their consent, entities holding posthumous endorsement rights can undermine the dignity of the deceased.²⁹⁰ For example, Marilyn Monroe and Muhammad Ali appear in advertisements for Snickers²⁹¹ and Gatorade²⁹² respectively, and numerous deceased

Frightening Afterlife of the Dead Celebrity Persona, 7 POPULAR CULTURE STUD. J. 39, 39 (2019) (“As technology has developed, however, family estates and production companies have gained even more potential control over dead celebrity personas. No longer is this a mere issue of images, works, and names being used after death, but now the issue has expanded to an almost complete resurrection of the persona itself.”); Sherlock, *supra* note 96, at 171 (“One might perhaps consider the technicians who created the Bob Monkhouse advertisement as modern necromancers—reanimating the digital remains of the deceased Monkhouse to impart his knowledge concerning his own death.”).

288. See Boeuf & Darveau, *supra* note 105, at 1078 (“[N]ecro-advertising associates a brand with individuals (i.e., the *delebs*) who cannot give their consent for the use of their image.”).

289. See McKenna, *supra* note 122, at 286-87 (discussing issues of compelled speech and Kantian concerns with someone speaking on behalf of another).

290. See Rothman, *supra* note 163, at 1326-27 (“Losing control over personal marks, particularly ones that are inseparable from the underlying identity-holder, can work fundamental injuries to a person’s autonomy and dignity.”). Although the argument here is framed largely in terms of questions of agency and free will, these dignitary issues might also be framed in terms of anti-commodification principles, whereby posthumous endorsement improperly treats deceased individuals as fungible market commodities—purchased and sold as means of achieving the commercial needs of their owners. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). Several aspects of the anti-commodification critique seem to apply to posthumous endorsement, for example the alienation of individuals from aspects of themselves that are integral to their personhood (such as their associational choices) and the flattening of a person’s individuality to meet the needs of the market. See, e.g., Tan, *supra* note 89, at 951-52 (referring to the “colonization of the veridical self” through the creation of celebrity); Mark Verstraete, *Inseparable Uses*, 99 N.C. L. REV. 427, 448 (2021) (“[W]hen a person is used through uses of a thing that is connected to them, it risks treating that person as merely a means to an end, undermining their inherent dignity.”); Sherlock, *supra* note 96, at 167 (referring to the creation of “soulless artifact[s]”).

291. See Snickers, *Snickers Super Bowl 2016 Commercial William Dafoe Marilyn Monroe*, YOUTUBE (May 22, 2017), <https://www.youtube.com/watch?v=RLAATrRjxCe> [<https://perma.cc/FM4F-NQMS>].

292. See *Gatorade Launches Champions Edition Collectors’ Bottles*, BEVERAGE INDUS. (July 23, 2021), <https://www.bevindustry.com/articles/94286-gatorade-launches-champions-edition-collectors-bottles> [<https://perma.cc/Q6HK-QLVR>].

celebrities have been tasked with promoting cloth face masks during the COVID-19 pandemic, receiving criticism at times from followers who object either to commercializing a public health crisis or to the politics of mask-wearing itself.²⁹³ For example, in response to a post on pinup icon Bettie Page’s Instagram page promoting face masks, one user responded “[s]he represents freedom she wouldn’t like church closed.”²⁹⁴ Living celebrities are able to assess the potential risks and benefits of associating themselves with products that (for better or worse) have taken on a political meaning in a politically polarized culture; deceased celebrities are not given this opportunity.²⁹⁵ Instead, deceased celebrities are frequently forced to stand behind the commercial and political messages that their acquirers support.

Although the dead cannot themselves march into court and seek an injunction against activities they oppose, the legal system routinely recognizes the interests of other individuals—such as children and persons with cognitive disabilities—who are also unable to protect their interests without a surrogate decision maker.²⁹⁶ The dignitary interests of the deceased undeniably raise concerns over the duration of posthumous rights, but the question of how to cabin such rights should be distinguished from whether such dignitary concerns are raised at all. Moreover, it should be noted that *all* trademarks are potentially perpetual in duration: so long as a name, word, or symbol continues to function as an indication of source, sponsorship, or approval, trademark law will recognize consumer reliance on such functions.²⁹⁷ As demonstrated throughout this Article, an individual’s endorsement can similarly remain culturally

293. See, e.g., Bob Ross (@bobross_thejoyofpainting), INSTAGRAM (Aug. 14, 2020), <https://www.instagram.com/p/CD38YMBgOIg/> [<https://perma.cc/YJ9V-N8K3>] (comment by user @cooperbcarr regarding Bob Ross face masks).

294. See Bettie Page (@bettiepage), INSTAGRAM (May 29, 2020), <https://www.instagram.com/p/CAyByNehJG5/> [<https://perma.cc/RG89-QFT3>] (comment by @realvintageswag).

295. See McKenna, *supra* note 122, at 287 (emphasizing the importance of being “able to weigh the risks of their association”); Kerry Barrett, Note, *Mad Men and Dead Men: Justification for Regulation of Computer-Generated Images of Deceased Celebrity Endorsers*, 65 CLEV. ST. L. REV. 561, 580 (2017) (“Digitally resurrected CGI endorsers lack discretion as to whether or not to appear in the advertisement and lend their credibility to the product.”).

296. See Smolensky, *supra* note 280, at 764.

297. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (noting that “trademarks may be renewed in perpetuity”).

and commercially material for many decades after their death.²⁹⁸ Posthumous dignitary interests are accordingly not incompatible with a functioning trademark system, so long as there is both meaningful continuity in decision-making postmortem and appropriate guardrails in place—such as a fiduciary relationship—to protect the dead’s ongoing interests.²⁹⁹

To the extent that the dead have agency in an increasingly digitized society, by necessity the living will mobilize it.³⁰⁰ In today’s legal landscape, however, this mobilization is not driven by the decedent’s own wishes or by any obligation on behalf of successors to respectfully steward their legacy. It is entirely driven by the demands of the marketplace and the chain of title that places the decedent in the hands of the highest bidder. If trademark law allows any form of exclusive posthumous endorsement rights, there needs to be safeguards in place that better tie the commercial and political activities of the decedent to their ongoing cultural agency.

D. Some Modest Defenses

The previous Sections set forth potential harms that can result from centralizing posthumous rights in family members or other successors in interest. Exclusive posthumous endorsement rights have the potential to deceive fans who are vulnerable to commercial exhortations and to undermine the dignity of the decedent themselves. This does not mean, however, that posthumous endorsement should be a fully unregulated space. There are instead a few reasons—from both consumer protection and dignitary perspectives—to place some legal limits on the market practices of posthumous endorsement.

First, consumers may need protection from overtly deceptive statements about the relationship between a brand, a deceased celebrity, and their family members. For example, at the same time

298. Professor Sperling notes along these lines that the duration of a person’s symbolic existence hinges on “their durability in the minds of others.” SPERLING, *supra* note 281, at 246.

299. *See infra* Part IV.

300. *See* PENFOLD-MOUNCE, *supra* note 105, at 11 (“[T]he agency of the dead ... is mobilised by the living who ‘own’ them.”); *see also* RAYMOND ANGELO BELLIOTTI, POSTHUMOUS HARM: WHY THE DEAD ARE STILL VULNERABLE 171 (2012) (observing that a person’s “transcendent interests are held in trust by proxies and guardians ... by the surviving moral community”).

that Black Lives Matter protests grew around the country during May and June 2020, merchandise featuring the names of George Floyd, Breonna Taylor, and others propagated online.³⁰¹ Some of this merchandise purported to be “official,”³⁰² suggesting that there was some connection between the seller and the families of victims of police violence.

To the extent that there are thousands of potential consumers who are strongly motivated by the deaths of these individuals and eager to support their grieving families, the risk of consumer deception and unfair competition is quite significant. Some of these concerns might be channeled into false advertising law, which provides standing to competitors injured by the falsity,³⁰³ but there is a plausible argument that the Floyd family should be allowed to play a gatekeeping role to the commercial elements of the Black Lives Matter movement. Recall from the discussion of posthumous endorsement practices in Part I that consumers often care quite a bit whether a commercial offering is associated with a decedent’s family or is instead purely profit-motivated.³⁰⁴

Existing Lanham Act jurisprudence may make it difficult to prevent this type of commercial piggybacking off the postmortem fame of the victims of police violence. Most courts have required that the alleged endorser have commercialized, or at least established some sort of commercial value, during their lives, and they have rejected false endorsement claims by surviving family members in the absence of such a showing.³⁰⁵ Notwithstanding efforts by some of

301. See Peter, *supra* note 36.

302. See, e.g., ShirtsByPRINTBOD, *George Floyd I Can’t Breathe Official Shirts—Black Lives Matter*, ETSY, <https://www.etsy.com/listing/802114188/george-floyd-i-cant-breathe-official> [<https://perma.cc/P838-9DNK>]; *Official Justice for George Floyd T-Shirt*, GEMINI PREMIUM, <https://geminipremium.com/product/official-justice-for-george-floyd-t-shirt/> [<https://perma.cc/N953-D8NZ>]; *Stand with George Floyd: Official Merchandise*, BONFIRE, <https://www.bonfire.com/store/stand-with-george-floyd/> [<https://perma.cc/524E-SHGK>] (listing “Official Merchandise,” the proceeds of which “will be donated to BLM or George Floyd’s family”).

303. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-40 (2014); see also Barrett, *supra* note 295, at 569-72 (arguing that use of posthumous endorsements via CGI technologies are deceptive under the FTC’s endorsement and testimonials guidelines).

304. See *supra* Part I.B.

305. See, e.g., *Brooks ex rel. Est. of Bell v. Topps Co.*, 86 U.S.P.Q.2d 1361, 1367-68 (S.D.N.Y. 2007). See generally CHARLES E. MCKENNEY & GEORGE F. LONG III, 1 FEDERAL UNFAIR COMPETITION: LANHAM ACT 43(A) § 7:5 (rev. ed. 2021) (“While some cases have held that the

these families to obtain a trademark in their loved one's name,³⁰⁶ or the observation by some IP scholars that *everyone* has a dignitary interest in not being falsely presented as an endorser,³⁰⁷ trademark law's privileging of lifetime fame may undercut the potential for posthumous endorsement law to protect consumers, the deceased, and their families.

Second, posthumous endorsement law, if better calibrated, could be an effective way of protecting the agency of the deceased by limiting the ability of the living to conscript them into activities they did not support, or demonstrably would not have supported. This concern is especially salient in the political context, when the families of deceased celebrities and public figures have objected to the inclusion of the decedent's image or voice in campaign fundraising.³⁰⁸ Although Lanham Act jurisprudence is split as to whether political fundraising is an actionable "use in commerce,"³⁰⁹ placing a deceased individual behind a cause without their consent both strongly triggers posthumous dignitary concerns and alters the constellation of cultural meanings surrounding the decedent. Each of these dynamics comes with potential detriment to the decedent, their fans, and their desired political and commercial associations. Giving standing to certain family members, or a decedent's *chosen* steward, might better recognize and protect the ongoing interests of the deceased.

attainment of popularity or celebrity may be a condition precedent for a successful false endorsement claim under the Lanham Act, there is a significant body of case law developing with respect to this issue." (footnote omitted)).

306. For example, the mother of Elijah McClain, who died at the hands of the Aurora, Colorado police, applied to register McClain's name as a trademark with the state of Colorado. See Gliha, *supra* note 36.

307. See, e.g., Dogan & Lemley, *supra* note 117, at 1211 (arguing that noncelebrities should be able to stop confusing uses of their names).

308. See *supra* note 10 and accompanying text.

309. Compare *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131 (C.D. Cal. 2009) (rejecting argument by the Republican National Committee that Lanham Act Section 43(a) does not apply to political speech), with *Nichols v. Club for Growth Action*, 235 F. Supp. 3d 289, 297-98 (D.D.C. 2017) (rejecting *Browne* and holding that the Lanham Act does not apply to "political speech expressing a point of view").

IV. POTENTIAL REFORM

Given the problems with existing posthumous endorsement law and recognizing the need to regulate growing use of digital resurrection technologies for commercial purposes, this Part suggests a new framework for approaching posthumous endorsements. It moves away from the existing framework, which (1) conflates the deceased individual with those who have purchased their intellectual property and (2) disconnects postmortem decision-making from the decedent's agency. There are accordingly two missing components in the developing law of posthumous endorsement: transparency and stewardship.

A. Disentangling Posthumous Endorsers

It is important that courts—and ideally social media platforms—become much more rigorous and transparent about both who is actually asserting endorsement rights and who consumers *perceive* as making a particular endorsement. In other words, trademark law needs to stop conflating the decedent with the decedent's surviving family members, with the personal representative of the decedent's probate estate, and with the licensing companies that purchase the decedent's rights. Consumers can be sensitive, in very different ways, to communications from each of these entities,³¹⁰ yet trademark law lumps these entities together when assessing likelihood of endorsement confusion.³¹¹ Some courts, for example, have allowed rightsholders to submit consumer survey evidence about perceptions of authorization from the decedent, “his heirs, estate, or agents.”³¹² If courts were to disambiguate these entities both in their opinions and in the evidence they admit, false endorsement jurisprudence

310. See McGeveran, *supra* note 12, at 1129.

311. See *supra* note 177 and accompanying text.

312. See, e.g., *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1070 (9th Cir. 2015) (accepting survey that asked whether merchandise received permission from “Bob Marley/the person on the shirt or his heirs, estate, or agents”); see also *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 326 (S.D.N.Y. 2019) (rejecting argument “that the Estate’s survey is irrelevant, because respondents did not identify the Estate by name, but rather made statements suggesting Ms. Monroe or people around her endorsed the shirts”).

would better reflect consumers' actual perceptions and be more firmly moored to the consumer protection commitments of trademark and unfair competition laws.

By teasing out these different entities, courts could better identify circumstances in which, from the perspective of the consumer, there has been a qualitative break in the received meaning of the deceased celebrity's endorsement. When consumers perceive that the appearance of a deceased celebrity in an advertisement signals a partnership with the decedent or the decedent's close family members, but the entity claiming false endorsement is an unrelated third party assignee, the consumer may be materially misled.³¹³ When there is a change in the fundamental character of the entity behind a name or image, trademark law typically requires the new entity to stand on its own two feet and start anew in building up consumer goodwill.³¹⁴ Given that endorsements are impactful due to their underlying voluntariness,³¹⁵ if the entity making endorsement decisions is not the entity perceived by consumers as making those decisions, then the rightsholder has no legitimate claim to step in and prevent consumer confusion.

Accordingly, the conflation of rightsholders within posthumous endorsement law *perpetuates* consumer confusion. If a consumer buys a t-shirt, manufactured by Company Z, with Muhammad Ali's image on it, and consumers perceive Ali's family as the party endorsing this t-shirt, there is no compelling reason why Authentic Brands Group (who owns Ali's rights)³¹⁶ should be able to seek damages from Company Z. Authentic Brands Group's decisions about what products *it* voluntary supports is immaterial to consumers, who think that Ali's family still makes endorsement decisions. Giving Authentic Brands Group posthumous endorsement may just privilege its own deceptive endorsement practices over those of third parties.

313. See, e.g., *Experience Hendrix, LLC v. Tiger Paw Distribs., LLC*, 119 U.S.P.Q.2d 1004, 1011 (S.D. Ga. 2016), *order amended* by No. CV 416-107, 2016 WL 3963079 (S.D. Ga. July 21, 2016).

314. See Ronald B. Coolley, *How to Transfer Trademarks when Business Ownership Changes*, 32 PRAC. LAW. 13, 15 (1986).

315. See McGeveran, *supra* note 12, at 1129.

316. See Bond, *supra* note 62.

B. From “Chain of Title” to “Privity and Power”

The only reason that courts recognize that entities with no relationship to the decedent have standing to challenge third parties’ false suggestions of endorsement is that they can trace their chain of title in the relevant trademark, publicity rights, and/or copyright interests back to the decedent.³¹⁷ This is not nearly enough to achieve what should be the twin goals of any posthumous endorsement regime: (1) protect consumers with continuing attachments from confusion and exploitation; and (2) respect the dignity of the deceased. Nowhere in the current formulation of posthumous endorsement rights is there any meaningful notion of stewardship; that is, an understanding that posthumous endorsements entail decision-making on behalf of the deceased with respect to their ongoing interactions with living consumers.³¹⁸ Although many posthumous rightsholders undoubtedly take their stewardship responsibilities very seriously,³¹⁹ there are few formal guardrails in place to ensure that rightsholders uphold the decedent’s express wishes or at least attempt to further the interests of the decedent and their surviving communities.³²⁰

To bring a more explicit element of stewardship into this area of law, this Article proposes that an entity should only have standing to assert a claim for false endorsement, infringement of an inherited selfmark, or cancellation of a trademark under Lanham Act section 2(a) if it has both “privity” and “power.” The “privity” requirement captures the chain of title concern present in existing

317. See *supra* Part II.A.

318. See Gildea, *supra* note 39, at 340 (“Unlike traditional questions of planning and inheritance, which require choosing a particular beneficiary and tailoring investment decisions based on the characteristics of that beneficiary, stewardship is the active, ongoing art of managing the relationship between that person, their family, and the many stakeholders who interact with the person and their digital trail.” (footnote omitted)).

319. See, e.g., Gildea, *supra* note 28, at 669-76 (surveying numerous examples of family members equating their ownership and enforcement of inherited intellectual property with both the continuity of their loved ones’ life projects and the protection of their posthumous legacy).

320. See Boeuf & Darveau, *supra* note 104, at 1079 (“[T]he nature of a posthumous association with a brand remains relatively ambiguous due to the general lack of consent [from dead celebrities] surrounding the publicity rights of their images.”); see also BELLIOTTI, *supra* note 300, at 171 (observing that a decedent’s “transcendent interests ... are held in trust by the surviving moral community”).

law³²¹ and requires that the plaintiff has title to the name, symbol, image, persona, or work that the defendant is using to suggest endorsement. The “power” requirement, however, substantially limits the scope of false endorsement rights to only those entities that are legally entitled to make decisions on behalf of the deceased, subject to duties of loyalty and prudence. Endorsements involve the voluntary choice to associate with a good, service, or cause,³²² and the only way that a dead person can coherently be said to endorse something is when they are survived by a surrogate decision maker who is tasked with acting on their behalf.

Thankfully, the legal system already provides numerous avenues for establishing posthumous decisional surrogacy. A decedent can charge an executor or trustee with a wide array of posthumous decisions,³²³ and a court can appoint an estate administrator in the absence of a will or trust.³²⁴ In each of these scenarios, the appointed surrogate is bound by fiduciary duties to place the interests of the decedent over their own, and with these structures in place, they are empowered to make some very sensitive personal decisions regarding the decedent. For example, an estate representative can consent to: the release of medical information under HIPAA,³²⁵ the disclosure of the decedent’s email account under the Stored Communications Act;³²⁶ the waiver of attorney-client, doctor-patient, and therapist-patient privileges;³²⁷ and the search of a home under

321. See, e.g., *A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, 364 F. Supp. 3d 291, 304, 311 (S.D.N.Y. 2019).

322. See *McGeveran*, *supra* note 12, at 1127.

323. See *Executor*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Trustee*, BLACK’S LAW DICTIONARY (11th ed. 2019).

324. See *Administrator*, BLACK’S LAW DICTIONARY (11th ed. 2019).

325. See 45 C.F.R. § 164.502(g)(1) (2021) (“[A] covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter.”).

326. See *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 768 (Mass. 2017).

327. See, e.g., *Mayorga v. Tate*, 752 N.Y.S.2d 353, 354 (App. Div. 2002) (per curiam) (“[J]ust as the attorney-client privilege itself survives the death of the client for whose benefit the privilege exists, the right to waive that privilege in the interest of the deceased client’s estate also survives, and may be exercised by the decedent’s personal representative.” (citations omitted)); *Dist. Att’y for Norfolk Dist. v. Magraw*, 628 N.E.2d 24, 27 (Mass. 1994) (“[W]aiver of the privilege may be in the patient’s estate’s best interest when the patient is deceased, just as it may be in her own best interest while she is living. We hold that the psychotherapist-patient privilege may be waived by the administrator or executor of the estate of the deceased patient.”); *McDonald v. McDonald*, 192 N.W.2d 903, 911 (Wis. 1972) (“[T]he physician-patient

the Fourth Amendment.³²⁸ Again, such decisions must typically be made in light of the decedent's best interests³²⁹ and in accordance with the decedent's express instructions, when available.³³⁰

If standing in false endorsement cases were limited to those entities which are legally empowered to make decisions on behalf of the deceased—typically entities subject to a fiduciary obligation—the results would change in some, but not all, of the cases surveyed in Part II. In many of the posthumous endorsement cases, there is already a fiduciary obligation in place requiring an appointed trustee, chosen executor, or court-appointed administrator to act in accordance with the decedent's express wishes and/or best interests.³³¹ Deviations from such duties of loyalty may be difficult to enforce as a practical matter, but they nonetheless constrain the rightsholder from prioritizing their own financial interests. In other cases, however, the transfer of endorsement rights (or related IP) to third parties severs the functional connection between the decedent's agency and the posthumous decision maker. For example, where the probate estate of a decedent, such as Marilyn Monroe, closes and the decedent's assets are transferred to an independent entity, that independent entity has no obligation to consider the interests of the decedent.³³² Such third-party transferees, who lack any formal legal tie to the decedent, do not meaningfully represent

privilege of a deceased person is held by his personal representative ... and extends to medical reports of an attending physician." (citing *Leusink v. O'Donnell*, 39 N.W.2d 675 (Wis. 1949)).

328. See *United States v. Hunyady*, 409 F.3d 297, 303-04 (6th Cir. 2005).

329. See *United States v. Yielding*, 657 F.3d 688, 707 (8th Cir. 2011) ("A personal representative of a deceased client generally may waive the client's attorney-client privilege, however, only when the waiver is in the interest of the client's estate and would not damage the client's reputation."), *aff'd*, 533 F. App'x 674 (8th Cir. 2013); 45 C.F.R. § 164.502(g)(5) (2021) ("[A] covered entity may elect not to treat a person as the personal representative of an individual if ... [t]he covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.").

330. See UNIF. TR. CODE § 801 (UNIF. L. COMM'N 2000) ("The trustee shall administer the trust in good faith, in accordance with its terms and purposes."); RESTATEMENT (THIRD) OF TRUSTS § 76(1) (AM. L. INST. 2007) ("[T]he trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.").

331. See, e.g., *Branca v. Mann*, 103 U.S.P.Q.2d 1993, 1999 (C.D. Cal. 2012) (lawsuit by chosen executor of Michael Jackson's estate against unauthorized tribute websites); *Est. of Barré v. Carter*, 272 F. Supp. 3d 906 (E.D. La. 2017) (lawsuit by sole heir and administrator of Messy Mya's intestate estate against Beyoncé).

332. See, e.g., OR. REV. STAT. § 116.213 (2021) (stating that the discharge of the personal representative "operates as a release of the personal representative from further duties").

the agency of the decedent and accordingly cannot signal to consumers the perceived voluntary associations inherent in celebrity endorsements. This limitation does not, however, render posthumous endorsement rights entirely inalienable. For example, estate assets can be transferred to a third party in trust, subject to obligations to continue the fiduciary management in the best interests of the decedent.³³³ Even without a trust or formal fiduciary role, the transferee could potentially agree via contract to take on the duty of loyalties that constrain their predecessors in interest.³³⁴ And to the extent that the “privity and power” framework disincentivizes large acquisitions undertaken by companies like Authentic Brands Group or Primary Wave, it does nothing to prevent these companies from working closely as advisors, agents, or managers to trustees, executors, or other estate representatives.³³⁵

The primary goal of the “privity and power” framework is to channel questions of endorsement more squarely into estate planning. Lawyers and scholars in the estate planning field increasingly recognize the importance of explicitly planning for the digital afterlife, for example by identifying who will inherit and control social media accounts postmortem.³³⁶ This chosen steward will often be forced to make difficult decisions concerning questions of privacy and other ongoing dignitary interests, and one of the goals of estate

333. See, e.g., *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1112 (9th Cir. 2015) (discussing Ray Charles’ transfer of his entire probate estate into a charitable foundation designed to “fulfill the wishes of Ray Charles”).

334. See, e.g., Gregory Klass, *What if Fiduciary Obligations Are like Contractual Ones?*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 93, 93 (Paul B. Miller & Andrew S. Gold eds., 2016) (“Parties can, by and large, contract for whatever first-order obligations they wish, including fiduciary ones.”).

335. These licensing entities already claim to work closely with the estate of the decedents whose rights they acquire. See, e.g., Olson, *supra* note 63 (“I am awed that Primary Wave has been chosen by the estate of James Brown to partner with the Godfather of Soul[.]”). Moreover, to the extent that these acquisitions center on other valuable assets, such as decedents’ copyright interests, the proposed framework would leave undisturbed the management of those assets, which are more easily separated conceptually from the decedent than are endorsement rights. See 17 U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”).

336. See, e.g., Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 *BAYLOR L. REV.* 547, 549-51 (2019); Gerry W. Beyer & Naomi Cahn, *When You Pass on, Don’t Leave the Passwords Behind: Planning for Digital Assets*, 26 *PROB. & PROP.* 40, 41-43 (2012).

planning in this context is to get the decedent to lay down instructions that will guide posthumous decisions about often emotionally and culturally complex topics.³³⁷ Posthumous endorsement would ideally be treated as another piece of the digital afterlife puzzle.

There are a few well-publicized examples of individuals expressly incorporating questions of posthumous endorsement into their estate plan.³³⁸ First, when Fred Astaire died in 1987, his will set forth detailed instructions to his surviving spouse and executor.³³⁹ Although she received immense criticism, the endorsements she permitted could be reasonably construed as an extension of her late husband's free will.³⁴⁰ Second, when actor, philanthropist, and salad dressing spokesperson Paul Newman died in 2008, his will transferred his intellectual property rights to the Newman's Own Foundation with instructions to prevent uses he "did not approve during [his] lifetime" and not to use his image to promote low-quality foods.³⁴¹ Third, when Robin Williams died in 2014, he funded a trust with his name and image rights and instructed the trustee not to authorize any commercial relationships for twenty-five years.³⁴² If the trustee were to enter into an endorsement deal, they would be in violation of their fiduciary duties and subject to liability or removal; by contrast, if an advertiser were to use Williams' image in a deceptive manner, the trustee should have standing to sue for false endorsement. And fourth, following the death of Herman Cain

337. See Gilden, *supra* note 39, at 335-40.

338. For a related discussion of the use of estate planning by artists to control their posthumous legacy, see Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253, 266-75 (2017).

339. Denver D'Rozario & Guang Yang, *The History and Evolution of the Market for 'Delebs' (Dead Celebrities)*, 8 ATL. MKTG. J. 1, 17 (2019), <https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1259&context=amj> [<https://perma.cc/F7FC-4LQW>].

340. See *id.*

341. See Alison Leigh Cowan, *Paul Newman, Philanthropist, Does Hereby Leave...*, N.Y. TIMES (Nov. 26, 2018, 2:13 PM), <https://cityroom.blogs.nytimes.com/2008/11/26/paul-newman-philanthropist-does-hereby-leave/> [<https://perma.cc/R48Z-XMNG>]; Julie Garber, *Paul Newman's Last Will and Testament*, LIFE & TIMES HOLLYWOOD (Mar. 16, 2018), <https://thelifeandtimesofhollywood.com/alzheimers-disease-has-robbed-actress-joanne-woodward-of-her-fondest-memories-while-her-family-feuds-over-her-billion-dollar-estate-also-paul-newmans-last-will-and-testament/> [<https://perma.cc/VP4A-4CS4>].

342. See Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, HOLLYWOODREP. (Mar. 30, 2015, 11:45 AM), <https://www.hollywoodreporter.com/business/business-news/robin-williams-restricted-exploitation-his-785292/> [<https://perma.cc/J7HE-XP6L>].

during the summer of 2020, his social media accounts were transferred to several family members, who continued to post highly political messages from his Twitter account.³⁴³ Although they received criticism for some of these messages, it appears that Cain's estate plan provided for this shift in decision-making authority.³⁴⁴ Moreover, Cain's family was far more transparent than other successors in interest have been following a transfer in social media accounts,³⁴⁵ acting with relative transparency about who continues to post from Cain's account. These are all examples of decedents using estate planning techniques to control their commercial after-life and posthumously exert their agency on their own behalves.³⁴⁶

By channeling posthumous endorsement rights through estate planning—and limiting standing to those who have the authority to act on the decedent's behalf—trademark and unfair competition laws can better ensure that *everyone* is protected against nonconsensual conscription into posthumous commercial activity. Instead of requiring, as some courts have, that the decedent establish a lifetime commercial interest in their persona, the “privity and power” framework would allow surviving family members of an individual with sudden posthumous fame—such as in the Black Lives Matter context—to initiate a false endorsement lawsuit upon receiving appointment as a personal representative.³⁴⁷ This representative would not have the benefit of explicit instructions on how to make endorsement decisions as they might if they were chosen via the decedent's will, but they would nonetheless be constrained to act in the best interests of the decedent and surviving family members. If an individual wants to both set forth binding instructions on

343. See Travis M. Andrews, *The Curious Saga of the Deceased Herman Cain's Living Twitter Account*, WASH. POST (Aug. 31, 2020), <https://www.washingtonpost.com/technology/2020/08/31/herman-cain-twitter-account/> [<https://perma.cc/A762-6V9Q>].

344. See *id.* See generally Tamara Kneese, *Herman Cain and the Problems with Tweeting After Death*, SLATE (Aug. 18, 2020, 1:55 PM), <https://slate.com/technology/2020/08/herman-cain-death-twitter.html> [<https://perma.cc/D2XH-R3XJ>].

345. See *supra* Part III.A.

346. See PENFOLD-MOUNCE, *supra* note 105, at 35 (“[D]ead celebrities can remain in control and exert their agency for themselves by leaving strict instructions regarding how they wish their posthumous career to be conducted.”).

347. See, e.g., *Est. of Barré v. Carter*, 272 F. Supp. 3d 906, 912-13 (E.D. La. 2017) (sister of deceased rapper opened probate and obtained fiduciary appointment in order to bring a false endorsement claim against Beyoncé Knowles-Carter, who prominently used the decedent's voice in her hit song “Formation”).

posthumous endorsements and ensure that there is an individual with standing to assert false endorsement claims for an extended (and in some states, perpetual)³⁴⁸ period of time, transferring endorsement rights to a trustee would ensure that there is an entity legally tied to, and constrained by, the wishes of the decedent long after they die.

The privity and power framework would not just extend the decedent's agency into their social afterlife; it might also signal the appropriate *endpoint* of such postmortem agency. When there is no longer any entity who meaningfully stands in the shoes of the decedent for purposes of deciding where, when, and how they should appear in culture, commerce, and politics, then this absence strongly indicates that a shift into the public domain is appropriate. This shift would allow everyone to remember, celebrate, and criticize a departed figure, removing any reasonable belief that the decedent voluntarily associated with a posthumous offering.³⁴⁹ Moreover, where there is no living steward representing the interests of the deceased, it suggests that the line between a "celebrity of our own times" and a "historical figure" has been crossed,³⁵⁰ and that the justification for centralizing false endorsement oversight in a single private entity has disappeared.

CONCLUSION

The dead have never been more alive. With advances in digital technologies and the proliferation of social media accounts, the death of an individual no longer means an end to their active, ongoing, day-to-day presence. But the dead, in their current digital form, are inextricably dependent upon the living to usher them through the culture they leave behind. Normally when an individual is vulnerable to and dependent on the decision-making of others, the legal system imposes some sort of obligation on the empowered decision maker to act in the vulnerable party's best interest. Posthumous endorsement law, by contrast, channels decisions

348. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

349. See *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149-50 (9th Cir. 2002) (finding no likelihood of endorsement confusion where there was a flood of official and unofficial Princess Diana merchandise on the market both before and after her death).

350. See discussion of Hemingway and Da Vinci, *supra* Part II.C.

around the decedent's official posthumous communications to whatever entity obtains the decedent's IP rights, and it places no substantive responsibilities upon that entity. The result is a system of posthumous endorsement that pays little heed to the dignity of the deceased or to the desire for surviving fans to maintain emotional and psychological bonds with them. Only if posthumous endorsements were made more transparent, were the result of deliberate decision-making, and were entrusted to individuals closely connected to the decedent could they constitute part of a thriving digital afterlife.