LIFE AFTER DEATH *

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SUMMARY: Lot the Public Reap what it Has Sown; «Disneyfication» and the Abuse of CeIebrity; The Diminishing Domain.

The position taken in this opinion is simple and egalitarian. Once a celebrity is dead, the reputation of that celebrity should be entitled to no greater protection in respect of his name and reputation than anyone, or anything else. This position rests on three arguments:

(1) Since it is the public at large who create celebrities, it is the public at large who should be entitled to enjoy the widest use of those reputations which they have created.
(2) Secondly, the conferring of rights in respect of dead celebrities is open to a species of abuse which might conveniently, if unkindly, be termed «disneyfication». While this abuse cannot be prevented, the refusal to extend legal protection still further will limit its speed of growth.
(3) Thirdly, like a cancerous growth, intellectual property protection feeds off and stifles the aspirations of the body from which it grows, our own cultural heritage. The Further protection of dead celebrities is part and parcel of this and must be stopped.

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* This opinion is based an a paper delivered in the course of a debate at the Intellectual Property Institute. January 22, 1998, on the proposition that special post-mortem legal protection should be given to the post-mortem reputation of deceased celebrities. Michael Golding (Lovell White Durrant) spoke in favor of the motion and Jeremy Phillips opposed it. The points made in this opinion should not be presumed to represent either the personal opinion of the author or the view of anybody with which he is associated.

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Each of these arguments will be addressed briefly in the course of this opinion. None of these arguments rests on propositions of law; it is not law but policy to which they are addressed. And just as Diana, Princess of Wales, chose to appeal over the mind to the Appellate Chambers of the heart, so too will these arguments seek to address the heart and not the intellect. Once the heart is led, the mind will follow.

Lot the Public Reap what it Has Sown

The first argument is that, since it is the public who make people celebrities during their lifetimes, it is the public who should be able to enjoy in common the greatest freedom to cherish those celebrities after death. Were it nor for the attention, the affection and the excitement generated among ordinary folk –whether in response to Princess Diana's good deeds or tragic personal life, whether by Elvis Presley's smouldering sex appeal (*ut audivi*) or whether by Che Guevara's rejection of the norms of political convention– were it nor for their attention, those great names would be unknown and of no account. And if it is the people who make their kings and idols, it is the people who should own them. How different is the case of famous trade marks, which enjoy their notoriety as the result of heavy media spend and saturation advertising. The public are taught to ask for Coke over Pepsi, even when double-blind tests have shown that their affection lies elsewhere. But no one teaches the public who its heroes are, whether it is Tim Henman or the Tamworth Two [1].

When the public chooses its heroes, the demand for control of celebrity icons through intellectual property rights appears. This demand cannot be said to be squarely founded on good reason. It is easy to paint the picture of an honest celebrity coiling with his fame

[1] The Tamworth Two were a pair of Singer boars which having escaped from in abattoir on the eve of their slaughter, defied all attempts to round them up for nearly a week. Having captured first the attention, then the affection of the British nation, the pigs - renamed Butch Cassidy and the Sundance Pig - were given a reprieve and have now been turned into trade mark, protected cuddly toys.

for the benefit of his unborn descendants; a worthy picture, to be sure. And no member of the public, surely, begrudges the estate of Elvis Presley a few cents' royalty on each CD sold or each performance of his song, but to make it a civil wrong for an individual to dress up like Elvis Presley and get up on stage? This seems to go too far.

In bygone times, when the adulation of celebrities (whether Christian or pagan) was part of the worship of God, not idols, so great was the appeal of the medieval equivalent of merchandised goods that the demand for relics of saints and scholars greatly outstripped the supply of them. Bones of saints, locks of their hair, phials of their blood were sought and treasured as though, to quote the phrase, they were the real thing. Of course it is easier to satisfy demand nowadays. If anyone wants the bones, hair or blood of Dolly the sheep they can have them a hundred times over. In this regard the story is told of the American Professor of Anatomy who visited Dublin many years ago in search of his Irish roots. He was accosted by a street peddler who asked him whether, for a mere $1,000, the good professor would like to acquire the authentic skull of the battlesome long-dead Irish celebrity Brian Boru. Excited and intrigued by this offer, the professor followed him back to his house, where he was shown, wrapped in a teatowel, a skull. It took the learned scholar little time to observe that, while Brian Boru died in the prime of his manhood, this skull appeared to be that of an infant. «How can this be Brian Boru's skull?», demanded the American. «Brian Boru was a fully-grown man!» «To be sure you're right», replied the peddler, «but this was his skull when he was just a little boy. If you want his skull when he was a grown-up, it'll cost you more.»

«Disneyfication» and the Abuse of CeIebrity

The second argument is that the conferring of property rights in respect of dead celebrities is open to abuse, even to the limited extent which is available under trade mark and copyright law. The word «disneyfication» has been mentioned before. This term requires some explanation.

There comes a time in every celebrity's afterlife when he or she becomes less famous. With no disrespect to the recently dead such as

Mother Theresa, Princess Diana and Michael Hutchence, the author refers to such former household names as Princes Albert, Arthur, Edward, George, Henry, John and William, the Princes of Denmark and Orange, Princesses Alice, Amelia, Frederica, Grace, May and Louise, not to mention a further list of kings and queens. Much loved in their lifetimes, their names are canonised on death-in Britain at any rate-by their association with worthy causes such as hospitals, colleges and charitable trusts; later on, the dignity of their names is lent to lesser but nonetheless worthy causes such as inner city primary Schools (those which have not yet been named after Nelson Mandela) and brands of cigar. Ultimately, in their posthumous rakes' progress, they descend to the level of pubs-and remain so until their heraldic device is unceremoniously displaced by that of the rampant ferret and firkin.

I.P. rights, particularly trade marks, do not reflect this decline. They carry on and on until they lapse or expire. But who in 200 years will remember even today's celebrities, let alone yesterday's. Will Elvis Presley still be King? Who will care to avoid stepping on his blue suede shoes? Andy Warhol Paradoxically has attained more than merely transient fame by predicting an era in which everyone will be famous for 15 minutes. One should hesitate to include the later Princess in so plebeian a category, but even 30 years is a long time for post-mortem fame to continue. Anyone who has teenaged children will share the feeling of exasperation at having to explain one's allusions to Sir Winston Churchill (formerly the greatest Briton of them all), Marilyn Monroe, Stirling Moss or Stanley Matthews, just as previous generations of parents had to peel away the lawyers of ignorance and indifference within which their children had enshrouded Bismarck [2], Garibaldi [3], Hamlet [4], Saint Bernard [5] or Mae West [6].

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[2] Formerly the Iron Chancellor, later a battleship, currently a marinaded herring.

[3] Previosusly the leader of the Italian Risorgimento, later a fashionable loose-sleeved blouse, currently a biscuit.

[4] Initially Prince of Denmark. now a small cigar.

[5] Originally a holy man, later a mountain pass and finally a large dug with a barrel of brandy hung round its neck.

[6] Late actress, later an inflatable life-belt.

So what happens when a dead celebrity goes into decline? Either nothing happens and the former celebrity remains obscure until discovered by some fortunate Ph.D. candidate, or there is a relaunch. With the relaunch the dead celebrity gets a remake, a rewrite and becomes more saleable. Take Pocahontas [7], for example. Or Robert the Bruce [8]. This is «disneyfication», even as the law stands, and look at its power. Pocahontas was a real person -and a celebrity too. She belonged to no one and was, quite literally, up for grabs. Disney redesigned her and made her their own, even without the benefit of assignment of DCR (dead celebrity's right). Now, if one wants to make one's own film about Pocahontas, one can. But how will one get one's money back? If a film maker has Pocahontased all the trade mark classes for T-shirts, mugs, stickers, badges and other merchandise, how can others be sold too? One can even visit the Pocahontas web site.

The deceased celebrity has effectively been ring-fenced by posthumous investment and is, in commercial terms, unassailable. In vain, but with the sympathies of many did the Greek Government make official objection to the film makers on account of the «disneyfication» of the hero formerly known as Heracles.

In Princess Diana's case, once the present, generation of grieving followers gives way to the next generation, what is to stop the trustees of the Princess Diana I.P. portfolio selling or licensing the rights to a major commercial film maker, with the same result as in Pocahontas' case? If it does, one will at least know what Diana will be like, with a six-inch waist and an American accent, although how animators who created Dumbo the elephant would treat the Prince of Wales' own remarkable ears is another story. Anyway, less, not more, I.P. protection is required if celebrities are not to be unfairly monopolised.

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[7] Otherwise known as Matoaka and later as Rebecca Relfe. Ms Pocahontas died in 1617, more than three and a half centuries before she commenced her career in Hollywood.

[8] King Robert I of Scotland and Victor at Bannockburn. Bruce did not reach stardom until 1996, over 650 years after his death.

The Diminishing Domain

The third argument is that the public domain, that great body of names, images, facts, information and activities which one may use or perform without risk of legal objection, is fast eroding. Readers are reminded of that which should need no mention, that intellectual property is only a temporary state of affairs. The justification of the I.P. monopoly, whether for inventions, writings, designs or anything else, is that the community confers a short-term benefit upon its owner, following die expiry of which it is the community and its members who then take their turn to use it. In other words, first it's your turn, then it's mine.

An analogy may be drawn between intellectual property and the physical world in which we live. The physical world was made for all mankind to enjoy, but there's hardly any of it which has not now fallen under public or private ownership. What is more, our physical environment is constantly under threat from pollution, global warming and suchlike. Just like the physical world, so too is the intellectual world falling increasingly under private control; and just like the physical environment, so too is our intellectual environment under threat of erosion.

There is scarcely an area of intellectual property in which the public domain is not being clawed back into private hands [9]. Works which fell happily out of copyright have now returned to private ownership-although to no benefit at all for their long-dead authors. Patents have been prolonged by supplementary protection certificates. Trade mark registration has expanded to accommodate the appropriation of place names, common surnames, common product shapes, smells, sounds and packages which were once available to all. New rights have been forged at the anvil of Brussels for the protection of

[9] On this topic see Jeremy Phillon, *The Diminishing Domain* (1996) 8 E.I.P.R. 429.

lists of telephone numbers, and to guard against the monumental injustices caused by being able to lend or hire out copyright-protected works, and even to create a pseudo-copyright in the post-copyright publication of a previously unpublished work. In passing off, a man's right to call his Elderflower champagne «champagne» [10] or to call his chocolate «Swiss Chalet» [11] has been ludicrously limited, in line with the prevalent philosophy of «if you can eat it, drink it or perform acts of personal intimacy with it, someone should own the monopoly right to stop everyone else doing it».

And now it is proposed to extend still further the scope of I.P. law, to restrict the use of celebrity icons, to deprive humble trades persons and their loyal customers of their last few pleasures in this age of ruthless privatisation of our dreams, our hopes and our aspirations. The closest most British citizens get to their celebrities is the cheap and tacky, but oh-so-accessible, merchandise: the T-shirt, the key-ring, the pencil case and the coronation mug. Is, now, the coronation mug to be dashed from the hands of the Great Britain public? Surely not! The time has come for readers of this journal to halt this juggernaut of I.P. expansionism in its tracks, to rescue the sleeping Princess from the train of thought of those who would shackle her forever with private proprietary rights. Give her back to the people who loved her, and who still do. Do not let Julius seize her!

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⊙ Índice ARS 20

[10] See Taittinger S.A. v. Allbev Ltd. (1993) F.SR. 41
[11] See Chocosuisse v. Cadburys Ltd (1998) E.T.M.R. 205.