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Lugosi v. Universal Pictures: Descent of the Right of Publicity

The exploitation of famous names and likenesses in the promotion and marketing of consumer goods has become an integral part of American merchandising.

> Licensing — the business of using famous names, titles, slogans, logos, cartoon characters and whatever to sell dolls, T-shirts, lunch boxes, brassieres, wastebaskets and what-have-you — is flourishing. Born maybe 50 years ago as an incidental thought, licensing has emerged as a full-blown industry that has estimated annual royalties of $20 million to $30 million and that is responsible for the sale of hundreds of millions of dollars of manufactured items each year.[1]

Many courts have responded to this phenomenon by providing celebrities with an exclusive right to the pecuniary value of their names and likenesses. This right is generally referred to as the "right of publicity."[2]

The ultimate contours of the right of publicity are as yet unclear.[3] A California case, *Lugosi v. Universal Pictures*,[4] has raised the question of whether a right of publicity should descend to heirs. The trial court held that the right was descendible, but the decision was reversed on appeal. The case is presently before the California Supreme Court.

This Note will discuss the descendibility of the right of publicity. An overview of the historical protection of name and likeness under the right of privacy and subsequent development of the right of publicity will provide a foundation for analysis of the descent issue. The

1. Connor, *The Licensing of Famous Names to Sell Products is a Booming Field These Days*, Wall St. J., Dec. 2, 1974, at 34, col. 1. *See* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 203-04 (1954) [hereinafter cited as Nimmer]. One entrepreneur expects to gross $10 million in 1977 through exploitation of the name and likeness of the late Elvis Presley. PEOPLE, Oct. 10, 1977, at 28, 31.

2. This term was coined by Judge Jerome Frank in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). *See* Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (App. Div. 1969) (defining the "right of publicity").

3. One court complained that "[t]he state of the law is still that of a haystack in a hurricane . . . . " Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

4. 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), *rev'd*, 70 Cal. App. 3d 552, *modified*, 71 Cal. App. 3d 1027a, *as modified*, 139 Cal. Rptr. 35 (1977), *petition for hearing granted*, Civil No. L.A. 30824 (Cal. Sup. Ct., Aug. 11, 1977).

trial court and appellate court adjudications of the descent issue in *Lugosi v. Universal Pictures* and a contrasting analysis by a New York federal district court in *Price v. Hal Roach Studios, Inc.*[5] will then be examined. Rationales for the descent of the right will be advanced, and the relationship between the right of publicity and society's interest in the free dissemination of information and ideas will be discussed. The Note will conclude that the California Supreme Court should find the right of publicity to be descendible and will propose that the legislature set a statutory limit on the duration of descent.

Protection of Name and Likeness: Privacy v. Publicity

Evolution in the Right of Privacy

The historical protection of name and likeness under the law of privacy has generated much of the confusion surrounding the issue of descent of the right of publicity. An analysis of the descent question must therefore begin with an overview of this historical protection. The source of the confusion is the failure of many courts to distinguish between the privacy interest in freedom from injury to feelings and a celebrity's publicity interest in the pecuniary value of his or her name and likeness. As a result, the general rule that the right of privacy is personal and may not be assigned or inherited[6] has been applied inappropriately to protection of a celebrity's right of publicity.

The purpose of the right of privacy expounded by Warren and Brandeis in their celebrated 1890 law review article[7] was protection of the general "right to be let alone" by preventing public scrutiny of thoughts, sentiments, and emotions.[8] Warren and Brandeis were concerned with abuses such as offensive newspaper gossip columns rather than with the appropriation of an individual's name or likeness.[9] Early twentieth century developments provided protection to name

5. 400 F. Supp. 836 (S.D.N.Y. 1975).

6. *E.g.*, Young v. That Was The Week That Was, 423 F.2d 265 (6th Cir. 1970); Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (1958); Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 408 (1960) [hereinafter cited as Prosser]. Statutes in three states, however, provide for descent of the right of privacy to next of kin, heirs, or personal representatives. OKLA. STAT. ANN. tit. 21, §§ 839.1-.3 (West Supp. 1977-78); UTAH CODE ANN. § 76-9-406 (Supp. 1977); VA. CODE § 8-650 (1957); *cf.* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 210-11, 50 S.E. 68, 76 (1905) (dicta disavowing adoption of the "personal" limitation on the right of privacy).

7. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

8. *Id.* at 205.

9. *Id.* at 196; *see* Prosser, *supra* note 6, at 401; Comment, *Commercial Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians*, 3 PAC. L.J. 651 (1972) [hereinafter cited as *New Remedy for Californians*].

and likeness as an extension of the law of privacy. At that time, when the business of licensing and exploiting famous names and likenesses was embryonic, the significance of an exclusive right to name and likeness was considered primarily within the context of emotional harm. The 1899 case of *Atkinson v. John E. Doherty & Co.*[10] is illustrative. In that case the defendant had appropriated the name and likeness of the plaintiff's deceased husband, a well known lawyer and politician, for use in marketing cigars. The plaintiff did not allege pecuniary harm, nor did the court discuss any financial implications of the appropriation. The court stated that neither the plaintiff nor her husband, were he alive, had a remedy; the pecuniary value of the deceased's name and likeness was not treated as relevant to the disposition of the case.

Because legislatures and courts seeking to protect name and likeness from appropriation perceived the wrong only as an invasion of the right to be let alone, name and likeness were protected under the developing right of privacy. The most significant early extension of such legal protection followed the 1902 refusal of the New York Court of Appeals to protect a plaintiff from use of her picture to advertise flour.[11] The New York legislature responded by designating the appropriation of name or likeness "for advertising purposes, or for the purposes of trade" as an invasion of the right of privacy.[12] Subsequent legislative[13] and judicial[14] action in other jurisdictions similarly sought to protect "[t]he right to withdraw from the public gaze at such times as a person may see fit."[15] Protection against appropriation of name and likeness became firmly entrenched in the law of privacy.[16]

Victims of appropriation consequently have sued for invasion of privacy even when their real complaint was that they were not com-

10. 121 Mich. 372, 80 N.W. 285 (1899).

11. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

12. 1903 N.Y. LAWS, ch. 132, §§ 1-2 (current version at N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976)).

13. Statutes similar to the New York privacy statute were later enacted in Oklahoma, Utah, and Virginia. They differ from the New York statute, however, in that they provide for descent of the right of privacy to next of kin, heirs, or personal representatives. See note 6 *supra*. In 1971 the California legislature codified the "right of privacy" protection of name and likeness, prohibiting appropriation "for purposes of advertising . . . or . . . solicitation." CAL. CIV. CODE § 3344 (West Supp. 1977); *see* Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 894, 118 Cal. Rptr. 370, 381 (1974).

14. *See* Annot., 23 A.L.R.3d 865 (1969).

15. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 196, 50 S.E. 68, 70 (1905).

16. Dean Prosser isolated four distinct types of privacy invasion: intrusion upon seclusion, public disclosure of private facts, false light in the public eye, and appropriation of name or likeness. Prosser, *supra* note 6, at 389.

pensated for the pecuniary value of their names and likenesses.[17] An example of such misstatement of the cause of action is seen in *O'Brien v. Pabst Sales Co.*,[18] in which a photograph of the plaintiff, a football player, was appropriated by the defendant and printed on calendars. The athlete sued for invasion of his privacy. The court declared that the plaintiff had no cause of action because he was only getting the publicity that public figures constantly seek.[19] A dissenting opinion pointed out, however, that the athlete had essentially sought to recover for the pecuniary value of his likeness but had pleaded the wrong theory.[20]

The insufficiency of the privacy theory for protection from pecuniary wrongs became more apparent as the commercial use of famous names and likenesses increased.[21] The *sine qua non* of invasion of privacy is injury to feelings through denial of the right to be let alone; this injury may be absent in the case of a celebrity who seeks publicity, so that the law of privacy logically should afford no relief.[22] Even when a celebrity is successful under a privacy theory, recovery will be limited by the rule of damages for invasion of privacy, which compensates for injury to feelings rather than for the pecuniary value of the use.[23] When the interest in name and likeness is financial, the concept that the right of privacy is personal[24] imposes an artificial limitation. The basis for so limiting the right of privacy, the personal nature of the right to be let alone, is irrelevant to the proposal that exclusive rights to the pecuniary value of a famous name or likeness should descend to heirs.

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17. This problem has been thoroughly examined in Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. Rev. 553 (1960) [hereinafter cited as Gordon].

18. 124 F.2d 167 (5th Cir. 1941).

19. *Id.* at 170. Another court similarly noted, "Professional privacy is . . . the very antithesis of the [baseball] player's need and goal." Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 327, 332 N.E.2d 543, 544, 274 N.Y.S.2d 877, 878 (1966), *vacated per curiam*, 387 U.S. 239, *aff'd on rehearing*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

20. 124 F.2d at 170-71. *Accord*, Gautier v. Pro-Football, Inc., 304 N.Y. 354, 361-62, 107 N.E.2d 485, 489-90 (1952) (concurring opinion) (action for invasion of privacy in broadcasting plaintiff's trained animal performance; real injury was nonpayment).

21. See text accompanying note 1 *supra*.

22. *See, e.g.*, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); O'Brien v. Pabst Sales Co., 124 F.2d 167, 170-71 (5th Cir. 1942) (dissenting opinion).

23. Nimmer, *supra* note 1, at 208. *See, e.g.*, Fairfield v. American Photocopy Equipment Co., 158 Cal. App. 2d 53, 322 P.2d 93 (1958) (compensation for worry and humiliation caused by invasion of privacy).

24. See note 6 & accompanying text *supra*.

Distinguishing a Right of Publicity

As the inadequacy of the law of privacy as protection for the pecuniary value of famous names and likenesses became clear, courts sought to distinguish the interests that could be invaded by an appropriation so that each could be afforded suitable protection.[25] Two distinct interests, emotional and financial, were recognized in the 1953 case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[26] In *Haelan* the plaintiff had acquired from a baseball player the exclusive right to use a photograph of the athlete in the sale of chewing gum. The ballplayer subsequently granted the same right to the defendant, a rival chewing gum manufacturer, and the lawsuit ensued. The defense challenged the plaintiff's claim of an exclusive right to the photograph by pointing out that the right of privacy is not assignable.[27] The court nevertheless held for the plaintiff, finding that the athlete had assigned a right that was separate and distinct from the right of privacy. Judge Jerome Frank explained the court's reasoning:

> We think that, in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a right may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else. . . .
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.[28]

A precise explanation of the two separate interests in name and likeness appeared in a 1957 case, *Hogan v. A. S. Barnes & Co.*[29] In that case the defendant had published a book that contained a picture of the famous golfer, Ben Hogan, along with textual material purporting to reveal some of his secrets to success in his sport. One of the causes of action alleged by Hogan was for invasion of privacy. The court stated that, although appropriation of name or likeness has been

25. An early example of such efforts is the dissenting opinion in O'Brien v. Pabst Sales Co.. See note 20 & accompanying text *supra*.

26. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

27. *Id.* at 867; *see* Prosser, *supra* note 6, at 408.

28. 202 F.2d at 868. A number of cases have reached similar conclusions. *See, e.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

29. 114 U.S.P.Q. (BNA) 314 (Pa. C.P. 1957).

called an invasion of privacy, it actually involves one of two distinct wrongs. If a plaintiff had been unknown to the general public, the essence of his complaint would be invasion of privacy through exposure to unwanted publicity. If he were a public figure, the essence of his cause of action would be the lack of compensation for the commercial value of his name or likeness.[30] The court held for Hogan on the basis of the latter.[31]

A plaintiff's status as a celebrity does not necessarily determine that the right of publicity, rather than the right to privacy, is being asserted. The possibility exists that the appropriation of a celebrity's name or likeness may actually cause injury to feelings.[32] An illustra-

30. *Id.* at 315-16; *see* Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *New Remedy for Californians, supra* note 9, at 656-57. *But cf.* Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970) (stating that appropriation cases generally involve a claim for pecuniary loss and are distinct from Prosser's other three types of privacy invasion).

31. *Hogan* also declared that the protection of a right of publicity is "but another way of applying the doctrine of unfair competition." 114 U.S.P.Q. (BNA) at 320; *see* Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 493-94 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (speculating that New York courts would use the law of unfair competition to protect valuable names and likenesses). This notion is based upon the idea that a name or likeness may acquire "secondary meaning" for publicity purposes. A word or phrase acquires secondary meaning when it is "used so long and so exclusively by one producer with reference to his article that . . . the word or phrase had come to mean that the article was his product." G. & C. Merriam Co. v. Saalfield, 198 F. 369, 373 (6th Cir. 1912), *modified and aff'd*, 238 F. 1 (6th Cir.), *cert. denied*, 243 U.S. 651 (1917). The law of unfair competition protects such words or phrases from imitation by another "producer" when the use is likely to result in deception as to the origin of the imitator's product. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity*, 5294 (8th ed. 1974). In the publicity context a name or likeness may be said to acquire "secondary meaning" when a person's achievements (*i.e.*, "product") are so widely recognized that they become synonymous with his or her name and likeness. The *Hogan* court essentially viewed the appropriation in that case as unfair competition through deceptive exploitation of the secondary meaning in the plaintiff's name. The approach worked well enough, but this result may be attributed to the fact that Hogan himself had written extensively on golf, so that the defendant's publication was in competition with Hogan's publications. Professor Nimmer has suggested that the doctrine will afford no relief when there is an absence of "palming off" (defendant's passing off his or her goods as those of the plaintiff) or when the plaintiff is not engaged in a competitive business. Nimmer, *supra* note 1, at 210-13. The modern trend in the law of unfair competition has been toward relaxation of the competition and passing off requirements (*see* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity*, 5300-03 (8th ed. 1974), but the doctrine will still provide no relief unless the plaintiff has commercially exploited his or her name or likeness. See notes 93-95 & accompanying text *infra*. The law of unfair competition is thus inadequate for protecting the right of publicity and has rarely been used for that purpose.

32. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824-25 n.11 (9th Cir. 1974) (dictum). Conversely, persons not known to the general public may assert a right of publicity. Professor Nimmer has stated that "[i]t is impractical to attempt to draw a line as to which persons have achieved the status of celebrity and

tive case is *Grant v. Esquire, Inc.*,[33] in which actor Cary Grant sued for use of his likeness in a magazine article on new clothing styles. Grant claimed that he wanted no one, including himself, to secure the financial benefits of this sort of publicity, which he apparently found offensive.[34] The court held that he had stated a cause of action for invasion of privacy under the New York privacy statute and, additionally, could recover damages for the pecuniary value of the exploitation.[35]

Most courts that have expressly or implicitly extended legal protection to the right of publicity have rationalized this action by characterizing the interest in the pecuniary value of a famous name or likeness as a "property" right.[36] As one judge observed, "[T]he word of *power* most frequently employed by the courts is either 'privacy' or 'property' . . . ."[37] The privacy label signifies protection of the interest in being let alone; the property label denotes protection of the interest in the pecuniary value of a famous name or likeness. The property rationale is based upon the concept that "[t]he term 'property' . . . extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value."[38] It is practicable, and common in the business com-

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which have not; it should rather be held that every person has the property right of publicity, but that the damages which a person may claim for infringement of the right will depend upon the value of the publicity appropriated which in turn will depend in great measure upon the degree of fame attained by the plaintiff." Nimmer, *supra* note 1, at 217. A rule of compensation based upon the value of the appropriated name or likeness will thus circumvent specious right of publicity claims.

33. 367 F. Supp. 876 (S.D.N.Y. 1973).

34. *Id.* at 880.

35. *Id.* at 880-81. *But see* Cason v. Baskin, 155 Fla. 198, 221, 20 S.2d 243, 254 (1944) (contradictory to seek both damages for injury to feelings and a share of profits from the use that caused injury).

36. *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205, 1206 (8th Cir. 1969); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 487 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); O'Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (dissenting opinion); Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314, 320 (Pa. C.P. 1957); Gordon, *supra* note 17, at 553-55, 605-13 (extensive argument favoring return to the property protection from which Warren and Brandeis had removed the right of privacy). One commentator has suggested that California Civil Code § 3344, which provides minimum damages of $300 for appropriation of name or likeness, in effect bestows a "property right" upon all persons. *New Remedy for Californians, supra* note 9, at 663.

37. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 486 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956). A footnote indicated that the court was "[u]sing the word 'power' in its magical or talismanic sense." *Id.* at 486 n.8.

38. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 826 n.14 (9th Cir. 1974) (quoting Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929)).

munity, to place a money value on a famous name or likeness,[39] which may therefore be conceived of as "property."[40]

Several authorities, on the other hand, have discouraged reliance on the property label to explain the right of publicity. Judge Frank declared in *Haelan* that "[w]hether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."[41] Dean Prosser similarly minimized the importance of the label.[42] The property label itself is without independent substance; it merely indicates that courts recognize a pecuniary right of publicity.[43] Nevertheless, the label is relied upon by most courts,[44] so that, not surprisingly, it appears in the controversy over descent of the right of publicity.[45]

In sum, there is a strong trend toward protecting the right of publicity. Assertions of the right in California, however, have been litigated infrequently.[46] Nevertheless, in a recent federal case in which a photograph of a professional race car driver's automobile was appropriated for use in a cigarette advertisement,[47] the United States Court of Appeals for the Ninth Circuit declared:

> So far as we can determine, California has no case in point; the state's appropriation cases uniformly appear to have involved only the "injury to personal feelings" aspect of the tort. Nevertheless, from our review of the relevant authorities, we conclude that the California appellate courts would, in a case such as this one, afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under the rubric of "privacy," "property," or "publicity"; we

39. See note 106 & accompanying text *infra*.

40. The property concept has been used to explain why the right to the pecuniary value of a famous name or likeness may be assigned even though rights of privacy are not assignable. *See* Cepeda v. Swift & Co., 415 F.2d 1205, 1206 (8th Cir. 1969); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

41. 202 F.2d at 868.

42. Prosser, *supra* note 6, at 406.

43. See text accompanying notes 67-69 *infra*.

44. One commentator has insisted that "in the light of the state of the law in this field, the tag 'property' becomes material as furnishing a firm basis for distinguishing between claims which have a solid pecuniary worth and those involving injured feelings." Gordon, *supra* note 17, at 606-07.

45. See notes 99-100 & accompanying text *infra*.

46. A 1958 attempt in a California federal district court elicited the following response: "This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity." Strickler v. National Broadcasting Co., 167 F. Supp. 68, 70 (S.D. Cal. 1958).

47. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974). The court held that although the driver's facial features were not visible, the car was recognizable as the plaintiff's, so that he was identifiable as its driver. *Id.* at 827.

> only determine that they would recognize such an interest and protect it.[48]

Lugosi v. Universal Pictures presented the California appellate courts with the opportunity to afford legal protection to the pecuniary interest in famous names and likenesses and to recognize that the right of publicity may descend to a person's heirs.

Adjudication of the Descent Issue

Lugosi v. Universal Pictures: The Trial Court Decision[49]

Bela Lugosi played the title role in the 1931 motion picture *Dracula*, produced by Universal Pictures' predecessor corporation, Universal Pictures Company, Inc. The film has continued to have wide appeal over the years and has been re-released and broadcast over television many times. Lugosi died in 1956.

Beginning in 1960, Universal Pictures sold licenses for the manufacture of numerous consumer items bearing Lugosi's likeness in his role as Count Dracula.[50] Lugosi's son and widow sued Universal in 1966, alleging that they had inherited Lugosi's exclusive right to exploit the commercial value of his likeness as Count Dracula.[51] Universal's appropriation of Lugosi's likeness through the sale of merchandising licenses was alleged to be an invasion of that inherited right.[52]

Judge Bernard S. Jefferson, the trial judge, issued a written opinion in 1972. The opinion contained a lengthy discussion of the nature of the right of publicity. The court began its discussion by ratifying

48. *Id.* at 825-26.

49. 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), *rev'd*, 70 Cal. App. 3d 552, *modified*, 71 Cal. App. 3d 1027a, *as modified*, 139 Cal. Rptr. 35 (1977), *petition for hearing granted*, Civil No. L.A. 30824 (Cal. Sup. Ct., Aug. 11, 1977).

50. "Universal issued merchandising licenses to manufacture and sell the following products containing Lugosi's photoplay appearance as Count Dracula: child phonograph records; plastic toy pencil sharpeners; greeting cards and talking greeting cards; model plastic figures; T-shirts, sweat shirts and patches; jump picture rings and pins; monster old-maid card games; soap and detergent products; Halloween costumes and masks; casting and enlargograph sets and kits; target games and sets; picture puzzles; mechanical walking toys; ink-on transfers; trading cards; Halloween candy and gum; small comic books; self-erasing magic slates; punch-out novelty mask books; cutout paper dolls and books; monster mansion vehicles; wax figurines; candy dispensers; rubber masks; transparencies; kites, calendars and prints; plastic sliding square puzzle games; children's and ladies' jewelry, belts and belt buckles; wall plaques; wallets; juvenile luggage; biking buddies; animated flip books; campaign type buttons; photo printing kits; advertising campaigns; stirring rods and spoons; toy horoscope viewers with flip cards." Petition for Hearing, at 11 n.4, Lugosi v. Universal Pictures, Civil No. L.A. 30824 (Cal. Sup. Ct., filed July 19, 1977) (citation omitted).

51. A prior suit, initiated in 1963, had been dismissed by the plaintiffs pursuant to the reopening of the probate of Lugosi's estate.

52. 172 U.S.P.Q. (BNA) at 541-42.

Judge Frank's statement in *Haelan* that the property label is immaterial to recognition of the right of publicity;[53] the *Haelan* approach was declared to be "eminently sound."[54] Nevertheless, the opinion then lapsed into the "property" rationale it had sought to avoid. Three right of publicity cases[55] were cited as authority for "the better view . . . that a celebrity's interest in his name, appearance, likeness and personality which has a publicity pecuniary value, should be considered a *property right* separate and apart from the right of privacy . . . ."[56] The court then utilized its property characterization as a rationale for descent: "It is this court's holding that Bela Lugosi's interest or right in his likeness and appearance as Count Dracula was a property right of such character and substance that it did not terminate with his death but descended to his heirs."[57] Following an accounting, the plaintiffs were awarded damages based on Universal's profits from the licensing agreements, and an injunction against future licensing without their consent was issued.[58]

Price v. Hal Roach Studios, Inc.[59]

In the interim between adjudication of *Lugosi* at the trial level

53. See text accompanying note 41 *supra.*

54. 172 U.S.P.Q. (BNA) at 545-46.

55. 172 U.S.P.Q. (BNA) at 546 (citing Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969)); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970). For a discussion of the cited cases, see notes 36-40 & accompanying text *supra.*

56. 172 U.S.P.Q. (BNA) at 548-49 (emphasis in original).

57. *Id.* at 551. The court also decided the following: (1) although in his 1931 contract for the production of *Dracula* Lugosi had assigned to Universal the right to exploit his likeness in connection with the film, this assignment extended only to use directly related to the advertising and exploitation of the motion picture, *id.* at 543-44; (2) the licensing of the Count Dracula character as played by Lugosi amounted to an appropriation of Lugosi's own likeness, *id.* at 549-50; and (3) the applicable statute of limitation was the two year limit set forth in California Code of Civil Procedure § 339(1) for actions for liability not founded upon an instrument in writing and was tolled upon commencement of the 1966 suit, *id.* at 551-56.

58. Plaintiffs recovered damages in the sum of $52,023.23, plus $19,970.63 prejudgment interest. Petition for Hearing, at 14, Lugosi v. Universal Pictures, Civil No. L.A. 30824 (Cal. Sup. Ct., filed July 19, 1977).

One court, in discussing the measure of damages for an appropriation, suggested that actual profit is merely indicative, rather than determinative, of the value of an appropriated right of publicity. Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314, 321-23 (Pa. C.P. 1957). A low profit margin may reflect poor business management rather than low publicity value. Thus, a measure of damages based upon a percentage of the manufacturer's gross receipts might more accurately reflect publicity value.

59. 400 F. Supp. 836 (S.D.N.Y. 1975).

and in the court of appeal, a New York federal district court held that the right of publicity is descendible. In *Price v. Hal Roach Studios, Inc.*, an action had been brought by the widows of Laurel and Hardy and a corporation to whom Hardy's widow and Laurel had granted exclusive rights to exploit the actors' names and likenesses.[60] Following the plaintiffs' grant of exclusive rights, defendant Roach, the producer of the Laurel and Hardy films, executed an assignment of merchandising rights in the names and likenesses of Laurel and Hardy.[61] The plaintiffs charged that the Roach assignment was an invasion of publicity rights which had descended to plaintiffs as the heirs of Laurel and Hardy.[62]

In holding that the plaintiffs were entitled to injunctive relief and damages, *Price* joined the cases that recognize that, "[w]hile much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable."[63] The right of privacy, explained the court, prevents injury to feelings, whereas the right of publicity is of a "purely commercial nature."[64] As in the *Lugosi* trial court opinion,[65] an understanding of this dichotomy enabled the court to find that the right of publicity is descendible.[66]

Price noted that the right of publicity has been recognized as a "property" right but, unlike the *Lugosi* trial court,[67] did not set forth the proprietary attributes of the right as a rationale for its descendibility. The court instead found that "[t]here appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a 'property right.'"[68] The court thus bestowed a property label on the right in recognition that there is no reason for its termina-

60. The corporation produced films and licensed toys and games. *Id.* at 838.

61. In contractual clauses similar to that in *Lugosi* (see note 57 *supra*), Laurel and Hardy had assigned to Roach the right to expoit their names and likenesses in connection with advertising and exploiting their films. The *Price* court reached the same conclusion as that reached in *Lugosi*: the assignments were restricted to such use. *Id.* at 839-42.

62. *Id.* at 839.

63. *Id.* at 843.

64. *Id.* at 844.

65. The *Price* court cited Judge Jefferson's *Lugosi* opinion as authority for its holding. *Id.* at 844-45.

66. "In arguing for termination of the right, defendants appear to confuse the two essentially different concepts, that is, the traditional right of privacy which clearly terminates upon death of the person asserting such a right and the right of publicity which we think does not terminate upon death." *Id.* at 844.

67. See text accompanying notes 53-57 *supra*.

68. 400 F. Supp. at 844.

tion on the celebrity's death, thereby placing the function of the label in proper perspective.[69]

Lugosi v. Universal Pictures: The Appellate Court Decision

Two years after *Price*, the decision of the *Lugosi* trial court was reversed by the California court of appeal. The appellate court characterized the "so-called right of publicity"[70] as a form of privacy invasion. Various segments of the opinion alluded to Prosser's characterization of the right against appropriation of name or likeness as one of four types of privacy invasion[71] and noted that the right of privacy is personal[72] and "dies with the person."[73]

69. *Price* also considered an argument that Laurel and Hardy had lost their rights of publicity through nonuse. The court's response was that this idea is "nonsensical," because they were protected during periods of nonuse by the law of privacy. *Id.* at 846. The *Lugosi* appellate court held, however, that Lugosi's right of publicity was not descendible because it was not "exercised" during his lifetime. See notes 81-84 & accompanying text *infra.*

The descent issue reappeared in New York recently in Factors Etc. v. Creative Card, No. 77 Civ. 4400 (CHT) (S.D.N.Y. Oct. 12, 1977). Two days following the death of Elvis Presley, Factors Etc. acquired rights to expoit the singer's likeness; the assignor had acquired those rights prior to Presley's death. The parties to the assignment sought to restrain the defendants from manufacturing and selling posters and other merchandise bearing the Presley likeness. The court granted a preliminary injunction, holding that Presley's right of publicity was descendible and therefore assignable after his death. The court cited the *Price* holding that the right of publicity is descendible notwithstanding "nonuse." The court also, however, explained its holding by noting that Presley's right of publicity was *"clearly exercised by and financially benefiting Elvis Presley in life;"* the holding was thus declared to be consistent with the view that an unexercised right of publicity is not descendible. *Id.* at 12 (emphasis in original). See notes 81-84 & accompanying text *infra.* That the court offered this rationale in addition to citing *Price* is unfortunate, because the two views, descent regardless of nonuse as opposed to descent due to exercise, cannot be reconciled.

70. 71 Cal. App. 3d at 1027b, 139 Cal. Rptr. at 40 n.8.

71. 70 Cal. App. 3d at 557, 139 Cal. Rptr. at 38. See note 16 *supra.*

72. *Id.* at 557-58, 139 Cal. Rptr. at 38.

73. *Id.* at 559, 139 Cal. Rptr. at 39 (quoting Hendrickson v. California Newspapers, Inc., 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429, 431 (1975). In noting that the right of privacy is personal, the court discussed three cases that had denied property-oriented appropriation claims by heirs. *Id.* at 558, 139 Cal. Rptr. at 39. It was implied that these decisions supported the holding that the right of publicity is not descendible. These cases, however, do not in fact support such a holding. In the first case mentioned, Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir.), *cert. denied,* 382 U.S. 883 (1965), the defendant had produced a film about the late Al Capone. The court held that Capone's widow and son could not recover for their pain and suffering caused by a so-called invasion of the deceased Capone's privacy. A cause of action pleaded by Capone's administratrix for unjust enrichment through appropriation of a "property right" was declared to be irrelevant to the privacy question; its merits were not discussed. In the third case cited by the *Lugosi* appellate court, James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799 (1959), the

The *Lugosi* appellate court followed Judge Frank and Dean Prosser in dismissing the property label as "pointless."[74] Like the *Price* court, it saw the need to seek other bases for resolving the descent issue. The court's basic premise was that the right asserted by Lugosi's heirs did not descend to them because, as a " 'right of value' to create a business, product or service of value," it was protected only by the personal right of privacy.[75] Because Lugosi had never exercised his right to exploit the commercial value of his likeness as Count Dracula, he had not converted his "right of value" into a "thing of value."[76] His right of value was characterized as an unexercised opportunity, which, the court intimated, should not be descendible.[77] Scant explanation was offered as to *why* opportunity should not be descendible. The court suggested that the decision to exploit the opportunities presented by the publicity value of name or likeness is a personal one and should belong only to Lugosi.[78] The specter of unlimited descent was also implied.[79] Finally, the court stated that "neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served" by descent.[80]

In arguments before the appellate court plaintiffs cited as authority for descent, several cases in which the right of publicity was

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plaintiff claimed that she was entitled to compensation for defendant's motion picture exploitation of the personality of her deceased husband, Jesse James, Jr. She had, however, alleged an invasion of her privacy, so that the court was able to deny her claim simply because she herself had not been depicted in the film. The *Lugosi* trial court noted that *James* was an injury to feelings case rather than a right of publicity case. 172 U.S.P.Q. (BNA) at 548.

The second case cited by the *Lugosi* appellate court, Schumann v. Loew's, Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954), *final amended complaint dismissed*, 144 N.Y.S.2d 27 (Sup. Ct. 1955), is the only one in which descent of the right of publicity was directly considered. Great-grandchildren of Robert Schumann contended that the defendant's film depicting the life of the composer constituted an appropriation of a descendible property right. The court did not expressly reject the property theory but held for the defendant because it could find no support for a rule of descent when, as in this case, the ancestor had been dead for nearly one hundred years. The plaintiffs, moreover, had not shown that they were Schumann's legal heirs. *Lugosi* is distinguishable in that the appropriation occurred only four years after Lugosi's death and the heirship of the plaintiffs was established. See notes 130-42 & accompanying text *infra*.

74. 70 Cal. App. 3d at 556, 139 Cal. Rptr. at 37-38.

75. *Id.* at 556, 139 Cal. Rptr. at 38.

76. *Id.* See notes 85-86 & accompanying text *infra*.

77. *Id.* at 559, 139 Cal. Rptr. at 40.

78. *Id.* at 559, 139 Cal. Rptr. at 39. See note 90 *infra*.

79. *Id.* at 559, 139 Cal. Rptr. at 40. See notes 129-42 & accompanying text *infra*.

80. *Id.* at 560, 139 Cal. Rptr. at 40.

held to be assignable.[81] The court's response was that "assignment of the right . . . is synonymous with its exercise."[82] As Lugosi had not "exercised" his right, either through assignment or direct exploitation, his name and likeness were held to have passed into the public domain upon his death.[83] "[A]nyone, related or unrelated to Lugosi, with the imagination, the enterprise, the energy and the cash" could exploit the publicity value of the Lugosi name and likeness.[84]

The appellate court opinion left unanswered the question whether an exercised right of publicity is descendible. If the California courts ultimately give this question a positive answer, subsidiary questions will arise, such as whether a given form of exercise creates a descendible right encompassing all other types of exercise and what is meant by the term "exercise."

The paramount question is whether the right of publicity descends when it has been exercised. The court's only positive statement regarding descent was that, if Lugosi had exploited his likeness by establishing a business with great public acceptance or good will, this "property" could have descended to his heirs but that descent "depends entirely on how [the business] was managed before Lugosi died."[85] This statement was actually nothing more than a recognition that an established business may be passed to heirs and may be protected by the law of unfair competition.[86] The court distinguished *Lugosi* from

81. *Id.* at 560, 139 Cal. Rptr. at 40 (citing Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970)).

82. *Id.* at 560, 139 Cal. Rptr. at 40. This point was underscored in a modification of the opinion after the plaintiffs had cited Price v. Hal Roach Studios, Inc. in a petition for rehearing. The court denied the petition and modified its opinion in order to distinguish *Price* as an "exercise through assignment" case. The modification stated that "assignment is in all respects a personal assertion of the right of publicity. This is not the case when an heir is invested by operation of law with the opportunity to exercise a personal right which was never exercised by the person who owned and controlled those rights." 71 Cal. App. 3d at 1027b n.8, 139 Cal. Rptr. at 40.

83. 70 Cal. App. 3d at 560, 139 Cal. Rptr. at 40.

84. *Id.* at 559, 139 Cal. Rptr. at 40. The *Lugosi* appellate court reaffirmed its position on the descendibility of the right of publicity three months later in Guglielmi v. Spelling-Goldberg Prod., 73 Cal. App. 3d 436, 140 Cal. Rptr. 775 (1977), in which the defendants had produced and exhibited a film about the late Rudolph Valentino. The same rationales discussed in *Lugosi* were asserted to support the holding that the right to exploit the name and likeness of a famous person is personal. See notes 119-22 & accompanying text *infra.*

85. 70 Cal. App. 3d at 557, 139 Cal. Rptr. at 38. The court's only example of how "management" might result in descendible property was that Lugosi could have sold such a business for installment payments due after his death. *Id.*

86. See note 31 *supra.*

Price on the basis that Laurel and Hardy had personally asserted their rights through assignment[87] but indicated neither approval nor disapproval of the result reached in that case. Whether the *Lugosi* court would have found that an "exercised" right of publicity is descendible remains unclear.

If California courts recognize descent of an exercised right of publicity, a question would arise as to the scope of the descended right. Would exploitation of a person's name or likeness in one manner result in descent of a right of publicity encompassing all other types of exploitation?[88] The *Lugosi* court's answer, apparently, would be no. Lugosi had "exercised" his right of publicity in 1931, insofar as he had assigned to Universal the right to use his name and likeness for the limited purpose of advertising and exploiting the *Dracula* film.[89] Despite this assignment, the court held that his heirs did not have any vested rights regarding the licenses later granted to toy and novelty companies by Universal. The scope of the descendible right created by Lugosi's exercise was restricted to the type of use for which he had assigned the right to exploit his name and likeness.

A consequence of such a limitation is that a celebrity cannot preserve rights related to types of exploitation that are not feasible during his or her own lifetime. The *Lugosi* appellate court wrongly assumed that nonexercise of the right of publicity is equivalent to a choice never to exercise the right.[90] A celebrity may in fact wish to exploit his or her name or likeness for both personal benefit and the benefit of heirs and yet, as a practical matter, be forced to wait until his or her name and likeness have attained their optimum publicity value. This point may not be reached in the celebrity's lifetime but rather may be brought about by death. The anomalous result is that, although the *Lugosi* court favored allowing persons to choose whether to create descendible property through systematic exercise of the right of publicity,[91] the celebrity might in reality have no choice. If premature exploitation were forced, the full commercial potential of name and likeness might never be realized.

87. 71 Cal. App. 3d at 1027b n.8, 139 Cal. Rptr. at 40. Note, however, that only Laurel had assigned his right of publicity. Hardy was deceased; his widow had joined with Laurel in the assignment. See text accompanying note 60 *supra*.

88. For example, if Lugosi had manufactured or licensed the manufacture of likeness-bearing sweat shirts, would his heirs have acquired rights to produce likeness-bearing beer mugs?

89. 70 Cal. App. 3d at 560, 139 Cal. Rptr. at 40. See note 57 *supra*.

90. The court stated that "[i]t is not at all unlikely that Lugosi and others in his position did not during their respective lifetimes exercise their undoubted right to capitalize upon their personalites . . . for reasons of taste or judgment or because the enterprise to be organized might be too demanding or simply because they did not want to be bothered." *Id.* at 559, 139 Cal. Rptr. at 39.

91. See text accompanying note 78 *supra*.

A final question is what constitutes the exercise that results in a descendible right of publicity. The *Lugosi* court left this question partially unanswered, restricting its discussion to exercise through assignment or creation of a business and to the legal effect of nonuse. No answers were provided as to the possibility of exercise in other ways, for example engaging in or ratifying a minor or token business enterprise.[92] The use of the term "exercise" without accompanying definition or explanation contributes more uncertainty to an area of the law already fraught with confusion.

The *Lugosi* court failed to perceive that the relevance of the law of unfair competition to the right of publicity is limited. Whereas *Price v. Hal Roach Studios, Inc.* noted that the right of publicity is similar to a commercial enterprise's rights in any secondary meaning attached to its name,[93] the *Lugosi* appellate court went much further than analogy. It stressed that Lugosi's name and likeness were protected solely by the personal right of privacy because he had never used them in connection with a business so as to create secondary meaning protectible under the law of unfair competition.[94] Treatment of the plaintiffs' claim in this manner enabled the court to find that Lugosi's right to the pecuniary value of his name and likeness did not descend to his heirs. This application of the law of unfair competition and the right of privacy was inapposite, however, for neither type of legal protection adequately safeguards the right of publicity.[95]

The appellate court's ultimate explanation of its decision was that it is "rather novel to urge that because one's immediate ancestor did not exploit the flood of publicity and/or other evidence of public acceptance he received in his lifetime for commercial purposes, *the opportunity* to have done so is property which descends to his heirs."[96] Descent of an exploitation opportunity is in fact not novel at all. For example, copyright law has long made descendible protection available to unpublished works.[97] Heirs may thus acquire the exclusive

92. For example, if Lugosi had manufactured three hundred likeness-bearing sweat shirts in 1950 and none thereafter, would an exclusive right to this type of exploitation descend to his heirs? If an assignment constitutes an "exercise," would a specific bequest of the right to exploit one's name and likeness similarly constitute a "personal assertion" of the right of publicity? See note 82 *supra.*

93. 400 F. Supp. at 843 n.4. See note 31 *supra.*

94. In other words, he had established no business that would have been interfered with by Universal's licensing. 70 Cal. App. 3d at 555-56, 139 Cal. Rptr. at 37.

95. See notes 22-24, 31 & accompanying text *supra.*

96. 70 Cal. App. 3d at 559, 139 Cal. Rptr. at 40.

97. The Copyright Act of 1976 treats all works the same, whether or not published; the general rule is that a copyright lasts for a term consisting of the life of the author and fifty years after his or her death. 17 U.S.C.A. § 302 (West Supp. Appendix 1977).

opportunity to exploit, through publication, a decedent's previously unpublished work.

The court's policy rationales for termination are similarly without support. The court assumed that an unexercised right of publicity should be considered personal because "neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served" by descent.[98] No explanation was provided to support this assumption or to show how society's interest is different if the celebrity had exercised his publicity rights. The court neither anticipated nor acknowledged the policy arguments in favor of descent.

Policy Bases for a Descendible Right of Publicity

The *Lugosi* trial court[99] and several commentators[100] have argued that the right of publicity should be descendible because it is a property right. Their argument is that, if name and likeness are property, they, like other forms of property, should be capable of succession as well as *inter vivos* transfer. As *Price v. Hal Roach Studios, Inc.* indicated, however, the appropriate function of the property label is to emphasize that the right ought to descend, rather than to rationalize descent.[101] Once the determination is made that the right of publicity should descend,[102] the right may be characterized as proprietary.

The most obvious reason for descent is that famous names and likenesses, because of their potential commercial worth,[103] are clearly "things of value."[104] As a recent New York case declared, the celebrity "must be considered as having invested years of practice and competition in a public personality which eventually may reach marketable status."[105] Licenses to exploit a name or likeness that has

98. 70 Cal. App. 3d at 560, 139 Cal. Rptr. at 40.

99. See text accompanying notes 53-57 *supra.*

100. Gordon, *supra* note 17, at 599; Sobel, *Count Dracula and the Right of Publicity,* 47 L.A.B. BULL. 373, 378, 399-401 (1972); Note, *The Right of Publicity — Protection for Public Figures and Celebrities,* 42 BROOKLYN L. REV. 527, 546 (1976) [hereinafter cited as *Protection for Public Figures*]; Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild,* 22 U.C.L.A. L. REV. 1103, 1117 (1975) [hereinafter cited as *Dracula's Progeny*].

101. See text accompanying notes 67-69 *supra.*

102. The *Price* rationale for descent was simply that there are no reasons for termination. See text accompanying note 68 *supra.*

103. See note 1 & accompanying text *supra.*

104. The *Lugosi* appellate court characterized Lugosi's exclusive right to name and likeness during his lifetime as "'a right of value,' which could have been transmuted into things of value." 70 Cal. App. 3d at 556, 139 Cal. Rptr. at 38. The court did not recognize that, in addition to a right of value to exploit his likeness, Lugosi possessed a marketable thing of value, the likeness itself.

105. Rosemont Enterprises, Inc. v. Urban Sys., Inc., 72 Misc. 2d 788, 790, 340

achieved marketable status are commonly purchased; the business community has recognized the great value of famous names and likenesses.[106]

Descent of the right of publicity would assist in enabling a celebrity to enjoy a fundamental benefit of his labor, the personal satisfaction derived from creating an estate for his family. A rule of descent would therefore serve "the artist's rights to the fruits of his own labor," notwithstanding the *Lugosi* appellate court's assumption to the contrary.[107]

An important policy consideration may be advanced in favor of descent of the right of publicity by analogy with the purpose of patent and copyright laws. Intellectual property is protected under patent and copyright laws pursuant to "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "[108] In *Zacchini v. Scripps-Howard Broadcasting Co.*,[109] the United States Supreme Court declared that the right of publicity has the same purpose. The Court stated that the decision to protect a performer's right of publicity "rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public."[110] Descent of the right of publicity would contribute to that incentive. Assurance that the exclusive right to exploit name and likeness will inure to the benefit of heirs will provide the celebrity with further impetus to contribute to his or her profession. The incentive will be even greater when the celebrity is advanced in years or when name and likeness do not reach their optimum publicity value during his or her lifetime.[111]

These reasons for descent of the right of publicity support the bestowing of the "property" label, which courts often find expedient to an understanding and explanation of the nature of the right of publicity.

N.Y.S.2d 144, 146 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973). *See also* Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 79, 232 A.2d 458, 462 (1967).

106. See note 1 & accompanying text *supra*.

107. See note 80 & accompanying text *supra*.

108. Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849, 2858 (1977) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

109. 97 S. Ct. 2849 (1977).

110. *Id.* at 2857.

111. See text accompanying notes 90-91 *supra*.

The Right of Publicity and the Dissemination of Information

Courts generally have agreed that the right of publicity cannot restrict the use of names and likenesses with respect to dissemination of information and ideas, which is protected by the first amendment.[112] For example, the publication of a person's name or likeness in a news report is not actionable as an invasion of the right of publicity. This protection "arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them."[113] It encompasses not only news regarding current events but also the dissemination of information, entertainment, and discussion of "interesting phases of human activity in general" in books, articles, pictures, films, and radio and television broadcasts.[114] The nonconsensual use of a famous person's name and likeness in such vehicles of information as biographies and motion picture documentaries is thus permissible. That the impetus for such use may be the potential for profit rather than a philanthropic desire to contribute to the public enlightenment is of slight significance, because the profit motive is the driving force behind much dissemination of information.[115]

The *Lugosi* appellate court alluded to the possibility of a conflict between a descendible right of publicity and society's interest in the free dissemination of ideas.[116] The court did not explain, however, why a descendible right of publicity would differ from a personal right of publicity in regard to interplay with the first amendment. Universal Pictures' use of Lugosi's likeness, moreover, cannot be considered speech or expression. The use of a famous name or likeness to embellish consumer products conveys neither information nor ideas and contributes virtually nothing to the public enlightenment.[117] Such

112. "Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 6, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969). *See, e.g.*, Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 447-48, 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968) (dissemination of information does not constitute use "for purposes of trade" within meaning of New York privacy statute).

113. Prosser, *supra* note 6, at 412.

114. *Id.* at 413. *See* Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 448, 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968).

115. W. Prosser, Law of Torts 806-07 (4th ed. 1971). *See* Gordon, *supra* note 17, at 574.

116. See note 80 & accompanying text *supra*.

117. By contrast, one court has found that the publication of a poster bearing the likeness of a comedian engaged in a satirical presidential campaign is constitutionally protected. The court explained that the use of likeness was related to a matter of

use, furthermore, is distinguishable from commercial expression, such as pharmaceutical advertising, which proposes a transaction rather than decorating a product.[118] The relevance of society's interest in the free dissemination of information, contrary to the *Lugosi* appellate court's assumption, is at best nominal when name or likeness is used to embellish consumer products, regardless of whether the right of publicity is deemed to be personal or descendible.

Cases such as *Lugosi,* involving consumer products, must be distinguished from those right of publicity cases that involve use of a name or likeness in motion picture and television biographies. A recent example of the latter is *Guglielmi v. Spelling-Goldberg Productions,*[119] decided three months after *Lugosi* by the same court. In *Guglielmi* the nephew of Rudolph Valentino sued the defendants for their production and exhibition of a film about the life of the late silent film star. The trial court sustained a demurrer. On appeal the plaintiff asserted that he had inherited an exclusive right to exploit the commercial value of Valentino's identity and that the defendants had invaded this right by exhibiting a fictionalized film biography of Valentino. The appellate court indicated, however, that the film constituted protected first amendment expression,[120] and reiterated its *Lugosi* holding, declaring that society's interest in the free dissemination of information and ideas would be frustrated by the recognition of a descendible right of publicity.[121] The allegation that the film was fictional was not discussed in the opinion.

The *Guglielmi* case, unlike *Lugosi,* involves the use of name and likeness in the dissemination of biographical information, so that the first amendment limitation on the right of publicity must be considered. The thrust of the plaintiff's argument in *Guglielmi* was that the film biography of Valentino did not merit first amendment protection because it was fictionalized. An analogous theory appeared in a fictional biography case adjudicated under the New York law of privacy, in which the court declared, "The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not."[122] This argument, that first amendment pro-

public interest rather than the mere sale of a commodity. Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 450-51, 299 N.Y.S.2d 501, 508-09 (Sup. Ct. 1968).

118. Pharmaceutical advertising as a form of commercial expression was recently afforded first amendment protection in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *see* Note, *The Constitutional Status of Commercial Expression,* 3 HAST. CONST. L.Q. 761 (1976).

119. 73 Cal. App. 3d 436, 140 Cal. Rptr. 775 (1977), *petition for hearing granted,* Civil No. L.A. 30872 (Cal. Sup. Ct., Nov. 14, 1977).

120. *Id.* at 442, 140 Cal. Rptr. at 778.

121. *Id.* at 442-43, 140 Cal. Rptr. at 778-79.

122. Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 274

tection is lost when the biography of a deceased person is fictionalized for commercial purposes, is tenuous at best. Serious difficulties may arise in determining at what point dramatization, speculation, or deviation from the truth renders a biography fictional.[123]

The most recent judicial comment on the role of the first amendment in right of publicity cases appears in *Zacchini v. Scripps-Howard Broadcasting Co.*,[124] involving the television broadcast of the plaintiff's "entire act," a fifteen-second human cannonball performance. The United States Supreme Court held in *Zacchini* that the first amendment does not prevent a state from finding the broadcast of an entire act to be an invasion of the performer's right of publicity,[125] notwithstanding the conveyance of information of public interest. The Court indicated that its holding did not restrict the free dissemination of information, implying that the defendant could have conveyed the same information

N.Y.S.2d 877, 879, *vacated per curiam*, 387 U.S. 239, *aff'd on rehearing*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969). Justice Powell, dissenting in Zacchini v. Scripps-Howard Broadcasting Co. suggests that use of name or likeness that is a "subterfuge or cover for private or commercial exploitation" should be held an invasion of the right of publicity. 97 S. Ct. 2849, 2860 (1977); *see* Rosemont Enterprises, Inc. v. Urban Systems, Inc., 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (App. Div. 1973) (game exploiting the personality of Howard Hughes an invasion of privacy despite the conveyance of biographical information); Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (1967) (use of biographies of professional golfers in board game an invasion of privacy).

123. Two New York privacy cases have stated that, regarding motion pictures, the mere dramatization of actual events is not in itself actionable; there must be some element of fiction. Molony v. Boy Comics Publishers, 277 App. Div. 166, 171, 98 N.Y.S.2d 119, 123 (App. Div. 1950); Youssoupoff v. Columbia Broadcasting Sys., Inc., 41 Misc. 2d 42, 44-47, 244 N.Y.S.2d 701, 704-06, *aff'd mem.*, 19 App. Div. 2d 865, 244 N.Y.S.2d 1 (App. Div. 1963), *motion for dismissal & directed verdict denied*, 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965). *But see* Gordon, *supra* note 17, at 584-85 (equating dramatization with fictionalization). Several privacy cases have indicated that a minor deviation from the truth may not be sufficient to transform a publication into fiction. *See* Youssoupoff v. Columbia Broadcasting Sys., Inc., 41 Misc. 2d 42, 244 N.Y.S.2d 701, *aff'd mem.*, 19 App. Div. 2d 865, 244 N.Y.S.2d 1 (App. Div. 1963), *motion for dismissal & directed verdict denied*, 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965) (films); Koussevitzky v. Allen, Towne, & Heath, Inc., 188 Misc. 470, 68 N.Y.S.2d 770 (Sup. Ct.), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 433 (App. Div. 1947) (books).

One commentator has noted that liability for appropriation of name or likeness through the publication of a false biography of a public figure would require, in accordance with constitutional demands, that the defendant knew of the falsity or recklessly disregarded it. *Protection for Public Figures*, *supra* note 100, at 553-54. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967) (requiring "actual malice" for liability in "false light" privacy cases); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 280 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

124. 97 S. Ct. 2849 (1977).

125. *Id.*

by staging its own human cannonball act.[126] An "entire act"[127] appropriation may thus be within the scope of a state's law of publicity if the concept or idea behind the act can be conveyed in another way.[128] *Zacchini* may have implications that go beyond its holding. The case suggests a requirement that any appropriation must be avoided if the underlying idea can be effectively conveyed in some alternative manner without diminishing the pecuniary value of name and likeness.

The Duration of Descent

Judicial recognition of a descendible right of publicity will raise serious questions concerning the duration of its protection. In this respect the apprehension of the *Lugosi* appellate court[129] was justifiable because unlimited descent would be impractical, unnecessary, and in some cases absurd.

A plethora of suits by distant descendants of historical figures could result from a rule of unlimited descent. In an illustrative case, *Schumann v. Loew's Inc.*,[130] great-grandchildren of Robert Schumann unsuccessfully contended that a film dramatization of the composer's life violated a property right that had descended to them. The court did not take issue with the property cases cited by the plaintiffs but emphasized the great length of time, nearly one hundred years, between Schumann's death and the lawsuit.[131] A related opinion, dismissing an amended complaint in the same suit, noted the absurd possibility of suits by the descendants of Shakespeare, Jefferson, and Voltaire, if the Schumann descendants were to prevail.[132]

The *Schumann* court rested its decision on the basis that the plaintiffs had shown only that they were descendants and not that they were legal heirs.[133] This point has led several commentators to suggest, in advocating a rule of unlimited descent, that the difficulties in proving legal heirship would reduce the threat of frivolous suits

126. *Id.* at 2858 n.13.

127. Justice Powell dissenting in *Zacchini*, states that in future cases involving different performances it may be difficult to determine just what constitutes an "entire act." *Id.* at 2859 n.1.

128. *Id.* at 2858 n.13. This concept is based upon Professor Nimmer's explanation as to why copyright law does not abridge the first amendment: copyright law allows others to restate an author's ideas, protecting only the author's own expression of those ideas. 1 M. NIMMER, NIMMER ON COPYRIGHT 28.11-.16 (1976).

129. See text accompanying note 79 *supra.*

130. 135 N.Y.S.2d 361 (Sup. Ct. 1954), *final amended complaint dismissed,* 144 N.Y.S.2d 27 (Sup. Ct. 1955). See note 73 *supra.*

131. 135 N.Y.S.2d at 368-69.

132. 144 N.Y.S.2d at 30.

133. 135 N.Y.S.2d at 368-69.

by distant descendants.[134] Even if proof of heirship is perceived as an obstacle, however, the deterrent contributes nothing toward alleviating the uncertainty and confusion that a rule of unlimited descent would generate. Difficulties in proving heirship might hopelessly complicate litigation rather than prevent it. Those persons who wished to exploit the name or likeness of an historical figure would be faced with the dubious task of determining whether there were any heirs with whom negotiations would be necessary.

There is no compelling reason for unlimited descent because the strength of the rationale supporting a descendible right of publicity diminishes with the passage of years. Estates are generally intended for those persons who were alive during the decedent's lifetime and would be expected to survive his or her death. Descent of the right of publicity to persons born decades or centuries later would not serve as additional incentive for the celebrity to contribute to his or her profession.[135]

A reasonable durational limit on descent of the right of publicity can be drawn from an analogy to copyright law. Under the Copyright Act of 1976, the general duration of copyright protection has been extended to a term consisting of the author's lifetime plus fifty years after his or her death.[136] The House Committee on the Judiciary explained that one reason for the change was a substantial increase in life expectancy, rendering the extension necessary in order to provide adequate protection for the author and his or her dependents.[137] The ultimate purpose of such protection is to encourage literary efforts and thereby "advance public welfare through the talents of authors."[138] Descent of the right of publicity has a similar rationale.[139] A right of publicity which lasts for a period of life plus fifty years will generally parallel the life spans of close heirs, so that the interest in encouraging a celebrity to contribute to his or her profession will be adequately served.[140] A longer term of protection would be cumbersome and is unnecessary.[141]

134. *See* Gordon, *supra* note 17, at 601; Sobel, *Count Dracula and the Right of Publicity*, 47 L.A.B. BULL. 373, 403-04 (1972); *Protection for Public Figures*, *supra* note 100, at 547-48.

135. See text accompanying notes 108-11 *supra*.

136. 17 U.S.C.A. § 302 (West Supp. Appendix 1977). The previous duration of a copyright was 28 years, renewable for a second 28 years. 17 U.S.C. § 24 (1952) (amended 1976).

137. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 134 (1976).

138. Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849, 2858 (1977) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

139. See text accompanying notes 108-11 *supra*.

140. See text accompanying notes 108-11 *supra*.

141. A "life plus fifty years" limit on descent of the right of publicity was suggested in *Dracula's Progeny*, *supra* note 100, at 1124-28. The author believed that a

The adoption of a specific durational limit is, of course, beyond the scope of judicial authority. If the California Supreme Court reverses the *Lugosi* appellate court decision and recognizes a descendible right of publicity, subsequent legislative action will be required to establish reasonable limits on the duration of the descent.[142] Consequently, a reversal of the *Lugosi* holding should be expressly limited to the facts of that case, reserving the issue of descent beyond one generation for future legislative or judicial action.

Conclusion

Lugosi v. Universal Pictures presents the California Supreme Court with the opportunity to remove past confusions and to provide a coherent rationale for descent of the right of publicity. The Supreme Court should reverse the holding of the court of appeal and uphold the trial court's award of damages and injunctive relief. Subsequent legislation imposing a life plus fifty years limit on descent of the right of publicity would appropriately complement the *Lugosi* adjudication and establish a descendible right with sensible durational limits.

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durational limit is necessitated by a countervailing free speech interest, comparable to the free speech interest requiring limits on the duration of copyright protection, which eventually becomes controlling. *Id.* at 1124-28. The right of publicity in *Lugosi*, however, does not in fact conflict with the free dissemination of news or information. See notes 112-28 & accompanying text *supra*. The free speech approach is not a sufficient basis for establishing durational limits in cases involving consumer products.

Another commentator has suggested that if durational limits are desired, the limiting of descent to heirs with a specified degree of kinship, such as those no more than two generations removed, may be adequate to prevent frivolous suits. *Protection for Public Figures, supra* note 100, at 549. A durational limit based upon individual life spans, however, is too variable. Furthermore, uncertainty as to the existence of living heirs would not be diminished by such a limitation. See text accompanying note 134 *supra*.

142. A legislative enactment separate from California Civil Code § 3344, see note 13 *supra*, would help alleviate the present privacy-publicity confusion.

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