Albert, Dianna and Marilyn

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Albert Einstein, Princess Diana of Wales and Marilyn Monroe have three things in common. All are famous, deceased, and without rights of publicity in California or elsewhere.

Apparently because Great Britain did not recognize the right of publicity, trustees of Princess Diana's Memorial Fund sued the Franklin Mint in California. *See* Cairns v. Franklin Mint Co., 292 F.3d 1139, 1145 (2002). Not only did they spend approximately $2.6 million, but they also were ordered to pay more than $2.3 million toward the mint's legal fees. *Id*. at 1159. Some of the assessment was imposed for two "groundless and unreasonable" Lanham Act claims. *Id*. at 1156-58.

Bad-faith is unnecessary, however, for prevailing parties to recover attorneys' fees and costs on a California postmortem right of publicity claim. *Id*. at 1156 (quoting Cal. Civ. Code § 3344.1(a)(1)). The mint prevailed on that issue, too, because recovery is conditioned on California domicile at the time of death. *See Cairns*, 292 F.3d at 1147.

Fee-shifting is also expected in two recent cases. *See* Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 992 (9th Cir. 2012) (New York domicile), and Hebrew University of Jerusalem v. General Motors LLC, 2012 WL 4868003, at *3 (C.D.Cal. 2012) (Einstein's domicile was New Jersey).

Monroe says plaintiff alleged California domicile "so that it can gain the significant advantage of California law, which, at its behest, now provides for a descendible, posthumous right of publicity…." 692 F.3d at 999. But that failed because, for over forty years, people administering her estate had "consistently represented in numerous judicial and quasi-judicial settings [in

Hawaii as well as New York and California] that Monroe was domiciled in New York when she died." *Id*. at 986. Indeed, the court therefore finds the claim unworthy of consideration: "This is a textbook case for applying judicial estoppel. Monroe's representatives took one position… for forty years, and then changed their position when it was to their great financial advantage…. Marilyn Monroe is often quoted as saying, 'If you're going to be two-faced, at least make one of them pretty.'" *Id*. at 1000 (noting apocryphal attribution).

It is unclear why HUJ, as beneficiary of the Einstein estate, might have thought otherwise, but the California statute was also inapplicable to its claim. But N.J. law had to be considered because Dr. Einstein was domiciled there when he died in 1955. 2012 WL 4868003, at *1.

HUJ's suit was sparked by a 2010 ad in which Einstein's face was "digitally pasted onto a muscled physique, accompanied by the written message 'Ideas are sexy too.'" *Id*. The main question was narrow but difficult to answer. Faced with a 55-year hiatus between Einstein's death and the ad, the court says. "Only one court in New Jersey, a federal district court, has ever discussed the question of duration, and it did not decide the issue." *Id*. at *3 (citation omitted). Although the N.J. legislature twice failed to address it, the court finds "nothing stopping HUJ from [seeking legislation] with retroactive applicability, that would create a definitive postmortem right of publicity with the extended duration that HUJ seeks here." *Id*. at *3.

That observation reflects little sympathy and signals the outcome. The court nevertheless feels obligated to examine arguably rational bases for setting the duration of postmortem rights. Its admirable efforts, reflecting three somewhat overlapping perspectives, warrant careful attention.

First, *HUJ* analyzes two basic factors that should bear on duration. It begins by considering the

roots of the right of publicity in privacy law. *Id*. at *4. Finding false suggestions of endorsement or sponsorship as a primary rationale, the court concludes, “55 years or more after Einstein's death, it is unlikely that any viewer of [GM’s humorous ad] could reasonably infer that Einstein or [his successors] was endorsing the GMC Terrain.” *Id*. at *5. Considering copyright’s analogous, property-centered framework, despite similar objectives, the current term is found inapposite. *Id*. at *5-7. Indeed, life-plus-fifty, enacted 21 years after Einstein’s death seems equally inapposite, but the 1909 span of 28 years, renewable for 28, would be nearly impossible for judicial implementation.

Second, *HUJ* summarizes the common law and statutes of other states. The former proves unhelpful because courts in “none of the five other states that recognize a common law postmortem right of publicity [have] even raised [duration] as a question needing to be answered.” *Id*. at * 7. A tally of thirteen statutes is of little additional value: “[A] slight majority limits the duration of that right to 50 years or less. Although this does not provide overwhelming support for such a length of time, it does tip the balance slightly in that direction.” *Id*. at *8.

Finally, *HUJ* presents a policy analysis focusing on “the balance that must be struck between protecting an individual's right to reap the benefits of his creative endeavors and the public's freedom of expression.” *Id*. In that respect, *Monroe* is cited for noting, “[A]n extended right of publicity may interfere with or decrease the value of copyrighted works… thereby pitting one form of protected property against another.” *Id*. (citing 692 F.3d at 1000). Skepticism of N.J. courts’ tolerance for a term exceeding 55 years is buttressed with references to their recognition of a “robust” First Amendment defense to rights of publicity claims, *Id*. at *8.

That defense is, however, less compelling when, as here, speech is commercial. *See, e.g.,* White v. Samsung Electronics America, Inc., 1395, 1401 (1992) (“The difference between a

"parody" and a "knock-off" is the difference between fun and profit."). *Compare* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (finding parodic trading cards to be noncommercial speech protected by First Amendment).

Ultimately the court finds that N.J. courts would regard 50 years as ample for postmortem rights. *HUJ* at * 9. Offering scant attention to the distinction between commercial and non-commercial speech, id. at *8 n. 7, it concludes that Albert Einstein's persona, as the embodiment of genius, "should be freely available to those who seek to appropriate it as part of their own expression, even in tasteless ads." *Id*. at *10.