



Right of Publicity and its Descendibility.

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The right of publicity is defined as the right of each individual to control and profit from the commercial value of his or her own identity. The right as recognizes and protects the unauthorized commercial exploitation of a celebrity’s name (actual or legal), likeness, as well as other aspects of identity such as photograph, portrait, caricature, and biographical facts and records of performance.¹ Originally, the Right of Publicity was thought to protect only the unauthorized use of a person’s name, likeness and image.² Now, it encompasses any personal attribute that identifies a particular person.

The History of the Right of Publicity

The right of publicity was first recognized in 1953 in a landmark decision of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*³ It involved a contractual dispute concerning a number of baseball players who had sold the “exclusive” rights to their names and likenesses to more than one baseball card company.⁴ The court recognized that a person has a right in the publicity value of his photograph and that this right might be called a right to publicity.⁵

Origin of Right of Publicity

The origin of right of publicity lies in the right of privacy, which in turn is based in liberty.

Any discussion of the right of publicity must begin with the “right to privacy” from which publicity later springs.⁶ The rationale for protecting the right of publicity is the straight forward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.⁷

Right of Publicity v. The First Amendment

Balanced against the economic interest of celebrities and the many companies which license their persona rights is the right of a free people to know about, comment on and criticize these same cultural icons.⁸ Under the First Amendment of the United States Constitution,⁹ the government (*inter alia*, through statutes or court proceedings enforcing private rights) cannot limit the exercise of free speech or the freedom of the press. Celebrities, even those who are in limelight just for few moments, are news worthy or subjects of public interest. Because of this essential need of a free society, there must be limitations on the right of a person to control the use by others of his or her persona.

As the Right of Publicity has become a more familiar cause of action, pleading of First Amendment defenses has increased and led to an unfortunate friction between these rights. Property ownership and property rights are highly valued in a capitalistic society, and a considerable number of laws are devoted to the protection of property. However, high value is placed on freedoms, particularly the freedom of speech and freedom of the press, both of which are fundamental to a democratic society.

Thus, there has been a continual issue in the development of the Right of Publicity law relative to the extent to which the First Amendment constrains the exercise of the Right of Publicity. Courts continue to differ in the scope of protection they afford each right. The decisions may reflect a social bias of the particular court either for property rights and recognition of limits to the First Amendment, or for limited property rights and an unfettered First Amendment right. It is evident that the unfettered First Amendment right advocates are more focused, more vocal and more zealously organized than the publicity rights advocates. Sometimes the most offensive acts are deemed protected under the First Amendment, as *Hustler Magazine v. Falwell* reveals.¹⁰ *Hustler*, depicted Jerry Falwell, the leader of a religious organization, in a sexually explicit act with his mother.¹¹ Falwell sought damages based on the claims of defamation and intentional infliction of emotional distress.¹² The Supreme Court held that a public figure is unable to recover damages for infliction of emotional distress.¹³ In other cases, the Supreme Court has protected the freedom of expression over personal rights by encompassing newsworthy purposes¹⁴ and certain art forms, such as plays¹⁵ and film.¹⁶ There remains the question of when the use of the publicity right is a protected expression and when is it merely an unauthorized commercial use for the sole purpose of profit. It appears that, if a claim of parody can be established, almost anything can be said regardless of the insult that it might cause.¹⁷ But determining when the unauthorized use of a persona is protected speech and when it is infringement of the right of publicity, remains a moot issue.¹⁸

Two types of unauthorized use of publicity rights have been defended by asserting a First Amendment privilege. These areas are (1) the use of a persona in consumer art, and (2) the

unauthorized use of a persona by news papers and magazines to sell their newspapers and magazines.

Descendibility of Publicity Rights:

Most courts and many state legislatures recognize the right of publicity.¹⁹ However, the trend toward recognizing its descendibility is not unanimously accepted²⁰. Even those accepting its descendibility disagree over the theoretical basis supporting the doctrine of descendibility. And some jurisdictions require that for a right of publicity to be descendible the celebrity must have exploited the rights during his or her life time, although most jurisdictions have no such prerequisites. Jurisdictions approach the right of publicity in a multitude of ways.

As previously stated, the term “right of publicity” was introduced in *Haelan laboratories, inc. v. Topps Chewing Gum, Inc...* It emerged from the right of privacy,²¹ that is, the appropriation of one’s name or likeness for another’s advantage.²² The right of privacy was historically viewed as a personal right terminating at death. By analogy, the right of publicity should also terminate at death.²³ However, the Haelan court rejected this analogy explaining that prominent persons have an economic interest in the publicity value of their images that is separate and independent of the right of privacy.²⁴ The court did not address the issue of descendability, as it was not faced with that question.²⁵

Philosopher John Locke suggested that an analogy to property rights would be more appropriate.²⁶ Under Locke’s theory, property rights existed before the state, which later developed to protect individuals’ rights “to the fruits of their labor.”²⁷ Accordingly, as property

rights were inheritable, the right of publicity can also be descendible.²⁸ The debate is one of personal right versus property right. Is the right of publicity a personal right that is not devisable upon death? Or is the right of publicity a property right that is devisable? Neither is a perfect classification. Publicity rights are susceptible of pecuniary value which is unique to a property right.²⁹ Yet, falling within the property classification does not automatically lead to descendibility.³⁰ A common thread in the search for a theoretical basis for the publicity right is the idea that individuals have the right to control the fruits of their efforts and enterprise. Third parties should not be allowed to appropriate the work of another for his or her own profit and advantage.³¹

Case Law.

The theoretical debate regarding the descendibility of the right of publicity has produced a body of case law. In *Lugosi v. Universal Pictures Co.*,³² the California Superior Court held that Bela Lugosi's identity as Dracula was a property right and, as such, descends to his heirs.³³ In *Price v. Hall Roach Studios, Inc.*,³⁴ the New York district court faced the issue of infringement of the publicity rights of Stan Laurel and Oliver Hardy.³⁵ The court explored the differences between a personal right and a property right,³⁶ and concluded that the widows of the comedy team had a cause of action because the right of publicity descended to them.³⁷

Three years later, in *Hicks v. Casablanca Records*,³⁸ the same district court defined what is known as the lifetime exploitation requirement. The court held that a party claiming the right of publicity must establish that the decedent acted in such a way as to evidence his or her own recognition of the extrinsic commercial value of his or her name or likeness, and manifested that

recognition in some overt manner, e.g. making an inter vivos transfer of the rights in the name[], or posing for bubble gum cards..³⁹ In *Hicks*, which involved the publicity rights of Agatha Christie, the court concluded that the author had exploited her right of publicity during her lifetime, and because of this, the right was descendible.⁴⁰

The lifetime exploitation requirement is viewed as a limiting principle meant to “physicalize” the intangible right of publicity,⁴¹ as an interest manifested in a discernible form is more easily legitimized as a survivable property right.⁴² While the *Hicks* court acknowledged the lifetime exploitation requirement, it rejected the defendant’s argument for an extension of the theory. The defendants had maintained that the exploitation must involve conduct or property not associated with the primary profession of the decedent.⁴³ The court concluded all that was necessary was some recognition of the publicity right by the author during her lifetime.⁴⁴

In 1979, the Supreme Court of California reversed the 1972 *Lugosi* decision.⁴⁵ The court explained: “It seems to us rather novel to urge that because one’s immediate ancestor did not exploit the flood of publicity and or the 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.”⁴⁶ This decision has been criticized as “opaque” and “thoroughly confusing the rights of publicity, privacy, and the law of trademarks, mixing them up into an unpalatable soufflé of confusion.”⁴⁷

Thus, the lifetime exploitation doctrine provides the link between the right of publicity and the notion of unlawful appropriation of a property right. However, the application varies from court to court, and is made even more confusing by choice of law principles.

There is no uniform law dealing with the descendibility of property rights. As more states have become concerned with the lack of legislative protection for a descendible right of publicity, ten states have adopted statutes which specifically protect these rights. They are California, Florida, Kentucky, Nebraska, Oklahoma, Tennessee, Virginia, Illinois, Texas and the state of Indiana.

California: Descendibility of Right California Civil Code §990-998 provides that the right of publicity passes to the heirs. California Right of Publicity Civil Code §3344 provides for a right to publicity and use of one's own likeness.

New York Right of Privacy Law Civil Rights Law §50. Allows for damages for the misappropriation or misuse of the likeness or image of a living person.

Florida Right to Publicity §540.08. Law against unauthorized use of name or likeness.

Kentucky Right of Descent Kentucky Revised Statutes 391.170. Part of probate code providing that the right of publicity passes to the heirs or beneficiaries.

Tennessee Right of Publicity Tennessee code §47-25-1101 et seq. "Personal Rights Protection Act of 1984".

Virginia Right of Publicity Virginia Code §8.01-40 prevents unauthorized use of name or picture of any person without prior consent.

Oklahoma Criminal Law Title 21 Chapter 30, §839.1-839.3 makes it a misdemeanor to use a person's image without their consent. This is part of the right to privacy.

Texas Publicity Rights Property Code §26.001 et seq. provides that there is a property right in one's image and that right passes to the heirs. Use of an individual's likeness requires permission from the property rights holder.

Illinois Right of Publicity Act, P.A. § 90- 747 recognizes Right of Publicity and it descendibility.

Twenty-five states now have some form of statutory protection or common law right of publicity protection, although some still refer to the right as a “privacy” right. Fifteen of those states have some statutory protection.⁴⁸ Seventeen of the states have common law rights.⁴⁹ Of these seventeen states, seven also have statutes.⁵⁰ Eight of these states only recognize statutory protection.⁵¹ The remaining twenty-five states have not yet recognized a right of publicity protecting the commercial value of misappropriated aspects of persona, but most recognize the right of privacy interests protecting a person from public embarrassment.

The right may not be inheritable under those statutes which are based on privacy, such as New York. Ten of the state statutes provide for the persona rights to be transferable and descendible.⁵² The duration of these post mortem rights vary, ranging from 10 to 100 years. Under Tennessee law, protection of publicity rights could extend indefinitely, so long as commercial use continues to be made of the persona. Indiana and Oklahoma provide for a 100-year term, which in Indiana also appears to apply retroactively to

persons who died at the beginning of this century. Florida provides forty years of protection. Virginia provides twenty years of protection.

Conclusion

The right of publicity is a valuable property right. This form of intellectual property should be afforded protection from being misused by the media for commercial purposes. Right to Publicity, very much like other property rights carries pecuniary value which is created by individuals in their personality by their best efforts. News papers and Magazines should not be permitted to capitalize on the Publicity rights of the Celebrities. Unjust enrichment under the garb of First Amendment defense must be curtailed. Courts should make an effort to strike a fair balance between Protection of Publicity rights and upholding of First amendment.

Right of publicity too, like any other property right should be made descendible. There is lack of uniformity in the legislation dealing with the issue of Publicity rights. Some states recognize right of publicity as a descendible right and some do not. This inconsistency in law creates uncertainty in the law. Congress should seriously consider enacting a law which uniformly applies to all States. Enactment of a Uniform legislation would infuse certainty and uniformity in the enforcement of Publicity rights. Thus publicity rights too, should be granted protection on par with other property rights. "A national rule on the right of publicity would serve a useful function in resolving the first

amendment and practical economic problems raised by the conflict between publicity rights and free speech.⁵³

End Notes

1. Donald E. Biederman ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 213 (Praeger 4d 2001).
2. W. Mack Webner & Leigh Ann Lindquist, *Transformation: The bright line between Commercial Publicity Rights and the First Amendment*.
3. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).
4. Id. at 867.
5. Id. at 868.
6. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
7. 17 Pepp. L. Rev. 933.

8. Baila H. Celedonia, *Recent Development in the Right of Publicity in the United States*.
9. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”
10. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).
11. *Id.* at 48.
12. *Id.* at 47-48.
13. *Id.* at 57.
14. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
15. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).
16. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
17. See *Hustler*, 485 U.S. at 46.
18. W. Mack Webner & Leigh Ann Lindquist, *Transformation: The bright line between Commercial Publicity Rights and the First Amendment*.
19. Dewey, *The Evolving Doctrine of Right of Publicity: Judicial Protection of Celebrity’s Pecuniary Interest from Commercial Exploitation of His or Her Identity and Theatrical Style*, 22 CREIGHTON L. REV. 39, 46, 62 (1988).
20. Terrell & Smith, *Publicity, Liberty, and Intellectual Property: A conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985).

21. Felcher & Rubin, *supra* note 3, at 1127. See *Groucho Marx Productions, Inc. v. Day & Night co.*, 523 F. Supp. 485, 487 (S.D.N.Y. 1981); *Estate of Elvis Presley v. Russen*, 513 F.Supp.1339, 1353 (D.N.J.1981). See also R.F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 134 (1987).
22. Terrell & Smith, *supra* note 5, at 11. The right of privacy comprises four distinct causes of action: (1) “the appropriation , for the defendant’s benefit or advantages, of the plaintiff’s name or likeness;” (2) “intrusion upon the plaintiff’s physical solitude or seclusion;” (3) disclosing “private information about the plaintiff, even though it is true and no action would lie for defamation;” and (4) casting “the plaintiff in a false light in the public eye.” W.L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 804 (4th ed. 1971). See also W.L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 635 (2d ed.1955).
23. Felcher & Rubin, *supra* note 3, at 1127.
24. Haelan, 202 F.2d at 868. See also Note, *An Assessment of the Commercial Exploitation requirement a limit on the Right of Publicity*, 96 *HARV. L. REV.* 1703, 1705 (1983).
25. Vicky Gerl Neumeyer, *The Right of Publicity And Its Descendibility*, 7 *U. Miami Ent. & Sports L. Rev.* 287.
26. See Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954) (cited in Note, *supra* note 14, at 1705).
27. Note, *supra* note 14, at 1706 n. 20.
28. Felcher & Rubin, *supra* note 3, at 1127.

29. Terrell & Smith, *supra* note 5, at 11.
30. J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 9:7 (1988).
31. See, e.g., *Edison v. Edison Polyform Mfg. co.*, 73 N.J. Esq. 136, 67 A. 392, 395 (N.J. Ch. 1907) (extending the term “property rights” to include the use of one’s name and pictorial representation); Hart, *the 100: A Ranking of the most Influence persons in History*, in 48 *JOHN LOCKE* 262 (1978) (discussing a 1689 writing by Locke which set forth Locke’s belief in a natural right to private property). See generally *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (discussing the natural rights of the individual).
32. 172 U. S. P.Q. 541 (Cal. Super. Ct. 1972), *rev’d*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr.323 (Ca. 1979).
33. *Lugosi*, 172 U.S.P.Q. at 551.
34. 400 F.Supp.836 (S.D.N.Y. 1975)
35. *Id.* at 838.
36. The Price court commented:
- Since the theoretical basis for the classic right of privacy ... is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy if not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right. Courts and Commentators have done just that in recognizing the right of publicity as assignable. There appears to be no logical reason to terminate this

right upon death of the person protected. It is for this, presumably, that this publicity right has been deemed a 'property right'.

37. Id. at 846.

38. 464 F. Supp.426 (S.D.N.Y. 1978).

39. Id. at 429.

40. Id. at 429-30.

41. Note, supra note 14, at 1707-14.

42. Id. at 1712. See also Felcher & Rubin, supra note3, at 1131.

43. Hicks, 464 F. Supp. at 429 n.6.

44. Id at 429. One commentator criticized this decision , claiming that the court misinterpreted a footnote in an earlier decision rendered by the Second Circuit in *Factors etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d cir. 1978). MCCARTHY<supra note 19, at §9. In *Factors*, which involved Elvis Presley's estate, the court stated that it did not have to decide if the descendibility of publicity rights was contingent on lifetime exploitation, because Presley had exploited his right of publicity. *Factors*, 579 F.2d at 222 n.11. The Hicks court followed the Second Circuit's reasoning, explaining that the court had held that the rights of publicity "survive[d] only if it [was] found that the owner 'exploited' the right during his or her lifetime." Hicks, 464 F. supp. at 429. See infra notes 68-94 and accompanying text for a discussion of the factors case.

45. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr.323 (1979).

46. Id. at 822, 603 P. 2d at 430, 160 Cal R p t r. at 328.

47. MCCARTHY, *supra* note 19, at §9.
48. Ten state statutes explicitly cover the property and commercial value concepts of the “right of publicity.” California, Indiana, Illinois Comp. Stat. Ann. 1075/1et Seq, Kentucky, Nevada, Oklahoma, Ohio, Tennessee, Texas and Washington. Eight states protect the right of publicity under their “privacy” statutes. Florida, Massachusetts, Nebraska, New York, Rhode island, Utah, Virginia and Wisconsin.
49. California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Tennessee, Texas, Utah and Wisconsin.
50. California, Florida, Kentucky, Tennessee, Texas, Utah and Wisconsin.
51. Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island and Virginia.
52. California, Florida, Indiana, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas and Virginia.
53. J. Steven Bingman, *A Descendible Right of Publicity: Has The Time Finally Come For A National Standard?*
