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Inheritability of the Right of Publicity Upon the Death of the Famous

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RECENT DEVELOPMENT

INHERITABILITY OF THE RIGHT OF PUBLICITY UPON THE DEATH OF THE FAMOUS

I. INTRODUCTION

The exploitation of famous names and likenesses in the marketing of consumer products involves huge sums of money.[1] Courts have recognized, albeit haphazardly, the tremendous pecuniary value of celebrity endorsements and have afforded individuals the right to exclusive control over their names and likenesses.[2] Although courts have applied various labels to this guarantee,[3] the term most commonly used is "right of publicity."[4] Given the large amount of money at stake, clear delineation of the scope of this right is imperative. Recently, however, state and federal courts[5] have reached divergent results concerning the inheritability of the right of publicity upon the death of the famous. More specifically, the Second and Sixth circuits reached opposite conclusions[6] on this

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1. Licensing—the business of using famous names, titles, slogans, and so forth to sell consumer products—has emerged as a full-blown industry that has estimated annual royalties of twenty to thirty million dollars and that is responsible for the sale of hundreds of millions of dollars of consumer products each year. 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.

2. *See* notes 7-32 *infra* and accompanying text.

3. *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205, 1206 (8th Cir. 1969) ("property right"); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979) ("right of value").

4. This label was coined by Judge Jerome Frank in Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). *See* notes 15-18 *infra* and accompanying text.

5. The inheritability of the right of publicity is clearly a question of state law. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977). Federal courts, however, have recently confronted this issue without any state precedents to guide them. Thus, federal courts have been forced to define the parameters of a state common-law issue without any judicial input from the states.

6. Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (holding that Presley's right of publicity is not inheritable despite previous exploitation during

question under virtually identical factual circumstances. After tracing the evolution of the right of publicity, this Recent Development focuses on these recent decisions confronting the issue of descendibility. This Recent Development then concludes that the right of publicity should be inheritable for a designated period of time and that inheritability should not depend upon previous exploitation of the right.

II. LEGAL BACKGROUND

Though the phrase "right of publicity" is of recent origin,[7] the law protecting a person from the appropriation of his name and likeness evolved under the rubric of the right of privacy. Dean Prosser maintained that the right of privacy embraces "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common *except that each represents an interference with the right of the plaintiff 'to be let alone.'* "[8] One type of invasion is the appropriation of the plaintiff's name or likeness for the defendant's benefit.[9] Thus, because the gist of any invasion of privacy claim is interference with the plaintiff's right to be left alone, a privacy invasion of the appropriation type involves *mental injury*[10] such as damage to reputation or hurt feelings.

The right of publicity, however, protects a totally different interest. Here, the focus is on *economic injury* to the plaintiff. The celebrity is not concerned with freedom from emotional harm, but rather is upset about the exploitation of his name without his consent or financial remuneration.[11] Despite these differences in the interests protected, for many years courts applied right of privacy principles to cases of economic injury.[12] Consequently, damages were not allowed absent proof of mental injury,[13] and the right

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his life); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 (2d Cir. 1978) (holding that the right of publicity, because exercised during Presley's life, survives his death and may be validly transferred).

7. *See* note 4 *supra*.

8. W. PROSSER, LAW OF TORTS 804 (4th ed. 1971) (emphasis added).

9. *Id.*

10. *See, e.g.*, Burns v. Stevens, 236 Mich. 443, 210 N.W. 482 (1926) (posing as plaintiff's wife); Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 A. 97 (1907) (providing father for child on birth certificate).

11. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977).

12. For a thorough discussion of this problem, see Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U.L. REV. 553 (1960); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

13. *See, e.g.*, O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1942).

protected was deemed personal[14] and hence neither assignable nor inheritable.

Since the landmark case of *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[15] however, many courts have distinguished the economic interest from the personal. In *Haelen* plaintiff manufacturer held a baseball player's exclusive product endorsement contract and sued a rival manufacturer for infringement thereof. In finding an infringement of the contract, the court stated that, in addition to, but independent of, the right of privacy, an individual has a right to the "publicity value of his photograph"[16] and the power to transfer the "exclusive privilege of publishing his picture"[17] without having to transfer anything else. The court found it unnecessary to label this interest a property right, reasoning that such a label merely reflects the fact that courts enforce claims that have pecuniary worth. Instead, the *Haelen* court suggested that this right be called a "right of publicity."[18]

Since Judge Frank's coining of the phrase in the *Haelen* opinion, courts have increasingly recognized, by enforcing this right of publicity, the economic interest of celebrities in controlling the use of their names and likenesses.[19] For example, in *Uhlaender v. Hendricksen*,[20] an action by numerous professional baseball players and their players' association to enjoin defendant manufacturer from using players' names in a baseball table game without entering into a royalty or license agreement, the district court held that the players and association had a proprietary or property interest in their names, sporting activities, and accomplishments sufficient to enable them to enjoin commercial use thereof.[21] Similarly, in *Cepeda v. Swift & Co.*[22] the Eighth Circuit also recognized a celebrity's economic interest in his name and likeness. Although deny-

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14. *See, e.g.*, Maritote v. Desilu Prods., Inc., 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965).

15. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

16. *Id.* at 868.

17. *Id.*

18. *Id.*

19. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-78 (1977); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974); Grant v. Esquire, Inc., 367 F. Supp. 876, 880 (S.D.N.Y. 1973); Uhlaender v. Hendricksen, 316 F. Supp. 1277, 1280-83 (D. Minn. 1970); Cepeda v. Swift & Co., 415 F.2d 1205, 1206 (8th Cir. 1969); Canessa v. J.I. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62, 75-76 (1967); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661, 664 (1977).

20. 316 F. Supp. 1277 (D. Minn. 1970).

21. *Id.* at 1283.

22. 415 F.2d 1205 (8th Cir. 1969).

ing recovery on the facts,[23] the court found that the plaintiff, a professional baseball player, had a valuable and marketable property right in his name, photograph, and image.

The notion that a right of publicity exists independently of any right of privacy became firmly entrenched by the Supreme Court's recognition of this right in *Zacchini v. Scripps-Howard Broadcasting Co.*[24] In *Zacchini* a television station had broadcast plaintiff's fifteen second "human cannonball" act and, in response to plaintiff's suit for invasion of his right of publicity, claimed the first amendment privilege[25] to report newsworthy events. The Ohio Supreme Court[26] was persuaded by this constitutional argument, but the United States Supreme Court reversed.[27] The Court, relying upon goals developed by patent and copyright laws,[28] reasoned that a state has an interest in guaranteeing the right of publicity so as to encourage creativity by protecting the proprietary interest of an individual in his talents.[29] The Court noted that a celebrity normally has no objection to widespread publicity about his talents provided he obtains some of the commercial benefits therefrom.[30] Furthermore, the Court, while quoting one of the commentaries[31] with approval, emphasized that the purpose of guaranteeing the right of publicity is to prevent unjust enrichment by the theft of goodwill because no social purpose is served by allowing outside parties to exploit free of charge a valuable celebrity image.[32]

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23. The court concluded that plaintiff had contracted with defendant sporting goods manufacturer and granted it the exclusive right to manufacture baseballs bearing plaintiff's name and to license others to do so. Consequently, the court held that plaintiff could not recover damages from the manufacturer or defendant meat processor to increase his sales by tying in the sale of baseballs with the sale of its meat products. *Id.* at 1207-08.

24. 433 U.S. 562, 575-78 (1977).

25. If use of a person's name or likeness is privileged under the first amendment, then there is no remedy afforded under the "right of publicity." As the *Zacchini* case illustrates, however, the scope of the first amendment privilege is often difficult to determine. This Recent Development does not address the problems posed by the first amendment privilege. For a discussion of the relationship between the right of publicity and the first amendment, see Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979).

26. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976).

27. 433 U.S. 562 (1977).

28. The Court stated that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." *Id.* at 573.

29. *Id.*

30. *Id.*

31. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966).

32. 433 U.S. at 576.

Although the existence of the right of publicity is clear the precise parameters of this right are uncertain. Unlike the right of privacy, which is personal,[33] the right of publicity has generally been held to be assignable.[34] While many decisions have labelled the right of publicity a species of property,[35] others have noted that such a label follows only from the parameters given to the right of publicity and therefore is immaterial to the determination of the parameters themselves.[36] Consequently, recent decisions addressing the inheritability of the right of publicity must be considered against the background of the early application of right of privacy principles and the recently emerged distinction between economic interests under the right of publicity and personal interests protected by the right of privacy. Because the right of publicity is independent of the right of privacy, courts are not bound by principles applicable to the latter but are free to determine the parameters of the right of publicity by analogy to the laws of property, privacy, copyright, and other areas.

III. Recent Treatment of Inheritability

A. *Decisions in Favor of Inheritability*

Only in recent years have courts confronted the issue whether the right of publicity is inheritable.[37] The first decision to address this question clearly was *Price v. Hal Roach Studios, Inc.*,[38] which involved a dispute over the right to use the names and likenesses of Stanley Laurel and Oliver Hardy after their deaths. The exclusive right to exploit the comedy team commercially had been assigned to plaintiff by Laurel during his lifetime, by Hardy's widow

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33. W. Prosser, *supra* note 8, at 814-15.

34. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978); Cepeda v. Swift & Co., 415 F.2d 1205, 1207-08 (8th Cir. 1969); Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

35. *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Uhlaender v. Hendricksen, 316 F. Supp. 1277 (D. Minn. 1970); Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963).

36. *See, e.g.*, Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); W. Prosser, *supra* note 8, at 807. *See also* Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 Hastings L.J. 751, 757-58 (1978).

37. Though several of the recent decisions have discussed older case law in their analysis, all of the older cases relied on are clearly distinguishable. *See, e.g.*, note 69 *infra*.

38. 400 F. Supp. 836 (S.D.N.Y. 1975). The trial court in *Lugosi v. Universal Pictures*, 172 U.S.P.G. (BNA) 541 (Cal. Super. Ct. 1972), was the first court to actually address this issue, but was subsequently reversed. *See* notes 63-75 *infra* and accompanying text.

and sole heir under Hardy's will, and by Laurel and Hardy's production company. When defendants sought to use the names and likenesses of Laurel and Hardy, plaintiff-assignee sued. The district court ruled that the actors' deaths did not extinguish the right of publicity held by plaintiff-assignee. Distinguishing the right of publicity from the right of privacy, the *Price* court reasoned that, while the right of privacy should not be assignable or inheritable because its purpose is to prevent injury to feelings, the right of publicity provides purely commercial protection. The court noted that other courts had recognized this distinction by insuring the assignability of the right of publicity. Discerning no reasons to deny inheritability, the court, in a case of first impression, held that the right is inheritable.[39]

Since the *Price* decision, several cases have addressed the issue of inheritability as a result of the death of Elvis Presley. Prior to Presley's death, Boxcar, Inc. held the exclusive right to market his name and likeness.[40] Boxcar and the previous grantees of Presley's right of publicity had marketed the Presley *persona* for many years with great success.[41] After Presley's death Boxcar sold these exclusive rights to Factors Etc., Inc.[42] Subsequently, Factors became embroiled in suits over its right to the exclusive control of Presley's name and likeness.

Several suits in the federal courts of New York[43] culminated in the Second Circuit's decision in *Factors Etc., Inc. v. Pro Arts, Inc.*[44] The *Factors* court held that Boxcar's exclusive right to exploit the Presley name and likeness, because exercised during Presley's life, survived his death and was validly transferred to Factors.[45] The court distinguished between the right of publicity and the right of privacy in regard to the interests protected and the remedies afforded. The opinion focused on the policy rationales behind the right of publicity as enumerated by the Supreme

39. 400 F. Supp. at 844.

40. Presley, however, was a shareholder in Boxcar, Inc. Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir. 1980); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 216-17 (2d Cir. 1978).

41. 616 F.2d at 957; 579 F.2d at 217.

42. 616 F.2d at 957; 579 F.2d at 217. Presley's father signed as executor of the estate and as representative of Presley's share of Boxcar.

43. Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288 (S.D.N.Y. 1977); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977); Factors Etc., Inc. v. The Wild Side, Inc., No. 77-4705 (S.D.N.Y. Oct. 14, 1977).

44. 579 F.2d 215 (2d Cir. 1978).

45. *Id.* at 222.

Court in *Zacchini* and cited with approval the approach taken by the *Price* court.[46] The *Factors* court maintained that Presley carved out a separate intangible property right for himself by assigning to Boxcar the exclusive authority to print, publish, and distribute his name and likeness.[47] The court reasoned that because Presley was merely the beneficiary of an income interest in Boxcar's exclusive right, Presley's death should not in itself extinquish Boxcar's property right. "Instead, the income interest . . . should inure to Presley's estate at death like any other intangible property right."[48] The court also stressed that denying inheritability would allow third parties a windfall in the form of profits from the use of Presley's name and likeness.[49]

Thus, through the *Price* and *Factors* decisions,[50] the federal courts have established a descendible right of publicity in New York[51] and guaranteed Factors the right to exclusive control over Presley's name and likeness. Unfortunately for Factors, the courts of other jurisdictions have not been so favorable.

B. Decisions Against Inheritability

In another Presley case involving Factor's attempt to assert exclusive control over the Presley name and likeness in Tennessee, the Sixth Circuit in *Memphis Development Foundation v. Factors Etc., Inc.*[52] held[53] that the right of publicity is not inheritable even

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46. *Id.* at 220-21.

47. *Id.* at 221.

48. *Id.*

49. *Id.*

50. While the *Price* and *Factors* opinions appear harmonious, the question whether a person *must* exploit his name or likeness during his lifetime in order for his right of publicity to survive him remains unanswered. The *Price* decision intimates that previous exploitation is unnecessary, 400 F. Supp. at 846, while the *Factors* court specifically refrains from addressing this question. 579 F.2d at 222 n.11.

51. The district court in *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978), expressly followed the *Factors* holding on the inheritability issue, but held that the first amendment privilege protected the infringement under the particular facts before it. *See also* note 25 *supra*.

52. 616 F.2d 956 (6th Cir. 1980).

53. This decision reversed the trial court's summary judgment in favor of Factors. The Sixth Circuit, however, had previously affirmed in a decision without a published opinion, 578 F.2d 1381 (6th Cir. 1978), the trial court's grant of a preliminary injunction against Memphis Development Foundation. The trial court in that case thoroughly examined the case law on the descendibility issue and decided to enjoin any further exploitation by Memphis Development Foundation because of its determination that Factors would probably win on the descendibility issue. This decision is reported in 441 F. Supp. 1323 (W.D. Tenn. 1977).

when a person has exploited the right by contract during life. The trial court had concluded, after analyzing recent case law, that the right is inheritable.[54] The Sixth Circuit, however, without citing supporting authorities,[55] weighed various policy arguments and concluded that a celebrity's name should pass to the public domain upon his death. The court reasoned that recognition of a post-mortem right of publicity would vindicate two possible interests: the encouragement of effort and creativity and a decedent's expectations of creating a valuable asset for his heirs.[56] According to the *Memphis Development* court, however, the desire to exploit fame for the financial advantage of one's heirs provides no substantial motivation for one's efforts, and recognition of a devisable or descendible publicity right would not significantly encourage creativity.[57] The court discussed practical problems of judicial line-drawing, including the difficulty of determining how long the right would continue and to whom or what the right would apply.[58] The court also noted that other personal attributes with economic value, such as titles, offices, and reputations, are not inheritable.[59] Drawing an analogy between the interests protected by the law of defamation and those protected by the right of publicity, the court concluded that the right of publicity should similarly terminate at death.[60] The court indicated that a post-mortem right of publicity would be "contrary to our legal tradition and . . . to the moral suppositions of our culture"[61] and that denial of such a post-mortem right would be "fairer and more efficient."[62] Thus, as a result of the two Presley decisions, *Factors* and *Memphis Development,* Factors has exclusive control over the Presley *persona* in New York, but in Tennessee anyone may exploit the Presley fame for profit.

In *Lugosi v. Universal Pictures*[63] the California Supreme

54. The trial court had concluded that the right is inheritable both in its preliminary injunction against Memphis Development Foundation, 441 F. Supp. 1323 (W.D. Tenn. 1977) (analyzing recent cases), and in its summary judgment for Factors, entered March 3, 1979 without an opinion.

55. The court did acknowledge the decisions supporting a right of inheritability in a footnote. 616 F.2d at 958 n.2 (6th Cir. 1980).

56. *Id.* at 958-59.

57. *Id.* at 959.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 960.

63. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

Court held that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime.[64] *Lugosi* was a suit by the heirs of actor Bela Lugosi, who played the title role in the 1930 film *Dracula,* to recover profits made by Universal in its licensing of the use of the Count Dracula character[65] to commercial firms and to enjoin Universal from making additional grants without plaintiff's consent. The California Supreme Court, adopting the opinion written by the Court of Appeal,[66] reversed the trial court's determination[67] that the right of publicity is inheritable. Although it acknowledged the new emphasis on the proprietary aspects of the right of publicity, the court focused on principles applicable to the right of privacy,[68] discussed several older cases that are clearly distinguishable,[69] and concluded

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64. *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 329. *See* notes 71-72 *infra* and accompanying text.

65. The trial court found that Universal was licensing the uniquely individual likeness and appearance of Bela Lugosi in the role of Count Dracula. 25 Cal. 3d at 817, 603 P.2d at 427, 160 Cal. Rptr. at 325. As one court pointed out, the issue in *Lugosi* is more complex than in other right of puhlicity decisions in which actors portray tliemselves and develop their own characters because *Lugosi* involves an established fictional character which has been given a particular interpretation by Bela Lugosi. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 845 (S.D.N.Y. 1975).

66. 139 Cal. Rptr. 35 (Ct. App. 1977).

67. 172 U.S.P.Q. (BNA) 541 (Cal. Super. Ct. 1972), *rev'd,* 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977).

68. For example, while noting that the right to exploit one's name or likeness is assignable, 25 Cal. 3d at 819, 603 P.2d at 428, 160 Cal. Rptr. at 327, and that the right of privacy is personal, and hence not assignable, *id.* at 820, 603 P.2d at 429, 160 Cal. Rptr. at 328, the court treated the right to exploit one's name or likeness as embraced in the law of privacy and therefore uninheritable. *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326.

69. The court discussed Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir.), *cert. denied,* 382 U.S. 883 (1965), James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799 (1959), and Schumann v. Loew's Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954), *final amended complaint dism'd,* 144 N.Y.S.2d 27 (Sup. Ct. 1955). 160 Cal. Rptr. at 327-38, 603 P.2d at 429-30. In *Maritote* 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 invasion of the deceased Capone's privacy. The court declared the question of unjust enrichment through appropriation of a property right to be irrelevant to the privacy question and did not discuss its merits. In *James* plaintiff claimed that she was entitled to compensation for defendant's motion picture exploitation of the personality of her deceased husband, Jesse James, Jr., on the grounds of both emotional injury and pecuniary appropriation. The court treated both actions as invasion of privacy claims and held that the right of privacy is personal and not assertible by related third parties. The *Schumann* case, however, did address the right of publicity and its descent. Descendants of Robert Schumann, who had been dead nearly a hundred years, contended that defendant's film depicting the life of the composer constituted an appropriation of a descendible property right. The court could find no support for a rule of descent when the ancestor had been dead for so many years and when the descendants had not shown that they were Schumann's legal heirs. *Schumann* is weak authority, however, in light of recent cases such as *Price* and *Factors*

that an inheritable publicity right would serve "neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor. . . . "[70] Although the decision expressly holds that the right to exploit name and likeness can only be exercised during the artist's lifetime,[71] much of the opinion intimates that the result would have been different had the artist exercised his right.[72]

The dissent, in an exhaustive opinion,[73] emphasized the difference between the right of privacy and the right of publicity and discussed the principles elucidated in the *Zacchini, Haelen, Price,* and *Factors* decisions.[74] The dissent concluded that the right of publicity should be inheritable because it is proprietary in nature and is similar to an inheritable copyright.[75]

IV. ANALYSIS

Regardless of the formal classification of the right of publicity, this right clearly protects pecuniary interests and is unconcerned with personal and emotional interests. Unlike the right of privacy, it is assignable,[76] as our highly commercialized world dictates that it must be. Consequently, in determining the scope of this recently recognized but distinctly different right, courts must not apply right of privacy principles simply because the right of publicity evolved from the right of privacy.[77]

Both the *Price*[78] and *Factors*[79] decisions correctly ascertain that the right of publicity is much more analogous to a property

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holding that the right of publicity is inheritable in New York.

70. 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

71. "We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime." *Id.*

72. The court intimated that assignment of the right is synonymous with its exercise and that since Lugosi had not exercised his right through either assignment or direct exploitation, his name and likeness passed into the public domain upon his death. *Id.* The court maintained that Lugosi in his lifetime had a right of value that could have been transmuted into things of value by his exercise of the right. *Id.* at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326. For a further discussion of the possible interpretations of this opinion, see Note, *supra* note 36, at 762-67.

73. 25 Cal. 3d at 828-59, 603 P.2d at 434-54, 160 Cal. Rptr. at 332-52 (Bird, C.J., dissenting).

74. *Id.* at 833-43, 603 P.2d at 437-44, 160 Cal. Rptr. at 335-42 (Bird, C.J., dissenting).

75. *Id.* at 844-49, 603 P.2d at 444-47, 160 Cal. Rptr. at 342-45 (Bird, C.J., dissenting).

76. *See* notes 17, 34 *supra* and accompanying text.

77. *See* notes 8-10 *supra* and accompanying text.

78. *See* notes 38-39 *supra* and accompanying text.

79. *See* notes 44-49 *supra* and accompanying text.

interest, be it tangible or intangible, than to the right of privacy.[80] Because the right of publicity is similar to property in nature, the courts' predilection was to make it inheritable like any other property interest. The *Price* court could not discern any policy reasons for terminating the right upon death[81] and consequently held that the right of publicity is inheritable. The *Price* decision, however, is not analytically complete because of its failure to undertake a thorough policy analysis. The *Factors* court, in contrast, properly considered the various policy arguments regarding the descendibility issue before finding an inheritable right. The court first noted the right of a person and his estate to reap the reward of his endeavors.[82] It also emphasized the prevention of unjust enrichment of outside parties who would receive a windfall in exploiting a hard-earned celebrity status without paying for the privilege.[83] The *Price* decision held in effect that the right of publicity is property and therefore descendible;[84] the *Factors* court correctly drew an analogy between the interests protected by rights of publicity and property and, after considering policy arguments, concluded that a publicity right, like a property right, should be inheritable.[85]

Although the Sixth Circuit correctly emphasized policy arguments and did not rely upon right of privacy cases,[86] *Memphis Development*[87] makes an unpersuasive presentation of policy rationales for its denial of a post-mortem publicity right. The court argued that the possibility of achieving celebrity status for the benefit of one's heirs provides very little motivation for one's success and that therefore the recognition of a post-mortem right of publicity would not encourage effort or creativity.[88] This argument, however, could apply to any successful career that has commensurate financial rewards. The primary motivation for success in any field is not to benefit one's heirs; yet any wealth that is accumulated as a result of one's success does pass to one's heirs. Thus, it seems more equitable for the celebrity's heirs, rather than outside parties, to benefit from the celebrity's hard-earned success.

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80. *See* notes 38-39, 44-49 *supra* and accompanying text.
81. *See* note 39 *supra* and accompanying text.
82. *See* notes 47-48 *supra* and accompanying text.
83. *Id. See* note 49 *supra* and accompanying text.
84. *See* notes 38-39 *supra* and accompanying text.
85. *See* notes 44-49 *supra* and accompanying text.
86. *See* note 69 *supra* and accompanying text.
87. *See* notes 52-62 *supra* and accompanying text.
88. *See* notes 56-57 *supra* and accompanying text.

The court also discussed problems of judicial line-drawing,[89] but close inspection reveals that except for the issue of the duration of the right, the problems are the same whether a person is alive or deceased. The court's further argument that denial of a post-mortem right would be fairer and more efficient[90] is, in light of the potential windfall to outsiders, similarly incorrect.

Although the right of publicity and defamation have some similarities, the Sixth Circuit's analogy between the two is unconvincing.[91] Like the right of privacy, the action of defamation, which protects against damage to reputation and corresponding loss of earning capacity, is personal, nonassignable, and uninheritable.[92] The right of publicity, on the other hand, is a transferable pecuniary interest[93] and as such is more similar to a property interest than to protection from defamation. Thus, although the Sixth Circuit identified the major arguments for denying the inheritability of the right of publicity, these arguments fail to withstand critical scrutiny.

The *Lugosi*[94] court, by applying right of privacy principles[95] and by relying on distinguishable right of privacy cases,[96] approached the descendibility issue in a confused manner. Moreover, the court's arguments[97] that a post-mortem right of publicity would serve neither society's interest in the free dissemination of ideas nor the artist's right to the fruits of his own labor are ill-founded.[98] Society's interest in the free dissemination of ideas is protected by first amendment guarantees,[99] which protect the use of another's name or likeness in the same manner whether that person is alive or not. Furthermore, as the analysis of the *Price* and *Factors* decisions indicates, the goal of allowing a person to reap the benefit of his labors is best protected by making the right of publicity inheritable. The *Lugosi* decision, however, probably has little predictive value. Given the four-to-three divided court,

89. *See* note 58 *supra* and accompanying text.
90. *See* note 62 *supra* and accompanying text.
91. *See* note 60 *supra* and accompanying text.
92. W. PROSSER, *supra* note 8, at 744-45.
93. *See* notes 17, 34 *supra* and accompanying text.
94. *See* notes 63-72 *supra* and accompanying text.
95. *See* note 68 *supra* and accompanying text.
96. *See* note 69 *supra* and accompanying text.
97. *See* note 70 *supra* and accompanying text.
98. *See* notes 73-75 *supra* and accompanying text.
99. *See* note 25 *supra*.

the ambiguous holding,[100] the unusual fact situation,[101] and the majority's adoption of the lower court's opinion,[102] it is difficult to predict what the California court would do with a case in which no fictional characters were involved and the celebrity had clearly exploited his right of publicity while alive.

An integral aspect of the descendibility issue is the question whether a person's exploitation of his right of publicity while alive is a condition precedent to the inheritability of the right. Although courts have not fully resolved this issue,[103] there appears to be no reason to distinguish between those who have exploited their names and likenesses and those who have not.[104] The amount recovered for infringement of one's publicity right depends upon the pecuniary interest affected, which in turn is commensurate with the degree of celebrity status attained. Ordinarily, a person's pecuniary interest will be greater because he has exploited his name and likeness, but there is no reason to deny recovery simply because a person has not sufficiently exploited his name. Such a denial would be particularly unfair to a person who died shortly after achieving fame and who had not had time to exploit his celebrity status. In that situation, the prevention of unjust enrichment[105] would seem to be an overriding policy objective. Therefore, courts should not require prior exploitation as a precondition to inheritability of the right of publicity, but should consider prior exploitation in determining the magnitude of the pecuniary interest affected and hence the recovery allowed.

Another important collateral issue to the question of inheritability is whether a post-mortem publicity right should be limited to a designated period. Several courts, including the United States Supreme Court, have recognized the similarity of copyright law to the right of publicity.[106] Consequently, as some have proposed,[107]

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100. *See* notes 71-72 *supra* and accompanying text.

101. *See* note 65 *supra.*

102. *See* note 66 *supra* and accompanying text.

103. *See* notes 50, 71-72 *supra* and accompanying text.

104. *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 848, 603 P.2d 425, 447, 160 Cal. Rptr. 323, 345 (1979) (Bird, C.J., dissenting); Note, *supra* note 36, at 765. *But see* Felcher & Rubin, *supra* note 25, at 1618-19.

105. *See* notes 49, 82-83 *supra* and accompanying text.

106. *See* notes 29, 47-48, 75 *supra* and accompanying text.

107. 25 Cal. 3d at 844-49, 603 P.2d at 444-47, 160 Cal. Rptr. at 342-45 (Bird, C.J., dissenting). In response to the *Memphis Development* decision, Felcher and Rubin expanded on their article cited in note 25 *supra* and argued that the right of publicity is most closely analogous to copyright law and hence should be inheritable. Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE

the fifty year post-mortem limitation of copyright law or a similar cut-off period could be adopted for the right of publicity. Such a limitation would preserve valuable publicity rights for a celebrity's immediate heirs and yet permit a celebrity's name and likeness to pass to the public domain a certain period after his death.

V. CONCLUSION

In a highly commercialized society in which a person's name and likeness can be very valuable, it is imperative that courts examine the right of publicity with reference to the pecuniary interest protected and weigh various policy objectives in determining whether this right should be inheritable. Although problems such as that of the post-mortem duration of the publicity right remain to be resolved, the reasons for allowing inheritability of the right outweigh the reasons against it. Both the similarity of the right of publicity to a property interest and the notion that a celebrity's heirs rather than unrelated third parties should benefit from that celebrity's hard-earned success compel the conclusion that the right of publicity should be inheritable. The *Factors* decision, analytically sound and persuasive, provides proper guidance for the courts of other states. At present, however, while our society's commercial communications are frequently interstate, the publicity rights of deceased celebrities' heirs are far from uniform.

BEN C. ADAMS

L.J. 1125 (1980).