

Who owns Marilyn Monroe?

by Mark Sableman

Marilyn's right of publicity expired when she died.

America's favorite sex symbol now belongs to us all.

You can now place the name "Marilyn Monroe" on your product or package. You can portray Monroe's sultry smile on your posters and advertising. And you don't need permission.

Fifty years after her death, Monroe is no longer under private ownership.

Monroe's life story involved movies, headline marriages and divorces, lots of sex appeal and a tragic death. The story of the rights to her name and

likeness is more prosaic – it involves a legal principle known as the "right of publicity," and the impact of long-ago maneuverings in the Surrogate's Court of New York.

The "right of publicity" is the right of a person (usually a celebrity) to control use of his or her name, likeness and other personal attributes in commercial advertising. Most states recognize this right. Some states recognize it after the celebrity's death; some don't. California, the home of many actors, does.

Monroe died in California, and her popularity only increased after her death. Eventually, her heirs linked up with professionals in managing publicity rights – and, for years since, Monroe's right of publicity has been carefully managed for profit. Anyone who wanted to use her name or image, or any iconic attribute closely identified with her, had to buy a license from her publicity agent, which most recently has been CMG Worldwide.

Her heirs made millions from publicity licensing of Monroe commemorative plates, Monroe-branded jewelry or clothing, and countless other products – including, for example, "Marilyn Merlot" wine.

But in 2005 Marilyn Monroe LLC, the entity that licensed her rights, sued Milton Green Archives, which then questioned whether Monroe's rights survived her death. In August, the U.S. Court of Appeals for the Ninth Circuit issued a decision with a simple and startling conclusion: Monroe's right of publicity expired when she died.

Monroe, the court concluded, was a domiciliary of the state of New York when she died, even though she died in California. "Domicile" is a complex legal concept, essentially referring to a person's place of permanent residence – which, in turn, depends on the person's

intent as much (or more) than his or her geographic location.

The executor of Monroe's estate and her heirs had urged the New York Surrogate's Court, where her estate was probated, to conclude that she was a domiciliary of the state of New York. They pressed that position hard – to avoid California inheritance taxes – and the court agreed.

One problem: New York law, unlike California law, does not permit a celebrity's right of publicity to survive death. (California's position wasn't so clear when Monroe died in 1962, but it is now.)

So the Ninth Circuit's ruling is easy to explain. Monroe's estate is bound ("estopped") by the position it took after her death. She has been conclusively found to have been domiciled in the state of New York. Thus, her right of publicity derived from New York law – and, under New York law, that right did not survive her death.

So break out the bottle of Marilyn Merlot, right? Now you should be able to set up your own Monroe-based business, offering Monroe posters, photos, jewelry, memorabilia, wine and Swiss cheese! Right?

Well, not quite. True, her right of publicity has been judicially proclaimed dead. But other rights could be lurking in the background: trademarks for existing products, and copyrights for photos, posters, and movie stills, for example. Monroe's heirs will do all they can to rely on such ancillary claims to extend their valuable franchise.

Monroe's life presented a classic Hollywood story of drama and sex appeal. Monroe's estate tells a different story, also classic in its own way: one of attempts to exploit intellectual property rights so ephemeral and intangible that millions of dollars can rest on the outcome of a single lawsuit. ■

