

[STOP FOR VIDEO ROLL]

Good evening and welcome to San Diego. I am very pleased to be here today.

As the song says, we haven't seen anything yet. And when it comes to the worlds of entertainment, evolving technology, and the ever-growing power of celebrity branding and endorsements, it is what I call a field of dreams.

[BACKGROUND VIDEO ROLL BEGINS]

As you know from my introduction, I am a boy from the heartland. I was born in Indiana, grew up there and our corporate headquarters is still there.

I guess it's fair to say that, despite all the time I spend in Hollywood these days, there's still a lot of the heartland in me.

When I was a boy, I used to spend a fair amount of time out in the cornfields and then after dark staring up at the stars - those cornfields were my field of dreams - thinking about a world of promise, a world of adventure, and a world of uncertainty.

Well, this evening, we're going to do some stargazing too. And when it comes to the complex realm of celebrities and intellectual property law, we're going to find ourselves confronted by those very same forces - promise, adventure, and uncertainty.

The entertainment industry and indeed the entertainment culture we live in today, is uniquely American. Just a few years ago, entertainment and media was America's 2nd biggest industry. Today, it is the biggest. The entertainment industry's core segments, (including newspapers, book publishing, recording, music, periodicals, motion pictures, radio and television broadcasting) account for an estimated 12% of the United States Gross Domestic Product at \$1.25 trillion dollars annually. Additionally, the entertainment industry achieved foreign sales and exports estimated at over \$90 billion last year, making entertainment the United States' leading export.

[BACKGROUND VIDEO ROLL BEGINS]

The United States Constitution has played a key role in creative development and the industries that come about from the fruits of intellectual property. In the formative stages of this country, the framers of our Constitution included language mandating the development of science and the useful arts, thereby laying the groundwork for copyright and patents—both forms of limited monopolies—in order to encourage creative development. And as we look back at our history and “star gaze” into the future, we see that these incentives really worked and we can see the role that the Constitution played in making our country the pioneering force that it is.

The strength of the entertainment industry rests in its ability to continue to create and foster imaginative products. That cultivation of creativity and products, in turn, has its foundation based on intellectual property rights. So we have an intriguing convergence of two main points: the largest export of the US is its entertainment, and the legal foundation for those industries, above all other practice areas in the law is Intellectual Property. The continued success of this industry both here and abroad depends upon how the United States and every other major country around the world protects those intellectual property rights.

The motion picture industry is now a century old. In its formative years, Hollywood had no intention of creating or promoting “stars”! That concept happened almost by accident.

The burgeoning movie industry did not want, or need, any so-called “movie stars.”

By definition, a “star” would come to mean someone whose name appears on screen ahead of the film title.

[BACKGROUND VIDEO ROLL BEGINS]

Players who performed in early, silent motion pictures, were not given screen credit and were not even identified by name. Audiences came to see "the picture show," but not any particular performers in the movie.

Financial backers and movie producers saw no need to publicize the unknown people who were in plentiful supply to perform as actors in the silent movies they were making. Their fear was that publicity might lead to performers wanting additional compensation for their work. They were right!

Let me tell you about the person who changed all that.....
the first bona fide movie celebrity ...and indeed, the first celebrity "brand": Mary Pickford. Her dimpled face was surrounded by distinctive golden curls and she always played an innocent child woman. She had a trademark image even if she didn't know it or understand it at the time.

The publicity that accrued to Mary Pickford because of her trademark image made her a valuable commodity that was quickly in high demand. For years this silent movie star, who was internationally acclaimed as "America's Sweetheart, was the world's greatest box office draw, even above her contemporary Charlie Chaplin." And Mary Pickford was an astute businesswoman. At a time before women could vote in this country, she had parlayed her intellectual property rights into financial freedom and almost total control over the films she appeared in.

[BACKGROUND VIDEO ROLL BEGINS]

Others came along and did the same. Charlie Chaplin was one. Douglas Fairbanks was another. Then Pickford married Fairbanks and together with Chaplin and D.W. Griffith, they formed their own motion picture production company which was called United Artists. This prompted at least one observer to comment, "The lunatics have taken over the asylum."

In their wake came Clara Bow, Gary Cooper, Jean Harlow, Humphrey Bogart, Marilyn Monroe, James Dean and the world has been star struck by Hollywood Royalty ever since. All the while, through the years, the public continues to value the magic of these Hollywood stars. Even in the greatest movies of all time, it's the stars who people come to see. It's the star's names that matter to the public. They are what attract us. They are what we value. They are compensated, therefore, accordingly. Everything they do interests us. We value the iconic images that they offer.

[BACKGROUND VIDEO ROLL BEGINS]

[When you watch CASABLANCA, the title read "Warner Bros. presents Humphrey Bogart and Ingrid Bergman in CASABLANCA." It's the stars whose names appear above the title.](#)

So in the next few moments, lets take an overview of this intellectual property landscape. We are going to see where the "stars" are today, and where they will likely be tomorrow. And we'll also see that the concept of a "career" has rapidly evolved as a result of these intellectual property rights.

So how do celebrities transcend their industry and become brands? Decades after Mary Pickford, what legal basis supports and protects the interests of Martha Stewart or a J-Lo in a complicated business world where stars can fall as quickly as they rise, and where counterfeiters can eat away at revenues? How is it possible that a Marilyn Monroe, Elvis Presley or a James Dean can really be a "brand" and still earn millions of dollars annually, decades after they have died?

The programs of this INTA annual meeting are designed to explore alot of these issues in greater detail than I can here. But the compelling question to me is, how does a personality achieve enduring greatness? Even Life after Death? While the measure of greatness may be inherently subjective the way to achieve maximum legal protection and sustained revenues is through a

combination of legal doctrines, working in tandem throughout the world, including trademark, right of publicity and conscientious brand placement, development and protection.

Let me briefly give an overview of two main legal doctrines that form the foundation of celebrity licensing, branding, and management. I'm sure, given this audience, that the majority of you are well-versed in trademark law, but it is interesting to note the fundamental differences between the components of Right of Publicity and Trademarks.

Right of Publicity, stated simply, is the right of every individual to control how his or her name, image, likeness or other distinct aspect of identity is commercialized, if at all. In the United States, the right of publicity was born out of the right of privacy. Privacy protects dignitary interests and hurt feelings. In contrast, the right of publicity protects the financial interests of an individual--typically celebrities--to control how and when their name, image, likeness or some aspect of identity will be used in commercial ways, such as on merchandise or in advertisements.

Trademark, conversely, has its origins in protecting the consuming public, serving as an identifying source of goods or services, and in avoiding confusion and passing off. The Right of Publicity serves a role very distinct from trademark. Furthermore, the standard for proving trademark infringement is typically the likelihood of confusion. With Right of Publicity, the standard is much lower, and is generally simply one of identification measured by a *de minimis* standard.

But, even given these differences, a worldwide celebrity branding campaign must employ a combination of trademark and Right of Publicity, because these doctrines are recognized in very different ways throughout the world.

[BACKGROUND VIDEO ROLL BEGINS]

The use of trademarks as a way to solidify legal rights is increasingly being utilized by celebrities these days. Everyone from Oprah Winfrey, to Donald Trump to Shania Twain, Gene Simmons of Kiss to Jay-Z has extensive trademark regimes in place to establish and promote their value in the marketplace. Even deceased stars, like Marilyn Monroe, James Dean and Elvis Presley rely on trademark protection around the world to protect and market their images. A celebrity like James Dean, even though he has been deceased for ½ of a century, has hundreds of trademark registrations throughout the world.

What elements of persona can be registered as a trademark? It depends of course on how the mark is being used, because it has to function as a trademark in the marketplace. But with that basic prerequisite in place, almost anything can be registered. Your signature? You bet. Your name as a word mark? Sure. What about registering my image? Common place.

The face paint of the members of Kiss constitute trademarks.
The lips and beauty mark of Marilyn Monroe also constitutes a trademark.
Paul Newman has his own food product line with his image as the logo.

[BACKGROUND VIDEO ROLL BEGINS]

Music and media entrepreneurs like Russell Simmons and Jay-Z have created clothing and multi-media product lines based in part around their identities and what they stand for, that each yield gross sales of upwards of \$500 million a year. The manifestations of their identity in their corporations and products, are simply extensions of their trademark and right of publicity interests.

And some major tectonic movements are taking place right before our eyes. A few months ago, one of the biggest deceased stars of all time changed hands. I think you might recognize him...

[STOP FOR VIDEO ROLL]

Yes, Elvis Presley's rights were acquired for 100 million dollars by the industrialist, who a few years ago built the company now known as 'Clear Channel'. And it's interesting to note that Lisa

Marie Presley was on Larry King just a few weeks ago explaining that, no, she did not sell Graceland. That \$100 M transaction applied only to the intangible, intellectual property rights and corresponding advertising and merchandising rights surrounding Elvis.

With a valuation of \$100 million dollars, it might be fairly argued that Elvis has just entered the building.

Another person I know you've heard of.....

[BACKGROUND VIDEO ROLL BEGINS]

Yes, that is Mr. Bill Gates...a genius in addition to being the world's wealthiest man, and he is making strategic inroads into this business as well, as one of his companies has just acquired the rights to Albert Einstein.....another man with a reputation for being pretty smart.

So what are these seemingly, intangible, invisible rights these bright people are paying so much to acquire? Intellectual property can also include trade secrets and patents, so obviously there are elements that fit into the Intellectual Property family that may not apply to celebrities.

But what is the subject matter of these transactions? Well, it will of course include any common law or Federally registered trademark interests, as noted above. I already described the basic distinctions between the Right of Publicity and Trademark, but it can be argued that, in these transactions, and in the business of celebrity branding, the Right of Publicity is at least as significant, perhaps more significant, than the trademark aspects of these properties.

As mentioned, the Right of Publicity was born out of the Right of Privacy. In 1902 New York passed New York Civil Law sections 50 & 51, which protect living people against commercial use. It does not protect deceased individuals, and today, New York stands as one of the only US jurisdictions not to recognize a post-mortem right of publicity. As of May, 2005:

- Approximately 30 states recognize the Right of Publicity by common law or by statute; and 19 states recognize the Right of Publicity by statute

Here in California the post-mortem Right of Publicity lasts 70 years. In Indiana, Right of Publicity lasts 100 years after death. In Tennessee, the Right of Publicity, like trademark, does not necessarily ever expire as long as there is sustained commercial use.

[BACKGROUND VIDEO ROLL BEGINS]

So clearly, a post-mortem Right of Publicity is one of the ways that celebrities can achieve a "life after death." As you can see from the Forbes List of the Top Revenue generating estates, it is clearly an important right for those that control the business interests of those celebrities after they die.

There have been many cases, in addition to the statutory sources of the law, which have shaped the parameters of the Right of Publicity. I can't even begin to give you a tour of all the fascinating cases out there. But I will mention the only Right of Publicity case decided by the US Supreme Court..... *Zacchini v. Scripps-Howard Broadcasting Co.*,

[BACKGROUND VIDEO ROLL BEGINS]

In this 1977 the Supreme Court of the United States upheld the notion of a Right of Publicity. This case arose out of Ohio, where a performer objected to having his "human cannonball" act televised on the local news. Nevertheless, the station aired his performance in its entirety. The argument was essentially that, by broadcasting his entire act, there is little motivation left for people to pay to see his act. The Supreme Court agreed.

Internationally, the right of publicity is developing at different speeds depending on the country, culture and laws involved in a given country. It can be said generally that there is a growing "right of personality" throughout Europe. Many countries recognize a right analogous to the right

of publicity through use of sources such as privacy, moral rights, unfair business practices, and even Constitutional protections. Sometimes these rights are called "personality rights."

Some of the significant countries addressing these personalities rights include the following countries:

- * The United Kingdom.....the right of publicity is not recognized. Unfair competition law in the form of "passing off" is a possible cause of action.
- * France, the law recognizes a violation of the "right of image, " and the appropriation of persona disputes in France has its roots in the right of privacy.
- * Italy, a right of image, or personality right, is protected through its Civil Code, as expanded in recent case law.
- * Brazil protects interests similar to the right of publicity under several bodies of law, including its constitution, copyright and neighboring rights laws.
- * Canada's sources for a right of publicity are in unfair competition law.
- * Germany has recognized the Right of Publicity. It protects against unauthorized commercial use of a person's identity.
- * South Korea is beginning to recognize publicity interests, but it is unclear the extent of recognition they will afford.
- * Japan recognizes both a right of privacy and the right of publicity.

In the United States, we have the Lanham Act, which can even be argued to be effectively a Federal Right of Publicity law. Often celebrity infringement cases are ruled in favor of the celebrity based on Lanham Act claims.

[BACKGROUND VIDEO ROLL BEGINS]

Vanna White, the famous hostess of the game show *Wheel of Fortune* sued Samsung for using a robot dressed like her in an ad set in the future, suggesting that long after Vanna is replaced by a robot, Samsung's products will still be going strong. She utilized a common law right of publicity—since California's statutory right of publicity did not seem to include a robot as constituting her "likeness" and she also used the Lanham Act to successfully protect her interests from this obvious use of her identity and brand in an advertisement. The Trademark aspect of her claim was critical to her success in establishing a cause of action.

While the US has trailblazed with the Right of Publicity and application of the Lanham Act to celebrities, in recent years, the major developments in patent & copyright laws have been driven internationally. We are seeing a form of consolidation, and standardization in the recognition and implementation of copyright and trademark on a worldwide basis—perhaps the Right of Publicity will receive similar treatment at some point in the future.

[BACKGROUND VIDEO ROLL BEGINS]

The counter point to all of this intellectual property right recognition is the problem of counterfeiting, which is a multi-billion dollar industry in and of itself. It accounted for 5 to 7 percent of all global trade three years ago according to the International Chamber of Commerce. In 2004, that figure was estimated to be up to 7% of total world merchandise trade or \$512 billion. China is often cited as the nation presenting the greatest counterfeiting problems, but this is a worldwide epidemic. Nevertheless, given the size of China's influence in production and export worldwide, their actions will be critical to turning the tide. Pressure has been put on the Chinese government by various nations, and that pressure needs to continue, from more nations, and in a more unified voice.

Let me offer a few quick thoughts on litigation concerning the unauthorized use of celebrities. Litigation over unauthorized uses is on the rise, and so it seems are damage awards in recent cases. In Missouri a hockey player won a verdict of \$25 million; and a model who appeared on the packaging of Nestle's Taster's Choice was awarded \$15.5 million based on profits from sales. If you recall the Vanna White case we discussed earlier, she was only awarded \$400,000 ten years ago. Use of expert witnesses in putting a value on these kinds of unauthorized uses is a key component to establishing an appropriate framework and dollar range for cases of this kind.

So, what does all this mean for celebrities when this rapidly changing and developing intellectual property right arena intersects with the lightning speed of the technology advancements that we are seeing?

Examples of this technology include Computer Generated Imaging, also voice modeling software, the convergence of wireless technology and distribution of content to multi-platform devices like cell phones, which are really not just phones anymore but also cameras, PDAs, mini-computers all in one, and even something as familiar as the Internet, which still presents many challenges and opportunities.

The Internet is dramatically changing the way personalities can brand their images. It allows the celebrity to have it's own global "Channel of Communication". Celebrities can sell their product, promote their brand, have a fan club and even sell tickets to a concert.

[BACKGROUND VIDEO ROLL BEGINS]

Even the estates of deceased celebrities like James Dean, Marilyn Monroe, and Elvis Presley recognize the inherent power that the internet offers them. All 3 of these estates recovered their "dot.coms" from cybersquatters in the past 5 years. A site such as MarilynMonroe.com receives $\frac{3}{4}$ million hits each day....that translates to 300 million hits in a single year. The power of that branding capability is enormous.

When it comes to finding imaginative new ways to harness technology, Madison Avenue has been taking the lead for years. Over a decade ago, here's a commercial that appeared on TV screens across the world...

[STOP FOR VIDEO ROLL]

More recently, advanced production techniques have made it possible to marry the brand power of bygone eras with elements of modern street culture...resulting in a combination that becomes entertaining, memorable, and accessible to broader age ranges...

[STOP FOR VIDEO ROLL]

Speaking of contemporary culture, commercials these days have the power to show us stars we know well in very unusual and imaginative settings. It can age them forward, or even backwards as you see here:

[STOP FOR VIDEO ROLL]

The videogame industry, which has grown today to become larger than the movie business itself, is regularly tapping into the multi-generational appeal of recognizable and often-mythic brand icons

[STOP FOR VIDEO ROLL]

Today's filmmakers are consistently and cleverly making use of computer-based artistry to make that which previously could only be imagined, become reality and that can now involve portrayals by deceased actors in 'seamless' live-action scenes that are otherwise undistinguishable from newly shot footage.

I'm going to show you two short clips from the recent motion picture 'Gladiator', which perhaps some of you saw in theaters or on video. During the filming of 'Gladiator', co-star Oliver Reed passed away unexpectedly. One of the scenes you're now going to see, which was considered

by the filmmakers to be critically important to the story, was constructed entirely after Reed's death.

See if you can tell which one was actually filmed with a live Oliver Reed and which one was created in an editing bay with computers and C.G.I.

[STOP FOR VIDEO ROLL]

Let's take a show of hands to see who can tell which seen was the "live" Oliver Reed and which was the "recreated" version.

How many think A
How many think B?

Those that picked A were right.

Technology and the ways in which it continues to evolve - faster, simpler, smaller and cheaper, will guarantee that the future of brand exploitation, brand depiction, and brand protection will include substantial measures of innovation...and uncertainty! This is all a signal of a true paradigm shift in the way we think about actors and their talents, and about the way we both extend and safeguard the intellectual property rights that underlie them, and the legal pursuits that we all continue to practice, refine, and improve.

? Within a few more years, the age of 'smart clothing' will be upon us. A direct outgrowth of defense department research, tiny chips will allow consumers to wear t-shirts adorned with their favorite celebrity. New technology means it will include audio, video, motion and even communicate with other "smart clothing" users exciting ways.

? Although the use of celebrities as game characters--avatars to the techies here--is increasingly common today in the online gaming world today, they are still largely symbolic and static icons. In a few more years, voice and motion technology will allow game-players to "become" the personalities of their choice - they'll sound like them, they'll move like them, and they'll act like them.

? These computer generated imaging toolsagain, C.G.I., and the creative skills that drive them will soon make it possible to faithfully reproduce actors - living or deceased - in ways that audiences will readily, and lastingly embrace. They will make old stars younger and or make young ones look mature far beyond their years in ways we can't yet fully appreciate. Like the example of Oliver Reed, our new technology can make a deceased person reappear. They can be made to do and say anything and viewers will not be able to differentiate real from artificial

? New musical recordings will reappear from Elvis Presley, to Buddy Holly, to the Beatles to Jim Morrison. We will be able to write and record a song and use voice modeling software that exactly mimics the professional sound and styling of specific artists. Natalie Cole was directly involved in her reanimated duet with her father's prior recording of Unforgettable, but the new and evolving technology we are talking about will take this to all new levels as Nat King Cole will be able to do a whole new recording.

Who is going to have the power to control this "New" person, with this "new" personality, with this new set of intellectual property rights? Beyond the legal considerations, think about the moral and ethical complications that inherently arise as a consequence of all these developments. During their lifetime, singers and musicians turn down countless potential songs, actors and actresses turn down countless scripts, all for artistic discretionary reasons. After they die, what happens when they can no longer exercise such artistic discretion. Then do we as the legal or business representatives make these decisions? Is so, based on what criteria?

Clearly, a whole new definition of "Career" has developed. It is no longer what we or even the celebrity themselves, thought a "career" was. No one ever thought a career would last beyond the celebrities mortal life.

But a celebrity's Intellectual Property rights do survive, affording them a measure of immortality. Celebrities have become brands, and those brands can and will live on beyond the celebrities' lifetime. We have to address and resolve the uncertainty that this brings, including the question of whether or not our stewardship reflects their best interest when they themselves are no longer here to tell us how they feel. It's our responsibility now.

What we are really talking about is a whole different "mindset" for artists, managers & all of us as their legal representatives. We are going to have to manage the careers of celebrities that become brands. Careers that can, and often will extend well beyond the mortal lives of the celebrities themselves. I believe that Elton John says it best...

[STOP FOR VIDEO ROLL]

Remember Mary Pickford.....when she began her career, we couldn't hear her speak.
When Humphrey Bogart began his career, we couldn't see him in color.
What does the future hold?

Look up at those same stars in the sky, because, in fact, the sky is the limit.

Finally, let's take a look at an extraordinary celebrity who also came from the Indiana cornfields, and gazed at those very same stars, and dreamed of a future filled with promise.

He was a cult icon who died an untimely death a half century ago.
At that point, everyone assumed that his career was over.

Once again.....they were wrong.

What we now have come to realize, is that this man's journey to true enduring greatness
.....even life after death.....had in reality..... just begun.

[STOP FOR VIDEO ROLL]

See a written copy or view this presentation at:

www.MarkRoesler.com or www.CMGWorldwide.com