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The Right of Publicity: A Matter of Privacy, Property, or Public Domain?

Kenneth E. Spahn*

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Abstract

This article discusses the right of publicity, beginning in Part II with the difficulty in defining a legal right of publicity, and the resulting various legal doctrines upon which the right has been analyzed.

KEYWORDS: privacy, property, public

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Kenneth E. Spahn*

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* Mr. Kenneth E. Spahn is currently an associate in the firm of Bond, Schoeneck & King, P.A. in Boca Raton, Florida and was formerly an associate with Ruden, Barnett, McClosky, Smith, Schuster, & Russell, P.A. in Fort Lauderdale, Florida. He received his B.S. in Business & Marketing *with honors*, from Miami University in Oxford, Ohio in 1982, and his J.D., *with honors*, from Florida State University in Tallahassee, Florida in 1993.

I. OVERVIEW

This article discusses the right of publicity, beginning in Part II with the difficulty in defining a legal right of publicity, and the resulting various legal doctrines upon which the right has been analyzed. Part III discusses four types of actions commonly involving publicity rights. Part IV presents a theoretical background, discussing four of the legal theories under which the right of publicity has been analyzed, and also the underlying policies common to copyright and publicity right protection. The application of copyright law to right of publicity cases is discussed in Part V, and Part VI discusses the two primary limitations to the right of publicity doctrine: descendibility and First Amendment conflicts. Part VII then ends with a summary, conclusion, and recommendation.

II. INTRODUCTION

The right of publicity is, basically, the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others.[1]

1. Ali v. Playgirl, Inc., 447 F. Supp. 723, 728 (S.D.N.Y. 1978). The right of publicity has also been described as: "a valuable proprietary right, a kind of property right in [a person's] name and image, and . . . an exclusive right to market it, to assign it, or to benefit from its use commercially." Memphis Dev. Found. v. Factors, Etc., Inc., 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977), *aff'd*, 578 F.2d 1381 (6th Cir. 1978); the right giving a person "personal control over commercial display and exploitation of his personality and the exercise

Disputes involving right of publicity issues commonly arise out of the unauthorized commercial exploitation of a celebrity's name or likeness in advertisements, endorsements, or commercial merchandising of items such as T-shirts or posters.

The right of publicity has not yet been fully developed or uniformly applied as a legal doctrine. The right is not specifically recognized by the United States Constitution or the Bill of Rights, nor is there any federal codification to govern it, such as the federal copyright, trademark, and patent laws. In the absence of such federal guidelines, courts must then look to state statutes and common law to decide right of publicity cases. Many states, however, do not recognize or even address the right of publicity statutorily, and may have no substantive common law on the topic. In addition, there are few secondary sources, such as treatises, restatements, or uniform codes for the courts to turn to for guidance.[2] Courts are thus left with minimal standards by which to interpret publicity rights, and must often turn to other states' common law. The result is that courts are often free, or forced, to create new law, which leads to inconsistency and a lack of predictability regarding the right of publicity.

Protecting a person's likeness does not fit neatly into one specific legal category, as it involves elements of tort, copyright, property, contract, and labor law. It must also be weighed against First Amendment rights. Although the right of publicity has traditionally been analyzed under the

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of his talents." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 569 (1977); "the publicity value of one's name or likeness." Hicks v. Casablanca Records, 464 F. Supp. 426, 429 (S.D.N.Y. 1978); "in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph[s] . . . . here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." Haelan Lab., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); and "the right to be free from having one's name, likeness, and identifying characteristics expropriated for commercial purposes without consent." J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179 (1987).

2. Nimmer & Nimmer's six-volume treatise on copyright law devotes only one small subsection, under "invasion of privacy and publicity." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][c] (1994). Neither Dean Prosser's nor Dean Keeton's renowned treatises on torts address the matter directly. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER & KEETON]; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971). There is, however, one treatise which focuses directly on the right of publicity. *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY & PRIVACY (1994).

common law right of privacy,[3] courts and plaintiffs have also applied other bodies of law, such as unfair competition,[4] misappropriation,[5] dilution,[6] and contract[7] in order to recognize a protectable interest in the monetary value of names and personal features. These factors further contribute to the lack of uniformity or consistency in publicity right cases.

III. FOUR TYPES OF ACTIONS WHERE THE RIGHT OF PUBLICITY ARISES

Right of publicity issues usually involve at least one of four general types of infringements: 1) appropriation of one's name or likeness for advertising or endorsement; 2) unauthorized use of one's name or likeness on commercial products; 3) appropriation of one's unique style or characteristics; and 4) appropriation of one's performance.

A. *Appropriation for Advertising or Endorsement*

Right of publicity infringements commonly arise when a celebrity's name or likeness is used, without authorization, to advertise or endorse a product or service. This type of exploitation results in several forms of harm:

1) It creates a false impression that the celebrity endorses the product or has a business relation with the product or manufacturer;

2) It may inhibit the celebrity's ability to obtain other endorsement opportunities, especially from competing brands;

3) It may undermine the celebrity's credibility and, therefore, his or her marketability, especially if the celebrity becomes overexposed, or if the advertisement or the product itself arouses controversy or negative feelings;

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3. *See* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960); *see also infra* text accompanying notes 54-64.

4. *See, e.g.*, Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962); Wyatt Earp Enter., Inc. v. Sackman, Inc., 157 F. Supp. 621 (S.D.N.Y. 1958); Lone Ranger, Inc. v. Currey, 79 F. Supp. 190 (M.D. Pa. 1948); Fisher v. Star Co., 231 N.Y. 414, *cert. denied*, 257 U.S. 654 (1921).

5. *See, e.g.*, *Zacchini*, 433 U.S. 562.

6. *See, e.g.*, Edgar Rice Burroughs, Inc. v. Manns Theatres, 195 U.S.P.Q. (BNA) 159 (C.D. Cal. 1976).

7. *See, e.g.*, Lugosi v. Universal Pictures, 603 P.2d 425, 433 (Cal. 1979); *infra* text accompanying notes 65-71; *see also* Corliss v. E.W. Walker Co., 64 F. 280 (C.C. Mass. 1894); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

4) It unjustly enriches the infringer, who reaps the benefits of the celebrity's good will or fame without paying for that benefit;

5) It penalizes those sponsors who do legitimately pay for the celebrity's endorsement;

6) Most important (to the celebrity), it deprives the celebrity of fees and royalties.

A typical example of an unauthorized use of a celebrity's name in an advertisement is *Hogan v. A.S. Barnes & Co., Inc.*,[8] where the defendant used, without authorization, golfer Ben Hogan's name and picture to help promote sales of its book. Although Mr. Hogan was successful in his challenge,[9] other celebrities have not always received such protection. In *Carson v. National Bank of Commerce Trust & Savings*,[10] for instance, comedian Johnny Carson attempted to prevent a Nebraska bank from using his name in an advertisement promoting a trip to Las Vegas. Although the bank had clearly appropriated Carson's name without his permission, Carson was still denied relief, because Nebraska law did not yet recognize a right of publicity.[11] Johnny Carson had better luck, however, in a later case, *Carson v. Here's Johnny Portable Toilets, Inc.*,[12] where he sought to enjoin the defendant's product name and marketing slogan, "Here's Johnny." The United States Court of Appeals for the Sixth Circuit upheld Carson's publicity rights, finding the defendant's use of "Here's Johnny" constituted an appropriation of Carson's identity.[13]

These two Johnny Carson cases exemplify the lack of consistency and predictability in right of publicity cases. The Nebraska bank blatantly used Carson's name and picture in its advertisements and brochures, which infringed upon Carson's right of publicity far more directly and extensively than the toilet company's use of the "Here's Johnny" slogan, which never even used Carson's name or picture. Carson was, however, unsuccessful against the bank, yet found relief against the toilet company. This apparent dichotomy exists not because of the factual or legal issues involved, but merely because the right of publicity was recognized as a legal cause of action in Michigan, but not in Nebraska.

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8. 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957).

9. Mr. Hogan prevailed on his claim. *Id.* at 320.

10. 501 F.2d 1082 (8th Cir. 1974).

11. *Id.* at 1084-86.

12. 498 F. Supp. 71 (E.D. Mich. 1980), *vacated*, 698 F.2d 831 (6th Cir. 1983).

13. *Carson*, 698 F.2d at 836. Although Michigan law had not yet recognized the right of publicity, the Sixth Circuit, in remanding to the district court, *flushed away* the lower court decision, predicting that Michigan courts would adopt the right. *Id.* at 834, n.1.

B. *Unauthorized Use of a Name or Likeness on a Commercial Product*

Right of publicity infringements frequently involve the unauthorized use of a celebrity's name or likeness on commercial products such as T-shirts or posters. The first case to recognize the right of publicity, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,[14] involved such commercial memorabilia. Other leading right of publicity cases have involved unauthorized commercial memorabilia such as statuettes[15] and memorial posters of Elvis Presley,[16] and plastic busts of Martin Luther King, Jr.[17]

C. *Appropriation of a Person's Unique Style or Characterizations*

Right of publicity protection may go beyond a person's name and likeness, and extend to his unique character, characterization, or personal style. This recognition of a person's unique style differentiates publicity rights from other more tangible intellectual properties such as copyrights, trademarks, and patents.[18]

The first case to apply the right of publicity to a performer's style was *Estate of Presley v. Russen*,[19] where Elvis Presley's estate succeeded in stopping the defendant's stage production, "The Big El Show," which featured an Elvis impersonator who duplicated an Elvis concert.[20] Less than six months after the *Russen* decision, the United States District Court for the Southern District of New York recognized protection of the Marx Brothers' characters in *Groucho Marx Productions, Inc. v. Day & Night Co.*,

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14. 202 F.2d 866, 868 (recognizing a common law right of publicity in photographs, specifically, photos on trading cards of professional baseball players).

15. Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

16. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *rev'd*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *see infra* text accompanying notes 150-51.

17. Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd*, 694 F.2d 674 (11th Cir. 1983); *see infra* text accompanying note 156.

18. *See* 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

19. 513 F. Supp. 1339 (D.N.J. 1981).

20. *Id.* at 1348. The plaintiffs sought to prevent the defendant from using the name "The Big El Show," as well as "the image or likeness or persona of Elvis Presley [and any of the various names by which Presley is popularly known] on any goods, in any promotional materials, in any advertising or in connection with the offering or rendering of any musical services." *Id.* at 1344.

Inc.,[21] where a satirical musical play imitated the famous comedians. The court held the defendant's play was an infringement of the Marx Brothers' unique characteristics and style,[22] concluding the play had "reproduced [the Marx Brothers'] manner of performances by imitating their *style and appearance* . . . [thus] infring[ing] the plaintiff's *rights of publicity* in the Marx Brothers characters."[23] The Laurel and Hardy characters have also received similar protection under the right of publicity. In *Price v. Hal Roach Studios, Inc.*,[24] the court specifically recognized the actors' publicity rights included the impersonation of their physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their voices for advertising or commercial purposes.[25] The *Price* holding was later relied upon in a similar case, brought by the same plaintiff to prevent unauthorized imitation of the Laurel and Hardy characters in the television show *Stan 'n Ollie*.[26] The court granted the injunction, again recognizing the publicity rights in the comedians' appearances and mannerisms.[27] California courts have also recognized the legal protection of a celebrity's style as far back as 1928, when an appellate court prevented an unauthorized imitation of Charlie Chaplin's distinct "characterizations and expressions."[28]

More recently, courts have extended publicity rights to grant protection against unauthorized *vocal* imitations. Singer Bette Midler, for example, successfully challenged an unauthorized imitation of her voice used in a Ford Motors commercial,[29] and a vocal imitation of singer Tom Waits was likewise found to infringe upon his publicity rights.[30] It is interesting to note how the right of publicity has evolved to protect against vocal imitation, when as recently as 1971 the right of publicity did not protect

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21. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982).

22. *Id.* at 493-94.

23. *Id.* at 494 (emphasis added).

24. 400 F. Supp 836 (S.D.N.Y. 1975).

25. *Id.* at 843.

26. Price v. Worldvision Enter., Inc., 455 F. Supp. 252 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979).

27. *Id.* at 256.

28. Chaplin v. Amador, 269 P. 544 (Cal. Ct. App. 1928). *But see* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 712 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (denying singer Nancy Sinatra's claim that the defendant's television commercial, which used the music to "These Boots Are Made For Walkin'," imitated her dress, mannerisms, and style of delivery).

29. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *cert. denied sub nom.* Midler v. Young & Rubicam, Inc., 112 S. Ct. 1513-14 (1992).

30. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

Nancy Sinatra against the blatant imitation of her voice, dress, style, and mannerism.[31]

These holdings demonstrate how the right of publicity may be extended beyond the actors' physical traits, to protect their acting styles or fictional creations. These cases also exemplify how courts may turn to the right of publicity in order to find some protection for performers, perhaps confusing the creators with their characterizations, because other bodies of law, such as copyright or trademark, do not provide adequate protection.[32]

D. *Appropriation of an Actor's Performance*

The fourth and least common type of publicity right infringement involves the unauthorized use or appropriation of the actor's live performance *itself*, rather than his or her unique style, as discussed *supra*. Because statutory copyright law does not protect a live performance which has not been fixed in a tangible medium of expression, performers turn to the right of publicity to find protection for their performances.[33] This type of appropriation was at issue in the first and only right of publicity case decided by the United States Supreme Court, *Zacchini v. Scripps-Howard Broadcasting Co.*[34] Plaintiff Hugo Zacchini, a human cannonball performer, alleged that the defendant had usurped his right of publicity by airing a fifteen-second broadcast of his performance on a local news telecast without his permission.[35] The Supreme Court ruled in favor of Mr. Zacchini, recognizing a right of publicity in an actor's performance, and further recognizing that this right was violated by the unauthorized broadcast of the performance.[36]

Zacchini stands apart from most right of publicity cases, in that: 1) it was the first right of publicity case to be decided by the United States

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31. *Sinatra*, 435 F.2d at 712 (denying relief despite the defendant's use, in a tire commercial, of a singer whose voice, style, and even boots were deliberately intended to imitate Sinatra's).

32. The usual rationale is that human characterizations cannot be copyrighted apart from some "work." *See* 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

33. Although section 106 of the Copyright Act of 1976 lists the right to perform a work as one of the exclusive rights held by an owner of a copyright, statutory copyright law does not protect works which are not fixed in a tangible medium of expression, such as live choreographic works, jazz improvizations, and other "unfixed" performances. Thus, if the work is the performance, it may not be protected by statutory copyright. *See* 17 U.S.C. § 301 (1988).

34. 433 U.S. 562.

35. *Id.* at 563-64.

36. *Id.* at 574-76.

Supreme Court; 2) it is still the only such United States Supreme Court case to date; 3) it involved appropriation of a live performance, while most publicity right cases involve infringement of a person's name, likeness, or style; 4) Mr. Zacchini was relatively unknown, where almost all other cases involve well-known celebrities; 5) Mr. Zacchini was alive and asserting his own publicity rights, whereas many other cases are brought by the estate or license holder of a celebrity who is deceased;[37] and 6) the First Amendment was more at issue than in most publicity cases, because this infringement involved a newscast, rather than a commercial exploitation.[38]

IV. THEORETICAL BACKGROUND: FOUR PUBLICITY RIGHT THEORIES AND THE UNDERLYING POLICIES BEHIND COPYRIGHT AND PUBLICITY RIGHT LAW

A. *Lugosi v. Universal—Four Right of Publicity Theories*

The right of publicity was thoroughly analyzed in the 1979 landmark case, *Lugosi v. Universal Pictures*,[39] where the California Supreme Court proffered the four models under which the right of publicity may be analyzed. Because *Lugosi* still stands as the seminal right of publicity case,[40] a more in-depth analysis is warranted.

Bela Lugosi portrayed Count Dracula in Universal Pictures' 1931 motion picture, *Dracula*. Although the character of Dracula has been

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37. Most leading right of publicity cases have been brought by the estate of a deceased celebrity, including Bela Lugosi, Elvis Presley, The Marx Brothers, Laurel and Hardy, Martin Luther King, Jr., Charlie Chaplin, and Agatha Christie. *See* descendibility discussion, *infra* text accompanying notes 138-56.

38. The First Amendment issue is addressed in Part VI of this article. *See infra* text accompanying notes 157-87. For a more detailed analysis of the *Zacchini* case and its implications, see generally Thomas H. Hannigan, Jr., *First Amendment Theory Applied to the Right of Publicity*, 17 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 339 (1979); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983).

39. 603 P.2d 425.

40. For a more in-depth analysis of *Lugosi* and its progeny, see generally, Jon B. Eisenberg, Lugosi v. Universal Pictures: *Descent of the Right of Publicity*, 17 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 311 (1979); David R. Ginsberg, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 UCLA L. REV. 1103 (1975); Miles P. Zatkowsky, *Dracula Draws Blood from the Right of Publicity*, 15 SUFFOLK U. L. REV. 181 (1981); Stephen F. Rohde, *Dracula: Still Undead; (Unresolved Right-of-Publicity Questions Are Sure to Haunt the Courts)*, CAL. LAW., Apr. 1985, at 51-55.

portrayed in many different fashions by many different actors,[41] it was Lugosi's portrayal which has defined the popular image of Dracula, and left the most memorable impression.[42] During the early 1960s, Universal began licensing the Count Dracula character to various commercial merchandisers, resulting in a plethora of T-shirts, masks, toys, models, lunchboxes, and other items bearing Lugosi's distinct image of Dracula. Lugosi's estate[43] then sought injunctive relief and recovery of Universal's profits, claiming Universal was exploiting a valuable property right belonging to Bela's estate.[44] In determining whether the plaintiffs could assert a postmortem right to Bela's portrayal of the Dracula character, the Supreme Court of California delineated four different theories under which the right of value[45] to one's name and likeness may be analyzed: 1) property; 2) privacy; 3) work product; and 4) copyright.

1. Property—The Trial Court's View

The *Lugosi* trial court interpreted the right of publicity to constitute a property right.[46] The property theory recognizes the right to one's commercially valuable name and likeness as a possessory right, which accrues as the fruits of one's labor.[47] This right, therefore, belongs to its creator, who has the right to profit from, as well as manage and control the likeness and image.

The property theory was also the basis for the court's decision in *Haelan*,[48] the first case to recognize the right of publicity. *Haelan*

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41. This includes Gary Oldman's portrayal in Columbia Pictures' recent (Fall 1992) Oscar-winning release, BRAM STOKER'S DRACULA.

42. LES DANIELS, LIVING IN FEAR: A HISTORY OF HORROR IN THE MASS MEDIA 130 (1975). The Lugosi character, with slicked-back black hair, rich Hungarian accent, and piercing eyes differs tremendously from the white-haired, shabby, mustachioed old man described by DRACULA'S author, Bram Stoker. *Id. See also* IVAN BUTLER, HORROR IN THE CINEMA 42 (2d ed. 1970).

43. Bela died in 1956. Apparently the actor, unlike his character, could not come back to assert his rights. Lugosi's widow, Hope Linninger Lugosi, and son, Bela George Lugosi, were awarded all causes of action belonging to the estate.

44. Lugosi v. Universal Pictures Co., Inc., 172 U.S.P.Q. (BNA) 541, 542 (Cal. Super. Ct. 1972), *rev'd*, 139 Cal. Rptr. 35 (1975), *and vacated*, 603 P.2d 425 (Cal. 1979).

45. Dean Prosser is credited with creating the "right of value" term, which was used by the *Lugosi* majority. *Lugosi*, 603 P.2d at 428; *see* PROSSER & KEETON, *supra* note 2, § 117, at 854.

46. *Lugosi*, 172 U.S.P.Q. (BNA) at 551.

47. *See* Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

48. *Haelan*, 202 F.2d at 866.

represents a landmark precedent in recognizing a proprietary right of publicity distinct from a privacy right:

> *[I]n addition to* and *independent of* [the] right of privacy . . . a man has a *right in the publicity value* of his photograph[s] . . . . [H]ere, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a "*right of publicity.*"[49]

New York courts have followed the *Haelan* decision, finding the right of publicity to be a proprietary right.[50] As the *Lugosi* court recognized,[51] a very significant consequence of labeling the right of publicity as a property right is that it confers two additional rights: assignability[52] and descendibility.[53]

2. Privacy—The Appellate Majority's View

Right of publicity issues have most often been construed under the right of privacy doctrine.[54] Rather than emphasizing the commercial right to control one's image, as the property theory does, the privacy model[55] mainly protects a person's "right to be let alone."[56] The right of privacy theory was first conceived in an 1890 law review article,[57] and was later

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49. *Id.* at 868 (emphasis added).

50. *See, e.g., Price v. Worldvision*, 455 F. Supp. at 257; *Price v. Hal Roach*, 400 F. Supp. at 844.

51. *Lugosi*, 172 U.S.P.Q. (BNA) at 551; *see also Price v. Hal Roach*, 400 F. Supp. at 844.

52. *See, e.g., Haelan*, 202 F.2d at 867.

53. *See, e.g., Russen*, 513 F. Supp. at 1355. The descendibility issue is discussed in Part VI of this article; *see also infra* text accompanying notes 138-56.

54. *See, e.g., Factors*, 579 F.2d at 220; Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905); Roberson v. Rochester Folding-Box Co., 64 N.E. 442 (1902) (finding the use of a young lady's picture to advertise a product (flour), without her knowledge or permission, violated her right of privacy).

55. *See generally*, NIMMER & NIMMER, *supra* note 2, § 1.01[B]; Gordon, *supra* note 3; Victor A. Kovner et al., *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims, in* COMMUNICATIONS LAW 1994 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 400, 1994).

56. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

57. *Id.* The right of publicity was not judicially recognized, however, until 1953, in *Haelan*, 202 F.2d 866. *See* Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1581 (1979) [hereinafter Felcher

expanded by Dean Prosser, who, in his 1960 law review article, identified four distinct kinds of intrusions into a plaintiff's privacy interests which could be protected:[58]

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[59]

The *Lugosi* appellate court relied upon the privacy model, which the Supreme Court of California majority also adopted. This analysis proved monumental, in that it directly contradicts the *Haelan* conclusion that the right of publicity is completely separate and distinct from the right of privacy.[60] The *Lugosi* interpretation results in certain benefits to the plaintiff, as privacy actions, under tort law, can offer several advantages over property law. As a tort action, a privacy infringement allows for punitive and emotional damages which may not be available through other remedies. It also provides an already developed body of case law, as well as numerous treatises and restatements[61] which may provide some consistency and predictability to an otherwise murky area of law.

The advantages of the right of privacy analysis are, however, outweighed by its inherent disadvantages. First, and perhaps most important, the privacy theory does not recognize publicity rights as descendible. Under the privacy model, the exploited person's privacy rights terminate upon his or her death, and third parties, including family members, may not claim a legal interest in the deceased's emotional or dignitary interests. This weakness is particularly apparent in the right of publicity context, which tends to be dominated by actions brought by the estates of deceased celebrities.[62]

& Rubin I].

58. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); *see also* PROSSER & KEETON, *supra* note 2, § 117, at 851.

59. Prosser, *supra* note 58, at 389. The fourth interest listed is the one most relevant to right of publicity actions.

60. *Haelan*, 202 F.2d at 868; *see supra* text accompanying notes 48-53.

61. *See, e.g.*, PROSSER & KEETON, *supra* note 2.

62. *See supra* note 37. The descendibility issue is discussed further in part VI of this article; *see also infra* text accompanying notes 138-56.

Second, the "invasion of privacy" rationale may not be appropriate for celebrities, who thrive on public exposure and publicity. Infringers are quick to invoke a waiver defense, arguing that public figures assume the risk of exploitation and waive their privacy rights as part of the price of entering the public arena. The waiver defense does have some merit in certain circumstances, particularly in slander and libel cases,[63] but should not be used to deny anyone protection from the unauthorized exploitation of their name or likeness.

A third inherent flaw lies within the general policies underlying the two doctrines. The right of privacy is primarily meant to protect *personal* interests (i.e., a person's mental and emotional well-being), whereas the right of publicity is, or should be, primarily intended to protect the person's *proprietary* and *financial* interests. The privacy theory may therefore not be the appropriate way in which to interpret publicity rights.

A fourth potential weakness is that the privacy theory would deny human owners the ability to assert a right of publicity for property which has no privacy right, such as an animal, inanimate object, or institution. Yet another disadvantage is that under the privacy model, a person's publicity rights are considered dignitary, rather than proprietary, therefore denying one the ability to transfer or assign publicity rights to others.

The inherent flaws of determining publicity rights under the right of privacy model have spawned a continuous flurry of criticism over the *Lugosi* ruling.[64] By classifying the right of publicity as a privacy right, the *Lugosi* majority has drastically limited the availability of right of publicity actions, as it essentially denies standing to all estates of deceased persons.

3. Work Product—The Concurrence's View

The third theory elicited by the *Lugosi* court was the work product model, as espoused by Justice Mosk in his concurrence. Under the work product analysis, an actor is an employee of the studio, and is paid to create

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63. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), *cert. denied*, 459 U.S. 1226 (1983); *Martin Luther King*, 508 F. Supp. at 863; *see also* PROSSER & KEETON, *supra* note 2, § 113, at 805; RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.06 (1994).

64. *See Haelan*, 202 F.2d at 868; *see also* Felcher & Rubin I, *supra* note 57, at 1588-89; Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980) [hereinafter Felcher & Rubin II]; Ginsberg, *supra* note 40; Gordon, *supra* note 3, at 555-57; Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204-10 (1954); Lionel S. Sobel, *Count Dracula and the Right of Publicity*, 47 L.A.B. ASS'N BULL. 373, 377-78 (1972); Zatkowsky, *supra* note 40, at 181-90; Rohde, *supra* note 40.

a product—the portrayal of a character, which then belongs to the employer, rather than the actor. According to Justice Mosk, Lugosi did not obtain any proprietary rights in his Dracula image because the image of the *character* Count Dracula, rather than the *actor* Bela Lugosi, was marketed,[65] and an employee's creation in the course of his employment belongs to the employer, pursuant to the California Labor Code.[66] Lugosi's portrayal of Dracula was part of his employment contract with Universal, who owned the fruits of the employee's labor[67] under California labor law. As Justice Mosk concluded, "[m]erely playing a role . . . creates no inheritable property right in an actor . . . ."[68]

Justice Mosk did, however, recognize that an actor may claim a right to the exclusive use of his portrayal of a character when the actor also creates that character. Thus, an inheritable property interest will vest for an actor's *creation* of a marketable character, but not for mere *performance*.[69] This philosophy has been used to protect the characters created by performers such as Groucho Marx[70] and Laurel and Hardy.[71]

4. Copyright—The Dissent's View

The fourth method of interpreting the right of publicity involves analyzing it under copyright law. The *Lugosi* dissent, lead by Chief Justice Bird,[72] adopted this approach, concluding that "the right of publicity recognizes an interest in intangible property similar in many respects to

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65. *Lugosi*, 603 P.2d at 431-34 (Mosk, J., concurring).

66. *Id.* at 433. California labor law provided that: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired . . . during or after . . . the term of his employment." *Id.* (citing CAL. LAB. CODE § 2860 (West 1971)).

67. *Id.* at 433. Universal's employment contract with Lugosi gave Universal the right to exploit "any and all of the artist's acts, poses, plays and appearances of any and all kinds . . . [and] to use and give publicity to the artist's name and likeness, photographic or otherwise . . . in connection with the advertising . . . of [the film]." *Id.* at 426-27 n.2.

68. *Lugosi*, 603 P.2d at 432. The trial court rejected the work product argument, finding Universal had contracted for Bela's performance, which was separate and apart from the commercial rights to his name and likeness, for which Universal had *not* contracted. *Lugosi*, 172 U.S.P.Q. (BNA) at 543-44.

69. *Lugosi*, 603 P.2d at 432.

70. *Groucho Marx Prods.*, 523 F. Supp. at 485; *see supra* text accompanying notes 21-23.

71. *Price v. Hal Roach*, 400 F. Supp. 836; *see supra* text accompanying notes 24-27.

72. Chief Justice Bird was joined in her dissent by Justices Tobriner and Manuel.

creations protected by copyright law, [and therefore] that body of law is instructive."[73]

A major advantage for plaintiffs through the copyright analogy is that, unlike the privacy model, the right of publicity becomes descendible unto the estate of the owner.[74] Justice Bird suggested this monopoly on the control of a person's name and likeness should fall into the public domain after a fixed period, as does a copyright, and further suggested adopting the same term of "life of the author and fifty years after the author's death" of copyright law as the standard time period.[75] Furthermore, the underlying policies of copyright law are compatible with the right of publicity, as discussed below.

B. *Underlying Policies of Copyright and Publicity Right Law*

1. Overall Goals and Objectives

Adopting the copyright model to the right of publicity reflects the underlying policy behind copyright law: to promote creative expression[76] while accommodating the free exchange of ideas and information.[77] Copyright law attempts to realize this goal through two general objectives: providing economic incentives to the creator, and preventing unjust enrichment. In deciding right of publicity cases, especially when adopting the copyright approach, courts give careful attention to these two objectives, balancing them against the countervailing interests of promoting free trade and preserving First Amendment protection.[78]

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73. *Lugosi*, 603 P.2d at 446 (Bird, C.J., dissenting).

74. Part VI of this article discusses the descendibility issue. *See also infra* text accompanying notes 138-56.

75. *Lugosi*, 603 P.2d at 446-47 (Bird, C.J., dissenting); *see also* 17 U.S.C. § 302(a) (1988).

76. U.S. CONST. art. I, § 8, cl. 8 (intending "[t]o promote the Progress of Science and useful Arts").

77. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180-93 (1970).

78. *See, e.g., Zacchini*, 433 U.S. at 575-77; *see also supra* text accompanying notes 34-38 and *infra* notes 163-64.

2. Economic Incentive

The primary impetus behind copyright law is to encourage creative endeavor by providing economic incentives to the creator.[79] This rationale has likewise played a prominent role in most right of publicity cases. In *Zacchini*, the United States Supreme Court recognized the public interest benefit of providing financial incentives to encourage artists and entertainers in pursuing creative endeavors[80] and continuing to perform.[81] The Court specifically recognized "the State's interest [in recognizing a right of publicity] 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 . . . ."[82] By recognizing the publicity rights in Mr. Zacchini's performance, the Court protected his drawing power and promoted his incentive to perform.[83]

Other courts have also specifically recognized the economic incentive policy behind protection of the right of publicity. In *Lugosi*, for example, Chief Justice Bird noted how the right of publicity "creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition."[84] The Sixth Circuit reached a similar conclusion in *Memphis Development*, discussed in Part V, holding that "[t]he basic motivations [of performance] are . . . the desire to receive the psychic and financial rewards of achievement. . . ."[85] and "should be regarded as . . . an economic opportunity available in the free market system."[86] In *Haelan*, the Second Circuit also noted "many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements, [or] popularizing their countenances . . . ."[87]

While economic incentive is certainly a valid policy, it is not without criticism. The economic incentive argument may fall short when used in the context of an estate seeking to assert a post mortem publicity right of a

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79. *See generally* 17 U.S.C. §§ 101-1010 (1988).
80. *Zacchini*, 433 U.S. at 567-77.
81. *Id.* at 576.
82. *Id.* at 573.
83. *Id.* at 575-76.
84. *Lugosi*, 603 P.2d at 441 (Bird, C.J., dissenting).
85. *Memphis Dev.*, 616 F.2d at 958.
86. *Id.* at 960.
87. *Haelan*, 202 F.2d at 868; *see supra* text accompanying notes 48-53; *see also* Gordon, *supra* note 3.

deceased celebrity, because a performer's primary incentive is usually fame and fortune *during* his lifetime, rather than the ability to pass these marketing rights onto his estate.[88]

Another potential drawback is that the economic incentive rationale grants the celebrity or the celebrity's heirs a monopoly power over his or her name and image. This monopoly control can lead to a general "chilling effect," as the free and open exchange of information about the celebrity may be restricted.[89] Ironically, although it was Chief Justice Bird who propounded the free enterprise argument in *Lugosi*,[90] she also expressed this chilling effect criticism in a companion case,[91] stating "prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction."[92]

3. Prevention of Unjust Enrichment

The second economic policy of publicity right protection is to prevent infringers from unjust enrichment, i.e., "reaping what others have sown."[93] The United States Supreme Court in *Zacchini*, for instance, reasoned that to allow Scripps-Howard to film and broadcast Mr. Zacchini's act without compensating him would unjustly benefit the defendant at no cost beyond its relatively insignificant production expense.[94] The Second Circuit also noted that to allow the defendant in *Factors*[95] to merchandize its unauthorized Elvis posters without compensating Presley's estate would result in unjust enrichment by "grant[ing the defendant] a windfall in the form of profits from the use of Presley's name and likeness."[96] The Pennsylvania

88. *See, e.g., Memphis Dev.*, 616 F.2d at 960 (recognizing the minimal motivation of "allowing a person to pass on his fame for the commercial use of his heirs or assigns").

89. *See id.* (holding that the publicity right of a deceased performer does not outweigh the unencumbered "commercial, aesthetic, and political use of the name, memory, and image of the famous").

90. *See supra* text accompanying note 84.

91. Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979).

92. *Id.* at 460, (Bird, C.J., concurring) (footnotes omitted).

93. *See* Samuelson, *supra* note 38, at 850 (stating that "[b]oth [copyright and publicity right] law are concerned not only with direct economic injury to the owner, but with prevention of unjust enrichment as well") (citing Kevin S. Marks, Comment, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786, 795 (1982)).

94. *Zacchini*, 433 U.S. at 575-76.

95. *Factors*, 579 F.2d at 221.

96. *Id.*

court in *Hogan*[97] reached a similar conclusion in awarding damages to Ben Hogan to compensate him for the defendant's unjust enrichment in appropriating Hogan's name.[98] Other examples where the unjust enrichment rationale has been applied to publicity rights include defendants' unauthorized publications of pictures of Muhammad Ali,[99] Cary Grant,[100] and author Jackie Collins Lerman.[101]

V. APPLYING COPYRIGHT LAW TO THE RIGHT OF PUBLICITY

Interpreting the right of publicity under copyright inevitably incorporates many of the aspects inherent in copyright law. First, as discussed in the preceding section, the two underlying policies behind copyright law—promoting creative endeavor and preventing unjust enrichment—also apply to the right of publicity. Second, as addressed in the following section, both doctrines potentially involve First Amendment freedom of speech conflicts.[102] Finally, both doctrines fail to provide clear standards regarding the extent of protection for an actor's performance or style, including whether or not such rights are assignable or descendible. This section examines certain issues where the right of publicity may be used to fill the gaps where copyright law does not provide adequate legal protection.

A. *Protection of a Person's Likeness, Image, or Character*

Most right of publicity cases involve the exclusive right and control of a performer's image. *Memphis Development*[103] is a typical example, where the defendants marketed an unauthorized statuette of Elvis Presley. The court adopted the traditional copyright approach, considering the

97. *Hogan*, 114 U.S.P.Q. (BNA) 314; *see supra* text accompanying notes 8-9.

98. The court awarded Mr. Hogan $5000 in compensatory damages. *Id.* at 321-23.

99. *Ali*, 447 F. Supp. at 728-29 (involving *Playgirl*'s publication of an objectionable portrait of the former champion to advertise its magazine).

100. Grant v. Esquire, Inc., 367 F. Supp. 876, 879 (S.D.N.Y. 1973) (involving the magazine's superimposition of a photograph of Cary Grant's head onto the torso of a model as part of an article dealing with clothing styles).

101. Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228, 232 (S.D.N.Y. 1981) (involving a magazine's use of the plaintiff's name in a publication which included pictures of a nude woman who the magazine incorrectly identified as the plaintiff).

102. The First Amendment is discussed in part VI of this article; *see also infra* text accompanying notes 157-92.

103. *Memphis Dev.*, 616 F.2d 956; *see supra* text accompanying note 15.

personal interest in economic reward and societal interests in encouraging performing arts.[104]

Copyright law protects creative *expression* when fixed in a tangible medium, but does not protect the *ideas* expressed. While this general rule is a basic precept of copyright law, it becomes very unclear when applied to a right of publicity situation. To illustrate, this rule does not provide any clear standard of distinguishing between Bela Lugosi's personal features and characteristics in his portrayal of Dracula, which could be considered proprietary, from the Dracula character itself, to which Lugosi would not have a proprietary claim.[105] This area of confusion presents a clear example of how a properly developed right of publicity law can help fill a void left open by copyright law.

B. *Protection of a Performance*

A second area where the right of publicity can fill certain legal gaps is the protection of an actor's *performance* itself. *Zacchini*[106] still stands as the seminal application of this concept, as the entire case revolved around the protection of Mr. Zacchini's human cannonball performance.[107] In reaching its decision, the Supreme Court strived to comply with the underlying goals of promoting artistic endeavor by providing the financial reward for the performer's investment into developing his act,[108] and preventing unjust enrichment to the infringer.[109]

C. *Protection of Fictional Characters*

Fictional characters, from Mickey Mouse and Tarzan, to Barney and the Teenage Mutant Ninja Turtles, are becoming an increasingly prevalent part of American culture, and are the subject of much infringement litigation. Protection of fictional characters is usually analyzed under copyright law.[110] Courts often employ the "story being told" standard,[111] which

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104. *Id.* at 958-59.

105. *See, e.g., Factors*, 579 F.2d at 221; *Lerman*, 521 F. Supp. at 232; *Ali*, 447 F. Supp. at 728-29.

106. *Zacchini*, 433 U.S. 562; *see supra* text accompanying notes 34-38.

107. *Id.* at 563.

108. *Id.* at 576-77; *see supra* text accompanying notes 79-92.

109. *Id.* at 576; *see supra* text accompanying notes 93-101.

110. For a more detailed analysis of the legal protections of fictional characters, see David B. Feldman, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CAL. L. REV. 687 (1990); Leslie A. Kurtz, *The Independent Lives*

holds that a character may only be protected under copyright law if "the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright."[112] Under this standard, a character cannot receive copyright protection unless the character itself is the story (i.e., the character is inseparable from the work in which it appears).[113] Plaintiffs may also turn to the "protected expression" theory to protect their fictional characters. The protected expression analysis looks beyond the fictional character's mere physical appearances, delving further into the character's expressions. This standard was used to find that Mickey Mouse[114] and the H.R. Puff'n'Stuff characters[115] were protectable apart from the stories in which they appeared.

Copyright law is, however, flawed by many inherent voids in protecting fictional characters. A character may not be entitled to copyright protection if the character is not sufficiently delineated to be considered copyrightable. Even when copyright law does apply, it may protect only the entire final work,[116] but not the individual components of that work. Fictional characters may thus be left virtually unprotected, especially as they migrate into new works and other mediums. As a result, plaintiffs and courts may

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of Fictional Characters, 1986 WIS. L. REV. 429 (1986); Dan D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359 (1992); Kenneth E. Spahn, *The Legal Protection of Fictional Characters*, 9 U. MIAMI ENT. & SPORTS L. REV. 331 (1992).

111. Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945 (9th Cir.) (the Sam Spade case), *cert. denied*, 348 U.S. 971 (1954).

112. *Id.* at 950.

113. *See* NIMMER & NIMMER, *supra* note 2, § 2.12, at 2-175. The Nimmer treatise points out that the Sam Spade ruling denies copyright protections for all fictional characters, because it "envisage[s] a 'story' devoid of plot wherein character study constitutes all, or substantially all, of the work;" *Id.* Nimmer further concludes, "although the *Sam Spade* [rule] protected [the author's] right to reuse his characters, the rule potentially relegated all fictional characters to the public domain." *Id.*

114. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (concluding that the infringing character's visual similarities to Mickey Mouse were substantial enough to constitute infringement). *Id.* at 756.

115. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp. 562 F.2d 1157 (9th Cir. 1977). The McDonald's commercials featuring *McDonaldland* characters (Ronald McDonald et al.) were found to so closely resemble the "total concept and feel" of Krofft's *Puff'n'Stuff* television program as to constitute copyright infringement. *Id.* at 1167. The decision represented an important progression in fictional character protection, because the court looked beyond the mere visual images of the characters themselves, and delved into the entire setting and feel of the characters' environments.

116. 17 U.S.C. § 102 (1988); NIMMER & NIMMER, *supra* note 2, § 2.12.

look to the right of publicity and other alternative legal doctrines to protect fictional characters.[117]

D. *Protection of "Pure" Characters*

Copyright law may provide little or no protection for creators of a "pure" character, which is a character who does not appear in an incorporated work. Because the Copyright Act protects works,[118] a performer who creates and develops a character such as Pee Wee Herman, the Church Lady, or Hanz and Franz may not have any copyright protection in that character unless the character is itself considered a work, or is incorporated into a work of authorship, and is "fixed in a tangible medium of expression."[119]

This weakness in copyright protection was dramatically evidenced in *Columbia Broadcasting System v. DeCosta*.[120] Actor Victor DeCosta created the fictional character "Paladin," which he portrayed at public appearances, carnivals, rodeos, etc.[121] Ten years after his retirement, DeCosta attempted to prevent CBS's use of an identical character in its television show, *Have Gun Will Travel*.[122] The television character went far beyond a mere resemblance, as CBS duplicated almost every detail of DeCosta's creation. The CBS character, like DeCosta's character, was also named "Paladin," was a good guy wearing a black outfit and a mustache, came from San Francisco, used a chess knight as a trademark, and handed out business cards bearing the chess knight and the inscription, "Have Gun Will Travel, Wire Paladin, San Francisco."[123] Although the jury found[124] that CBS blatantly pirated almost every detail of DeCosta's character, the actor was denied relief because his pure character had never been incorporated into any copyrightable work.[125]

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117. *See generally* Feldman, *supra* note 110; Kurtz, *supra* note 110; Spahn, *supra* note 110.

118. 17 U.S.C. § 102 (1988).

119. *Id.*

120. 377 F.2d 315 (1st Cir. 1967).

121. *Id.* at 316.

122. *Id.* at 316-17.

123. *Id.* at 317.

124. *Id.* at 321.

125. 377 F.2d at 321. The court reasoned that DeCosta's public appearances did not constitute a "tangible medium," and thus were not sufficient to provide copyright protection for the character. *Id.*

The court also denied DeCosta protection because he did not take the affirmative step of copyrighting his performance, business cards, or photos.[126] Note, however, that even if DeCosta had copyrighted his cards and pictures, those copyrights would only have protected against reproductions of the actual cards or photos, not the Paladin pure character itself.[127] Also note that neither trademark nor unfair competition law would have protected DeCosta because his limited personal appearances would not have been sufficient to establish a secondary meaning or create consumer confusion between his character and the CBS show.[128]

Protection of pure characters represents another area where the right of publicity can help fill in a gap left open by copyright and trademark law. The right of publicity doctrine would protect Mr. DeCosta's performance, as was done in *Zacchini*, as well as his style and character as in *Groucho Marx Productions*, *Russen*, *Price v. Hal Roach*, and *Chaplin v. Amador*.

E. *Applying the Fair Use Doctrine*

The fair use doctrine, which is found in the federal Copyright Act, provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."[129] Certain infringements of a copyright are thus permitted when the infringement furthers "the greater

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126. *Id.* Although the business cards and photographs which DeCosta handed out did satisfy the writing requirement to warrant copyright protection, the actor had not obtained copyright on these materials, thus opening his character up to the public domain; *see also* Compco Corp. v. Day-Bright Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).

127. 17 U.S.C. § 102(a) (1988). Even if the Paladin chess knight symbol was original, it still would not "tangibly fix" DeCosta's character, which incorporates his cards, props, characterization, performances, and physical appearance. *See* Michael V.P. Marks, *The Legal Rights of Fictional Characters*, 25 COPYRIGHT L. SYMP. (ASCAP) 35, 60 (1980).

128. Federal trademark law is governed under the Lanham Act, Title 15 of the United States Code. *See* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd. 604 F.2d 200 (2d Cir. 1979); Eden Toys, Inc. v. Floralee Undergarment Co., Inc. 526 F. Supp 1187 (S.D.N.Y. 1981); DC Comics, Inc. v. Filmation Ass'n, 486 F. Supp. 1273 (S.D.N.Y. 1980); Tomlin v. Walt Disney Prods., 18 Cal. App. 3d 226 (1971); *see also* J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 4, 5, 23 (2d ed. 1984); NIMMER & NIMMER, *supra* note 2, § 2.12, at 2-178.1; Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 314 (1979).

129. 17 U.S.C. § 107 (1988). Factors used to determine whether infringement falls under the fair use exception include: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect upon the potential market for or value of the copyrighted work. *Id.*

public interest in the development of art, science and industry."[130] Fair use also establishes a privilege to use copyrighted material in a reasonable manner without the copyright owner's consent,[131] and is most commonly applied in the case of parody.[132]

The fair use doctrine was applied to the right of publicity in *Namath v. Sports Illustrated*,[133] where quarterback Joe Namath claimed that an advertisement for *Sports Illustrated* magazine, featuring an issue of the magazine with his picture on the cover, had violated his publicity right. The court denied relief to Namath, finding the use of his picture was only incidental, and raised no implication of his endorsement.[134] The use of Namath's photograph was deemed incidental and thus permissible, as compared to Scripps-Howard's unauthorized broadcast of Mr. Zacchini's act, which was considered far more than incidental, having taken the performer's "entire act."[135] The fair use doctrine was also argued by the defendants in *Groucho Marx Productions*, but was rejected by the court.[136] Also note that if the *DeCosta* court would have recognized a protectable interest in the plaintiff's Paladin character, the fair use doctrine likely would *not* have protected CBS, because the network's wholesale duplication of DeCosta's character was clearly more than incidental.[137]

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130. Berlin v. E.C. Pubs., Inc. 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

131. Stephen S. Morrill, Harper & Row Publishers v. Nation Enterprises: *Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests*, 79 NW. U. L. REV. 587, 610 (1984).

132. *See* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (holding that rap music group 2 Live Crew's parody of Roy Orbison's "Pretty Woman," although commercial in nature, did not create a presumption against fair use of Orbison's copyrighted work); Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252 (2d Cir. 1980). "A parody is entitled . . . to 'conjure up' the original." *Id.* at 253 n.1; *see also* Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962). *But see Groucho Marx Prods.*, 523 F. Supp. at 493 (denying fair use defense when parody goes beyond conjuring up the original, to the point of wholesale appropriation of the original's characterizations); *supra* text accompanying notes 23-25.

133. 352 N.E. 2d 584 (1976).

134. *Id.* at 386.

135. *Zacchini*, 433 U.S. at 575.

136. *Groucho Marx Prods.*, 523 F. Supp. at 493-94; *see supra* text accompanying notes 21-23.

137. *See supra* text accompanying notes 120-28.

VI. LIMITATIONS TO THE RIGHT OF PUBLICITY DOCTRINE

As discussed in Parts IV and V, the theoretical policies behind the right of publicity are essentially analogous to those of copyright law, which can generally be applied to publicity right issues. Such application would help resolve two primary limitations on the right of publicity law as it currently exists: descendibility[138] and First Amendment conflicts.

A. *Descendibility of Publicity Rights*

One of the most debated issues concerning one's right of publicity is whether that right dies with the person, or descends to the person's heirs or estate.[139] This is particularly important, because publicity right cases often involve the exploitation of a celebrity who is deceased, and must therefore be brought by that celebrity's estate.[140]

As with other publicity right issues, the descendibility question has no uniform standard, and the answer varies from state to state and court to court. In order to successfully assert a claim on behalf of the deceased, the estate must first establish the existence of the decedent's right of publicity, and the defendant's infringement upon that right. Even after successfully meeting this burden, the estate may still be denied relief if that jurisdiction does not recognize the right of publicity as descendible.[141] As a general rule, publicity rights are not descendible when viewed under the privacy model, as the *Lugosi* majority held,[142] because a privacy right terminates upon the death of the infringed person, and third parties, including the celebrity's family, may not assert a legal interest in another person's dignitary or emotional rights.

However, when analyzed under the property or copyright model, a person's publicity rights become his personal property, and may descend to

138. For a more in-depth analysis of descendibility under the right of privacy doctrine, see generally, Felcher & Rubin II, *supra* note 64, at 1129; Ginsberg, *supra* note 40; Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981).

139. The same analysis and arguments concerning the descendibility issue of publicity rights apply equally as well to the transferability and assignability issues. This article therefore limits its discussion to descendibility.

140. *See supra* note 37 and accompanying text.

141. *See, e.g., Factors*, 579 F.2d at 222; *Memphis Dev.*, 441 F. Supp. at 1330.

142. *See supra* text accompanying notes 54-64.

his estate upon death.[143] The *Lugosi* dissent agreed with the trial court[144] that publicity rights should be descendible. As Chief Justice Bird concluded, "the right of publicity recognizes an interest in intangible property similar in many respects to creations protected by copyright law . . . [and] that body of law is [therefore] instructive."[145]

The publicity rights of the deceased performer have been asserted most frequently by the estate of Elvis Presley. In *Russen*,[146] the estate was able to prevent an unauthorized stage production which mimicked an Elvis Presley concert.[147] The descendibility issue has, however, prevented the Presley estate from prevailing in similar actions. In *Memphis Development*,[148] the Sixth Circuit recognized that the defendant's unauthorized production of Elvis statuettes violated "The King's" publicity rights, yet still denied relief to his estate, because the law of Tennessee (the domicile of Presley at his death) did not consider publicity rights to be survivable.[149] Presley's estate was also unable to prevent unauthorized production of Elvis memorial posters in *Factors*,[150] again because Tennessee law did not recognize the descendibility of publicity rights.[151]

The Second Circuit followed its *Factors* decision in *Groucho Marx Productions*,[152] denying the Marx Brothers' estates the right to assert the comedians' post mortem publicity rights, because publicity rights were not survivable under the law of the Brothers' domicile, California. Because the California court in *Lugosi* defined the right of publicity as a privacy right which terminates upon death, the New York court "conclude[d] that

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143. *See, e.g., Russen*, 513 F. Supp. at 1354-55; *Price v. Hal Roach*, 400 F. Supp. at 844; *see also supra* text accompanying notes 19-20.

144. *Lugosi*, 172 U.S.P.Q. (BNA) at 551.

145. 603 P.2d at 446 (Bird, C.J., dissenting). Justice Bird further suggested adopting copyright law's life plus fifty years time period before celebrity's name and likeness become public domain. *Id.*; *see also supra* text accompanying note 72.

146. *Russen*, 513 F. Supp. at 1382-83; *see also supra* text accompanying notes 19-20.

147. *Russen*, 513 F. Supp. at 1382-83.

148. *Memphis Dev.*, 616 F.2d 956, *cert. denied*, 449 U.S. 953 (1980); *see also supra* note 15 and accompanying text.

149. *Id.* at 958.

150. *Factors*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *see also supra* note 16.

151. *Factors*, 652 F.2d at 284. The Second Circuit initially granted relief to the plaintiffs, recognizing the right of publicity as descendible under New York common law, citing *Factors*, 579 F.2d 215, but then reversed its decision in response to the *Memphis Dev.* holding that Tennessee law should govern. *Id.*

152. *Groucho Marx Prods.*, 523 F. Supp. at 489-90; *see supra* notes 21-23 and accompanying text.

California would not recognize a descendible right of publicity that protects against an original play using a celebrity's likeness and comedic style."[153]

Other estates have been able to successfully assert the postmortem publicity rights of a deceased celebrity, when the jurisdiction involved is one which recognizes the right of publicity as descendible. New York allowed the estates of Laurel and Hardy to assert the comedians' postmortem publicity rights in the first case to recognize a descendible right of publicity, *Price v. Hal Roach*,[154] and again in *Price v. World-vision*.[155] Georgia has also recognized publicity rights as descendible in a case involving the estate of Martin Luther King, Jr.[156]

B. *First Amendment Conflicts*

The second major limitation to right of publicity protection concerns First Amendment conflicts,[157] as any discussion regarding the use of a person's name or likeness inherently involves freedom of speech and freedom of press issues.[158] Defendants who are accused of infringing upon a person's publicity rights often rely on the First Amendment as a defense, which courts must weigh against the plaintiff's personal interests. Any First Amendment issue, particularly free speech, will always invoke strong judicial deference. The United States Supreme Court has affirmed "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ."[159] First Amendment guarantees may also extend beyond newsworthy information to protect entertainment[160] and citizens' privacy interests.[161] In determining public-

153. *Groucho Marx Prods.*, 689 F.2d at 323 (footnote omitted). Although the New York court could not extend the right of publicity to the estate, it did, however, use the misappropriation doctrine to find another basis on which to enjoin the defendant's play. *Id.*

154. 400 F. Supp. at 844 (concluding that "[t]here appears to be no logical reason to terminate this right upon death of the person protected").

155. 455 F. Supp. at 266 (holding that the defendant's unauthorized *Stan 'n Ollie* television program violated the comedians' publicity rights, which passed onto their heirs).

156. *Martin Luther King*, 508 F. Supp. at 866 (allowing the estate to prevent the defendant from producing and distributing unauthorized plastic busts of Mr. King, Jr.).

157. *See generally* Felcher & Rubin I, *supra* note 57; Hannigan, *supra* note 38; Samuelson, *supra* note 38.

158. *See* U.S. CONST. amend. I (stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

159. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

160. Purely commercial speech receives only minimal First Amendment protection. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

ity right issues, courts must weigh the publicity rights of the plaintiff against the First Amendment protection of the defendant's infringing work. This section briefly reviews the First Amendment considerations found in publicity right cases, which typically involve either commercial exploitation such as unauthorized advertisements and sale of commercial memorabilia, or unauthorized biographies.

1. Commercial Exploitation

The First Amendment balancing test was dramatically put to test in *Zacchini*,[162] where the United States Supreme Court weighed the performer's right of publicity against the defendant's First Amendment protection to broadcast news. In holding for the plaintiff, the Court concluded the newscast exceeded the bounds of the First Amendment protection, as it appropriated the performer's "entire act."[163] The Court also considered that its decision would not withhold the material completely from the public, but merely determined who would benefit from its dissemination.[164]

In *Russen*,[165] the New Jersey court acknowledged that First Amendment protection may override the plaintiff's infringement claims when such exploitation disseminates information or "contributes to society's cultural enrichment,"[166] but not when the exploitation is purely for commercial gain.[167] Focusing on whether the defendant's expression "serve[d] a social function valued by the protection of free speech,"[168] the court found *The Big El Show* to be a commercial exploitation "without contributing anything of substantial value to society."[169] The court concluded the show lacked its own "creative component and [did] not have a significant value as pure entertainment,"[170] and therefore did not merit sufficient First Amendment protection.[171] The Second Circuit reached a similar result in *Groucho*

161. By entering the realm of public figures, however, a person's privacy interest protection under the First Amendment may be less than that afforded to private citizens. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

162. *Zacchini*, 433 U.S. 562.

163. *Id.* at 575.

164. *Id.*

165. *Russen*, 513 F. Supp. 1339; *see supra* text accompanying notes 19-20.

166. *Id.* at 1356.

167. *Id.*

168. *Id.*

169. *Id.* at 1359.

170. *Russen*, 513 F. Supp. at 1359.

171. *Id.* at 1361.

Marx Productions,[172] concluding that the defendant's musical play lacked the creative component to constitute societal value,[173] and that any literary or entertainment value of the infringing play was "substantially overshadowed . . . by the wholesale appropriation of the Marx Brothers characters."[174]

An interesting and very different decision was reached in *Paulsen v. Personality Posters, Inc.*,[175] when comedian Pat Paulsen mockingly declared himself a candidate for President in the 1968 presidential election. The defendants capitalized on the popularity of Paulsen's schtick by merchandising "Pat Paulsen for President" posters, which Paulsen then alleged were an unauthorized appropriation of his name and likeness.[176] Although the Supreme Court of New York agreed that the poster infringed upon Paulsen's publicity rights, it still refused to grant him relief. Because the poster was *political*, it warranted First Amendment protection, which outweighed the privacy and publicity rights of the plaintiff. The court reasoned that a presidential candidacy, even one that is a sham, is a newsworthy matter, warranting First Amendment protection sufficient to overcome an infringement claim.[177]

The *Factors*[178] defendants relied on *Paulsen* to argue their Elvis memorial poster should also receive First Amendment protection, because the death of "The King" was protected as a privileged celebration of a newsworthy event.[179] This defense was, however, rejected, as the court refused to classify the defendant's Elvis poster "in the same category as one picturing a presidential candidate, albeit a mock candidate."[180]

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172. *Groucho Marx Prods.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *see supra* text accompanying notes 21-23.

173. *Id.* at 493.

174. *Id.*

175. 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968).

176. *Id.* at 503.

177. *Id.* at 507-08 (further stating "[w]hen a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. . . . sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected and 'deserving of substantial freedom'") (quoting *Berlin*, 329 F.2d at 545).

178. *Factors*, 579 F.2d 215.

179. *Id.* at 222.

180. *Id.*

2. Unauthorized Books and Biographies

As discussed above, unauthorized appropriation of one's publicity rights is generally entitled to only minimal First Amendment protection when used for purely commercial exploitation. However, when such appropriation takes the form of a *book* rather than a poster, statuette, stage production, or rebroadcast, First Amendment protection is heightened, because of the high literary value associated with (almost) any book. This issue arises most commonly in the context of an unauthorized biography of a celebrity.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,[181] the defendant's unauthorized biography of the late Howard Hughes was challenged as an infringement upon the billionaire's publicity rights. The Supreme Court of New York denied relief, holding that the First Amendment protection inherent in the nonfiction book outweighed the deceased's publicity rights.[182] This First Amendment protection has been extended even further to protect fictional books. In *Hicks v. Casablanca Records*,[183] the estate of mystery writer Agatha Christie challenged the defendant's fictional novel about Christie as an infringement upon the deceased author's right of publicity. In following the *Rosemont* holding, the court ruled the First Amendment protection granted to the defendant's book outweighed the plaintiff's publicity rights. As the court concluded, "the [F]irst [A]mendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess."[184]

This First Amendment deference given to books was perhaps best exemplified in *Frosch v. Grosset & Dunlap Inc.*,[185] where Marilyn Monroe's executor claimed that Norman Mailer's book, *Marilyn*, infringed upon the late celebrity's right of publicity. The plaintiff argued the defendant's book should not merit First Amendment protection because it was not a true biography.[186] The court, however, soundly rejected this argument, concluding:

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181. Rosemont Enters., Inc. v. Random House, Inc., 58 Misc. 2d 1 (Sup. Ct. N.Y. Co. 1968), *aff'd mem.*, 32 A.D.2d 892 (N.Y. App. Div. 1969).

182. *Id.* at 7. The court further denied the descendibility of publicity rights, noting that the "plaintiff, in any event, has no standing to assert another's right of privacy . . . . such right is a purely personal one which may be enforced only by the party himself." *Id.*

183. 464 F. Supp. 426 (S.D.N.Y. 1978).

184. *Id.* at 433. Note, however, that Ms. Christie would most likely have been able to prevail under a right of *privacy* action, had she been alive when the book was published.

185. 427 N.Y.S.2d 828 (App. Div. 1980).

186. *Id.* at 829.

> We think it does not matter whether the book is properly described as a biography, a fictional biography, or any other kind of literary work. It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services. The protection of the right of free expression is so important that *we should not extend any right of publicity*, if such exists, to give rise to a cause of action against the publication of a literary work about a deceased person.[187]

Thus, under the *Frosch* holding, a court will not delve into attempting to draw a line between protected and non-protected books, but will almost routinely grant First Amendment protection to *any* kind of literary work.

Courts apply a sliding scale in balancing a defendant's First Amendment protection against the plaintiff's publicity rights. Newsworthy information, political speech, and books receive maximum First Amendment protection,[188] while purely *commercial* speech, which lacks the inherent values considered worthy of constitutional protection,[189] warrants less protection. Commercial memorabilia is entitled to even less (i.e., minimal) protection, because it is considered to be exploitative, motivated entirely by pecuniary return, and lacking any substantial informative or cultural values.

This multi-tiered standard is perhaps best exemplified by the two poster cases. The Elvis poster in *Factors* was considered pure commercial exploitation, void of any political significance, and therefore entitled to only minimal First Amendment protection. The *Paulsen* poster, however, qualified (arguably) as political speech, thereby invoking heightened First Amendment protection which outweighed the comedian's publicity rights.

In general, a defendant's First Amendment protection may prevail over the plaintiff's publicity rights when the infringement is found to contain sufficient literary or informative value,[190] which the courts will almost automatically find in books of any kind.[191] An infringer's First Amendment rights may also prevail if the infringement is limited to the minimum

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187. *Id.* (emphasis added).

188. *See Red Lion*, 395 U.S. at 390.

189. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); *Virginia Pharmacy*, 425 U.S. at 771; *Russen*, 513 F. Supp. at 1359.

190. *See Red Lion*, 395 U.S. at 389; *Groucho Marx Prods.*, 523 F. Supp. at 493; *Russen*, 513 F. Supp. at 1359.

191. *See, e.g.*, *Hicks*, 464 F. Supp. at 426; *Rosemont*, 32 A.D. at 892; *Frosch*, 427 N.Y.S.2d at 829.

necessary to conjure up the plaintiff's unique *character or style*, especially in the cases of parody, spoof, or satire.[192]

VII. SUMMARY, CONCLUSION, AND RECOMMENDATION

A. *Summary*

The right of publicity may protect a person's name or likeness, his or her actual performance, and even his or her unique style or characterization, but it is still a very uncertain and murky area of law.[193] Right of publicity issues involve many diverse and often conflicting individual and societal interests. Issues such as an individual's privacy rights, whether or not publicity rights are property, the descendibility of such rights, the employer's interest in its work product, the underlying policies of encouraging creative endeavor and preventing unjust enrichment, and the promotion of free market competition must all be weighed against each other and against society's interest in free speech.

This balancing act presents a very difficult task for the courts, resulting in unclear standards and inconsistent results. In order to assert a right of publicity claim, the plaintiff must establish the existence of his publicity rights, and the infringement of these rights. After meeting these initial burdens of proof, however, the plaintiff may still be denied relief if he has not taken adequate copyright precautions, as in *DeCosta*; or when the defendant's infringement is protected by the fair use doctrine, as in *Namath*; or by the First Amendment, as in *Paulsen*, *Rosemont*, *Hicks*, and *Frosch*. Even after all of these obstacles have been overcome, the right of publicity may *still* not afford protection when the plaintiff's state does not recognize the right of publicity, as in *Factors*, *Groucho Marx Productions*, and *Carson v. National Bank of Commerce*; or, even when recognized, is not considered to be descendible, as in *Lugosi*, *Memphis Development*, *Groucho Marx Productions*, and *Factors*.

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192. *See Groucho Marx Prods.*, 689 F.2d at 492; *Elsmere Music*, 623 F.2d at 252; *Russen*, 413 F. Supp. at 1359; *see also* Netterville, *supra* note 132, at 254.

193. *See, e.g.*, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (stating "[t]he state of the [right of publicity] law is still that of a haystack in a hurricane"); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 282-83 (S.D.N.Y. 1977) (acknowledging that many courts address the right of publicity under the guise of a right of privacy); Eisenberg, *supra* note 40, at 311 (stating "[t]he ultimate contours of the right of publicity are as yet unclear"); Gordon, *supra* note 3, at 554; Samuelson, *supra* note 38, at 836 (stating "[the right of publicity's] boundaries . . . [and] standards . . . are not yet defined").

B. *Conclusion*

The right of publicity reflects many of the attributes and policies found in copyright law. One major difference, however, is that copyright law is guided by a uniform national standard under the federal Copyright Act,[194] whereas right of publicity is inconsistent and varies by state. Some states recognize the right of publicity statutorily,[195] other states only through common law,[196] and still other states do not recognize publicity rights at all.[197] Even when recognized, the durational limits of publicity rights also vary from state to state.[198] The right is descendible in some states, but terminates upon death in other states, and is inheritable in other states only if the depicted person exercised the right during his or her lifetime.[199]

The right of publicity exists on a continuum. On one end, the copyright theory may protect a purely fictional character such as a comic book or cartoon character, while on the other end, the privacy theory may protect the celebrity himself. A jointly created image such as Count Dracula, however, falls uncomfortably in between the two extremes. The end product is a synthesis of the actor's distinct performance, and the studio's enhancement of costume, makeup, lighting, and direction. The closer an actor's character resembles the actor himself, the less copyright protection the character will receive. This is, after all, "the penalty an author must bear for marking [his or her characters] too indistinctly."[200] The right of publicity is bound to become a pertinent issue as the O.J. Simpson saga continues to unfold. Mr. Simpson's trial, and its ensuing media frenzy, may thus create precedent in areas of law well beyond criminal prosecution.

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194. 17 U.S.C. §§ 101-1010 (1988).

195. *See* MCCARTHY, *supra* note 2, at §§ 6.2-.15 (discussing the statutory protection provided in thirteen states: California, Florida, Kentucky, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin).

196. *Id.* § 6.1[C] (discussing states such as Connecticut, Georgia, Hawaii, Illinois, Michigan, New Jersey, Ohio, Oregon, and Pennsylvania, which recognize a common law right of publicity).

197. *Id.* § 6.1[B] at 6-6 (stating that the right of publicity is recognized either by statute or under common law, in less than half of the states).

198. *See id.* § 6.3[A].

199. *See id.*

200. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

C. *Recommendation*

Right of publicity protection is currently in a state of flux, marred by a lack of uniformity and standards. The result is confusion, inconsistency, and a lack of predictability in this legal arena. Publicity rights have traditionally been considered under the privacy doctrine, which the *Lugosi* majority adopted. Applying the privacy doctrine, however, is not the right solution. The privacy model may not provide adequate protection for a public figure, is not intended to protect a person's proprietary or financial interests, and does not recognize publicity rights as descendible. The privacy doctrine should not be allowed to drift so far from its conceptual mooring as to interfere with the objectives and rationale of publicity rights. Rather, the right of publicity should be recognized as a body of law distinct and separate from the right of privacy.

A uniform standard guideline to define publicity rights, as found with federal copyright, patent, and trademark law, would provide such guidance to state courts. This national standard would provide uniformity and predictability to a murky and uncertain arena, accommodate the underlying policies behind publicity and copyright law, and reduce potential First Amendment conflicts. A uniform right of publicity doctrine, if properly developed, can provide the legal protection needed to fill the voids left open by current copyright, trademark, and privacy law. This will play a particularly important role when attempting to protect creations such as an actor's style or characterization, live performances, fictional characters, and pure characters—in essence, a performer's *identity*.