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## IP, R.I.P.

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# IP, R.I.P.

ANDREW GILDEN<sup>\*</sup>

## ABSTRACT

*Death is an inevitably disruptive event. When a famous artist or public figure dies, the fallout can be particularly complex and contentious. An artist's surviving family and close friends frequently seek privacy and solitude as they process a deeply personal loss, while millions of fans, by contrast, seek to widely share, rework, and celebrate the decedent's archive of work. When these very different mourning processes intersect, intellectual property laws play a pivotal role in deciding how an artist is mourned, commemorated, and remembered.*

*This Article reexamines the interests of an artist's families, friends, and other heirs (IP estates) within the IP system. Previous scholarship has been nearly uniformly critical of IP estates: IP estates "jealously guard" their ancestor's legacy, "sit back and collect rent," and put a "stranglehold" on the public domain. This Article, by contrast, reveals a more diverse and sympathetic set of motivations. Although IP estates do often try to restrict fair use and free speech, they also seek to vindicate interests otherwise celebrated in our legal culture: remedying exploitation, protecting family privacy, and maintaining the dignity of the deceased. For the families and friends of individuals in creative fields, IP can serve as a valuable tool in managing the messy tasks of mourning and moving forward.*

*This Article excavates the role of IP in mediating the diverse interests of families and fans as they process the death of an artist. Even if the conduct of IP estates can be highly questionable from a social welfare perspective, recognizing the interests that animate their disputes nonetheless can lead to (1) greater common ground among the various stakeholders negotiating an artist's cultural legacy and (2) improved use of estate planning to reduce the likelihood of conflict.*

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## INTRODUCTION

The year 2016 witnessed the deaths of an astonishing number of cultural icons: David Bowie, Prince, Leonard Cohen, George Michael, Carrie Fisher, Debbie Reynolds, Gene Wilder, Florence Henderson, Harper Lee, Elie Wiesel, Muhammad Ali, and many, many others. In the wake of this year of great loss—this “year of the reaper”<sup>1</sup>—how should our culture grieve, remember, and commemorate each of their legacies? Are there any limits to how to process the loss of someone with widespread cultural influence? And who decides the proper way to mourn?

When artists and other public figures die, two parallel processes begin. For most people, the passing of a celebrity sets off a very public commemoration, as millions of fans rapidly buy, share, and rework the decedent’s archive of work. Mortality has claimed the individual, but the music, books, films, and speeches can live on forever. It is easy to forget, however, that the decedents’ friends and families need to process the deaths of actual human beings they loved apart from the oeuvre that constitutes their public legacy. In the midst of the near-constant circulation of a deceased artist’s words, voice, and image, the artist’s family and friends must negotiate a new day-to-day reality where they can no longer interact with their mother, sister, daughter, or best friend. They often want what any mourner wants—solitude, privacy, and respect for the difficult task of moving forward with their lives.

Intellectual property laws frequently ensure a clash between these two mourning processes. Under copyright and right-of-publicity laws, family members of a deceased individual are often tasked with deciding what public uses of a decedent’s work or image are lawful at the same time they are most acutely grieving their personal losses. Under U.S. copyright law, copyright protections subsist for seventy years after the author dies,<sup>2</sup> and under many states’ right-of-publicity laws, a property right subsists for many decades after the death of a celebrity.<sup>3</sup> As a result, family members who typically inherit these rights (IP estates) have the exclusive right to authorize dissemination of their ancestor’s creative works and to control commercial uses of their ancestor’s image or likeness. The families and

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1. Lisa Respers France, *2016 Celebrity Deaths: A Year of Great Loss*, CNN (Dec. 26, 2016, 12:32 PM), <http://www.cnn.com/2016/12/22/entertainment/2016-celebrity-deaths>.

2. 17 U.S.C. § 302 (2012).

3. *See, e.g.*, CAL. CIV. CODE § 3344.1(g) (2017) (seventy years after death); IND. CODE § 32-36-1-8 (2017) (100 years after death); TEX. PROP. CODE § 26.012(d) (2017) (fifty years after death). *But see* *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990) (observing no postmortem right in New York).

friends of Prince,<sup>4</sup> David Bowie,<sup>5</sup> and George Michael<sup>6</sup> will accordingly play a pivotal role in shaping how they and their 2016 cohort are remembered in the years to come.

Postmortem intellectual property accordingly highlights the dual meanings of an artist's legacy. "Legacy" means both "a gift by will especially of money or other personal property" (e.g., a bequest) and "something transmitted by or received from an ancestor or predecessor or from the past" (e.g., the legacy of ancient philosophers).<sup>7</sup> IP estates inherit a "legacy" from an artist in the first sense that allows them to control the broader cultural impact and memory of the artist—a legacy in the second sense. In transmitting rights from artists to heirs, IP estates are forced to decide when the personal relationships underlying their testamentary legacies are paramount and when those relationships must cede to the public demands of the decedent's cultural legacy.

Although IP estates play a complex and incredibly important role in today's intellectual property regimes, IP scholars have devoted surprisingly little attention to them.<sup>8</sup> To the extent they have appeared in IP scholarship more than fleetingly, they have appeared almost entirely as the objects of pointed criticism.<sup>9</sup> They are "capricious" aristocrats;<sup>10</sup> "misbehaving children";<sup>11</sup> "trust fund" babies;<sup>12</sup> and "privileged and sometimes arbitrary custodians of culture."<sup>13</sup> They "jealously guard" their

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4. Jeff Nelson & Jordan Runtagh, *The Battle for Prince's Estate: A Complete List of Who Is Staking a Claim to His Millions*, PEOPLE (June 27, 2016, 2:45 PM), <http://people.com/crime/prince-estate-battle-list-of-alleged-heirs-who-he-owned-money>.

5. Daniel Kreps, *Details of David Bowie's Will Revealed*, ROLLING STONE (Jan. 30, 2016), <http://www.rollingstone.com/music/news/details-of-david-bowies-will-revealed-20160130>.

6. Richard Spillett & Alex Matthews, *George Michael's £100m Fortune 'Will Go to His Godchildren'*, DAILYMAIL (Dec. 27, 2016, 4:03 AM), <http://www.dailymail.co.uk/news/article-4067832/George-Michael-s-100m-fortune-Godchildren.html>.

7. *Legacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legacy> (last visited Aug. 11, 2017).

8. The major recent exceptions are scholarship by Professors Eva Subotnik and Tonya Evans. See *infra* notes 24, 37, 280, 285.

9. One exception is in Professor Roberta Kwall's work defending a freely descendible and devisable right of publicity, in which she acknowledged the potentially significant emotional interests of a celebrity's heirs in limiting use of a decedent's image, particularly in highly objectionable contexts. See Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 82 (1994). Professor Eva Subotnik's recent work on the intersection between copyright and trusts and estates is also more sanguine about descendible rights, though she too expresses concerns about the cultural stewardship practices of IP estates. See *infra* note 37 and accompanying text.

10. Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 258 (2011).

11. *Id.*

12. William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 908 (1997).

13. Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1827 (2009).

ancestor's legacy,<sup>14</sup> "sit back and collect rent,"<sup>15</sup> and put a "stranglehold"<sup>16</sup> on what would otherwise be a thriving public domain. Despite being a central component of IP regimes and frequently successful litigants and lobbyists, IP estates often emerge in scholarship as its black sheep: families in chaos, out-of-touch scrooges, and the idle rich.

This Article takes a different approach and seeks to understand what motivates the sometimes restrictive instincts of IP estates. It documents and examines the expressed motivations of deceased artists' families when they assert infringement claims against fans, scholars, or other individuals with an interest in the deceased artist. Drawing from a broad range of litigation-related documents (e.g., briefs, pleadings, depositions, and trial transcripts) and related public statements by heirs, this Article reveals a far more complex taxonomy of interests than suggested by most portrayals of IP estates. Yes, the individuals in these disputes do often inherit great sums of money, and yes, they do often try to quell activities that are likely fair use, but they also often seek to vindicate interests otherwise often celebrated in our legal culture: remedying exploitation, protecting family privacy, and maintaining the dignity of the deceased.

What emerges from this Article's examination of IP estates is that the families of a deceased artist act in many ways like any other family working through the death of a relative: they are at times staunchly protective of their family member's memory; they fiercely guard space for their own private reflection; they cling to inherited property as a way to continue their bonds with a deceased loved one; and they expect others to respect and facilitate their processes of mourning.<sup>17</sup> These mourning practices are often unpredictable, irrational, inefficient, and can very much frustrate the continued dissemination and transformation of the deceased artist's life work. The private mourning of artists' families thus can be sharply at odds with the interests of the millions of fans who have deep attachments to the artists' public personae.

Nevertheless, it is far from a simple task to decide in what circumstances private or public mourning comes first. Scholars, judges, and lawmakers may ultimately and rightfully decide that in many cases the private interests of families may need to give way to the expressive interests of the broader public, but they should do so based on a conscious

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14. Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 318 n.209 (2006).

15. Desai, *supra* note 10, at 259.

16. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 9 (2010).

17. For bereavement literature on "continuing bonds," see *infra* note 238 and accompanying text.

weighing of the actual interests at stake.<sup>18</sup> When confronted with similar emotional attachments, scholars in other fields (e.g., trusts and estates, property law, and family law) have often responded with a sympathetic ear. IP scholarship is notable in its contrasting, widespread skepticism.

It is becoming increasingly untenable for scholars and advocates to overlook the perspectives of IP estates. First, technological advances have enabled deceased celebrities to virtually live on in the public spotlight. For example, *Star Wars: Rogue One* features an incredibly lifelike CGI version of deceased actor Peter Cushing, the 2012 Coachella Festival featured a “live” performance by deceased rapper Tupac Shakur, and Michael Jackson’s hologram performs nightly in Las Vegas. These controversial, but highly lucrative, resurrections are almost entirely in the hands of IP estates. Second, there recently have been numerous high-profile lawsuits involving IP estates, most notably the *Blurred Lines*<sup>19</sup> and *Stairway to Heaven*<sup>20</sup> litigations, as well as infringement lawsuits against artists Ed Sheeran, Justin Timberlake, and Jay-Z.<sup>21</sup> Third, IP estates have latched onto the Supreme Court’s 2014 opinion in *Petrella v. MGM, Inc.*,<sup>22</sup> which effectively allowed lawsuits against uses of copyrighted works that had been ongoing for decades prior to the copyright owner’s death.<sup>23</sup> Fourth, since 2013, copyright heirs have the ability to terminate their relative’s decades-old lifetime transfers, taking copyright out of the hands

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18. See Jeanne Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 562 (2015) (“[I]t is not always clear exactly what is motivating these rights assertions—a desire to preserve the deceased’s reputation or privacy or instead a wish to capitalize on these copyrighted works as successfully as possible.”).

19. See generally Ed Christman, *‘Blurred Lines’ Verdict: How it Started, Why it Backfired on Robin Thicke and Why Songwriters Should Be Nervous*, BILLBOARD (Mar. 13, 2015), <http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and>.

20. See generally Jazz Monroe & Marc Hogan, *Led Zeppelin “Stairway to Heaven” Lawsuit Win Appealed*, PITCHFORK (July 26, 2016), <http://pitchfork.com/news/67079-led-zeppelin-stairway-to-heaven-lawsuit-win-appealed/>.

21. See Jon Bilstein, *Ed Sheeran Sued for Allegedly Copying Marvin Gaye’s ‘Let’s Get It On’*, ROLLING STONE (Aug. 9, 2016), <http://www.rollingstone.com/music/news/ed-sheeran-sued-for-allegedly-copying-lets-get-it-on-w433632>; Ashley Cullins, *Justin Timberlake, Will.i.am Facing Copyright Suit Over ‘Damn Girl’*, BILLBOARD (Feb. 17, 2016), <http://www.billboard.com/articles/business/6882079/justin-timberlake-will-i-am-copyright-suit-damn-girl>; Khaleda Rahman, *Jay Z Is Sued by Egyptian Composer’s Heir over Copyright Claims to Flute Sample in 1999 Hip-Hop Classic Big Pimpin’*, DAILY MAIL (Aug. 14, 2015, 1:11 PM), <http://www.dailymail.co.uk/news/article-3198406/Jay-Z-sued-Egyptian-composer-s-heir-copyright-claims-flute-sample-1999-hip-hop-classic-Big-Pimpin.html>.

22. 134 S. Ct. 1962 (2014).

23. See Ashley Cullins, *From “Stairway to Heaven” to “Damn Girl”: ‘Raging Bull’ Remains Center Stage in Copyright Fights*, HOLLYWOOD REP. (Sept. 9, 2016, 6:16 PM), <http://www.hollywoodreporter.com/thr-esq/stairway-heaven-damn-girl-raging-927182>; Eriq Gardner, *CBS Sued Over ‘Hawaii Five-O’ Theme by Composer’s Family*, HOLLYWOOD REP. (Mar. 20, 2015, 8:17 AM), <http://www.hollywoodreporter.com/thr-esq/cbs-sued-hawaii-five-o-783275>.

of corporate assignees and into the hands of spouses, children, and grandchildren.<sup>24</sup> For IP reformers looking to respond to problems with the current IP landscape or for IP lawyers who must interact or negotiate with IP estates on a regular basis, it is crucial to understand what motivates artists' families to assert infringement claims, how these concerns might be addressed, and ultimately where there might be some common ground.

Clashes between IP estates and the public domain—and between private and public mourning—trigger difficult and important questions about the normative aims of IP regimes: Does IP care about the artist's interpersonal relationships and the conditions under which the author operates? Or is cultural progress fundamentally about harvesting and disseminating discrete cultural works as widely as possible? The answer to these questions have important doctrinal consequences in terms of what uses of a copyrighted work are “reasonable,” whether and how IP can be inherited and alienated, and what remedies are available for assertions of rights holders' “noneconomic” interests. These answers cannot be developed in a vacuum and require a richer and fairer understanding of all the actors in the IP system, including artists' families.

This Article expressly approaches IP disputes from the perspective of the individuals who have—often unwittingly—been given stewardship over an artist's legacy. Part I canvasses the largely negative portrayals of IP estates in previous IP scholarship. Part II documents a more sympathetic set of interests articulated by IP estates in relation to copyright and right of publicity disputes. Part III contrasts the treatment of these interests in IP scholarship with scholarship in other areas of law. Part IV develops a theory of “parallel mourning,” which acknowledges the difficult position in which IP laws place family and friends of deceased artists by requiring them to navigate their own grieving processes at the same time as the broader public's very different process. It then suggests some practical reforms that both respond to the concerns of IP estates and better incorporate estate planning into IP practice. In the absence of an estate plan, IP rights often fracture via intestacy, and more deliberate estate planning could help reduce conflicts between families and fans and underscore that both sides share a strong connection to the deceased artist. Postmortem IP, for better or worse, gives tremendous cultural influence to artists' families, and it is crucial not just to criticize their failings, but also to set them up to succeed.

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24. 17 U.S.C. § 203 (2012); see generally Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109 (2006); Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfers*, 119 W. VA. L. REV. 297 (2017).



## I. SCHOLARLY CRITICISM OF IP ESTATES

IP estates play a tremendously important role within contemporary IP governance, yet they have received surprisingly sparse treatment within the rich field of IP scholarship. Although there is voluminous scholarship dedicated to the extended postmortem duration of copyright protections at the end of the twentieth century,<sup>25</sup> and a smaller, but significant, body of scholarship debating postmortem publicity rights, surprisingly little attention has focused on the actual individuals who receive the direct benefits of these extended terms of protection. Moreover, despite scholarly efforts to better understand the actual motivations of creators and inventors who are meant to be spurred into action and rewarded by IP rights,<sup>26</sup> relatively little empirical work has focused on the IP estates that wield these rights. And to the extent that IP estates have been expressly featured in scholarly work, their treatment has been overwhelmingly negative. This section will summarize the marginal position of IP estates within IP scholarship. It first situates IP estates within broader scholarly debates about IP protections and then turns to their express treatment within IP scholarship.

### A. Postmortem Rights and IP Theory

Estates play a particularly significant role in at least two areas of IP.<sup>27</sup> Under federal copyright law, copyright protections for individually

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25. More specifically, a major catalyst for an explosion in contemporary IP scholarship was the passage of the Sonny Bono Copyright Term Extension Act in 1998, which extended all terms of protection by an additional twenty years and was subsequently affirmed by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Pub. L. No. 105-298, 112 Stat. 2827, and later codified in scattered sections of 17 U.S.C.

26. See KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012); JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015); Symposium, *Values, Questions, And Methods in Intellectual Property*, 90 ST. JOHN'S L. REV. 549 (2016).

27. Other areas of intellectual property do sometimes involve family successors and issues of postmortem ownership, but typically not in ways that trigger the range of emotional attachment and cultural stewardship challenges discussed in this Article. The patent term of protection (twenty years from the filing date of the application) is much shorter than the copyright term (life plus seventy years), meaning that postmortem patent only arises if the inventor dies during that twenty-year period. Trademark protections are *potentially* perpetual, meaning that trademark rights could descend across generations for all time. However, trademark protections only endure so long as the mark is used in commerce, meaning that trademark control will be tied closely to control over the businesses with

authored works endure for the life of the author, plus an additional seventy years.<sup>28</sup> Under the laws of many states, the right of publicity endures several decades beyond the life of the person (identity holder) whose name, voice, and image is protected against advertising, trade, or other commercial uses.<sup>29</sup> Both sets of rights are typically devisable by will or trust and subject to intestate succession,<sup>30</sup> meaning that the holders of copyright or publicity rights will often be family members who survive the author or identity-holder during the postmortem terms of protection.

Even though both IP regimes extend significant power to successor rights holders, such power is only weakly justified by IP theory. Although debates over the foundational justifications for IP protections remain heated among scholars, estates have a fairly tenuous claim under any dominant theory of protection. This section will briefly summarize the position of IP estates within the most commonly cited theories of copyright and publicity rights.

There are longstanding and ongoing heated debates among scholars about whether copyright law is justified by utilitarian or deontological concerns.<sup>31</sup> Under the utilitarian approach, which generally dominates American copyright law, copyright law provides an economic incentive for authors to invest time and energy into the creation of original works of

which the mark is associated. For a discussion of family businesses and intergenerational transfers, see *infra* notes 205–207 and accompanying text. To the extent that trademark law protects celebrities against false indications of sponsorship or association, this strain of trademark law is functionally a subset of the right of publicity, which protects against unauthorized uses of a celebrity’s name, image, voice, and likeness in advertising, without additionally requiring consumer confusion. *See, e.g.*, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (addressing overlapping Lanham Act and state law publicity claims for use of Tiger Woods’ image in commemorative painting); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (addressing overlapping Lanham Act and state law publicity claims for use of a robot version of Vanna White in a Samsung advertisement); *see generally* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *STAN. L. REV.* 1161 (2006) (explaining the overlap between right of publicity and trademark laws).

28. 17 U.S.C. § 302 (2012).

29. *See, e.g.*, CAL. CIV. CODE § 3344.1 (2017) (seventy years postmortem); IND. CODE § 32-36-1-0.2 (2017) (100 years postmortem); TEX. PROP. CODE § 26.001 (2017) (fifty years postmortem). For a state-by-state summary of right of publicity laws, including differences in duration, see ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <http://www.rightofpublicityroadmap.com/> (last visited Sept. 18, 2017).

30. *See* 17 U.S.C. § 201(d)(1) (2012) (“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.”); CAL. CIV. CODE § 3344.1(b) (2017) (“The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument . . .”).

31. *See* Mark A. Lemley, *Faith-Based Intellectual Property*, 62 *UCLA L. REV.* 1328 (2015) (criticizing “faith-based” deontological claims to IP protections); Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 *ST. JOHN’S L. REV.* 681 (2017) (pushing back against Lemley’s critique).

authorship; by prohibiting the unauthorized copying and distribution of an author's work, copyright allows authors to recoup the costs of creation and grow the stock of creative works available for public consumption.<sup>32</sup> By contrast, under the deontological or natural rights approaches more dominant in Europe, copyright protections are justified by an intrinsic connection between authors and their work.<sup>33</sup> This connection might reflect Lockean labor-desert theory, whereby authors mix their labor with intellectual resources and obtain private property in the fruits of such laboring,<sup>34</sup> or Hegelian personhood theories, whereby property rights recognize that creative works are an extension of the author's personality.<sup>35</sup> Although each of these dominant theories suggests a somewhat differently scoped property right, the important point of commonality is that they all focus on *the author*; the living, working author is the social actor who needs to be nudged under utilitarian approaches or recognized and protected under natural rights approaches.<sup>36</sup>

Because authors dominate all foundational theories of copyright, the interests of family members and other successors-in-interest are, at most, incidental to protecting the interests of the author. If copyright is meant to incentivize *creation*, postmortem protections would seem to provide a valuable property right to individuals who are not engaging in creative pursuits (e.g., the *children* of creators). Some scholars and lawmakers have argued that the ability to leave behind a valuable asset to care for surviving family members might provide an additional incentive to authors,<sup>37</sup> but, again, the focus remains on what motivates the author—not on the needs or desires of the surviving family. Under natural rights theories, it is similarly difficult to justify the interests of surviving family members—they have not mixed their intellectual labor with external

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32. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (“By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”).

33. See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 37–52 (2010).

34. See ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 31–67 (2011); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1540–83 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296–330 (1988).

35. See Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *CHI.-KENT L. REV.* 609 (1993); Hughes, *supra* note 34, at 330–65; Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

36. See, e.g., Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 *HOUS. L. REV.* 613 (2014).

37. See Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 *HARV. J.L. & TECH.* 77 (2016); see also 141 *CONG. REC.* 6553 (1995) (statement of Senator Hatch that “copyrights in valuable works are too often expiring before they have served their purpose of allowing an author to pass their benefits on to his or her heirs”).

resources nor are the creative works they control an extension of *their* personalities.<sup>38</sup> Natural rights theories may justify strong control over creative works by the author, but they would seem to cut against similar control by third parties after the author's death.<sup>39</sup>

Surviving families play a similarly marginal role in theoretical justifications for the right of publicity.<sup>40</sup> Although numerous scholars are highly skeptical about the need for publicity rights at all,<sup>41</sup> publicity rights have been justified on similar bases as copyright protections: (1) as an incentive for individuals to cultivate a valuable celebrity/commercial identity; (2) as recognizing natural rights in the fruits of such commercial cultivation; and (3) as protecting the identity holder's autonomy and dignity against unauthorized commercialization.<sup>42</sup> As with copyright law, it is difficult to justify postmortem publicity rights to the benefit of surviving family members under an incentive or labor theory,<sup>43</sup> except perhaps as incidental to the interests of the identity holder.<sup>44</sup>

Under a dignitary/autonomy theory of protection, there has been some measured support for protecting the independent interests of surviving family members. Professor Jennifer Rothman is "not convinced that a postmortem right of publicity should exist," but acknowledges that surviving relatives "might have their own identity-based and dignitary interests in preventing the commercialization of their loved one's image . . .

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38. See Desai, *supra* note 10, at 245–54; Lionel Bently, R. v The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 99 (2008) ("The creative link between an author and her work may justify protection during that author's life, but thereafter an earlier author's claim should readily give way to the needs of subsequent authors."). Natural rights scholars will sometimes carve out a narrow space for the economic dependents of the author.

39. See Bently, *supra* note 38, at 101 ("The idea of authorship points, as much to a reduction in that term (to life) as to its further extension.").

40. Most arguments in favor of the survivability of publicity rights have centered on their formal classification as "property rights," which are generally understood as descendible. See generally Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 19–20 n.107–09 (2009) (surveying literature supporting and opposing a descendible right of publicity).

41. See, e.g., Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125 (1993); F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J. L. & ARTS 1, 62 (2003); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

42. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 237 (2012) (outlining theories).

43. See Madow, *supra* note 41; Tate, *supra* note 40, at 23 ("[E]ven if the prospect of *inter vivos* publicity rights encouraged celebrities (or would-be celebrities) to work harder, it does not follow that making those rights encouraged devisable or descendible would have substantially increased that incentive.").

44. See Rothman, *supra* note 42, at 239 ("Although I am highly skeptical of the incentive rationale for publicity rights, if we accept for purposes of this discussion that it has some legitimacy, then postmortem rights might provide some, though no doubt a minimal, additional incentive.").

. . .”<sup>45</sup> For example, she suggests that the Martin Luther King, Jr. estate might have legitimately objected “if people had profited from making inflatable sex dolls of him upon his death.”<sup>46</sup> Professor Roberta Kwall has recognized similar interests of surviving family members in preventing objectionable portrayals of the deceased individual.<sup>47</sup> These more sympathetic treatments of postmortem publicity rights, however, are fairly abbreviated and touch on only a few specific examples.

### B. *Scholarly Narratives*

The most extensive, express treatment of IP estates appears in critical scholarship by Professors Deven Desai, Robert Spoo, William Patry, Paul Saint-Amour, and Olufunmilayo Arewa.<sup>48</sup> Each of these scholars critiques IP estates for restrictive conduct that limits potentially valuable speech and expression by third parties.<sup>49</sup> What emerges as a byproduct of these important critiques, however, are three distinctly negative narratives about IP estates.

The first narrative is the “slothful heir.” Unlike the author who actually engages in the creative activities that IP laws are meant to foster, the author’s spouses, children, and grandchildren have done nothing to deserve—yet feel strangely entitled to—the lucrative revenue streams that come from lengthy postmortem IP terms. In large part due the dubious incentives rationale for awarding rights to heirs, Professor Desai strongly opposes any postmortem copyright protections: “Unlike authors who labor and pour their being into a work, their children and their children’s

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45. Rothman, *supra* note 42, at 237.

46. *Id.* at 238.

47. Kwall, *Right of Publicity*, *supra* note 9, at 83. Kwall discusses *Hicks v. Casablanca Records*, which concerned the portrayal of author Agatha Christie “as an emotionally unstable woman, who, during her eleven-day disappearance, engages in a sinister plot to murder her husband’s mistress, in an attempt to regain the alienated affections of her husband.” 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

48. See also Kate O’Neill, *Copyright Law and the Management of J.D. Salinger’s Literary Estate*, 31 CARDOZO ARTS & ENT. L.J. 19 (2012) (arguing that any dignity or privacy interest Salinger held in his copyrighted work does not extend to his heirs).

49. Professor Eva Subotnik is more supportive of postmortem copyright protections than the scholars mentioned above, but her support for postmortem protections is tied to the deceased author’s freedom of disposition and the benefits that come from knowing that your testamentary wishes will be heeded and your desired loved ones will inherit valuable property. See Subotnik, *supra* note 37, at 94. She largely agrees with criticisms lodged at the estates who wield these rights, but argues that these criticisms should be aimed at poor stewardship decisions by particular heirs, and not at the basic concept of postmortem rights. *Id.* at 121. Additionally, as discussed in the previous section, Professors Rothman and Kwall have expressed some more measured support for the potential independent dignitary interests of family members wielding postmortem publicity rights. See *supra* notes 44–47.

children simply sit back and collect rent . . . .”<sup>50</sup> Professor Patry similarly finds lengthy copyright terms difficult to justify based on an incentive rationale and instead frames copyright expiration as “impoverishing the trust funds of composers’ grandchildren.”<sup>51</sup> In a similar vein, according to Professor Saint-Amour, “the high prices and restricted access maintained by the estate can increase the elite glamour and apparent vitality of the cultural legacy.”<sup>52</sup> IP estates “become so invested in strategies of legal and financial self-perpetuation that they grow distanced from the memory or intentions of the writers to whom they largely owe their existence . . . .”<sup>53</sup> Professor Arewa criticizes the George Gershwin estate for tending to “authorize performances that gave the most promise of financial return or favorable publicity, with less regard for quality or integrity.”<sup>54</sup> Under this first narrative, IP estates are in it just for the money—they care for nothing beyond a reliable stream of licensing revenues. They are greedy rent-seekers; they are the “idle rich.”<sup>55</sup>

The second narrative characterizes IP estates as mad, unruly tyrants. They exert an “iron grip” on their ancestor’s image and works and make it at best highly uncertain and at worst highly unlikely that scholars and subsequent authors can obtain licenses to proceed with their work.<sup>56</sup> Along these lines, Professor Spoo has been particularly critical of Stephen Joyce, the grandson of Irish author James Joyce—“[p]robably the most fiercely vigilant and obstructive modernist estate in recent years. . . .”<sup>57</sup> The Joyce estate has refused permission for numerous scholarly and creative projects about James Joyce,<sup>58</sup> and Professor Spoo’s response has been scathing:

Armed with a few wasting copyrights and some spare moral rights, and what personal authority he can command, Mr. Joyce has tilted repeatedly at the academic and pop-culture windmills which, he feels, are making a commodity of a beloved family member. Mr. Joyce’s efforts have not been without a certain quixotic integrity, but their strangely antic and belated quality serves to remind us that,

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50. Desai, *supra* note 10, at 259; *see also* Arewa, *supra* note 14, at 320 (arguing that because “[h]eirs and legal successors are in most instances not creative . . . incentives to create [are] far more tenuous than such justifications in relation to creators.”).

51. Patry, *supra* note 12, at 908.

52. PAUL K. SAINT-AMOUR, *THE COPYRIGHTS* 128 (2003).

53. *Id.* at 211.

54. Arewa, *supra* note 14, at 321.

55. Patry, *supra* note 12, at 907.

56. Spoo, *supra* note 13, at 1824.

57. Spoo, *supra* note 13, at 1825.

58. *See, e.g.,* Shloss v. Sweeney, 515 F. Supp. 2d 1068 (N.D. Cal. 2007) (denying motion to dismiss lawsuit against the Joyce estate for copyright misuse).

in the normal course of culture, the protests of such an individual would not command much attention.<sup>59</sup>

He has similarly critiqued the estates of T.S. Eliot and Samuel Beckett for “obstructionist behavior” against biographers and translators of the authors’ work.<sup>60</sup> Professor Desai similarly observes that “[a]uthors’ children can be capricious or even malicious as they exert control over copyrighted material,”<sup>61</sup> and points to the estates of Joyce, Eliot, Beckett, Tolkien, as well as J.M. Barrie, J.D. Salinger, Sylvia Plath, and Bertolt Brecht, who exhibit an almost “fetishistic” attachment to their ancestors’ legacies.<sup>62</sup>

This vision of the iron-fisted, yet mercurial, heir has also been broadened to chaotic families struggling to maintain any semblance of a coherent management strategy. Rather than “dutiful children” responsibly managing their parents’ work, Desai characterizes IP owners like the Martin Luther King, Jr. and J.R.R. Tolkien estates as “in-fighting adults who deny others access to work and/or disagree about what works can and cannot be made or released to the public.”<sup>63</sup> This narrative of the unruly family has emerged more recently in media coverage of the Marvin Gaye family and litigation concerning the hit song *Blurred Lines*.<sup>64</sup>

The third narrative might be characterized as the censor—the author’s family as the enemy of the public domain. Of particular note in this category is the estate of Martin Luther King, Jr., which has exerted a “stranglehold”<sup>65</sup> on the use of King’s likeness and famous speeches in significant cultural works such as the film *Selma*.<sup>66</sup> Family members often serve as the gatekeepers to the deceased author’s work, and they are

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59. Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, 31 CARDOZO ARTS & ENT. L.J. 77, 108 (2012); see also SAINT-AMOUR, *supra* note 52, at 157 (describing the Joyce estate’s “more capricious” denials of permission).

60. Spoo, *supra* note 13, at 1822–25.

61. Desai, *supra* note 10, at 258.

62. *Id.* at 251; see also Warren Manger, *Martin Luther King’s Family Have Milked his Legacy and He’d Feel Betrayed by Them*, MIRROR (Feb. 1, 2015, 9:04 PM), <http://www.mirror.co.uk/news/world-news/martin-luther-kings-family-milked-5087665> (“Now people see the name Martin Luther King and one of the things they think about is his loser children who are trying to profiteer in any way possible from his contribution.”).

63. Desai, *supra* note 10, at 259.

64. See, e.g., Shekhar Bhatia, *Marvin Gaye’s Family in Ugly Feud After \$7.4m “Blurred Lines” Payout*, DAILYMAIL (Mar. 25, 2015, 11:28 AM), <http://www.dailymail.co.uk/news/article-3008499/Marvin-Gaye-s-family-ugly-feud-7-4m-Blurred-Lines-payout-widow-accuses-penniless-sisters-picking-bones-say-hated-like-this.html>.

65. MADOFF, *supra* note 16, at 9.

66. Timothy B. Lee, *The Crazy Reason Selma Doesn’t Use the Actual Words from MLK’s Speeches*, VOX, (Jan. 13, 2015, 4:50 PM), <http://www.vox.com/2015/1/13/7540027/selma-copyright-king-speeches>.

frequently criticized for placing their own desires over the interests of other authors and the general public interest in the decedent. Under this view, to put it plainly, the Joyce family's private life is "no one's fucking business."<sup>67</sup>

Professor Arewa is particularly critical of the George Gershwin estate's requirement that any stage performances of *Porgy and Bess* be cast solely with black actors. Even though Gershwin borrowed and reworked African American cultural traditions, similar racial reworkings (à la *Hamilton*) are not authorized for later authors.<sup>68</sup> "Gershwin family restrictions on uses of *Porgy and Bess* substantially affect cultural meaning in preventing any reinterpretation of this work, which now represents a seminal 'high' culture depiction of African-Americans and African-American culture."<sup>69</sup> The Gershwin estate has placed "respect for the Gershwin image and music" above and beyond the "artistic practices" that Gershwin himself embodied.<sup>70</sup> As similarly articulated by Professor Spoo, "[g]enetic connection is no guarantee of literary sensitivity."<sup>71</sup> heirs are "privileged and sometimes arbitrary custodians of culture."<sup>72</sup>

These critical narratives about IP estates often are closely tied up in the frequent legislative coalition between IP estates and media companies, publishers, and other corporate intermediaries.<sup>73</sup> Desai points to the long

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67. D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006 (quoting Stephen Joyce), <https://www.newyorker.com/magazine/2006/06/19/the-injustice-collector>.

68. A similar, and perhaps even more persuasive, critique has been lodged at the estate of Margaret Mitchell, which prohibited reworkings of *Gone With The Wind* that involved interracial or homosexual sex or depicted Scarlett O'Hara dying. Spoo, *supra* note 13, at 1824 n.254; SAINT-AMOUR, *supra* note 52, at 210–14. See generally *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (finding fair use in the novel *The Wind Done Gone*, which retold the Mitchell story from the perspective of a mixed-race slave).

69. Arewa, *supra* note 14, at 311. Professor Madoff is similarly critical of efforts by the John Wayne estate to prevent the use of Wayne's likeness on gay-themed greeting cards. MADOFF, *supra* note 16, at 138–39.

70. Arewa, *supra* note 14 at 317–18.

71. Spoo, *supra* note 13, at 1827.

72. *Id.*

73. See, e.g., Patry, *supra* note 12, at 908 ("Instead of protecting authors, these [term extension] proposals are heavily weighted in favor of distributors such as publishers. Instead of encouraging living authors to create new works for the benefit of the public, term extension is being pushed by the estates of long deceased authors."); Arewa, *supra* note 14, at 282 n.3 (noting the Gershwin estate's involvement in copyright term extensions and in the subsequent *Eldred v. Ashcroft* litigation); see also Joyce Slaton, *A Mickey Mouse Copyright Law?*, WIRED (Jan. 13, 1999, 12:00 PM), <https://www.wired.com/1999/01/a-mickey-mouse-copyright-law/> (quoting Eric Eldred who stated, "This is not an instance of wanting to take money out of authors' pockets . . . The only people who will benefit from this act are distant heirs of the author and publishing companies."); Donald A. Barclay, *Shouldn't There Be a Time Limit on Mickey's Copyright*, CONVERSATION (Feb. 10, 2016), <http://theconversation.com/shouldnt-there-be-a-time-limit-on-mickeys-copyright-53788> ("The chief criticism to the [Copyright Term Extension Act], as expressed by the likes of academic and attorney



tradition in copyright reform—and the consistent expansion of rights with each new Copyright Act—of using widows and children as “props that help hide the true motivations at work.”<sup>74</sup> Longer and stronger copyright protections typically inure to the benefit of corporate licensees and assignees, who are typically unconstrained by physical mortality, and framing copyright expansion in terms of protecting wives and children tends to be a more politically palatable way of “extracting rent in a parasitic way.”<sup>75</sup> According to Professor Saint-Amour, “[n]aming the Copyright Term Extension Bill after the late Congressman Sonny Bono, a former singer-songwriter who had been killed in a ski accident, was both a rhetorically brilliant and a philosophically revealing tactic . . . .”<sup>76</sup>

In the right of publicity context, Professor Mark Bartholomew has argued that expanded postmortem protections have not been the result of increased concern for the privacy and well-being of decedents’ families; instead, these rights have emerged from an increasingly commoditized understanding of celebrity and a “successful political coalition” of “the famous, their heirs, and the licensing companies.”<sup>77</sup> A person’s “celebrity” value can be quantified, securitized, sold, and assigned; the descendibility of publicity rights is merely one of the sticks in the alienable property interest celebrity has become.<sup>78</sup> Any “egalitarian” promise of protecting all surviving families is merely legislative “window dressing, trying to sell their constituents on a new law really meant to protect a rarefied few.”<sup>79</sup>

Particularly in light of this overwhelming scholarly skepticism, IP estates have fared, by contrast, remarkably well in legislatures and courts. As mentioned above, they have been instrumental in major copyright reforms such as the Copyright Term Extension Act and in Supreme Court cases affirming Congress’s power to extend and revive copyright protections.<sup>80</sup> They also have successfully (though not universally)

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Lawrence Lessig, is that Congress’ retroactive extension of copyright terms benefits a handful of corporations like Disney and the heirs of commercially successful artists . . . .”).

74. Desai, *supra* note 10, at 233.

75. Desai, *supra* note 10, at 234; *see also id.* at 226 (“To support the extension, [Senator] Hatch needed to move his audience away from dead authors to a more compelling image, so he turned to pathos and a tale of a dead father and his industrious daughter.”).

76. SAINT-AMOUR, *supra* note 52, at 122.

77. Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 357 (2011).

78. Bartholomew, *supra* note 77, at 341.

79. Bartholomew, *supra* note 77, at 355.

80. *See, e.g.*, 141 CONG. REC. 6551 (1995) (statement of Sen. Hatch regarding Copyright Term Extension Act); S. Hrg. 104-817, at 58–59 (testimony by Henri Mancini’s widow); *id.* at 65–66 (testimony by Schoenberg’s grandson testimony); Brief of Amici Curiae Association of American Publishers in Support of Respondent, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

obtained postmortem right of publicity protections through litigation<sup>81</sup> and lobbying.<sup>82</sup> And juries have proven receptive to infringement claims brought by individuals who had no direct participation in the creation of the allegedly infringed subject matter. Most notably, in 2015, a jury rendered a \$7.5 million verdict against Robin Thicke and Pharrell Williams in favor of Marvin Gaye's heirs. The jurors found that the #1 hit song, "Blurred Lines," was substantially similar to the Gaye classic "Got to Give it Up," based not upon similarities in lead melody or lyrics, but seemingly instead based upon similarities in "rhythmic and harmonic footprint" and the overall "vibe and feel" of the funk/R&B genre Gaye employed.<sup>83</sup> The verdict—along with the Gaye family—has been widely criticized for misapplying and distorting music copyright.<sup>84</sup> In another recent lawsuit, members of the rock group Led Zeppelin managed to successfully defeat an infringement action claiming that the classic song, "Stairway To Heaven," infringed the song "Taurus," written by the late musician Randy California, who had toured with Led Zeppelin in the late 1960s.<sup>85</sup> Notably, even though the jury did not find infringement and the plaintiff's lawyer was repeatedly admonished for misbehavior during the trial, the judge nonetheless denied Led Zeppelin's request for attorney's fees based on the plaintiff's "honorable motivation" in bringing the suit.<sup>86</sup> "Once the media hype and tangential distractions are stripped away, what remains is an objectively reasonable claim motivated by a desire to recognize Randy California's musical contribution."<sup>87</sup>

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81. See, e.g., *Martin Luther King, Jr. Ctr. for Social Change v. Am. Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982).

82. Compare, e.g., Cal. Civ. Code § 3344.1 (2017) (providing postmortem publicity rights) with Veto Message from John Lynch, Governor of N.H. (June 12, 2012), <http://mediacoalition.org/files/legislation/new-hampshire-sb175-veto-message.pdf>.

83. Toni Lester, *Blurred Lines—Where Copyright Ends and Cultural Appropriation Begins—The Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217, 230–31 (2014).

84. Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity*, SLATE (Mar. 12, 2015 12:27 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/03/\\_blurred\\_lines\\_verdict\\_is\\_wrong\\_williams\\_and\\_thicke\\_did\\_not\\_infringe\\_on.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.html); Noah Feldman, *'Blurred Lines' and Bad Law*, BLOOMBERG VIEW (Mar. 12, 2015 1:07 PM), <https://www.bloomberg.com/view/articles/2015-03-12-blurred-lines-and-bad-law>; Wendy Gordon, *How the Jury in the 'Blurred Lines' Case Was Misled*, CONVERSATION (Mar. 17, 2015 5:47 AM), <http://theconversation.com/how-the-jury-in-the-blurred-lines-case-was-misled-38751>.

85. *Skidmore v. Led Zeppelin*, No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 (C.D. Cal. Aug. 8, 2016).

86. The attorney was subsequently suspended by the Pennsylvania bar for his misconduct in a separate copyright action. See Ashley Cullins, *Music Publisher Denied Legal Fees Award for "Stairway to Heaven" Trial*, HOLLYWOOD REP. (Aug. 8, 2016, 6:24 PM), <http://www.hollywoodreporter.com/thr-esq/music-publisher-denied-legal-fees-918170>.

87. *Skidmore*, No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 at \*4.

This disconnect between IP scholarship and doctrine suggests that IP estates are presenting arguments, evidence, and stories that resonate with legal decision makers but so far have not resonated with scholars. Something is happening in courtrooms and legislatures that either has largely escaped the attention of scholars or nonetheless has failed to trigger their sympathies. The remainder of this article will begin to fill in this gap and surface what interests are being expressed by IP estates when they assert their copyright and publicity rights.

## II. ESTATE NARRATIVES

There is wide agreement that the traditional justifications for intellectual property rights have only relatively weak application to an artist's heirs. Nonetheless, the litigation and lobbying successes of these individuals signals that there are interests at play that do not neatly fit into the standard trio of utilitarian/Lockean/Hegelian theories, yet resonate with key players in the IP ecosystem. This section carefully examines the arguments and narratives deployed by IP heirs in asserting their rights. Through examining the rhetoric of IP estates, it sheds greater light on what interests motivate IP heirs' actions, which of those interests resonate with judges and juries, and accordingly what interests are actually shaping the development of IP doctrines.

The following subsections survey a broad range of litigation documents, judicial opinions, legislative records, and published interviews, and extract at least five categories of narratives that IP heirs repeatedly invoke: (1) ensuring proper credit for the deceased artist; (2) remedying exploitation of the deceased artist; (3) family privacy; (4) the deceased artist's reputational purity; and (5) children's right to inherit a family member's legacy. These themes are often interwoven and combine with other interests that are decidedly more economic in nature. I should note that many IP disputes brought by heirs—like IP disputes involving living creators—are ultimately straightforward commercial disputes about contract terms and corresponding revenue sharing and do not explicitly touch on the more emotion-driven themes explored below.

There admittedly are significant limits in relying on statements produced in connection with legal disputes—particularly statements that have been filtered through legal counsel for strategic purposes. Statements about emotional attachment or mourning or legacy preservation might sound sympathetic and may resonate with a decision maker, but this does not mean that they are sincere. Regardless of whether the statements are sincere, however, they nonetheless are operative. The rhetoric deployed by IP estates, even if it is difficult to square with foundational IP policies, is

presented to legal decision makers and ultimately shapes the development of IP doctrines. There is rich ongoing debate about the legitimacy of noneconomic motivations for asserting IP claims, and the repeated invocation of noneconomic interests by IP estates further pressures IP decision makers to acknowledge the moral and ethical work that IP doctrines are already doing.<sup>88</sup> Even when viewed skeptically, this rhetoric should be taken seriously.

Additionally, the repeated—and perhaps surprisingly coherent—deployment of privacy, dignity, and equality narratives by IP estates is in tension with their dominant portrayal as greedy rent-seekers driven solely by windfall profits. It certainly would be naive to dismiss the economic stakes in the disputes discussed below, but IP estates frequently act at odds with their own rational financial interests and refuse potentially lucrative licensing opportunities. They are neither greedy rent-seekers nor irrational, quixotic despots; they are a diverse group of individuals with a broad mix of economic and noneconomic interests.<sup>89</sup> Even if scholars ultimately think these interests are insufficient bases for IP rights, these interests are triggering litigation, shaping IP doctrine, and driving outcomes in ways that should not be ignored. The debate about IP's normative thrust at the very least should be waged with fuller awareness of the actual competing private and public interests presented to judges, juries, and lawmakers.

#### *A. Ensuring Proper Credit*

Heirs often argue that deceased artists were in some way unfairly treated during their lives, and they seek to vindicate and prevent the further exploitation of those artists now that they are in a position to sue. Through litigation and advocacy, IP protections allow family members to ensure that a deceased artist finally receives the recognition and fair treatment they have long been denied.

Several high-profile lawsuits brought by IP estates seek to ensure that the deceased author receive credit for his or her contribution to major works of popular culture. Although estates are sometimes accused of “smelling money” in the form of an infringement lawsuit, they repeatedly push back that the accused infringer did not adequately acknowledge their relative's substantial influence. The Marvin Gaye heirs, for example,

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88. See, e.g., Christopher Buccafusco & David Fagundes, *Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016) (arguing that copyright infringement lawsuits brought for a complex mix of noneconomic and economic reasons).

89. See, e.g., Rothman, *supra* note 42, at 206 (pointing out false dichotomy between emotional and economic rights).

stressed that it was Robin Thicke and Pharrell Williams who filed suit when they “had the temerity to question why their father was not credited” in “Blurred Lines.”<sup>90</sup>

In the “Stairway to Heaven” litigation, the trustee for the Randy Craig Wolfe trust sued members of the band Led Zeppelin for copying significant portions of the song “Taurus,” written by the deceased musician Randy Wolfe, a.k.a. “Randy California.” Led Zeppelin had toured with Wolfe’s band, Spirit, in the late 1960s, during which Spirit had performed “Taurus” many times. The complaint alleged “[f]alsification of Rock n’ Roll [h]istory”<sup>91</sup> and that “Randy California deserves writing credit for ‘Stairway to Heaven’ and to take his place as an author of Rock’s greatest song.”<sup>92</sup> In opposition to defendant’s summary judgment motion, the plaintiff submitted affidavits by Wolfe’s sister, friends, and bandmates indicating that Wolfe had long been frustrated for not receiving attribution for his contribution to “Stairway to Heaven,” had long been pressured to sue, but had repeatedly desisted out of financial concerns.<sup>93</sup>

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90. See Counter-Claimants’ Joint Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at 1, *Williams v. Bridgeport Music, Inc.*, No. 2:13-CV-06004-JAK-AGR, 2016 WL 6822309 (C.D. Cal. Apr. 12, 2016); see also Defendant’s Opening Statement at 81, *Williams*, No. 2:13-CV-06004-JAK-AGR, 2016 WL 6822309 (“Jan Gaye did not want to be here. Nona didn’t want to be here. Frankie Gaye didn’t want to be here. And Marvin the III didn’t want to be here. And how did we know that? Because when she heard *Blurred Lines*, she loved it. And she knew that it was so similar that it just had to have been licensed. She even tweeted out thanks to Robin Thicke and Pharrell Williams because she believed it had to have been licensed. Unfortunately, as she later learned and as the family later learned, they had not licensed *Got to Give it Up*, had not credited Marvin Gaye, but made tens of millions of dollars on it.”).

91. Plaintiff’s Complaint, *Skidmore v. Led Zeppelin*, No. 2:14-CV-03089-JS, at 26 (E.D. Pa. May 31, 2014), transferred No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 (C.D. Cal. Aug. 8, 2016).

92. *Id.* at 4.

93. See Declaration of David Waterbury ¶¶ 5–6, *Skidmore v. Led Zeppelin*, No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 (C.D. Cal. Aug. 8, 2016) (“Jimmy Page told Randy when confronted that Randy could go ahead and try to sue him, but that Led Zeppelin would hire 20 to 25 lawyers for every lawyer Spirit could hire, that they would lose, and that they didn’t stand a chance. Randy was extremely and visibly despondent and frustrated about this incident. Randy said that after he and Page talked a little more they simply shook hands and parted. Randy said ‘and that was it.’”); Declaration of Janet Wolfe ¶ 10, *Skidmore*, No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 (“The brother I knew was a kind, gentle soul for whom the music—not the money—was everything. Randy told me he knew that Jimmy Page had lifted his song from *Taurus*, and he felt beleaguered by interviewers always asking him about it and people always telling him he was crazy for not suing.”); Decl. of Tracy Longo ¶ 26, *Skidmore*, No. 2:15-CV-03462-RGK-AGR, 2016 WL 6674985 (“I told Randy, ‘You should go after Led Zeppelin. It would be the biggest lawsuit. It would be like someone goin’ after Freebird. Win or lose the band Spirit’s gonna get notoriety that it deserves.’ Randy thought about it and responded, ‘Well, I wouldn’t lose, my publisher has 50 percent of all my stuff. Any money I would get out of this would—I would never see any money. I don’t know even if it would be worth it or if I could get a lawyer to take this on.’”).

“Randy Craig Wolfe did not have a lot of money during his life and was touring on a shoe string budget. He could not have hired a lawyer.”<sup>94</sup>

Other recent lawsuits against the creators of the musical *Jersey Boys* and the sitcom *The Big Bang Theory* similarly alleged that the defendants had received significant revenue and acclaim from a deceased author’s uncredited work. In the *Jersey Boys* litigation, the decedent, Rex Woodward, coauthored but never published a manuscript about the pop group the Four Seasons. Woodward died of lung cancer 1991, and the other coauthor, Four Season’s member Tommy Devito, used the manuscript as the basis for the hit musical *Jersey Boys*. Woodward’s family received nothing, and Woodward was given no credit for his contribution. According to the complaint filed by his widow, “Mr. Woodard’s dying wish was that Plaintiff and his sister would ensure that the Work was published after his death. Mr. Woodard also hoped that income generated by the Work, and/or adaptations thereof, would support his wife and children when he would no longer be there to support them.”<sup>95</sup> Woodward’s widow and sister documented a decade’s worth of unsuccessful efforts to obtain a publisher, which ultimately was foreclosed by the launch of *Jersey Boys*, and Woodward’s erasure from the project. A jury found DeVito liable for copyright infringement, although the presiding judge subsequently found defendants’ use protected by the fair use doctrine.<sup>96</sup> In a lawsuit filed in 2016, the producers of *Big Bang Theory* were sued for their extensive commercial use of the short poem, “Soft Kitty,” written and published by the plaintiffs’ deceased mother, while she worked as a nursery school teacher.<sup>97</sup> “Not only did Defendants fail to credit Edith Newlin, but they also went so far as to put a credit on some merchandise and accompanying packaging and tags, making it

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94. Declaration of David Waterbury ¶ 11.

95. Plaintiff’s Second Amended Complaint ¶ 36, *Corbello v. Devito*, 832 F. Supp. 2d 1231 (D. Nev. 2011) (No. 2:08-CV-00867-RCJ-PAL).

96. Ashley Cullins, *Jury Finds ‘Jersey Boys’ Creators Liable for Copyright Infringement*, HOLLYWOOD REP. (Nov. 29, 2016 11:33 AM), <http://www.hollywoodreporter.com/thr-esq/jury-finds-jersey-boys-creators-liable-copyright-infringement-951024>; Eriq Gardner, *Judge Overturns Jury’s Verdict That ‘Jersey Boys’ Is a Copyright Infringement*, HOLLYWOOD REP. (June 14, 2017), <http://www.hollywoodreporter.com/thr-esq/judge-overturns-jurys-verdict-jersey-boys-is-a-copyright-infringement-1013558>.

97. Complaint, *Chase v. Warner Bros.*, No. 1:15-CV-10063-NRB, 2017 WL 2172909 (S.D.N.Y. Mar. 27, 2017). According to the complaint, “Defendants . . . used the Soft Kitty Lyrics in their entirety and with only a minor change in word order:

Soft kitty, warm kitty [instead of “Warm kitty, soft kitty”],  
Little ball of fur,  
Happy kitty, sleepy kitty [instead of “Sleepy kitty, happy kitty”],  
Purr! Purr! Purr!”

*Id.* at ¶ 48.

appear as if one of the Defendants themselves created the Soft Kitty Lyrics.”<sup>98</sup>

This narrative of insufficient credit loomed particularly large in efforts by the heirs of Jack Kirby and Jerome Siegel to reclaim copyright in some of the most acclaimed (and lucrative) comic book superheroes:

Many of our most celebrated literary and musical works were created before 1978 and signed away to publishers in unremunerative transactions . . . . It would be hard to find a better example of this than the prolific Jack Kirby who worked in his basement with no contract, no financial security, and no employment benefits, but without whom Marvel might not even be in business today.<sup>99</sup>

Under the “termination of transfers” provisions of the 1976 Copyright Act, an author’s heirs are entitled to terminate assignments and licenses to third parties “notwithstanding any agreement to the contrary.”<sup>100</sup> This is a powerful tool for family members to renegotiate compensation schemes that were arranged long before the true commercial value of a creative work was realized,<sup>101</sup> and unsurprisingly these termination provisions can substantially increase the economic value of postmortem copyright. Nonetheless, efforts to use the termination provisions are infused with desires for both money *and* recognition.

For the children of Jack Kirby, who first penned superheroes such as The Fantastic Four, Iron Man, Thor, and X-Men, their litigation with Marvel Comics was a continuation of their “father’s quest for credit and fair compensation.”<sup>102</sup> In Neal Kirby’s deposition, he recalled his father’s complaints about not getting paid for the pages he submitted to Marvel’s Stan Lee and frustration when Lee had not given him public credit for creating major characters, such as Thor.<sup>103</sup> Jack Kirby labored exhausting hours on his comic book characters in a smoke-filled basement “Dungeon,” and his son fondly recalled “treasur[ing] the fact I had a front-

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98. *Id.* ¶ 53.

99. Reply Brief for Petitioners at 13, *Kirby v. Marvel Characters, Inc.*, 135 S.Ct. 42 (Mem) (2014).

100. 17 U.S.C. §§ 203, 304(c)(5) (2012).

101. Termination rights were “needed because of the unequal bargaining position of authors.” H.R. Rep. No. 94-1476, at 124 (1976).

102. See Jeffrey Texler, *Should the Kirby Family Have Settled?*, COMICS J. (Nov. 21, 2014), <http://www.tcj.com/should-the-kirby-family-have-settled/>.

103. Supplemental Declaration of Marc Toberoff in Support of Defendants’ Opposition to Summary Judgment at 84, *Marvel Worldwide v. Kirby*, No. 1:10-CV-00141-CM-KNF (S.D.N.Y. filed Mar. 28, 2011) (“I do recall one instance involving the creation of Thor and I guess Stan had taken—he had created that and my father was very upset about that. He said Thor was his idea, his creation.”).

row seat for that cosmic event.”<sup>104</sup> The Kirbys wove together family nostalgia and romantic authorship to hammer home the unfairness for not giving proper credit and ongoing royalties to Kirby and his family for creating some of the most enduring and profitable entertainment franchises. The heirs of Jerome Siegel, co-creator of Superman, similarly emphasized the author’s unfair treatment at the hands of DC Comics.<sup>105</sup>

### *B. Remedying Exploitation*

Closely related to heirs’ concerns that the decedent was insufficiently credited for their work is the frequently strong sentiment that the decedent was mistreated or exploited during life and that this mistreatment is continuing after death. Accordingly, the role of the IP heir is to protect their loved one against individuals who seek to exploit their labor and memory with little care for the actual human being who has passed.

Gerard Basquiat was the father and sole intestate heir of the acclaimed artist Jean-Michel Basquiat, who died of a drug overdose in 1988 at the age of twenty-seven. Gerard was highly protective of his son’s legacy and spent much of the rest of his life heavily involved in overseeing Jean-Michel’s estate. “He tightly controlled his son’s copyrights, methodically poring over movie scripts, biographies or gallery show publications that wanted to use his son’s works or images.”<sup>106</sup> For example, he refused permission for Julian Schnabel to use images of Jean-Michel’s work in his 1996 film, *Basquiat*, about the two artists’ friendship.<sup>107</sup> Gerard largely blamed the 1980s art world for contributing to his son’s destructive lifestyle while attempting to profit greatly off of his work, both before and

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104. Neal Kirby, *Growing up Kirby: The Marvel Memories of Jack Kirby’s Son*, HERO COMPLEX (Apr. 9, 2012, 11:30 AM), <http://herocomplex.latimes.com/comics/growing-up-kirby-the-marvel-memories-of-jack-kirbys-son/#/0>; see also Defendants’ Pre-Trial Statement at 2, *Marvel Worldwide v. Kirby*, No. 1:10-CV-00141-CM-KNF (S.D.N.Y. filed Apr. 1, 2011) (“Kirby worked as a freelancer from the basement of his own home, without any financial security.”); Reply Memorandum in Support of Defendants’ Motion for Summary Judgment at 1, *Marvel Worldwide v. Kirby*, No. 1:10-CV-00141-CM-KNF (S.D.N.Y. filed Apr. 8, 2011) (“Marvel did not own Kirby’s prolific creations as ‘work for hire’ the moment his pencil hit paper in the basement studio he fondly called ‘The Dungeon.’”).

105. Open Letter from Laura Siegel Larson, Daughter of Superman Co-Creator Jerry Siegel (Oct. 11, 2012), [http://www.filmbuffonline.com/FBOLNewsreel/wordpress/2012/10/17/th\\_e-laura-siegel-larson-letter-only-part-of-the-story/](http://www.filmbuffonline.com/FBOLNewsreel/wordpress/2012/10/17/th_e-laura-siegel-larson-letter-only-part-of-the-story/).

106. James Fanelli, *Jean-Michel Basquiat’s Dad Leaves Behind Son’s Art, and Tax Problem*, DNAINFO (Sept. 5, 2013, 6:27 AM), <https://www.dnainfo.com/new-york/20130905/boerum-hill/jean-michel-basquiats-dad-leaves-behind-sons-art-tax-problem>.

107. Katie Calautti, *Why This Movie Perfectly Re-Created a Picasso, Destroyed It, and Mailed the Evidence to Picasso’s Estate*, VANITY FAIR (Apr. 25, 2014, 1:06 PM), <http://www.vanityfair.com/hollywood/2014/04/art-in-movies>.



after his death.<sup>108</sup> In an interview about administering Jean-Michel's estate, Gerard lamented, "People took advantage of Jean Michel[—he] was very young and had a loose life style, and the minute he died all these people came up with groundless claims."<sup>109</sup> By contrast, when documentarian Tamra Davis sought permission to use archived footage in a 2010 documentary, Gerard told her "I trust you. You're the only person who has had something of this of my son for this long time and you've never profited from it? I've never heard of you?"<sup>110</sup> By the time he died in 2013, however, Gerard Basquiat had been widely criticized for tightly controlling his son's legacy.<sup>111</sup>

Similar criticism has been lodged at Robyn Astaire, the third wife and widow of legendary dancer/actor Fred Astaire.<sup>112</sup> She has refused use of classic movie clips for numerous entertainment projects, for several documentaries and, controversially, a Kennedy Center tribute to Astaire's frequent costar, Ginger Rogers.<sup>113</sup> She also has sued commercial entities for using Fred's likeness without permission.<sup>114</sup> A journalist with the Los Angeles Times aptly framed the debate surrounding Robyn Astaire: "Is Robyn Astaire the greedy ogre her critics contend, condemning her husband's image to obscurity in her misguided craving for money? Or is she the protective widow, pining after the only person who really loved her and tending the fires of his lifelong perfectionism?"<sup>115</sup>

In the few public interviews she has given, Robyn Astaire related that Fred had told her, "I've been taken advantage of all my life. Please don't let them take advantage of me. And I know you won't. I'm leaving you in

108. Liza Ghorbani, *The Devil on the Door*, N.Y. MAG. (Sept. 28, 2011), <http://nymag.com/arts/art/features/jean-michel-basquiat-2011-9/>.

109. Grace Glueck, *The Basquiat Touch Survives the Artist in Shows and Courts*, N.Y. TIMES (July 22, 1991), <http://www.nytimes.com/1991/07/22/arts/the-basquiat-touch-survives-the-artist-in-shows-and-courts.html>. For a fuller discussion of Jean-Michel Basquiat's life and death, particularly in the shadow of the booming 1980s art market, see PHOEBE HOBAN, *BASQUIAT: A QUICK KILLING IN ART* (1998).

110. Interview by Dreux Dougall with Tamra Davis, filmmaker (Dec. 22, 2010), <http://www.pbs.org/wnet/need-to-know/the-daily-need/a-portrait-of-the-artist-as-a-young-man/5984/>

111. See Fanelli, *supra* note 106.

112. See, e.g., Irene Lacher, *Fred Is Her Co-Pilot*, L.A. TIMES (Aug. 17, 1997), <http://articles.latimes.com/1997/aug/17/entertainment/ca-23118> ("Daggers have been drawn over the way Robyn Astaire has meagerly—and expensively—parceled out approval for the use of clips of his classic films.").

113. *Id.*

114. See *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297 (9th Cir. 1997). She was particularly criticized, however, when she did allow the use of Astaire clips in a series of *Dirt Devil* advertisements. According to an interviewer, "she gave the nod to *Dirt Devil* because the company granted her artistic control and because Fred himself was no stranger to commercials—during his life, he appeared in ads for Chesterfield cigarettes and the now-defunct Western Airlines, among others." Lacher, *supra* note 112.

115. Lacher, *supra* note 112.

charge because I trust you implicitly.”<sup>116</sup> Accordingly, when people use Fred’s image without permission, “I have to go after them. I’m constantly scolding people because they think they own him.”<sup>117</sup> Fred’s son has concurred: “I think my father knew how people exploited personalities [after their death], and he didn’t want that to happen to him. Protecting him is Robyn’s job.”<sup>118</sup> This job is demonstrably inseparable from her grief and emotional connection to Astaire. Although the two were over forty-five years apart in age, Robyn fondly remembers, “Every night after dinner . . . we’d tango out of the dining room . . . . He was so much fun. For the first time in my life, I had someone who truly loved me. I was so lucky.”<sup>119</sup> After Fred’s death, Robyn “found herself bereft of purpose save for preserving—and protecting—the Astaire legend.”<sup>120</sup> Other celebrities’ surviving family members view themselves in a similar position.<sup>121</sup>

In addition to protecting decedents from continued financial mistreatment, IP estates have exercised postmortem rights against the backdrop of discrimination and cultural appropriation. For example, heirs to blues singer Bessie Smith brought copyright and right of publicity claims against Columbia Records, charging that its licensing arrangements with Smith reflected systemic racial discrimination and took advantage of Smith’s illiteracy and ignorance of financial matters.<sup>122</sup> The court, however, ultimately was unwilling to toll the statute of limitations for almost forty years, but the descendible nature of both copyright and right of publicity has on several occasions provided the opportunity for an heir to combat discrimination suffered by the decedent.<sup>123</sup>

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116. Mark Goodman, *Keeping the Flame*, PEOPLE (Feb. 22, 1993, 12:00 PM), <http://people.com/archive/keeping-the-flame-vol-39-no-7/>.

117. *Id.*; see also Bob Thomas, *Fred Astaire's widow says she is guarding his legacy*, AMARILLO GLOBE-NEWS (June 2, 1998, 12:26 PM), [http://amarillo.com/stories/060298/ent\\_he.shtml#.WEdLZZMrKCQ](http://amarillo.com/stories/060298/ent_he.shtml#.WEdLZZMrKCQ).

118. Lacher, *supra* note 112.

119. Goodman, *supra* note 116.

120. *Id.*

121. See, e.g., Tony Cantu, *Cashing in on Selena*, HISP., June 1996, at 18, 22 (“Quintanilla [father of the late singer Selena] explains that though he may not show it, he grieves daily for his daughter, and staving off attempts to capitalize on his daughter’s death has preoccupied his time.”).

122. *Gee v. CBS, Inc.*, 471 F. Supp. 600, 632, 637 (E.D. Pa. 1979); see also K.J. Greene, “*Copynorms*,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1204–07 (2008) (discussing judicial indifference to exploitation of black artists in the *Gee* case).

123. See, e.g., Complaint, *Black Box Royalties, Inc. v. Rhino Entm’t Co.*, No. 1:15-CV-04012-LLM (N.D. Ga. filed Nov. 17, 2015) (lawsuit by same-sex partner of deceased collaborator of Otis Redding, seeking unpaid royalties from record company); Sean O’Connor et al., Opinion, *Overdue Legal Recognition for African-American Artists in ‘Blurred Lines’ Copyright Case*, SEATTLE TIMES (May 20, 2015, 5:19 PM), <http://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case/>.

In 2007, Connie Brooks brought a right of publicity claim against Topps for releasing a baseball card using the image of her father, James “Cool Papa” Bell.<sup>124</sup> Bell played, managed, coached, and scouted for the Negro Leagues from 1922 to 1950, and he was inducted into the Baseball Hall of Fame in 1974.<sup>125</sup> According to Brooks, “I promised my father that I would carry on and keep his legacy alive” and she has worked “tirelessly . . . to make sure that he is not forgotten . . . .”<sup>126</sup> In the *Topps* litigation, Brooks emphasized, “My father endured tremendous injustices during his career and in life. My father refused to let racism or segregation discourage him.”<sup>127</sup> Nonetheless, Cool Papa Bell subsequently worked twenty-two years as a custodian, never received a pension from the Negro League or Major League Baseball, and it took his daughter five years to save enough money to purchase a proper headstone for his grave.<sup>128</sup> With this backdrop, Brooks argued:

“[T]he right of publicity protects a person from losing the benefit of his work . . . this is especially true where, as here, the celebrity is an African-American man who lived in an era in which entertainment essentially provided the only opportunity for a man like him to achieve success, and even the highest attainable levels of success did not equal prosperity during life.”<sup>129</sup>

Although the *Topps* court rejected the publicity rights claim on statute of limitations grounds,<sup>130</sup> Topps subsequently publicly apologized to Brooks and settled on undisclosed terms.<sup>131</sup> Inherited IP rights were a vehicle for Brooks to push back against the continued commercial exploitation of her

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124. Brooks *ex rel.* Estate of Bell v. Topps Co., No. 06-CV-2359 (DLC), 2007 WL 4547585 (S.D.N.Y. Dec. 21, 2007)

125. *Id.* at \*1.

126. Declaration of Connie Brooks in Opposition to Defendants’ Motion for Summary Judgment ¶ 9, *Brooks*, No. 06-CV-2359(DLC), 2007 WL 4547585.

127. *Id.* ¶ 6.

128. *Id.* ¶¶ 7–8. Additionally, before he died, hundreds of thousands of dollars in merchandise was stolen from his home by memorabilia dealers, who were subsequently indicted with theft and fraud. William C. Rhoden, *Cool Papa Bell’s Stolen Moments*, N.Y. TIMES (Aug. 7, 1990), <http://www.nytimes.com/1990/08/07/sports/sports-of-the-times-cool-papa-s-stolen-moments.html>.

129. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 14, *Brooks*, No. 06-CV-2359(DLC), 2007 WL 4547585.

130. See *Brooks*, No. 06-CV-2359(DLC), 2007 WL 4547585, at \*5; see also Lateef Mtima, *What’s Mine is Mine but What’s Yours Is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323, 356–60 (2012) (arguing that the *Brooks* court was insufficiently sensitive to the social justice issues raised in the case).

131. Press Release, Topps Co., *Topps Settles Lawsuit Over Cool Papa Bell Cards*, PRNEWswire (Nov. 14, 2008), <http://www.prnewswire.com/news-releases/topps-settles-lawsuit-over-cool-papa-bell-cards-65433552.html>.

father after his death and, in at least a small way, bring a sense of honor to someone who had encountered a lifetime of injustice.<sup>132</sup> As mentioned in the Introduction, the Supreme Court's 2014 opinion in *Petrella* broadens opportunities for heirs (at the very least in the copyright context) to challenge unfair treatment of their family members long after tort remedies have expired.

IP estates are frequently criticized for stingily refusing permission for uses of the deceased artist's work that would seem to enrich the public domain and harm no one. Professor Spoo, for example, has argued that long copyright terms, stewarded by overly protective estates, upset the "ecological cycle" in which old works "become part of the furniture of our cultural life."<sup>133</sup> Our most valuable cultural works have their origins in the "raw material of the public domain," and eventually those works "return[] to the public domain to enrich those raw materials and to spur the creation of new works."<sup>134</sup> He envisions a time when "Joyce's oeuvre will finally take its place with *The Odyssey* and *The Aeneid* as raw myth-making material for some future national epic. Indeed, it could be argued that works do not really become 'classics' until they are unqualifiedly available for cultural exploitation."<sup>135</sup>

The perspective of the heirs here, however, is a forceful reminder that the debates around intellectual property versus the public domain cannot be so easily reduced to greed versus righteousness, irrationality versus enlightenment, or stuck-in-the-past versus embracing the future. A vibrant public domain may appear to be an unmitigated good—more speech, more knowledge, more progress.<sup>136</sup> But it comes at a cost, and too often that cost is the unacknowledged and uncompensated labor of women, minorities, indigenous peoples, and outsider artists.<sup>137</sup> Surviving family members sometimes bristle at the notion that an artist will "blend into the cultural scenery" and be treated as a stock, generic element for future commercial

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132. Along these lines, Professor K.J. Greene has argued that "creative intellectual property also belongs in the debate on reparations." Greene, *supra* note 122, at 1217; *see also* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012); Margaret Chon, *Intellectual Property and the Developmental Divide*, 27 CARDOZO L. REV. 2821 (2006).

133. Spoo, *supra* note 59, at 108.

134. *Id.* at 107–08.

135. *Id.* at 110–11.

136. *See* SUNDER, *supra* note 132; *See* Chon, *supra* note 132.

137. *See* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355 (2016).

endeavors.<sup>138</sup> IP is one means of pushing back against erasure and involuntary cultural appropriation.<sup>139</sup>

When artists die, their lives' work cannot be so easily disentangled from the questionable conditions in which they were produced. And it is particularly galling to expect artists' families to overlook this historical context and get out of the way of cultural progress. Creative works are never truly "raw"—unworked and awaiting cultural meaning; they are instead *cultural legacies* that are produced in very particular social contexts amidst webs of human relationships.<sup>140</sup> Intellectual property rights can serve as tools for preventing those in power from tearing down those webs and glossing over troubling contexts in which they too often were built.

### C. Family Privacy

Of all the noneconomic motivations for asserting copyright infringement, privacy is perhaps the most debated by intellectual property scholars, with a robust contemporary debate on both sides of the issue.<sup>141</sup> Copyright law generally gives stronger protections for unpublished works and allows authors and their heirs significant leeway in deciding what works to publish, and when. Accordingly, copyright has been an attractive vehicle for notoriously reclusive authors like J.D. Salinger. The right of publicity has direct genealogical roots in Warren and Brandeis' famed right of privacy, and it is fairly uncontroversial for an individual to use publicity rights to limit exposure of embarrassing or intimate portrayals.<sup>142</sup>

What is more controversial in both the copyright and right of publicity realms, however, is the interest of an *heir* in protecting their family's privacy. Privacy rights, unlike property rights, are typically understood to be personal to the individual and to extinguish upon death.<sup>143</sup> Accordingly, the use of an inherited property right to achieve privacy-related ends would seem at least arguably improper. Nonetheless, privacy concerns repeatedly emerge in disputes initiated by IP estates.

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138. See John J. Pauly, *Taming the Wildest: What We've Made of Louis Prima*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 191 (Steve Jones & Joli Jensen eds., 2005).

139. *Id.* at 201 (documenting lawsuits by Gia Prima, widow of swing musician Louis Prima, against Campbell Soup and Olive Garden).

140. See Gildden, *supra* note 137.

141. Compare Fromer, *supra* note 18, with M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTEL. PROP. 1 (2016).

142. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

143. Rothman, *supra* note 42, at 203.

Although the decedent in many IP disputes was a celebrity or public figure, quite often the successor rights holder is not. Accordingly, the term “reclusive” pops up repeatedly in regards to IP estates that are widely seen as stingy with permissions or overprotective of their family members’ legacies. Stephen Joyce, Robyn Astaire, Gerard Basquiat, Christopher Tolkien, and Teresa Earnhardt, for example, have all at times been called reclusive or secretive.<sup>144</sup> On one hand, this reclusiveness may seem troubling; they are the gatekeepers to extremely public cultural legacies; on the other hand, they did not themselves seek a career as a celebrity and may wish to maintain a quiet existence now that their loved one has passed. For example, in litigation between the Joyce estate and English professor Carol Shloss, the unpublished letters<sup>145</sup> at issue concerned the mental health of James Joyce’s daughter, Lucia, and how it impacted her relationship with her family.<sup>146</sup> Lucia was certainly not a public figure by choice, and the disclosure of letters containing such information likely would be objectionable to many private individuals. It may be difficult to sympathize with these interests, particularly when exercised by a hostile or aggressive heir, but the underlying interest itself should not be dismissed out-of-hand. Again, IP theory and First Amendment doctrine may justifiably limit estates’ ability to silence documentarians, biographers, and journalists, but the public attention that comes from the death of a celebrity can have significant privacy implications for the people in the celebrity’s orbit.

For example, Nancy Benoit was married to, and tragically murdered by, professional wrestler Chris Benoit, and this murder received widespread media coverage. Hustler Magazine used this public interest in Chris and Nancy to justify publishing nude photographs of Nancy that she had taken more than twenty years earlier. Nancy’s mother successfully sued for violation of Nancy’s publicity rights, which are descendible in Georgia.<sup>147</sup>

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144. See, e.g., Spoo, *supra* note 13 (Joyce); Goodman, *supra* note 116 (Astaire); Carl E. Butler, *Teresa Earnhardt: Her Side of the Story*, *Race Journal Online* (May 28, 2007), <http://racejournalonline.com/index.php?page=read&article=126>

145. On the recurring issue of copyright and unpublished letters see Alan Lee Zegas, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134 (1980).

146. See *A Fire in the Brain*, *NEW YORKER* (Dec. 8, 2003), <https://www.newyorker.com/magazine/2003/12/08/a-fire-in-the-brain> (“In fact, many artists’ children turn out just fine, and grow up to edit their parents’ work and live off the royalties. But some do not—for example, James Joyce’s two children. His son became an alcoholic; his daughter went mad. Carol Loeb Shloss, a Joyce scholar who teaches at Stanford, has just written a book about the latter.”); see also Richard Lea, *Ted Hughes Estate Withdraws Biographer’s Access*, *GUARDIAN* (Mar. 31, 2014, 8:20 AM), <https://www.theguardian.com/books/2014/mar/31/ted-hughes-estate-biographer-jonathan-bate-access> (Ted Hughes biographer Jonathan Bate “suggests that the [Hughes’] family may be worried by the prospect of revelations about the poet’s private life.”).

147. *Toffoloni v. LFP Publ’g Grp., LLC*, 483 Fed. App’x 561 (11th Cir. 2012).

At trial, Maureen testified that she viewed it as her responsibility “to protect her [daughter]” and that she would have never given permission for her daughter to be shown in a “hardcore pornography” magazine.<sup>148</sup>

An analogous scenario confronted Teresa Earnhardt, widow of legendary NASCAR driver Dale Earnhardt, Sr., who died tragically in an accident at the 2001 Daytona 500. There was understandably tremendous media interest in the accident and Earnhardt’s death, and certain media outlets requested that the Volusia County, Florida coroner release autopsy photos of Earnhardt’s corpse to help assist their coverage. Teresa successfully sued for violation of her husband’s publicity rights. In her motion for a permanent injunction, she wove together themes of privacy and commercial exploitation:

[T]he relationship between Teresa Earnhardt as wife as well as Dale Earnhardt, Jr. and Taylor Earnhardt as children and Dale Earnhardt could not possibly be any more intimate and sacred. It is beyond doubt that each of these family members have a right of privacy in their own right to prevent the needless emotional distress which would accompany the release of the autopsy images.<sup>149</sup>

Against this backdrop, use of these photos by the Orlando Sentinel were solely meant “to profit from Dale Earnhardt’s family tragedy.”<sup>150</sup> She further emphasized the importance of a privacy interest in the wake of her husband’s death:

The Earnhardt family is still grieving from the loss of Mr. Earnhardt just a few short weeks ago. . . . The Earnhardt family is entitled to their privacy in grieving for the loss of Dale Earnhardt as a father and husband. To inflict additional grief and emotional distress on this family is simply unjustified.<sup>151</sup>

The trial court ultimately agreed that “[t]he publication of a person’s autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person’s surviving family members, particularly their children, parents, and spouse.”<sup>152</sup>

Although the Earnhardt and Benoit cases are fairly extreme instances of a decedent’s image being used in morally suspect ways, they nonetheless

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148. See Transcript of Jury Trial Proceedings at 151, 154, *Toffoloni*, 483 Fed. Appx. 561 (No. 1:08-CV-00421-TWT).

149. Plaintiff’s Memorandum of Law in Support of Motions for Permanent Injunction, at 8, *Earnhardt v. Volusia County*, No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct. July 10, 2001).

150. *Id.* at 17.

151. *Id.* at 20.

152. *Earnhardt*, No. 2001-30373-CICI, 2001 WL 992068, at \*3.

are an important reminder of the interests that postmortem IP rights can serve, particularly in the absence of a general postmortem right to privacy. IP rights are a way for family members to protect themselves from the emotional harms that flow strongly, if technically indirectly, from presentation of a decedent's image or likeness in unexpected or highly objectionable contexts. This type of emotional distress will often need to give way to factual reporting on matters of public interest or subsequent authors' critical commentary about the decedent,<sup>153</sup> but family privacy is nonetheless an important, unavoidable variable in the balance between IP and free speech.

#### *D. Moral or Reputational Integrity*

Another interest frequently cited by IP estates—and probably the most difficult to square with the First Amendment—is the need to purify the memory of a loved one in the face of unflattering or misleading portrayals. IP owners often seek to suppress such unflattering uses of an image or likeness, for example reinterpretations of *Gone With the Wind* or *Porgy and Bess*, photographs of Barbie in a blender,<sup>154</sup> or blog posts critical of a public figure.<sup>155</sup> In such circumstances, fair use and related free speech defenses rightfully prevent rights holders from dominating cultural discourse or demand that critics obtain licenses from the objects of their critiques.<sup>156</sup> Nonetheless, even if the *effect* of such “integrity” interests are ultimately unacceptable,<sup>157</sup> the underlying *desire* for integrity is not necessarily abhorrent, particularly as expressed in the context of postmortem rights.<sup>158</sup>

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153. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (“Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.”); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (overturning civil liability for newspaper that truthfully published the name of a rape victim, contrary to state law).

154. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

155. *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015).

156. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

157. The United States only recognizes a very limited right of “integrity” for works of fine art, and this right is personal to the author, i.e. it can't be devised or alienated. See 17 U.S.C. § 106A(a)(3)(a) (providing a limited right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”). Professor Amy Adler has been one of the most vocal opponents of this ability of authors to limit critical disintegrations of their work. See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009).

158. These tensions between an estate's desire to uphold the integrity of the author's work and the strong public interest in reshaping that work were evident in a recent dispute between the estate of Edward Albee and an Oregon production of *Who's Afraid of Virginia Woolf?* The estate has been heavily criticized for insisting that the character Nick be played solely by white actors, in line with Albee's expressed casting wishes. See, e.g., Kyle Turner, *Who's Afraid of White Fragility? Edward*



For example, Christopher Tolkien, the son and executor of author J.R.R. Tolkien, has been criticized for his hostile stance towards commercial uses of *The Hobbit* and *The Lord of the Rings* lore—particularly the blockbuster films directed by Peter Jackson.<sup>159</sup> The elder Tolkien assigned movie rights for his books in order to cover his children’s potential estate tax bills.<sup>160</sup> Christopher Tolkien has expressed “intellectual despair” over the results, highlighting the “parallel universe” between his father’s writings and their commercial descendants; his ultimate fear is that the films would (like *The Ring of Power* and *Sméagol*) “engulf the literary works” on which they were based.<sup>161</sup> In his view, Jackson “eviscerated the book by making it an action movie for young people aged 15 to 25”; the resulting “commercialization has reduced the aesthetic and philosophical impact of the creation to nothing.”<sup>162</sup> Accordingly, he has invoked intellectual property rights to “protect the literary work from the three-ring circus that has developed around it.”<sup>163</sup> The Tolkien estate sued Warner Brothers for what it viewed as overextensions of its acquired rights: *The Lord of the Rings* slot machines and downloadable “[h]ack-and-slash” videogames.<sup>164</sup> These are examples,

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*Albee*, HYPERALLERGIC (May 25, 2007), <https://hyperallergic.com/381406/whos-afraid-of-white-fragility-edward-albee/>; Diep Tran, *When a Writer’s Rights Aren’t Right: The ‘Virginia Woolf’ Casting Fight*, AM. THEATRE (May 22, 2017) <http://www.americantheatre.org/2017/05/22/when-a-writers-rights-arent-right-the-virginia-woolf-casting-fight/>. The casting director, however, was more circumspect: “I do not question the motives of those that made the decision. . . . I think they have some fealty to a sense of integrity to Edward Albee’s desires. But I had hoped the negative aspects of Albee would die with him. I do not question their right to make the decision. If I did, I would pursue it legally.” Hazel Cills, *Did the Edward Albee Foundation Deny Rights to a Play Because the Production Cast a Black Actor?*, JEZEBEL (May 18, 2017, 4:40 PM), <http://jezebel.com/did-the-edward-albee-foundation-deny-rights-to-a-play-b-1795345657>.

159. See, e.g., Michael Masnick, *Tolkien Estate Strikes Again: Forces Summer Camp To Change Name*, TECHDIRT (Apr. 20, 2011, 11:40 AM), <https://www.techdirt.com/articles/20110419/01104713954/tolkien-estate-strikes-again-forces-summer-camp-to-change-name.shtml>; Michael Masnick, *Tolkien Estate Says Just Mentioning Tolkien Infringes; Tolkien Censorwear Appears In Response*, TECHDIRT (Feb. 28, 2011, 8:43 AM), <https://www.techdirt.com/articles/20110226/19564813296/tolkien-estate-says-just-mentioning-tolkien-infringes-tolkien-censorwear-appears-response.shtml>.

160. Raphaëlle Rérolle, *Tolkien, L’anneau de la Discorde*, LE MONDE (Fr.) (July 5, 2012 3:15 PM), [http://www.lemonde.fr/culture/article/2012/07/05/tolkien-l-anneau-de-la-discorde\\_1729858\\_3246.html](http://www.lemonde.fr/culture/article/2012/07/05/tolkien-l-anneau-de-la-discorde_1729858_3246.html) (for a translation by Jeff Israely see *My Father’s “Eviscerated” Work—Son of Hobbit Scribe J.R.R. Tolkien Finally Speaks Out*, WORLD CRUNCH (Dec. 5, 2012), <https://www.worldcrunch.com/world-affairs/my-father039s-quot-eviscerated-quot-work-son-of-hobbit-scribe-jrr-tolkien-finally-speaks-out>).

161. *Id.*

162. *Id.*

163. *Id.*

164. Erik Wecks, *The Tolkien Estate Sues to Protect Their Precious*, WIRED (Nov. 21, 2012), <https://www.wired.com/2012/11/tolkien-lawsuit/>.

according to the estate's complaint, of commercial entities "prostituting art."<sup>165</sup>

The question ultimately is why millions of Tolkien fans should be subject to the aesthetic judgments of the author's son, and the likely answer is that they should not. But when viewed from the perspective of Christopher Tolkien, the desire to preserve the integrity of the original Tolkien literary works is deeply personal and important. He had a front row seat to his father's authorship of these classic works and assisted with typing and drawing the manuscripts. When Christopher served in the Air Force, his father would send him weekly updates on *The Lord of the Rings*. When his father died, Christopher gave up his Oxford professorship to work on his father's unpublished works, and he now feels a "heavy responsibility" to keep his father's original vision alive.<sup>166</sup> Frodo, Sam, Gandalf, and fellow riders are not open-ended cultural memes for Tolkien's family; they are the products of the long, hard work of their father and are rooted in very specific childhood experiences. Again, family nostalgia certainly should not be the sole driver of cultural policy, but its already substantial role cannot be ignored.

Christopher Tolkien is hardly alone among heirs in turning to IP to protect the integrity of a family member's public memories. Connie Brooks, daughter of Cool Papa Bell, brought her lawsuit against Topps in large part because Topps portrayed her father as "a lazy buffoon, or a drunkard, who did not take the game seriously."<sup>167</sup> The baseball card falsely stated that Bell "earned his nickname, by falling asleep before a game."<sup>168</sup> Teresa Earnhardt emphasized during her lawsuit against the Florida coroner that her "family's desire and right to control the property interests in Dale Earnhardt's name and likeness is driven by their desire to protect the sanctity of Dale Earnhardt's memory . . . [as] a man full of life and energy who earned the respect of the world . . . ."<sup>169</sup> Published autopsy

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165. Complaint ¶ 8, *Fourth Age Ltd. v. Warner Bros*, No. 12-CV-9912 (C.D. Cal. filed Nov. 19, 2012). A similar concern with the reputation of a deceased artist is raised by a recent social media feud between Kendall and Kylie Jenner and Voletta Wallace, mother of the Notorious B.I.G. The Jenners sold a t-shirt with their faces superimposed on the late rapper's image, prompting Wallace to emphasize strongly on social media that there was no affiliation between the rapper's estate and the Jenners: "I am not sure who told @kyliejenner and @kendalljenner that they had the right to do this. The disrespect of these girls to not even reach out to me or anyone connected to the estate baffles me." See Shenequa Golding, *Voletta Wallace to Kendall and Kylie: 'This is Disgusting and Exploitation at its Worst'*, VIBE (June 29, 2017, 2:08 PM), <https://www.vibe.com/2017/06/voletta-wallace-reacts-kendall-kylie-biggie-shirt/>.

166. Rérolle, *supra* note 160.

167. Declaration of Connie Brooks, *supra* note 126, ¶ 37.

168. *Id.* ¶ 36.

169. Plaintiff's Memorandum of Law in Support of Motions for Permanent Injunction, *supra* note 149, at 33–34.

photos threatened to “taint Dale Earnhardt’s memory and image.”<sup>170</sup> Jan Gaye, ex-wife of Marvin Gaye, testified at trial in the *Blurred Lines* litigation that her family grants licenses “depend[ing] on the integrity of what the license is about. And it's not always the amount. It's not always a financial issue. It's—some of it's emotional.”<sup>171</sup> In the early 1970s, Robert and Michael Meeropol, the orphaned children of convicted Cold War spies Ethel and Julius Rosenberg, sued their parents’ trial lawyer for including the Rosenberg’s prison correspondence in a book about the trial.<sup>172</sup> In one scene, for example, the book turned their parents’ first embrace since being sentenced to death “into a virtual sex scene from an R-rated movie.”<sup>173</sup> The copyright suit began their decades-long effort to “correct [the] misrepresentations” about their parents—in particular, Ethel Rosenberg, who they maintain was entirely innocent.<sup>174</sup> In each of these examples, family members are using the descendibility and exclusive rights of intellectual property to fill in the gaps of defamation and privacy laws to positively shape the memory of the decedent.<sup>175</sup>

The desire to scrub clean the legacy of a deceased artist, however, is by no means always a noble cause. The struggle for control over the artist after death can be a continuation of a similar struggle for control during life. In this regard, Karen Carpenter’s posthumous IP disputes loom most ominously. Pop stars Karen Carpenter and her brother Richard developed a squeaky-clean all-American image in the 1970s, and Karen embodied

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170. *Id.* at 34, n.10.

171. Transcript of Day Two of Trial Proceedings at 45, *Williams v. Bridgeport Music, Inc.*, No. 2:13-CV-06004-JAK-AGR, 2016 WL 6822309 (C.D. Cal. Apr. 12, 2016). According to Gaye, some of most important questions with respect to permissions include: “Are we diminishing the integrity of Marvin's music in any way by doing certain things? Are we disrespecting the music? Because it's so precious to us.” *Id.* at 48.

172. *See Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977).

173. THE ROSENBERG LETTERS: A COMPLETE EDITION OF THE PRISON CORRESPONDENCE OF JULIUS AND ETHEL ROSENBERG 108 n.96 (Michael Meeropol ed., 1994) (“It was such total fabrications that led us to sue Nizer for both copyright infringement, invasion of privacy and libel, a suit that was settled out of court.”).

174. *See, e.g., The Son of Ethel and Julius Rosenberg Writes of An Execution in the Family*, AM. BOOKSELLERS ASS'N (June 10, 2003), <http://www.bookweb.org/news/son-ethel-and-julius-rosenberg-writes-execution-family>; Marry C. Serreze, *Meeropol Brothers to Seek Presidential Exoneration for Ethel Rosenberg at White House Gates*, MASS LIVE (Nov. 28, 2016, 3:59 PM), [http://www.masslive.com/politics/index.ssf/2016/11/ethel\\_rosenbergs\\_sons\\_plan\\_was.html](http://www.masslive.com/politics/index.ssf/2016/11/ethel_rosenbergs_sons_plan_was.html) [<https://perma.cc/5XYU-27VJ>].

175. *See also Fahmy v. Jay-Z*, 835 F. Supp. 2d 783 (C.D. Cal. 2011). The nephew of Egyptian composer Baligh Hamdi sued Jay-Z over an allegedly unlawful sample in the hit song *Big Pimpin'*. The nephew “said the late composer would have been 'horrified' to learn his song had been combined with 'vulgar' rap lyrics in the track which extols the 'pimpin' life of casual sex.” Thomas Burrows, *Judge Dismisses Copyright Claim Against Rapper Jay Z over His 1999 Track Big Pimpin'*, DAILYMAIL (Oct. 21, 2015, 6:25 PM), <http://www.dailymail.co.uk/news/article-3283567/US-judge-dismisses-Jay-Z-Big-Pimpin-copyright-case.html>.

“the role of star-struck female innocence.”<sup>176</sup> Behind the scenes, however, Karen’s image and behavior were tightly controlled by her family, and after a lengthy battle with anorexia nervosa, she died at the age of thirty-two. Her family continued to tightly control the use of her music and likeness after death in order “to maintain Karen’s marketability by reinforcing images of [her] virginal sainthood.”<sup>177</sup> Most famously, the Carpenter’s successfully sued director Todd Haynes for his film *Superstar*, which used Barbie dolls to depict Karen’s life, madness, and death. The film showed the slow degradation of Karen’s body and mind and strongly linked Karen’s condition with her “perversely overbearing family.”<sup>178</sup> The family also sought to block the posthumous release of Karen’s solo recordings with Phil Ramone, which were far more sexually mature than the virginal Karen they had long promoted.<sup>179</sup> These efforts to purify the memory of Karen Carpenter provide a stark reminder that dysfunction and mistreatment within families can continue after death. This potential does not mean that dignity interests are inherently improper. Again, it means that fair use and other free speech doctrines play especially important roles in ensuring cultural space for critique and commentary.

### E. Legacies

One term emerges repeatedly in heirs’ explanation of why they are asserting IP rights: legacy. And they use this one term in several different ways. Family members feel a responsibility to actively promote their loved one’s “legacy” as a contributor to their field. They want to protect the deceased’s “legacy” from negative exploitation. They feel entitled to the economically valuable “legacy” that was explicitly left to *them*.<sup>180</sup> “Legacy” takes on overlapping cultural, emotional, and economic meanings when invoked by IP estates.

The Martin Luther King, Jr. estate frequently invokes King’s legacy in an economic sense. King’s family members see themselves as “guardians of King’s legacy,” and this includes enforcing IP rights against those who

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176. Peggy J. Bowers & Stephanie Houston Grey, *Karen: The Hagiographic Impulse in the Public Memory of a Pop Star*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* 97, 99 (Steve Jones & Joli Jensen eds., 2005).

177. *Id.* at 102.

178. *Id.* at 110.

179. *Id.* at 113–14.

180. See, e.g., Petition for a Writ of Certiorari at 33, *Petrella v. MGM, Inc.*, 134 S. Ct. 1962 (2014) (No. 12-1315) (“To this day, MGM persists in infringing Ms. Petrella’s copyright—and depriving her of her father’s legacy—by continuing to market and sell the film.”).

seek to profit from it.<sup>181</sup> For example, in its suit against CBS for unauthorized use of the “I Have a Dream” speech, the estate repeatedly emphasized that King had protected, licensed, and enforced more than two dozen of his copyrighted works and “intended those copyright royalties as a ‘modest legacy’ for his family.”<sup>182</sup> Family members and friends of King have emphasized that King was not a wealthy man and expected that his children would inherit the value of his intellectual property.<sup>183</sup> According to former Atlanta Mayor Shirley Franklin, who frequently interacted with the King family: “Dr. King copyrighted his own work. . . . He expected that it would have value and expected it would be part of the legacy . . . Dr. King left the rest of us a tremendous legacy, but he was not a wealthy man.”<sup>184</sup> This quote demonstrates the slipperiness of legacy in the context of IP estates; Dr. King’s economic legacy belongs to his children, but his tremendous cultural legacy belongs to “the rest of us.”<sup>185</sup> On one hand, King’s words and images are “the rightful inheritance of King’s family”; on the other hand, over time those words and images “belonged to everyone.”<sup>186</sup>

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181. Krissah Thompson and Hamil R. Harris, *Martin Luther King Jr.’s Children Reflect on the Weight of His Legacy*, WASH. POST (Aug. 24, 2011), [https://www.washingtonpost.com/politics/martin-luther-king-jrs-children-reflect-on-the-weight-of-his-legacy/2011/08/24/gIQAHT6KcJ\\_story.html?utm\\_term=.12b23f23f9ff](https://www.washingtonpost.com/politics/martin-luther-king-jrs-children-reflect-on-the-weight-of-his-legacy/2011/08/24/gIQAHT6KcJ_story.html?utm_term=.12b23f23f9ff).

182. Brief for Appellant at 7, *Estate of Martin Luther King, Jr., Inc. v. CBS Inc.*, 194 F.3d 1211 (11th Cir. 1999) (No. 98-9079); *see also id.* at 10 (“Finally, the world-wide, commercial exploitation of the TV show and the exorbitant licensing fees exacted by CBS from non-profit organizations make a mockery of the First Amendment and fair use defenses, and Dr. King’s desire to provide his family with an intellectual property legacy.”); Complaint ¶ 9, *Estate of Martin Luther King, Jr. v. CBS Inc.*, 13 F. Supp. 2d 1347 (N.D. Ga. 1998) (No. 1:96-CV-03052-WCO) (“Dr. King’s copyrighted works are part of his legacy, and Dr. King recognized the importance of protecting his copyrights in his writings. According to records in the Library of Congress, prior to his death Dr. King personally registered his copyrights in many other speeches, books, sermons and articles, including his 1965 ‘Address at the Conclusion of the Selma to Montgomery March’ and his 1967 ‘Declaration of Independence from the War in Vietnam.’”).

183. Gene Demby, *King’s Family Builds Its Own Legacy of Legal Battles*, NPR: CODE SWITCH (Jan. 18, 2015, 12:39 PM), <http://www.npr.org/sections/codeswitch/2015/01/18/378015843/kings-family-builds-its-own-legacy-of-legal-battles>; *see also* Jenny Jarvie, *Legal Battles of Martin Luther King Jr.’s Children Threaten His Legacy*, L.A. TIMES (Jan. 19, 2015, 5:30 AM), <http://www.latimes.com/nation/la-na-mlk-family-20150119-story.html>.

184. Demby, *supra* note 183.

185. The heirs to another legendary civil rights activist, Malcolm X, have expressed a similar mix of economic and cultural interests. *See* Complaint ¶ 3, *X Legacy, LLC v. Third World Press Inc.*, No. 13-CV-7984 (S.D.N.Y. filed Nov. 8, 2013) (“His children assigned their interests . . . [to plaintiff holding company] so that their value could be best realized, and so that the legacy of Malcolm X could be best shared with the world.”).

186. Demby, *supra* note 183; *see also* James Bock, *King’s Heirs Battle to Protect His Legacy*, BALT. SUN (Jan. 19, 1994), [http://articles.baltimoresun.com/1994-01-19/news/1994019001\\_1\\_king-estate-luther-king-king-legacy](http://articles.baltimoresun.com/1994-01-19/news/1994019001_1_king-estate-luther-king-king-legacy) (“Speakers at Martin Luther King Jr. celebrations like to remind listeners that the slain civil rights leader’s legacy belongs to all Americans. But Dr. King’s heirs have increasingly issued another reminder: In a legal sense at least, that legacy belongs to them.”).

The Gaye family similarly expresses a strong economic claim to Marvin Gaye's legacy but simultaneously see themselves as stewards of his cultural legacy. For example, Jan Gaye testified in the *Blurred Lines* trial:

[W]e love the fact that people think of it as the ultimate party record from the '70's, from '77 to this day. And we're very proud of that. We're very proud of everything he did. It's part of what he left his children since he can't be here with us. It's a gift from him. So we treasure that and we value that.<sup>187</sup>

"Gift" and "value" are intriguingly ambiguous concepts here, evoking both a cultural and an economic dimension. On one hand, Marvin's daughter Nona Gaye describes the "painful joke" of Thicke and Williams's copying "Got to Give it Up" in a highly proprietary way: "That's our father, that's what he left for us, our legacy."<sup>188</sup> On the other hand, the Gaye children have stressed that they are the "caretakers of such treasures" with a responsibility of "protecting the legacy of original artistry."<sup>189</sup> As IP heirs, they are accordingly purporting to act both on their own behalves and in furtherance of musical traditions generally. Ultimately, "we all feel like it's the living legacy that Marvin left behind for his children and family and his fans and for the world, really."<sup>190</sup> As the legacy shifts, however, from children to family to fans, its characteristics and obligations change quite substantially.

Several other heirs have described themselves as stewards of a cultural legacy. For Connie Brooks, daughter of Cool Papa Bell, "I promised my father that I would carry on and keep his legacy alive. I have worked tirelessly for years by pushing ahead to make sure that he is not forgotten and that portrayals of him are accurate and appropriate."<sup>191</sup> For Christopher Tolkien, his father's legacy is "a patrimony which has been

187. Transcript of Day Two of Trial Proceedings, *supra*, note 171, at 43–44.

188. Nancy Dillon, *Marvin Gaye's Daughter Speaks About 'Blurred Lines' Court Decision: 'It's a Beautiful Day'*, N.Y. DAILY NEWS (Mar. 11, 2015, 12:20 AM), <http://www.nydailynews.com/entertainment/music/marvin-gaye-daughter-speaks-court-decision-article-1.2144974>.

189. Brittany Spanos, *Marvin Gaye's Children: What Our Father Would Say About Lawsuit*, ROLLING STONE (Mar. 18, 2015), <http://www.rollingstone.com/music/news/marvin-gayes-children-what-our-father-would-say-about-lawsuit-20150318>; *see also* Defendant's Opening Statement, *supra* note 90, at 99 ("Marvin Gaye left his songs to his children. They are here protecting his work and his legacy."). This "caretaker" motif invokes a long history of pro-copyright advocates using a parent/child metaphor to frame the relationship between authors and their work. *See, e.g.*, Buccafusco & Fagundes, *supra* note 88, at 2477–78; MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L. J. 1431 (2012).

190. Transcript of Day Two of Trial Proceedings, *supra*, note 171, at 10.

191. Declaration of Connie Brooks, *supra* note 126, ¶ 9.

his life's work." This has involved both limiting commercial knockoffs and carefully completing and releasing his father's stories.<sup>192</sup> Gia Prima, the widow of swing musician Louis Prima, sees a similar role for herself in completing his "legacy"—publishing unreleased works, limiting authorized uses by commercial entities like the Olive Garden, and suing Disney for *Jungle Book* royalties.<sup>193</sup> Both Robyn Astaire and Teresa Earnhardt have taken on the roles of "guardian" and "caretaker" of their late husbands' "legacies" and have clamped down on third-party uses of their inherited IP, to considerable criticism.<sup>194</sup>

The multiple, intertwined meanings of legacy invoked by IP estates encapsulates the intertwined and at times conflicting interests triggered by postmortem IP. As spouses, children, and grandchildren, they sometimes want to make sure that their family member is remembered fairly, accurately, and with dignity. As rights holders of often deeply important objects of culture, they sometimes want to make sure that their family member's contributions maintain widespread cultural attention. As recipients of valuable inheritances, they sometimes want to materially improve their own economic conditions. And as private individuals mourning the death of a public figure, they sometimes just want to be left alone. What ultimately emerges from a close examination of IP estates' expressed motivations is a much more complex and sympathetic—if not always likeable—cast of real-world characters than typically presented in IP debates.

### III. ESTATES IN BROADER CONTEXT

In light of the various, and often conflicting, public policies triggered by the death of a famous artist (e.g., privacy, dignity, artistic expression, and free speech) the largely uniform scholarly attitude towards IP estates is rather startling. As shown in Part I, there has been little empathy directed towards the rights holders surveyed in Part II; even if the interests of IP estates ultimately must give way to larger societal commitments to a

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192. Rérolle, *supra* note 160.

193. Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 350 (D.N.J. 2000) (finding prima facie case of right of publicity violation); Keith Spera, *Louis Prima's Legacy Was Incomplete Until 2002, When His Wife Reissued Long-Lost Songs*, TIMES-PICAYUNE (Oct. 13, 2002, 4:00 AM), [http://www.nola.com/music/index.ssf/2002/10/post\\_12.html](http://www.nola.com/music/index.ssf/2002/10/post_12.html); Mark Miester, *The Monkey v. the Mouse*, BEST OF NEW ORLEANS (Aug. 21, 2001), <http://m.bestofneworleans.com/gambit/the-monkey-vs-the-mouse/Content?oid=1239351>.

194. Thomas, *supra* note 117; Jeff Owens, *How Teresa Earnhardt Is Tarnishing Dale Earnhardt's Name and Legacy*, SPORTING NEWS (May 9, 2016), <http://www.sportingnews.com/nascar/news/teresa-earnhardt-lawsuit-controversy-dale-earnhardt-name-legacy-kerry-dale-earnhardt-jr/9knelm180kop141brytlir6g>.

robust public domain, that ultimate policy decision is not without cost or consequence. This strong skepticism towards estates also stands in significant contrast with the far more diverse views about the interests of heirs in other areas of legal scholarship. The interests of heirs set forth in Part II are far from unique to IP, yet the response by scholars in other domains has been far more sympathetic, even when not ultimately more supportive.

In the area of law that addresses death and inheritance most directly—trusts and estates—the substantial, and often disenfranchised, interests of heirs and familial beneficiaries loom large. Trusts and estates doctrines reflect a constant triangulation among three sets of interests: decedents’ “freedom of disposition” with respect to their property; living beneficiaries’ economic and emotional interests in the decedent’s property; and the broader societal interest in the fair and efficient use of economic resources.<sup>195</sup> U.S. trusts and estates law largely comes down on the side of the freedom of disposition, giving decedents wide latitude to disinherit dependent family members or bind their property in service of suboptimal ends.<sup>196</sup> In only limited, fairly extreme circumstances will U.S. law unsettle or otherwise redirect property away from the decedent’s desired plans.<sup>197</sup> As a result, family members can be entirely cut out of a lawful estate plan,<sup>198</sup> regardless of their economic vulnerabilities or strong emotional attachments to heirlooms that have been directed elsewhere.

Numerous scholars have pushed back forcefully against the priorities of U.S. trusts and estates law, often carrying a brief for marginalized family members. For example, scholars have argued that disinherited children should have the right to claim a portion of their parent’s estate—similar to the rights of disinherited spouses in separate property states to claim a

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195. See, e.g., Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125 (2013) (analyzing when freedom of disposition should be limited by negative externalities or donees’ ex post interests).

196. See, e.g., MADOFF, *supra* note 16, at 6–7 (“Americans are largely free to impose whatever conditions they want, and their plans can often be imposed for as long as they want, even in perpetuity.”); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”).

197. For example, a decedent’s will cannot direct the destruction of the family home. *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975). Nor can it unreasonably interfere with a family member’s decision of whom to marry. *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 829 (Com. Pl. 1974) (permitting a reasonable restraint on marriage). But the decedent can bind a trustee to pursue questionably necessary charitable ends. *Estate of Buck v. Marin Cmty. Found.*, 35 Cal. Rptr. 2d 442 (Cal. Ct. App. 1994). The decedent may also place relatively onerous conditions on their children’s inheritances, such as requiring them to marry a person of a particular religion. *Shapira*, 315 N.E.2d at 825.

198. See, e.g., John H. Langbein, *Book Review: Will Contests*, 103 YALE L.J. 2039 (1994).



share of their spouse's estate.<sup>199</sup> Scholars have also argued for greater flexibility in modifying trusts in light of changing circumstances, again largely out of concern that a trust ultimately should function for the benefit of its beneficiaries and not out of pure fealty to the wishes of a settlor who had died decades earlier.<sup>200</sup> Although there certainly are scholars who support the foundational commitment to freedom of disposition,<sup>201</sup> I am unaware of any recent scholarship that fails to at least acknowledge its burden on family members with a stake in the decedent's property.

Trusts and estates scholars furthermore have expressly recognized that successful estate planning cannot be disentangled from family members' emotional attachments. Professors Deborah Gordon and Karen Sneddon, for example, advocate that decedents incorporate personal narratives about their property into their will in order to aid in bereavement and help reduce conflict around inheritance decisions.<sup>202</sup> Moreover, Professor Gordon and other trusts and estates scholars recognize that "[a] possession, be it a keepsake, jewelry, a home, or even a business, often takes on meaning that is unrelated to the item's material worth or market value."<sup>203</sup> Therefore, it is perfectly understandable that family members will act economically "irrationally" in service of their tremendous emotional investments.<sup>204</sup> Inheritance is not just about the intergenerational transfer of an economically valuable asset; it is also about "creat[ing] a legacy that connects that individual to her survivors and allows her to live on after death."<sup>205</sup> Professor Shelly Kreiczer-Levy similarly argues that inheritance law creates an "intergenerational bond."<sup>206</sup> The decedent extends herself

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199. See, e.g., Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964).

200. See, e.g., John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111 (2004).

201. See, e.g., Kelly, *supra* note 195; David Horton, *Testation and Speech*, 101 GEO. L.J. 61 (2012); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U. CAL. DAVIS L. REV. 129 (2008).

202. Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J. L. & HUMAN. 265 (2016); see also Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355 (2013); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992).

203. See Gordon, *supra* note 202; see also Eduardo M. Penalver, *Property's Memories*, 80 FORDHAM L. REV. 1071 (2011); Horton, *supra* note 201, at 88 ("[B]eneficiaries perceive owners' distributional choices as a proxy for their voice and an extension of their affection."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-60 (1982).

204. Gordon, *supra* note 202, at 276 ("[P]roperty that may seem insignificant based on economic value alone has tremendous expressive, and in particular narrative, potential.")

205. *Id.* at 275-76.

206. Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 495 (2012).

into the future, and the beneficiary maintains a bond with the past by becoming a caretaker for the decedent's legacy: "a beneficiary who becomes the caretaker of a cherished object satisfies a moral obligation to members of her intergenerational community."<sup>207</sup> Trusts and estates scholars often take very seriously the emotional components of a decedent's legacy; empathy in estate planning can both reduce conflict and help achieve common ground in the emotionally fraught aftermath of a person's death.<sup>208</sup>

Other areas of law also regularly confront and acknowledge the difficult balancing of interests between decedents, survivors, and the general public. In the context of bodily dispositions—i.e. decisions about whether to bury or cremate a corpse—and organ donation, applicable state and national laws have variously shifted between: (1) prioritizing the general public's interest in the body for scientific research or medical transplants; (2) recognizing the interests of family members in making decisions about what happens to their loved one's remains; and (3) respecting the decedent's own desires about whether to donate their bodies to science and medicine.<sup>209</sup> Both to empower grieving families and to

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207. Gordon, *supra* note 202, at 314; *see also* Gregory S. Alexander, *Intergenerational Communities*, 8 LAW & ETHICS HUM. RTS. 21, 23 (2014) ("I argue further that each generational community owes its predecessors the obligation to accept life-transcending projects transmitted to them by their forebears and make reasonable efforts to carry those projects forward into the future."); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 764 (2009) (recognizing "an innate desire among the living to honor the wishes of the dead even when those wishes negatively impact their own interests"); Kreiczler-Levy, *supra* note 206, at 521 ("The giver connects to her future by bequeathing her property while the receiver has an interest in belonging and in having roots, and the property reaffirms the receiver's place in the world.").

208. *See, e.g.*, Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 376 (1969) ("Lawyers who advise clients and draft documents in the 'estate planning' practice . . . live with their clients an experience which results in change and in choice. They are companions in another man's world."); *see also* Horton, *supra* note 201, at 86–87 ("[D]isgruntled beneficiaries are notoriously litigious. . . . These beneficiaries are not fighting the pecuniary value of the gifts. Instead, they are challenging something else: the message encoded in the testamentary scheme.").

209. Smolensky, *supra* note 207, at 773 ("Possible right-holders in cases involving decedents might include the decedent, the estate, heirs, the public, and the next of kin."); *see also* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 402–09 (2000) (canvassing conflicting decisions on the constitutionality of state statutes authorizing removal of organs from dead bodies without prior consent); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 547 (2014) (supporting certain limits on posthumous transfers, for example in decedent's body parts, on the basis of "administrability" problems); *id.* at 555–56 (canvassing gradual shift from denying property treatment to cadavers to giving families a "quasi-property" interest in ensuring proper handling); *see* MADOFF, *supra* note 16, at 16–34 (chronicling legal developments from the common law principle of *corpus nullius in bonis* through contemporary burial/cremation and organ donation statutes). Some scholars believe that families now have too much decisional authority and advocate a more individualized focus on what the decedent wanted to happen. *See, e.g.*, Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351 (2008); Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999).

increase the supply of transplantable organs, several scholars have advocated increased decision-making authority for surviving family members, including some degree of economic stake in what can often be a valuable resource for medical treatment and research.<sup>210</sup> Although legal scholarship is all over the map in terms of how to balance the competing interests in human remains, the important takeaway is that scholars recognize and appreciate how difficult it is to accommodate competing claims among heirs, decedents, and the public.

Similarly, several scholars have emphasized the importance of limiting public disclosure of certain types of information about the decedent, such as genetic information, autopsy reports, or death certificates.<sup>211</sup> For example, one of the most famous examples of bioethics and family privacy involves the descendants of Henrietta Lacks, a black tobacco farmer whose cancer cells were taken without her knowledge in 1951 and used to develop some of the most important advances in modern medicine.<sup>212</sup> Although the HeLa cell line has been invaluable for scientific research, its development has also been subject to much criticism—her family members were unaware of the HeLa cell line provenance until the 1970s and were themselves unable to afford health insurance or any of the medical advancements to which Henrietta Lacks had contributed.<sup>213</sup>

Moreover, in 2013, German researchers sequenced and published the Lacks genome, prompting criticism that this information violated the privacy of Henrietta’s descendants because it could allow researchers to identify their potential risk for a range of diseases.<sup>214</sup> Even though this genetic information provided an invaluable reference tool for medical research, the National Institutes of Health chose to limit access only to researchers who submitted applications and agreed to abide by the “HeLa Genome Data Use Agreement.” According to the NIH Director:

The sequencing and posting of the HeLa genome brought into sharp

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210. See Horton, *supra* note 209, at 554 n.74 (collecting sources); see also *id.*, at 589 (supporting experimentation with some financial payment to decedents’ families for organ harvesting).

211. See generally Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927 (2016).

212. See Radhika Rao, *Informed Consent, Body Property, and Self-Sovereignty*, 44 J. L. MED. & ETHICS 437, 438 (2016); Natalie Ram, *DNA By the Entirety*, 115 COLUM. L. REV. 873, 873 (2015).

213. Rao, *supra* note 212, at 441–42; Robin McKie, *Henrietta Lacks’s Cells Were Priceless, But Her Family Can’t Afford a Hospital*, GUARDIAN (Apr. 3, 2010, 7:06 PM), <https://www.theguardian.com/world/2010/apr/04/henrietta-lacks-cancer-cells>; see generally REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010).

214. See SKLOOT, *supra* note 213; see also Rebecca Skloot, *The Immortal Life of Henrietta Lacks, the Sequel*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/opinion/sunday/the-immortal-life-of-henrietta-lacks-the-sequel.html> (“‘That is private family information,’ said Jeri Lacks-Whye, Lacks’s granddaughter. ‘It shouldn’t have been published without our consent.’”).

relief important ethical and policy issues . . . . To understand the family's perspectives, we met with them face to face three times over four months, and listened carefully to their concerns. Ultimately, we arrived at a path forward that respects their wishes and allows science to progress. We are indebted to the Lacks family for their generosity and thoughtfulness.<sup>215</sup>

Even though the HeLa genome provides a compelling case for a robust public domain, privacy advocates and bioethicists listened and responded to claims of family privacy, particularly where the family had been largely shut out of the economic upside of their ancestor's contribution.<sup>216</sup>

Despite similar public interests militating in favor of the disclosure of autopsy reports and death certificates to journalists and scholars, many states (with scholarly support) limit access to death certificates to certain close family members.<sup>217</sup> "Many courts justify these access restrictions based upon the right to privacy held by the decedent's family that 'protects people from suffering the unhappiness of unwanted publicity about their deceased relatives.'"<sup>218</sup> Similarly, the Supreme Court upheld the denial of a Freedom of Information Act request where the disclosure of death-scene photographs of Bill Clinton aide Vince Foster would have violated the privacy interests of Foster's surviving family members.<sup>219</sup> The Court affirmed the interest of the Foster family "to secure their own refuge from

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215. See Press Release, Nat'l Insts. of Health, NIH, Lacks Family Reach Understanding To Share Genomic Data of HeLa Cells (Aug. 7, 2013), <https://www.nih.gov/news-events/news-releases/nih-lacks-family-reach-understanding-share-genomic-data-hela-cells>.

216. See Rao, *supra* note 212, at 441–42. Professor Rao also points to the experience of the Havasupai Tribe, which provided blood samples to Arizona State University to research the high rates of diabetes within the tribe. The University conducted additional research on the blood samples and published papers reporting a high degree of inbreeding within the tribe and suggesting that the tribe's ancestors migrated across the frozen Bering Sea. These conclusions were insulting to the tribe and contradicted tribal origin stories. Although the tribe failed to hold the university accountable through litigation, it ultimately reached a settlement whereby the university paid tribal member \$700,000 and returned the remaining blood samples. *Id.* at 438–39.

217. Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J.L. & PUB. POL'Y 237, 239 (2012) ("Public access to death certificates, autopsy reports, and other types of government-held death records, a seemingly benign legal topic, has generated robust disagreement, pitting open government principles against privacy concerns surrounding the deceased."); Smolensky, *supra* note 207, at 796–97.

218. Boles, *supra* note 217, at 241 (quoting *Metter v. L.A. Exam'r*, 95 P.2d 491, 495 (Cal. Dist. Ct. App. 1939)).

219. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004); see also *Catsouras v. Dept. of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010) (permitting family of decedent to assert cause of action against California Highway Patrol for disclosure of young woman's mutilated corpse).

a sensation-seeking culture for their own peace of mind and tranquility.”<sup>220</sup> Justice Kennedy cited at length a sworn declaration from Foster’s sister:

Sheila Foster Anthony, stated that the family had been harassed by, and deluged with requests from, “[p]olitical and commercial opportunists” who sought to profit from Foster’s suicide . . . “I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media . . . Once again my family would be the focus of conceivably unsavory and distasteful media coverage.” . . . “[R]eleasing any photographs . . . would constitute a painful unwarranted invasion of my privacy, my mother’s privacy, my sister’s privacy, and the privacy of Lisa Foster Moody (Vince’s widow), her three children, and other members of the Foster family.”<sup>221</sup>

Foster Anthony’s declaration echoes many of the interests set forth in Part II—family privacy, commercial exploitation, and reputational purity—and the Supreme Court expressly weighed these interests against the correspondingly strong public interest in the details of Foster’s death. “Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”<sup>222</sup> Privacy scholars have been largely sympathetic to this view, even if also highly sympathetic to the corresponding burden on press freedoms.<sup>223</sup>

Business law scholars have also considered potential conflicts between the interests of families and the general public. Professors Benjamin Means and Allison Tait have recently emphasized that family-operated businesses are often valuable inherited assets and can serve a range of important noneconomic interests. Professor Tait observes that family-operated firms seek to preserve “socioemotional wealth” in addition to profit margins and shareholder value.<sup>224</sup> This includes “preservation of a positive family image, concerns about the company’s perpetuation, desire

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220. *Favish*, 541 U.S. at 158.

221. *Id.* at 167 (internal citations omitted).

222. *Id.* at 168.

223. See, e.g., Clay Calvert, *Salvaging Privacy & Tranquility From The Wreckage: Images Of Death, Emotions Of Distress & Remedies Of Tort In The Age Of The Internet*, 2010 MICH. ST. L. REV. 311 (2010); Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL’Y 313, 345 (2005); Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 OHIO N.U. L. REV. 717, 744 (2008); Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 863–64 (2000).

224. Allison Tait, *Corporate Family Law*, 112 NW. U. L. REV. (forthcoming 2017)

of family members to influence decisions, and care for acquaintances and community relations.”<sup>225</sup> According to Professor Means, “Family businesses seek to advance collective goals, economic and noneconomic; they are contractual, but also reflect status-based family relationships.”<sup>226</sup> Even though certain business-related decisions may impose social costs, for example denying employees insurance coverages for birth control, they nonetheless might be consistent with the family’s strongly held beliefs and values.<sup>227</sup> Although family values—i.e. intimacy and emotional bonds—would appear to conflict with the market values—i.e. efficiency and transparency—that tend to drive corporate regulation, they do not argue that family values should be discarded. To the contrary, each argues that courts and lawmakers should try and accommodate and adapt to the needs of family-operated businesses, particularly in potential moments of internal conflict, such as the transition of control from parents to children.<sup>228</sup> Professor Means accordingly encourages lawyers to appreciate their clients’ mix of family and business motives, and to “take special care to explore questions, such as succession and estate planning, that are critical to the success of the venture.”<sup>229</sup>

The above paragraphs are hardly an exhaustive survey of scholarly treatment of family members’ socioemotional interests in a parent or spouse’s assets. What they highlight, however, is that scholars in other areas of law confronting families, succession, property, and/or privacy have grappled with the difficulty of navigating and balancing the interests of heirs, decedents, and the general public. A broad range of scholars outside of IP have recognized that family members have a powerful mix of emotional and economic attachments to what a deceased relative has left behind, whether it is a business, belongings, or a body.<sup>230</sup> Strong desires for privacy are not dismissed out of hand as censorship; decisions reflecting a strongly-held value system are not immediately tossed aside as irrational; and economic vulnerabilities are not branded as greed. Instead, heirs’ interests are taken seriously and factor into the overall debate about how to craft a legal rule in light of the competing costs and benefits. This

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225. *Id.*

226. Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1230 (2013).

227. Tait, *supra* note 224; see also Means, *supra* note 226, at 1210 (“[I]ndividuals may find themselves torn between advancing the interests of the business and upholding their obligations as members of a family.”).

228. Tait, *supra* note 224; Means, *supra* note 226, at 1215 (“Nowhere are the difficulties of balancing family and business values more formidable than in the transfer of control from one generation to the next.”).

229. Means, *supra* note 226, at 1235.

230. See also Radin, *supra* note 35.

does not mean casting aside social welfare or the public domain, and there are vigorous debates in each of these areas about how to address and accommodate all the interests at stake.

IP law and policy would benefit greatly from an analogous debate that recognizes and takes seriously the competing interests that are actually at stake in many contemporary disputes. IP disputes need not be framed simplistically and antagonistically in terms of the public domain versus various categories of greedy rights holders. Instead, they might at least acknowledge the difficult mix of important social, economic, and emotional values triggered by the succession of popular culture from one generation to the next.

Other areas of law recognize the mix of interests exercised by heirs, and then explicitly balance them against competing interests. Sometimes surviving family members get much of the benefit and control they desire, sometimes they get very little, and often the law is a compromise among the interests of the decedent, survivor, and general public. IP doctrines on their surface share this posture of compromise—rights holders (both ante- and postmortem) have broadly framed, exclusive rights over the use of certain writings, inventions, likenesses, and symbols, tempered by a wide assortment of exceptions and limits in service of a wide range of expressive, scientific, and economic concerns. But rarely are the interests on rights holders' side of the ledger framed in terms of the actual diverse mix of interests served by IP protections—they are framed largely in terms of an increasingly discredited theory that authors, inventors, and celebrities need monetary incentives in order to invest time and energy into the production of nonrival, intangible goods. When framed in terms of incentives to create, IP estates stand on rather shaky ground—they never created anything in the first place, so what is the point of giving them so much power? By contrast, when framed in terms of the mix of economic and emotional interests set forth in Part II, postmortem IP protections map much more neatly onto a coherent set of real world needs and serve a group of interests that legal scholars have often embraced.

#### IV. THE THEORY AND PRACTICE OF PARALLEL MOURNING

By largely overlooking the interests of IP estates, two types of disconnect have taken hold. First, the discourse of postmortem rights is largely framed in terms of windfalls to children with no legitimate claim to the rights they inherit and assert. As this Article has demonstrated, however, IP estates are employing powerful narratives of legacy, recognition, privacy, and fairness that are doing real work in invoking the sympathy of judges, juries, and lawmakers. These narratives can't be

easily framed in terms of economic incentives or authors' rights, so it is difficult for them to be embraced explicitly in judicial opinions.<sup>231</sup> The dominant IP narratives accordingly don't reflect the full range interests doing work below the surface. Second, the combination of villainization and inattention toward IP estates has resulted in doctrines that poorly reflect the interests of the family members who inherit several decades of exclusive rights and in a relative dearth of scholarly attention on how to *help* family members better manage IP. This Article concludes by imagining a more transparent discourse of postmortem IP and suggests some ways for IP law and practice to reflect this reimagined discourse.

#### A. Theory

What emerges from the analysis above is a notion of what I call "parallel mourning." Families, fans, scholars, and journalists are engaging in simultaneous, intersecting acts of processing, remembering, contextualizing, and coping with the loss of a famous person. These processes often conflict in operation, but they are triggered by the same event.

Most significantly, the interests expressed by IP estates emphasize that families' ownership and stewardship of IP are often inextricable from their personal connections to the decedent and inseparable from their mourning of the loss of a family member. For example, Tina Sinatra, director of Frank Sinatra Enterprises, has confessed about her father that "she can't 'separate [her]self' from him; that her father is with her 'every second of every minute of every hour of every day.'"<sup>232</sup> Marvin Gaye's children similarly have written, "We will celebrate what would have been our dad's 76th birthday next month, and though we miss him every day – just like the many thousands of well-wishers who have expressed their heartfelt goodwill – it is through his music that we find our compass and our paths moving forward."<sup>233</sup> Christopher Tolkien describes having his father's "voice in my ear," directing him as he became "the historian of the work, its interpreter."<sup>234</sup>

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231. See, e.g., *Garcia v. Google, Inc.* 786 F.3d 733, 745 (9th Cir. 2015) ("In broad terms, 'the protection of privacy is not a function of the copyright law . . . . To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author.'") (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)); *id.* ("Likewise, authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works.").

232. See Andrew Gilden, *Sinatra's Mug and Postmortem Publicity Rights*, PRAWFSBLAWG (Dec. 11, 2015, 5:53 PM), <https://perma.cc/T8GW-LM6J>.

233. Spanos, *supra* note 189.

234. Rérolle, *supra* note 160.



One understandable response to these sentiments is to dismiss them as fetishistic attachments to the deceased; that the Gayes, Sinatras, and Tolkiens should move on with their lives rather than continue holding on to their parents' legacies. Indeed, literary scholar Professor Paul Saint-Amour has argued that postmortem copyright might assist with family mourning for a "circumscribed" period, but counters that a lengthy postmortem term can contribute to an "interminable mourning" and prolonged "psychic trauma" of attachment to the deceased and unhealthy opposition to more communal forms of public mourning.<sup>235</sup> In his view, "the grief-stricken culture of copyright maximalism wishes the annihilation of the public domain."<sup>236</sup>

This response, however, is at odds with the growing consensus among contemporary bereavement scholars about the possibilities and goals of mourning. The earlier Freudian model of mourning, expressly employed by Professor Saint Amour, posits the goal of mourning as relinquishing attachment to a deceased family member—disengage, let go, move forward.<sup>237</sup> Contemporary psychologists and grief scholars see this goal as often unrealistic and unhealthy. Instead, the dominant paradigm has been termed "continuing bonds"—mourning is about working through and navigating an ongoing relationship between the living and the dead.<sup>238</sup> Continuing bonds may mean a more enduring presence of the dead in the life of the living, but it also helps reinforce a sense of identity, family belonging, and life-transcending purpose. Bereavement scholars have embraced a model of healthy continued attachments to the deceased that parallels the insights of many of the legal scholars in Part III—managing a family business or continuing a loved one's charitable work or caring for family heirlooms can be a constructive and empowering aspect of intergenerational exchange.

When postmortem IP is viewed in light of the idea of continuing bonds, it is easier to see how third party uses of the decedent's work or image can conflict with family mourning. For example, the public representation of

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235. SAINT-AMOUR, *supra* note 52, at 205.

236. *Id.* at 156.

237. *Id.* at 154, n.53. Freud describes the work of mourning as "[t]he testing of reality, having shown that the loved object no longer exists, requires forthwith that all the libido shall be withdrawn from its attachment to this object . . . when the work of mourning is completed the ego becomes free and uninhibited again." *Id.* (quoting SIGMUND FREUD, GENERAL PSYCHOLOGICAL THEORY: PAPERS ON METAPSYCHOLOGY 165–66 (Philip Rieff ed. 1963)).

238. See generally Robert A. Neimeyer et al., *Continuing Bonds and Reconstructing Meaning: Mitigating Complications in Bereavement*, 30 DEATH STUD. 715 (2006); DENNIS KLASS ET AL., CONTINUING BONDS: NEW UNDERSTANDINGS OF GRIEF (1994).

the deceased strongly shapes the family's grieving process,<sup>239</sup> and it can be particularly important for grieving family members to establish and maintain a positive narrative about the deceased.<sup>240</sup> Although this might take the form of trying to suppress critical, albeit truthful, portrayals of the deceased, this desire for suppression at least bears a coherence to a reasonable human psychological process as opposed to an irrational, narcissistic hunger for censorship. Moreover, individuals vary greatly in terms of how public they are comfortable being with their mourning. For individuals who seek a relatively private form of grief, the pervasive presence of the deceased on social and traditional media can thwart this process.<sup>241</sup> It can be difficult to constantly see the face or hear the voice of someone whose death you are trying to adjust to.

Even though a celebrity's families and fans may both mourn the celebrity's death, death has a qualitatively different impact on the two sets of mourners. The physical death of a celebrity causes a fundamental shift for individuals who knew them personally; there is less of a qualitative shift for fans and the general public. For most fans, the relationship with a "star," both before and after death, is highly mediated, both by recording technologies and telecommunications advances.<sup>242</sup> The vast majority of fans of a famous deceased musician, such as Prince or Kurt Cobain or Michael Jackson, "know" the musician through audio and video recordings that preserve their image and voice,<sup>243</sup> and although physical death forecloses the supply of "new" recordings, fans can engage with the deceased artist in death much the same way as they did during life. "Though their physical being is gone, it was never physically before us, and our interaction with them can be little changed, if at all."<sup>244</sup> The rise of the Internet and social media has substantially increased the social

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239. Jo Bell et al., *'We Do it to Keep Him Alive': Bereaved Individuals' Experiences of Online Suicide Memorials and Continuing Bonds*, 20 *MORTALITY* 375, 377 (2015) (citing David R. Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 *SOC. PROBS.* 340 (1983)).

240. *Id.* at 381, 384 (citing John H. Harvey et al., *Embracing Their Memory: The Construction of Accounts of Loss and Hope*, in *MEANING RECONSTRUCTION AND THE EXPERIENCE OF LOSS* 213 (Robert A. Neimeyer ed. 2001)).

241. *Id.* at 385.

242. See Andy Bennett, *Mediation, Generational Memory and the Dead Music Icon*, in *DEATH AND THE ROCK STAR* 61, 62 (Catherine Strong & Barbara LeBrun eds., 2015) ("Thus, rock and pop artists from the 1950s onwards, whether they are today living or dead, have been experienced primarily as mediations—as images on a screen, as sounds and voices on a vinyl album or CD, as figures on a stage whose music is conveyed electronically . . . .")

243. RICHARD DYER, *STARS* 2 (1986).

244. Steve Jones, *Echo Homo*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* 269, 274 (Steve Jones & Joli Jensen eds., 2005).

presence of celebrities in the public's day-to-day lives, but that presence is largely metaphysical, both before AND after death.<sup>245</sup>

Today's major "stars" are both "private persons"—flesh-and-blood human beings with families and childhood friends—and "legends"—widely shared cultural symbols.<sup>246</sup> The widespread remixing and repackaging that attends public mourning of a cultural legend can be difficult for the individuals who are working through the permanent loss of the private person. "[A] dead celebrity is commodified along with his or her death, in a manner perhaps morbidly similar to embalming or mummifying, and exhumed each time the deceased-as-commodity circulates through the media and through culture."<sup>247</sup> Unauthorized uses of a deceased celebrity's work can accordingly feel to family members like a metaphysical resurrection of the dead. For example, Jan Gaye repeatedly refers to "Blurred Lines" as "breathing new life" into Marvin Gaye's work—on one hand, it reminds the family and the public about one of her "personal favorites"; on the other hand, the family was extremely frustrated that there had been no permission and no credit.<sup>248</sup> Third-party uses thus trigger a complex mix of emotions for the decedent's family members—they can potentially provide an opportunity to jointly celebrate an artist's legacy, but they can also involuntarily resurrect the artist and supplant the family's position within a social hierarchy of mourning.<sup>249</sup>

It might be countered that even if this experience of usurped mourning is sincere, the acute sense of grief suffered by a handful of individuals should nonetheless give way to the widespread cultural desire to celebrate, remember, and rediscover the treasures left behind. This individual has achieved the dream of so many struggling artists and ascended to the status of cultural legend; even if the private person is gone, they have achieved a sort of cultural immortality that should be celebrated by our legal system. They have transcended the physical body and become a

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245. See Tony Walter et al., *Does the Internet Change How We Die and Mourn? An Overview*, 64 OMEGA 275, 292, 294 (2012).

246. Marko Aho, *A Career in Music: From Obscurity to Immortality*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 237, 242 (Steve Jones & Joli Jensen eds., 2005).

247. Steve Jones, *Better Off Dead: Or, Making it the Hard Way*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 3, 6 (Steve Jones & Joli Jensen eds., 2005); see also Bennett, *supra* note 242, at 66.

248. Transcript of Day Two of Trial Proceedings, *supra*, note 171, at 11.

249. See Patricia Robson & Tony Walter, *Hierarchies of Loss: A Critique of Disenfranchised Grief*, 66 OMEGA 97, 109 (2012) ("Our contention therefore is that disenfranchisement is not a norm, but a feeling experienced by mourners whose personal grief exceeds their position in the hierarchy either as generally perceived or as perceived by one or more significant condolers.").

cultural resource.<sup>250</sup> Artists' families should embrace their loved ones' exalted place within the pantheon of the public domain.

There are considerable dangers in asking families to get out of the way of the public domain, or at least an overly romanticized notion of the public domain. It may be tempting to cast deceased artists' work as "resources" or "raw materials" for future artists,<sup>251</sup> but too often these monikers have a way of overlooking the problematic cultural conditions in which these works were produced and the range of adversities confronting the artists themselves.<sup>252</sup> Asking families to embrace their loved ones' new status as cultural raw materials metaphorically asks them to accept that their loved one has returned to the dirt, as fertile soil for future generations to chew up and process in whatever forms they choose. But this cultural chewing-up of artists, unfortunately, does not begin at death; instead, as shown in many of the stories set forth in Part II, individuals like Bessie Smith, Jack Kirby, Randy California, Rex Woodward, Jean-Michel Basquiat, and Cool Papa Bell were subjected to a diverse range of mistreatment during their lives, and their family members sought to make sure that this mistreatment wasn't glossed over after their deaths.

Entertainment industries sadly have a troubling track record of building up and then ultimately tearing down the individuals who labor on their behalf. Celebrity culture entices creators with fame, wealth, and adoration, but it provides little in the way of tools to deal with them.<sup>253</sup> The result, too often, is an early death,<sup>254</sup> overdoses, suicides, and murders have taken the lives of a shocking number of cultural icons, from Kurt Cobain to Amy Winehouse to Jean-Michel Basquiat to Marvin Gaye to Whitney Houston to Michael Jackson and on and on and on. Too often these premature

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250. See Joli Jensen, *On Fandom, Celebrity, and Mediation: Posthumous Possibilities*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* xv, xx (Steve Jones & Joli Jensen eds., 2005) ("[W]e also use celebrities, especially safely dead celebrities, as a cultural resource.").

251. See, e.g., Spoo, *supra* note 59, at 107–10.

252. See Gilden, *supra* note 137, at 382–86; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1341 (2004) ("The public domain movement leaves the common person to the mercy of an unregulated marketplace where she must struggle to realize her rights."). See generally Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97 (2007).

253. Daniel Harris, *Celebrity Deaths*, 66 ANTIOCH REV. 616, 623 (2008) ("A culture that truly respected and needed its artists would create for them the conditions of personal stability necessary for their survival, whereas at present we sponsor destructive if entertaining fantasies that drive them straight to the syringe.").

254. See, e.g., Dianna Kenny, *Stairway to Hell: Life and Death in the Pop Music Industry*, CONVERSATION (Oct. 27, 2014), <http://theconversation.com/stairway-to-hell-life-and-death-in-the-pop-music-industry-32735> ("Across the seven decades studied, popular musicians' lifespans were up to 25 years shorter than the comparable US population. Accidental death rates were between five and 10 times greater. Suicide rates were between two and seven times greater; and homicide rates were up to eight times greater than the US population.").

deaths are greeted with romantic notions of celebrities joining “the dead rock star club”<sup>255</sup> or proclamations that their work “lives on forever.”<sup>256</sup> Our culture repeatedly holds out the romantic myth of the celebrity artist emerging from nowhere, creators cling onto it, and when the myth takes its toll, most people shrug it off after a few weeks of dance parties and Spotify playlists.<sup>257</sup> They’ve achieved the American Dream of fame and immortality, so there’s no need to feel guilty or complicit in their deaths.

Surviving family members, however, are acutely aware of both the adversity that the decedents confronted during their lives and the dark side of celebrity romanticism. They are too often the living victims of a celebrity culture that rips families apart and then asks them to find solace in their daughter’s, mother’s, or sister’s subsequent beatification. Intellectual property provides one of the few realistic opportunities to push back against the cultural economies that routinely harvest creative labor and discard its laborers. Through IP, they can seek some measure of recognition, dignity, and fair treatment in death that was missing during life. As articulated by communications scholar Joli Jensen, “Posthumous fame allows celebrity figures to slip loose from the moorings of biography and geography, so they can better serve the current purposes of those who need them—to sell, to enjoy, to identify with, to interpret.”<sup>258</sup> IP estates provide a biographical and geographical mooring for cultural symbols that transcend physical mortality, and they can help ensure that past mistreatments of actual human beings are not entirely overlooked as necessary byproducts of a robust public domain.

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255. Jones, *supra* note 247, at 13 (“To again use Kurt Cobain’s death as an example, it is interesting that almost immediately after news of his death spread many began adding him to the ‘dead rock star club’ by assigning him a place alongside the likes of Jimi Hendrix, Janis Joplin, and Keith Moon.”).

256. See, e.g., Jeff Smith, *Musicians Who Died in 2016: Music that Lives on for Eternity*, BUFFALO CHIP: STURGIS RIDER NEWS (Apr. 21, 2016) <http://www.buffalochip.com/NEWS-INFO/News/Sturgis-Rider-News-Blog/ArtMID/2002/ArticleID/513/Musicians-Who-Died-in-2016-Music-That-Lives-On-for-Eternity>.

257. See Harris, *supra* note 253, at 623 (“We subscribe to a mythology of genius that takes a heavy toll on the health—indeed the very existence—of our artists, whom we grant the license to behave, to lead chaotic, undisciplined lives that often spin out of control . . . We are complicit in a holocaust of talent.”); see also DYER, *supra* note 243, at 7, 48 (describing the “myth of success” that allows everyday artists to rise to the top).

258. Joli Jensen, *Posthumous Patsy Cline: Constructions of Identity in Hillbilly Heaven*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 121, 139 (Steve Jones & Joli Jensen eds., 2005); see also Abigail Gardner, *En’shrine’d: Ushering Fela Kuti into the Western ‘Rock’ Canon*, in DEATH AND THE ROCK STAR 135, 136–37 (Catherine Strong & Barbara LeBrun eds., 2015) (describing the posthumous “containment and enshrinement” of Nigerian musician Fela Kuti to minimize his political activism and assimilate him into western music cannon); Regina Arnold, *There’s a Spectre Haunting Hip-Hop: Tupac Shakur, Holograms in Concert and the Future of Live Performance*, in DEATH AND THE ROCK STAR 177, 183 (Catherine Strong & Barbara LeBrun eds., 2015) (“Shakur has been rendered harmless by mortality, technology and time.”).

Even if IP scholars remain skeptical of the role of heirs within the IP system, it is important to at least recognize just how challenging a position they are in. In the immediate aftermath of the decedent's death, family members must process the loss of a loved one—often one who died young and/or tragically—in the midst of an onslaught of public attention and rapidly increased desire to spread the loved one's image, words, and voice far and wide.<sup>259</sup> From there, they must run what is essentially a family business that involves constantly balancing the financial opportunities of selling their family member's image, words, and voice with the personal investments in moving forward with a sense of peace and stability.<sup>260</sup>

The difficulty of this task is perhaps best illustrated by the increasingly important question about whether dead artists should be “resurrected” via CGI and hologram technologies. Most prominently, in the most recent *Star Wars* movie, *Rogue One*, actor Peter Cushing reprised his role as the sinister Grand Moff Tarkin, commander of the Death Star. Cushing, however, had been dead for over twenty years, and his estate was criticized for giving their approval to this “indignity”—“the reduction of the soul to regurgitated digital correspondence.”<sup>261</sup> Tupac Shakur's mother similarly has been criticized for permitting a “live” hologram performance at the 2012 Coachella Festival. The hologram performance was “implicitly violent”; “forcing the reanimated body in question to sign, dance and say words of someone else has overtones of puppetry, minstrelsy and voodoo, activities that have artistic and historical links to slavery.”<sup>262</sup> On the flip side, when heirs, such as the Jimi Hendrix estate, deny permission for posthumous performances they view as degrading or cheapening, they face criticism of impeding the public domain and the decedent's continued

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259. Jones, *supra* note 247, at 7 (“[D]eath is a good career move as far as the music business is concerned. If nothing else, the publicity surrounding a performer's death stimulates record sales.”); Scott K. Radford & Peter H. Bloch, *Grief, Commiseration, and Consumption Following the Death of a Celebrity*, 12 J. CONSUMER CULTURE 137, 140 (“As with saints and martyrs, death represents a common route to increased sacralization for celebrities and their related products.”).

260. For example, Professor Janne Mäkelä poses the question about whether surviving family members should allow posthumous duets or reunions, like Natalie Cole's duet with the late Nat King Cole or the Beatles' 1995 “virtual reunion.” On one hand, these are exciting new ways to pay tribute and celebrate the deceased star, but they are often dismissed as tacky publicity stunts, as “necropop.” Janne Mäkelä, *Who Owns Him? The Debate on John Lennon*, in AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME 171, 178–79 (Steve Jones & Joli Jensen eds., 2005).

261. Catherine Shoard, *Peter Cushing Is Dead. Rogue One's Resurrection Is a Digital Indignity*, GUARDIAN (Dec. 21, 2016, 12:55 PM), <https://www.theguardian.com/commentisfree/2016/dec/21/peter-cushing-rogue-one-resurrection-cgi>; Zac Thompson, *Digitally Reviving Peter Cushing for Rogue One is Disrespectful*, HUFFINGTON POST: THE BLOG (Dec. 22, 2016, 6:06 PM), [http://www.huffingtonpost.com/zac-thompson/digitally-reviving-peter-cushing\\_b\\_13800074.html](http://www.huffingtonpost.com/zac-thompson/digitally-reviving-peter-cushing_b_13800074.html).

262. Arnold, *supra* note 258, at 180–81, 184 (noting that the same criticisms would apply to the holographic version of Michael Jackson used in Cirque du Soleil).

cultural vitality.<sup>263</sup> If they broadly permit appropriation, they are enslaving the decedent to ongoing labor without consent. If they tightly restrict appropriation, they are enslaving the public domain.<sup>264</sup> There may be, of course, a middle ground position, but finding the sweet spot is far from straightforward.

And perhaps most importantly, they often did not ask for this. A shocking number of cultural icons died without a will, and IP rights passed solely by operation of intestacy laws. Martin Luther King, Jr., Marvin Gaye, Jimi Hendrix, Prince, Kurt Cobain, Tupac Shakur, Sonny Bono, and many other famous people died without wills and with a lucrative portfolio that passed to their closest family members, often in highly fractionated interests. For example, Prince died in 2016 without a will, spouse, or children, meaning that his copyright interests will be divided among one full sister and five half-siblings (and potentially the descendants of other putative half-siblings)<sup>265</sup>—a very loose assortment of relatives now in charge of one of the most celebrated musical catalogs in history. Although these celebrities died intestate, many nevertheless diligently protected their intellectual property<sup>266</sup>—Sonny Bono even has a copyright statute named after him. The result has been the creation of valuable assets and the conscription of family members into managing those assets postmortem. IP heirs accordingly often face a daunting task of preserving a family member's cultural legacy, in the face of lucrative commercial opportunities, in the context of premature death, and without prior consultation.<sup>267</sup> IP law and scholarship could seek to improve and respond

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263. See Teresa Méndez, *The Day the Music Didn't Die*, CHRISTIAN SCI. MONITOR (Oct. 12, 2007), <http://www.csmonitor.com/2007/1012/p13s01-alm.html> (“‘We kind of look at it as the karaoke version of playing with Jimi,’ says Ms. Hendrix, CEO of Experience Hendrix. ‘We try to keep things as authentically correct and as pure as possible’”); Sarah Kershaw, *Rock Idol's Legacy Devolves Into Family Feud*, N.Y. TIMES (July 23, 2003), <http://www.nytimes.com/2003/07/23/us/rock-idol-s-legacy-devolves-into-family-feud.html> (“And then there has been the growing criticism from fans and others over how Janie Hendrix, who won the rights to Hendrix's music and likeness in 1995 and now runs a company near here called Experience Hendrix, has marketed the image.”).

264. SAINT-AMOUR, *supra* note 52, at 214 (exploring “a certain structural homology between slavery and copyright” with respect to Alice Randall's *The Wind Done Gone*).

265. See Christopher Watson, *Minnesota Judge Drops 2 from Claim to Prince's Estate*, ABC (Oct. 27, 2016, 11:01 AM), <http://abcnews.go.com/Entertainment/minnesota-judge-drops-claim-princes-estate/story?id=43100385>.

266. See, e.g., Thompson & Harris, *supra* note 181 (“People may not know that he litigated the ‘I Have a Dream’ speech. Someone got copies of the speech and tried to market it. . . . We have tried to continue in his tradition.”).

267. See, e.g., Demby, *supra* note 183 (“The death of a parent can be a calamity for anyone, but King's death was a generation-defining moment. King's children watched as their father increasingly belonged to everyone: a staple of history textbooks, an avatar for any cause deemed righteous, an evermore formless, affirming abstraction. King's heirs benefit from the expansion of that legacy, and are its legal custodians as well as real, flawed, not-always-noble human beings. It's no wonder the light cast on them can often look so unflattering.”).

to the difficult circumstances confronting IP estates, but too often it blames them for not doing a good enough job.

At the same time, the framework I set forward here centers on *parallel* mourning; families and fans are mourning in distinct ways, but it is *not* just close relatives who experience a loss. Although, as explained above, it is important not to *equate* private and public mourning, the IP system does need to recognize the attachments that fans have to celebrities and popular culture. The attachments are highly mediated, but they are still real.<sup>268</sup> In the aftermath of a celebrity death, fans gather together, both in person and online to share the integral role that a public figure or a song or a book played during their formative years;<sup>269</sup> popular culture inscribes itself into our individual and collective identities, and the loss of the cultural figure can feel like a symbolic loss of the self.<sup>270</sup> As articulated by sociology professor Margaret Gibson:

Because so much of our identities and histories are forged through mediated culture, there are very profound, identifications that build up or carry though, often unconsciously, over-time. One can imagine a person who, upon finding out that a public figure or celebrity who shaped their memories of childhood died, being effected [sic] by this death because it renders fragile their own sense of mortality. . . .<sup>271</sup>

In this context, the death of a celebrity provides an opportunity for collective memorializing and the reinforcement of communities of affinity during a time when many people are working through a sense of loss.<sup>272</sup>

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268. See Radford & Bloch, *supra* note 259, at 151 (“As fans grieve for a celebrity they exhibit very real mourning behaviours and they look for product-relics to conserve the memory of the departed.”); Jones, *supra* note 247, at 11 (“Pop stars are seldom known personally by their audiences and yet many fans perceive their relationship with the star as being somewhat intimate.”).

269. See, e.g., George Kamberelis & Greg Dimitriadis, *Collectively Remembering Tupac: The Narrative Mediation of Current Events, Cultural Histories, and Social Identities*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* 143, 153 (Steve Jones & Joli Jensen eds., 2005) (“Tupac’s life story and his music intermingled with the everyday lives of many different young people with a broad range of day-to-day concerns.”); Taylor Cole Miller, *Social Sorrow: Tweeting the Mourning of Whitney Houston*, in *DEATH AND THE ROCK STAR* 87 (Catherine Strong & Barbara LeBrun eds., 2015).

270. See Anu Harju, *Socially Shared Mourning: Construction and Consumption of Collective Memory*, 21 *NEW REV. HYPERMEDIA & MULTIMEDIA* 123 (2014).

271. Margaret Gibson, *Death and Mourning in Technologically Mediated Culture*, 16 *HEALTH SOC. REV.* 415, 421 (2007).

272. Harju, *supra* note 270, at 139 (“[S]haring of commemorative content online gives a sense of mourning together.”); Julie L. Andsager, *Altared Sites: Celebrity Webshrines as Shared Mourning*, in *AFTERLIFE AS AFTERIMAGE: UNDERSTANDING POSTHUMOUS FAME* 17, 20 (Steve Jones & Joli Jensen eds., 2005) (“Webshrines seem to serve three basic functions: (1) building community among mourners; (2) negotiating conflicting feelings over the death; and (3) immortalizing and magnifying



As much as heirs feel like their family member's legacy is being compromised or that their family is being mistreated, many fans are also experiencing a loss that often is insufficiently supported socially.<sup>273</sup> Disruption of mourning through IP thus risks further disenfranchising a grieving process that is perhaps an inevitable byproduct of mass culture.<sup>274</sup>

And speaking of mass culture, it is important not to overlook that mourning can be an incredibly lucrative business opportunity. "Individuals frequently react to death by spending money."<sup>275</sup> For example, following their deaths, Michael Jackson captured the top ten spots on the Billboard albums chart,<sup>276</sup> Whitney Houston held seven of the top ten spots on Amazon's best seller list,<sup>277</sup> and Prince's sales surged 16,000 percent.<sup>278</sup> Celebrities can sometimes earn substantially more in death than in life, fueled by lucrative, nostalgia-rich ventures like Cirque du Soleil and Graceland, on top of diverse merchandising and advertising opportunities.<sup>279</sup> Mourning, in other words, is big business, and there are a wide range of intermediaries ready and willing to facilitate collective memorialization. It may be tempting (and at times correct) to dismiss these commercial opportunities as crass commodification, but they nonetheless serve important purposes—they provide ample opportunities for communal mourning, which in turn can produce immense economic value for both businesses *and* surviving families.<sup>280</sup>

After an artist's death, there is undoubtedly a push-and-pull negotiation among family, fans, and businesses (plus journalists and scholars) about

celebrity."); Jensen, *supra* note 250, at xvii ("The image of Elvis is iconic—used by fans to construct 'a series of cultural and social practices that foster a sense of belonging . . . .").

273. Andsager, *supra* note 272, at 18 ("I argue that mourning the death of a beloved popular music star also constitutes disenfranchised grief.").

274. See Mäkelä, *supra* note 260, at 185 ("John Lennon is not a 'thing' that a lawyer can give you permission to use, but rather John Lennon was a person, a real person, who left indelible imprint on a generation of people . . . that no lawyer can take away from us."); Gibson, *supra* note 271, at 420 ("When public/celebrity figures die what is lost is the link between collective myths and ideals, and their embodiment in real flesh and blood people.").

275. Radford & Bloch, *supra* note 259, at 141.

276. *Id.*

277. *Id.*

278. Paul Schrodt, *Prince Album Sales Surge 16,000% After His Death*, BUS. INSIDER (Apr. 26, 2016, 5:06 PM), <http://www.businessinsider.com/prince-album-sales-after-death-2016-4>.

279. See Dorothy Pomerantz, *The Top-Earning Dead Celebrities*, FORBES (Oct. 25, 2011, 10:43 AM), <http://www.forbes.com/sites/dorothypomerantz/2011/10/25/the-top-earning-dead-celebrities/> - 1111dc756e9a.

280. See Radford & Bloch, *supra* note 259, at 150 ("Using products to assist in the grieving process was viewed as natural and positive by fans. However, there was a clear disdain for persons seeking to profit from Dale [Earnhardt's] loss. There was an intriguing dichotomy: fans were highly interested in Earnhardt merchandise, but its purchase or sale for profit was criticized."); Jensen, *supra* note 250, at xx ("Commercial processes are what make posthumous celebrity possible, what give fans, journalists, critics, and scholars the materials we use to tell ourselves stories.").

how to define an artist's legacy.<sup>281</sup> Disputes within and among these constituencies cannot be fully avoided, particularly where the private person and public persona were available to each group in highly divergent degrees. But by at least recognizing that diverse processes of mourning are at stake, the negotiations (both legal and cultural) can begin from a shared appreciation that everyone is participating in the messy task of constructing a person's legacy.<sup>282</sup> Personal histories and public celebrations are both deeply important parts of constructing and preserving cultural legacy, and collaboration between fans, families, and intermediaries stand to be much more productive if they gave each other a chance. IP has a role in facilitating this parallel mourning by simultaneously giving the decedent's family a prominent seat at the table while expressly limiting their ability to dictate cultural conversation about the deceased.

Embracing the concept of parallel mourning involves embracing a set of interests often cast to the periphery of IP policy. There have recently been growing debates about whether noneconomic interests are "suspect" and accordingly whether courts should be skeptical of IP assertions rooted in a desire to maintain privacy or a good reputation.<sup>283</sup> For IP estates, these concerns are often paramount, and the potential for IP to play a role in remedying past and ongoing exploitation and mistreatment should not be dismissed lightly. Particularly where some traditional justifications for IP have become highly suspect,<sup>284</sup> scholars would be well-served to acknowledge the work IP is already doing under the radar. Judges, juries, and lawmakers at least implicitly care about fairness in creative communities and facilitating the needs of surviving families.<sup>285</sup> IP can

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281. See Jensen, *supra* note 250, at xviii ("[F]ans, critics, and journalists generate a variety of conflicting stories of legacy. The struggle to 'own' a celebrity, especially after death, foregrounds the problematic difference between personal and familial claims, fan desires, and critical commentary on who can constitute the star's legacy.").

282. Jensen, *On Fandom*, *supra* note 250, at xix ("[F]amilies, fans, journalists, critics, and scholars are all in the same business of defining a legacy, even if they usually work at cross-purposes. . . . [I]n each case, we are laying claim to our own interpretation of what the celebrity's life and death can and should tell us.").

283. See, e.g., Fromer, *supra* note 18; M. Margaret McKeown, *supra* note 141, at 7 (describing a "fundamental mismatch" between the reputational claim in *Garcia v. Google* and the purposes of copyright); Margaret Chon, *Copyright's Other Functions*, 15 *CHI.-KENT J. INTELL. PROP.* 364, 366 (2016) ("If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present.").

284. See Mark Lemley, *supra* note 31; Brian L. Frye, *Machiavellian Intellectual Property*, 78 *U. PITT. L. REV.* 1 (2016) (summarizing consequentialist/deontologist debate that has followed Lemley's article); Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 *B.U. L. REV.* 1487 (2017).

285. See Bair, *supra* note 284, at 1506–08.

work to constrain socioeconomic forces that deny artists, celebrities, or their families recognition, privacy, or fair treatment.

Questions of mourning trigger foundational questions about whether IP laws should care explicitly about the interpersonal relationships involving actual, flesh-and-blood authors or whether the primary focus should be on the circulation of their intangible work. Estates repeatedly use IP as a mechanism to address vulnerabilities and inequalities within systems of cultural production, but both courts and scholars are hesitant to expressly describe IP as a tool against exploitation.<sup>286</sup> Dominant notions of facilitating cultural “progress” are so linked with “forward”-looking innovation, production, commodification, and dissemination of creative works,<sup>287</sup> that it can be difficult to accommodate the backwardness that often comes with death—looking back, grieving, and a sense of nostalgia for the past. It is certainly cleaner and easier to just say that these “regressive” human impulses are beyond the ken of the legal system, but it is important to at least grapple with the reality that the individuals impacted by IP systems are looking both forward and backwards.

### *B. Doctrine*

How might IP law better accommodate a theory of parallel mourning? By recognizing that death triggers a range of challenging cultural and emotional processes, and not merely unbridled greed and irrationality, IP can both help rights holders become better stewards of the decedent’s legacy and steer stewardship towards individuals willing and able to take on this difficult cultural role.

First, the most straightforward takeaway is it that estate planning needs to be much better integrated into IP management. Many of the problems surrounding estate ownership of IP emerge when the author takes all the necessary steps to secure their IP rights but fails to affirmatively decide who will be the proper steward for those rights after they die. Martin Luther King, Jr., for example, dutifully registered copyrights in his speeches but never left a will, and as a result his family is widely criticized for poor stewardship and infighting about access to and use of King’s image, work, and belongings. The absence of an estate plan creates coordination headaches among a slew of tenants-in-common and unsurprisingly magnifies the likelihood of friction among family members.

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286. Cf. MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE* (2012).

287. See Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

Given that copyright and (in many states) the rights of publicity subsist for many decades after death, questions about estate planning should be front and center when securing and transferring IP: What persons or charitable causes does the rights holder want to receive the economic benefits of postmortem rights? Who does the rights holder want to make decisions about how their work or image is used after they die? How can ownership and management authority be structured in life to minimize the disruption of death?<sup>288</sup> These are standard estate planning questions that can give rise to postmortem ownership structures in which families can serve as beneficiaries, trustees, and/or outright transferees according to the particular wishes of the decedent. Although the decedent's wishes can certainly produce suboptimal results for heirs or the broader society,<sup>289</sup> deliberate estate planning can at least limit the principal/agent and coordination problems that occur with pure reliance on intestate succession.<sup>290</sup>

Registration is one place within the IP system where rights holders might be more forcefully nudged into deliberate estate planning. For example, when authors register copyrights (or, in a few states, when celebrities register their publicity rights),<sup>291</sup> they might be expressly and explicitly notified that the rights they are registering will last for seventy years after they die, and accordingly they should consult with an estate planning attorney or otherwise adjust their wills or trusts to account for their postmortem copyright interest. A more significant step forward might be to allow IP registrants to expressly designate a postmortem transferee—this designation might fill in gaps of estate plans that fail to mention IP rights or more modestly supplant state intestacy laws in the absence of a will.

Another place to better incorporate estate planning is the Copyright Act's termination of transfers provisions, which entitle an author or a set list of statutory successors—spouses, children, and grandchildren—to terminate any copyright license, sale, or transfer thirty-five years after execution.<sup>292</sup> The line of succession and voting proportions set forth in the Copyright Act *cannot* be altered through deliberate estate planning,

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288. For example, the author might settle an *inter vivos* trust with themselves as a co-trustee and a lifetime beneficiary along with their family members; therefore, when the author dies, management of the trust property would remain relatively stable, as does the economic benefit to the family.

289. See generally Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017).

290. See, e.g., Smolensky, *supra* note 207, at 800–01 (discussing problems with heirs acting as surrogate decisionmakers).

291. See, e.g., HAW. REV. STAT. § 482P-8 (2017).

292. 17 U.S.C. §§ 203, 304 (2012).

meaning that authors cannot deliberately centralize by will or trust all renegotiation powers in one child, sibling, or friend who is familiar with their work and the artistic community.<sup>293</sup> Moreover, if the author settled a trust to administer copyright issues before and after death, the statutory successors may terminate the transfer of copyright to the trust and upset a deliberate decision about who is best situated to steward the author's legacy.<sup>294</sup> For example, Ray Charles devised all of his IP interests to a charitable foundation in order to support research and scholarship grants for deaf, blind, and underprivileged youth; he separately provided \$500,000 in trust for each of his children in exchange for waiving all rights as against the estate. Notwithstanding Charles' deliberate plan for who should manage his estate—and for what purposes—seven of his adult children sought to terminate certain publishing agreements, which provided royalties to the foundation, and reclaim copyright for *themselves*.<sup>295</sup> If Charles' children ultimately prevail, the result will be highly fractured ownership and management of the musician's work, expressly contrary to his desires. The termination of transfers provisions were ostensibly designed to protect authors and their successors from unequal or uncertain bargaining with corporate intermediaries,<sup>296</sup> not to rigidly police authors' estate planning.<sup>297</sup> Lee-ford Tritt, Tonya Evans, and Bradley Greenberg have advocated reforms to the termination provisions to better respect intelligent estate planning;<sup>298</sup> these reforms would help address the stewardship challenges raised by parallel mourning.

Relatedly, estate planning in IP could also be encouraged more actively during licensing, corporate acquisitions, and accompanying due diligence. When entities are negotiating the transfer of an ownership interest in IP, particularly in copyright, the identity of the author's heirs and successors can greatly affect the value of the rights they obtain. Although the termination of transfers provision again provides surviving spouses, children, and grandchildren an inalienable right to terminate a license or transfer, if none of these family members survive, termination rights vest

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293. Tritt, *supra* note 24; see also Brad A. Greenberg, *DOMA's Ghost and Copyright Reversionary Interest*, 108 NW. U. L. REV. 391 (2014).

294. See Evans, *supra* note 24.

295. See *Ray Charles Found. v. Robinson*, 795 F.3d 1109 (9th Cir. 2015).

296. See Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH. 49, 78–79 (2013).

297. Evans, *supra* note 294, at 304 (“Congress did not intend for the right to prevent authors from making advantageous lifetime transfers into vehicles controlled by the author for prudent business, tax, and estate planning reasons. To the contrary, Congress sought to empower authors to reap the financial benefits the copyright exclusivity monopoly was intended to protect.”).

298. Tritt, *supra* note 24; Evans, *supra* note 294; Greenberg, *supra* note 293.

in the executor of the author's estate.<sup>299</sup> Accordingly, the existence and substance of an estate plan can matter greatly. For example, Prince was survived solely by siblings—none of whom may exercise termination rights—meaning that the executor of his estate ultimately decides whether to terminate his licensing deals and on what terms to renegotiate.<sup>300</sup> He never indicated who he wanted to make these decisions, and his licensees and assignees are left ignorant as to whom they are likely to be negotiating with in coming years. When obtaining these rights, it would be incumbent to request estate planning documents or require that such plans be made.

Second, the interests asserted by IP heirs map fairly poorly onto the remedies available for IP infringement. Contrary to the view that IP estates are trolling for licensing revenue, quite often the interests they are asserting—recognition, privacy, reputation—are very difficult to address through the monetary relief increasingly favored after the Supreme Court's decision in *eBay v. MercExchange*.<sup>301</sup> A few courts recently have held that, in a copyright dispute, the "irreparable harm" requirement for injunctive relief cannot be satisfied through a showing of privacy harms or emotional distress. These harms are "too attenuated from the purpose of copyright."<sup>302</sup> Several scholars, however, have recognized that many rights holders are not primarily concerned with monetary damages and want remedies that are typically unavailable in copyright—such as attribution.<sup>303</sup> IP estates in this regard may be no different. Family members repeatedly speak in terms of the lucrative licensing opportunities they turn down, so the prospect of money damages or a compulsory license<sup>304</sup> fails to respond to the emotional interests often at stake in their disputes. These interests will often map far better onto injunctive forms of relief.<sup>305</sup> Ultimately, it is important that the remedies available for infringement actually reflect the needs of the individuals seeking relief

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299. See 17 U.S.C. §§ 203, 304 (2012).

300. See Britton Payne, *Heirs Go Crazy: Prince's Estate and Copyright's Termination of Transfer*, COPYRIGHT ON! (2016), <https://paynebritton.wordpress.com/2016/05/23/heirs-go-crazy-princes-estate-and-copyrights-termination-of-transfer/>.

301. 547 U.S. 388 (2006). See generally Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123 (critiquing the shift away from injunctive relief post-*eBay*).

302. *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015); see also *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

303. See, e.g., SILBEY, *supra* note 26; Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

304. See Arewa, *supra* note 14, at 348 (suggesting a liability rule for postmortem infringements); Spoo, *supra* note 13, at 1828.

305. Horton, *supra* note 209, at 597 (suggesting only injunctive relief for postmortem publicity violation).

through the legal system, and IP's increased reliance on a liability rule creates an unfortunate wedge between the two.<sup>306</sup>

Third, recognition of parallel mourning may provide some additional support for the much-criticized “life-plus-70” copyright term and often equivalently lengthy duration of publicity rights. Parallel mourning emphasizes that death is a significant event—both economically and culturally. From an economic perspective, the marked spike in revenues that often attends the death of an artist suggests that the “life-plus” structure is not an arbitrary means of setting a long term, but reflects an economically valuable moment that policymakers might want to allow rights holders to capture as an incentive to create.<sup>307</sup> Death also is a morally complex and emotionally charged moment in which questions of dignity and personhood are perhaps at their greatest, challenging the position that moral rights in creative works, if protectable at all, must extinguish upon the author's death.<sup>308</sup> The narratives deployed by IP estates surveyed in Part II, particularly in conjunction with the insights of trusts and estates scholars surveyed in Part III, demonstrates that many of the interests protected by moral rights—recognition, dignity, integrity—continue beyond death among individuals who maintain close emotional bonds to the author. And importantly, these bonds are not ephemeral, but *continuing*.<sup>309</sup> Mourning is not about a short period of coming to grips with the death of a loved one and moving on. It is about integrating the loss and legacy of that person into the life narratives of future generations.<sup>310</sup> A “life-plus-many-decades” term, while rightfully associated with a wide range of economic and cultural costs, at least has the benefit of being consistent with evolving notions of mourning and the cultural, economic, and emotional significance of death.

Finally—and perhaps most difficult—how should courts respond in the inevitable event that the interests of estates, more sympathetically recast above, collide with the interests of downstream authors and audiences? Of

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306. See generally Gilden, *supra* note 301 (critiquing copyright law's increasing embrace of liability rules).

307. Jeanne Fromer has relatedly suggested that the “life-plus” structure of copyright may provide an “expressive incentive” to authors—the life-plus-seventy term of protection expressly recognizes the importance of actual human authors within the copyright regime, thereby encouraging them to participate in cultural production. Fromer, *supra* note 303, at 1802–03 (“Keying duration to the work's creation or registration, as was once done, signals the work's importance at the author's expense. The current durational structure, by contrast, assures the author that protection will attach for the author's lifetime (and then some).”).

308. See *supra* notes 33–36 (moral rights scholarship).

309. See, e.g., Kreiczler-Levy, *supra* note 206, at 505 (“This process of self-understanding [enabled by inheritance laws] does not end on a particular date . . .”).

310. See *supra* notes 238–39.

utmost importance, the concept of parallel mourning requires acknowledging both the interests of family members in controlling third-party uses *and* the interests of fans, scholars, and journalists in actively engaging with the decedent and their work. In this respect, parallel mourning is entirely consistent with—indeed it *mandates*—a robust fair use defense in copyright and related free speech defenses to the right of publicity. Family mourning should not be a complete defense to truthful reporting about the decedent’s legacy, a critical interpretation of the decedent’s work, or a fan’s celebratory reworking.

Fair use and the First Amendment are, at their core, a balance between the expressive interests of the defendant and the harms that expression causes the plaintiff. This balancing, however, should be explicit and transparent about what interests are really at stake. Courts should not shy away from recognizing—and even empathizing with—an heir’s interest in protecting reputation, dignity, or privacy.<sup>311</sup> Although in many circumstances (e.g., criticism, parody, and artistic expression) these interests might ultimately need to give way to truthful and open cultural discourse, they nonetheless can provide at least a modest thumb on the scale in favor of the estates. Quite often IP estates are concerned with a lack of recognition for the decedent, suggesting—as other scholars have—that the absence of attribution should weigh against fair use (and its presence should weigh in favor of it).<sup>312</sup> Additionally, where family privacy concerns are most heightened (e.g., the disclosure of unpublished manuscripts and letters) the analysis above lends further support to

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311. A good recent example of a judicial opinion expressly recognizing the interests of heirs but ultimately dismissing their claims on fair use grounds involved the rapper Drake’s sampling of a spoken-word track by the deceased jazz musician Jimmy Smith. *Estate of Smith v. Cash Money Records, Inc.*, No. 14-cv-02703, 2017 WL 2333770 (S.D.N.Y. May 30, 2017). In that case, the court expressly engaged plaintiffs’ argument that “the use cannot be transformative because the copied portions are not readily identifiable as [the sampled track] and because the track does not identify Jimmy Smith.” *Id.* at \*8. The court ultimately rejected this argument in light of Drake’s alteration of the underlying track’s criticism of rap to an express celebration of rap’s endurance. *Id.* at \*8–9. Although I disagree with the court’s rhetorical reliance on Drake’s use of the track as “raw material” for his work, the court at least engaged with the plaintiffs’ desires to have their family member more expressly recognized, but ultimately decided that Drake’s critical, expressive interests outweighed them. See Gildea, *supra* note 137.

312. See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007) (proposing a fifth fair use factor that considers whether the defendant gave attribution to the author of the work); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 680 (1997) (arguing that the presence of disclaimers should influence fair use determinations). As Rebecca Tushnet has argued, however, the presence/absence/relevancy/sufficiency of attribution is likely to be highly context-specific and resistant to clear-cut rules. Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789 (2007).



existing limitations on fair use for private or unpublished materials.<sup>313</sup> Lastly, as I have argued elsewhere, courts in copyright and right of publicity cases might focus less on whether a work is “transformative” from the perspective of the reasonable audience member and more on the material impact of the challenged use on the rights holder.<sup>314</sup> The “transformative use” inquiry has diverted attention away from the actual ethical, economic, and cultural stakes at issue in copyright and publicity rights disputes, masked the cultural dialogue that exists within appropriative uses, and has had a tendency to disproportionately benefit famous authors when they appropriate from others.<sup>315</sup> The “metaconsideration”<sup>316</sup> of transformative use accordingly makes it difficult to introduce the diverse range of interests asserted by IP estates into actual litigation. Particularly where IP purports to rely heavily on case-by-case balancing of each side’s interest, IP doctrine should provide ample opportunity for both plaintiffs and defendants to tell their story, so that both the doctrine and the discourse evolves in a manner that reflects and responds to the real-world struggles over crafting a cultural legacy.

### CONCLUSION

Death inevitably upends economic support systems, alters social circles, and imposes substantial emotional burdens on those who need to come to terms with the loss of another person. The wider the decedent’s social circle and the broader the decedent’s cultural impact, the more complex and contentious their death becomes.

For the families and friends of individuals in creative fields, intellectual property can serve as a valuable tool in managing the messy tasks of mourning and moving forward. IP estates are by no means perfectly selfless stewards acting nobly in service of their loved one’s legacy. But they are also not the greedy, despotic rent-seekers too often portrayed in IP debates. Instead, they are a diverse group of individuals, with a complex

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313. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (rejecting fair use defense when *The Nation* released excerpts from Gerald Ford’s unpublished autobiography); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176, 1183 (9th Cir. 2012) (“Maya’s purpose in publishing the photos was to expose the couple’s secret wedding, which was at odds with the couple’s purpose of documenting their private nuptials. . . . Maya’s effort to document its exposé does not automatically trump the couple’s rights in its unpublished photos.”).

314. Gilden, *supra* note 137, at 403–406.

315. *Id.*

316. Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 115 (2009).

mix of economic and emotional investments, who use the tools at hand to navigate incredibly thorny issues of death, fame, money, and cultural legacy.

For those individuals whose cultural contributions have been widely acknowledged, IP can help surviving families traverse the onslaught of attention and commercialization that attends the death of a celebrity. For those individuals whose cultural impact was substantial but unacknowledged, IP can help surviving families inscribe the decedent's rightful place in cultural history. For those individuals who suffered greatly in the creation of their cultural legacy, IP can help make sure that their struggle is not forgotten. For some families, IP allows their loved ones to finally rest in peace.