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Privacy and Publicity, Then and Now

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INTRODUCTION

One hundred years ago, Samuel D. Warren, together with his friend and one-time law partner, Louis D. Brandeis, authored a legal article entitled, "The Right to Privacy."[1] According to one scholar, their article turned out to be "the outstanding example of the influence of legal periodicals upon the American law."[2] The article provided a basis upon which courts could recognize and protect an individual's privacy rights, rights that Warren and Brandeis claimed had not been recognized before in common law.[3]

When the privacy rights of a public figure[4] are involved, however, the foundation built by Warren and Brandeis crumbles. A public figure, often a celebrity, usually seeks publicity rather than privacy; therefore, the right of privacy and privacy law do not apply. A public figure waives his or her privacy rights by seeking publicity and is not able to assert a claim that some use of that public figure's name, image or person violates a privacy right.[5] Bette Midler's re-

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

2. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

3. "[I]n very early times, the law gave a remedy only for physical interference with life and property . . . . Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,-the right to be let alone . . . ." Warren & Brandeis, *supra* note 1, at 193.

4. For right of privacy action purposes, a public figure is one "who has arrived at a position where public attention is focused upon him [or her] as a person." Dietemann v. Time, Inc., 284 F. Supp. 925, 930 (C.D. Cal. 1968), *aff'd* 449 F.2d 245 (9th Cir. 1971).

5. Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1953). *See also* Prosser, *supra* note 2, at 411-19.

cent victory in California against a New York City advertising agency for its use of an impersonation of her voice in one of its television commercials was based in tort, for the appropriation (by imitation) of her "distinctive voice."[6]

Although courts have refused to recognize that a public figure like Ms. Midler possesses privacy rights in cases like this, courts traditionally have recognized that *some* right of value has been violated. Courts and scholars have come to refer to it as a "right of publicity."[7] Judicial treatment of this right of publicity, however, depends upon how, if at all, state courts classify it. In some states, the right represents a personal right belonging to an individual.[8] In other states, the right is classified as a property right reflecting the monetary value of the individual's persona or image.[9] Whether a judicial decision necessitates classification at all is a question which still exists.[10]

Because the rights of publicity and privacy have evolved primarily in the New York and California courts, this article predominately addresses how the courts of these two states treat these rights. Section I of this article examines the development of the right to privacy since the publication of the Warren and Brandeis article one hundred years ago. Section I is significant because the persuasiveness of

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6. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

7. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir). *cert. denied*, 346 U.S. 816 (1953). *See also* Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

8. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 820, 603 P.2d 425, 430, 160 Cal. Rptr. 323, 327 (1979); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 861, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979).

9. Brinkley v. Casablancas, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004, 1012 (N.Y. App. Div. 1981).

10. United States Court of Appeals for the Ninth Circuit Judge Noonan, in reversing the dismissal of the United States District Court for the Southern District of California, enabled Bette Midler to sue the advertising agency in tort for misappropriation. Judge Noonan backed off from classifying an individual's voice as a personal or property right. *Midler*, 849 F.2d at 463. His refusal to classify this right follows a history of such refusals by the California courts. Until the California legislature passed a statute in 1984 recognizing a property interest in a celebrity's "right of publicity," the California courts refrained from classifying the right. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825-26 (9th Cir. 1974); *but see* Lugosi, 25 Cal. 3d at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326; Guglielmi, 25 Cal. 3d at 860, 603 P.2d at 454, 160 Cal. Rptr. at 352. Until 1981, in Brinkley, 80 A.D.2d 428, 438 N.Y.S.2d 1004, the New York courts were also reluctant to classify the right. *See* Namath v. Sports Illustrated, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (N.Y. Sup. Ct. 1975), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (N.Y. App. Div. 1975), *aff'd* 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976), Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (N.Y. App. Div. 1977).

the Warren and Brandeis article led several states to adopt a common law right of privacy.[11]

Section II addresses how the courts classify the right of publicity (*i.e.*, as a personal right or as a property right), if they classify it at all. Such classification ultimately determines how the courts treat the right of publicity and explains the courts' positions regarding that right.

This article concludes with an alternative foundation for the right of publicity. The suggested foundation encompasses the classifications already provided by the courts and also harmonizes the rights of publicity and privacy. Such a foundation allows for greater protection of both rights.

I. THE RIGHT TO PRIVACY

In "The Right to Privacy,"[12] Warren and Brandeis presented a broad legal basis which courts implemented when deciding cases where no specific constitutional or statutory right had been violated. Warren and Brandeis claimed that the basis of their legal theory originated in the common law of torts which protects each person's general right to be let alone.[13] The two proffered that if the common law of torts protected individuals from harm inflicted by others, creating such negative rights as a right not to be assaulted, not to be battered, not to be defamed and not to be falsely imprisoned, then, applied affirmatively, the same common law logically protected an individual's general right to be let alone.[14] Warren and Brandeis christened this the "right to privacy."[15]

The first court to address the right to privacy was the 1902 New York Court of Appeals. This court, however, refused to recognize a general right to be let alone.[16] In that case, *Roberson v. Rochester Folding Box Co.*, the plaintiff sued a flour company for using her picture on its bags of flour, claiming that the company had invaded her right to privacy. The court disagreed with the reasoning offered by the plaintiff and by the Warren and Brandeis article, which the plaintiff had adopted, and held that the plaintiff had no cause of action. The court's decision suggested that if a "right to privacy"

11. Nimmer, *supra* note 7, at 203.
12. Warren & Brandeis, *supra* note 1, at 193-95.
13. *Id.*
14. *See id.* at 205-6.
15. *Id.* at 198.
16. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556 (1902).

was ever to exist legally, the legislature would have to enact a statute.[17]

The furor following this decision prompted the New York Legislature to do just that. In 1903, the New York Legislature passed an act empowering individuals to sue for damages and to obtain an injunction when someone uses that individual's name, portrait or picture for advertising purposes or for the purpose of trade without the individual's consent.[18] This statute effectively provides a cause of action to all individuals who choose to remain private, and prevents the use of their name, portrait or picture (later defined to include representation, mental image and likeness)[19] for commercial advertising or trade purposes without permission.

Under this privacy statute, one New Yorker successfully sued to prevent the creators of a public exhibit from using his name and likeness in an exhibit, which purported to show him using wireless telegraphy to signal for help after the ship upon which he was aboard collided with another ship.[20] Another person prevented a company from using her photograph in a street scene of a motion picture.[21] Still another individual, whose name had been mentioned in the context of a news story reporting a fire, recovered damages when a safe manufacturer reprinted his story alongside its advertisements for the sale of its safes.[22]

These early cases exemplified the courts' recognition of the importance of enforcing an individual's right to be let alone. States that had not previously recognized such a right gradually began to reassess and change their positions. Since 1980, all fifty states have acknowledged that a right of privacy exists, either by enacting privacy statutes[23] (much like the one passed by the New York Legislature in

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17. *Id.* at 545.

18. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) (derived from L. 1903, c. 132 § 1).

19. "Representation" was determined to be encompassed by the statute. Binns v. Vitagraph Co. of America, 210 N.Y. 51, 57, 103 N.E. 1108, 1110 (1913); "mental image" and "likeness" were added by Lombardo, 58 A.D.2d at 622, 396 N.Y.S.2d at 664.

20. *Binns*, 210 N.Y. at 51.

21. Blumenthal v. Picture Classics, Inc., 235 A.D. 570, 257 N.Y.S. 800 (N.Y. App. Div. 1932), *aff'd* 261 N.Y. 504, 185 N.E. 713 (1933).

22. Flores v. Mosler Safe Co., 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

23. *See generally* Prosser, *supra* note 2, at 386-88 nn. 17-54.

1903)[24] or through extension and application of existing common law.[25]

II. THE RIGHT OF PUBLICITY

A. *No Cause of Action Acknowledged*

Once courts began to recognize the right of privacy, a class of people emerged who remained unprotected under a privacy statute and the common law. These people were held to have waived their privacy rights because they openly sought publicity. Their "waiver" prohibited them from successfully demanding redress under a cause of action for violation or invasion of their right to privacy.[26] These people were those who earned their livelihood through public recognition, i.e., celebrities, performers, public figures. Since a "waiver" theory was applied to the image, name and persona of a public figure, public figures could not demand redress when another had used his or her name or persona without approval.

A 1952 New York Court of Appeals decision exemplified this problem.[27] The plaintiff, Gautier, a famous animal trainer, had performed a half-time show for a football club that had televised his performance without his consent.[28] Gautier sued the club for compensation for the violation of his right of privacy. The New York court held that Gautier had no cause of action under the privacy statute because he had waived his privacy rights by agreeing to perform in public. The court refused to recognize a right of privacy where that right had been deemed waived. The court also refused to recognize that Gautier had any right to the monetary value of his performance, thereby preventing him from receiving any compensation from the club.[29]

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24. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976).

25. Since the publication of Prosser's *Privacy* article, the four states that had refused to recognize a right of privacy have changed their laws. The Rhode Island Legislature passed a privacy statute in 1980 (R.I. GEN LAWS § 9-1-28 (1956) (derived from P.L. 1972, ch. 281, § 1)) recognizing a cause of action for the unauthorized use of a person's name, portrait or picture. The Texas judiciary recognized a tort cause of action for the invasion of a person's privacy in Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973). The Nebraska Legislature enacted its right of privacy statute in 1979 (NEB. REV. STAT. § 20-202 (1943) (derived from Laws 1979, LB 394 § 2)) after the judiciary had refused to recognize such a right. The Wisconsin Legislature passed a similar act in 1974. WIS. STAT. ANN. § 895.50 (West 1983).

26. *See supra* note 5 and accompanying text; *see also* Yankwick, *The Right of Privacy, Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499, 513-17 (Summer 1952).

27. Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952).

28. *Id.* at 357, 107 N.E.2d at 487.

29. *Id.* at 359-60, 107 N.E.2d at 488-89.

The 1953 California Supreme Court reacted similarly in a case involving two non-public figures. In *Gill v. Hearst Publishing Co.*,[30] the court held that the Gills, a young couple whose photographs had been taken without their knowledge or permission as they embraced outside their market stall, did not have a cause of action against a magazine publisher who used the photograph as part of an article about love. Like the New York court that decided the *Gautier* case, the California Supreme Court refused to recognize an infringement of the Gills' right of privacy because they had been in a public area and had thereby waived their privacy rights. The California court ruled consistently with the *Gautier* court and refused to recognize that the Gills had a right to the value of the photograph, even though the publisher generated sales and made a profit by publishing the photograph in a magazine.[31]

B. *The Foundation for a Cause of Action*

The recognition of a cause of action for public figures began in 1953 when the United States Court of Appeals for the Second Circuit distinguished a professional athlete's right to the value of his or her image or picture as distinct from his or her right of privacy.[32] In *Haelan Laboratories v. Topps Chewing Gum*,[33] a baseball player had contracted exclusively with Haelan, a chewing gum company, permitting Haelan to use his photograph on their baseball cards. The player, induced by Topps, another chewing gum company, later breached that exclusivity clause by allowing Topps to use his photograph on their baseball cards. Haelan sued Topps for inducing the breach, asserting that the player had assigned the exclusive right to his image to Haelan by contract.[34]

Topps argued that Haelan had no cause of action because the New York privacy statute protected only an individual's personal right to privacy. Hence, only the player could sue Topps for using his photograph and only then if Topps had not obtained the player's permission to use his photograph on the baseball cards. As a personal and non-assignable right, the right of privacy did not apply to the player's contract with Haelan and did not allow Haelan to claim ex-

30. 40 Cal. 2d 224, 253 P.2d 441 (1953).

31. *Id.*

32. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d. Cir.), *cert. denied*, 346 U.S. 816 (1953).

33. *Id.*

34. *Id.*

clusive rights in the player's photograph. Thus, Topps concluded, Haelan did not have a cause of action against Topps unless the court recognized a transferable right in the use of an individual's image.[35]

The U.S. District Court for the Eastern District of New York followed the precedent set by the *Gautier* court and refused to find such a right, but the United States Court of Appeals for the Second Circuit reversed the decision holding that individuals have an assignable right in publicity value of their images.[36] The court essentially treated this right of publicity value as a property right because of its pecuniary value, but believed it unnecessary to declare the right of publicity a property right and refrained from classifying the right as a personal or property right.[37]

In the year following this decision, Melville B. Nimmer wrote an article discussing the growing discord between what was known as the right of privacy and what the United States Court of Appeals for the Second Circuit had christened the "right of publicity."[38] Nimmer discussed the inadequacy of the developing law with respect to the right of privacy as applied to people who, by choice or by circumstance, find themselves in the public arena. Referring to the *Gill* and *Gautier* decisions, among others, Nimmer argued that the laws governing the right to privacy are unable to protect the right of publicity or the right to the value of publicity. Therefore, Nimmer believed the right of publicity represented the "flip side of the coin of the right of privacy," and should be recognized and declared a property right possessing all the characteristics of such right.[39]

Four years later, Nimmer had a chance to present his arguments to a federal court in California when he represented a plaintiff in a tort claim against the National Broadcasting Company (NBC).[40] NBC used the plaintiff's name and identity as part of a docudrama which portrayed his experience as a survivor of an airplane crash. In this case, the plaintiff sued NBC for violating his right of privacy and, alternatively, for violating his right of publicity.[41] The court, following the decision in *Gill*, refused to recognize that the plaintiff possessed any right in the value of the plaintiff's

35. *Id.* at 867.

36. *Id.* at 868.

37. *Id.* The court determined that the treatment of the right of publicity did not depend on classifying it as a personal or a property right.

38. Nimmer, *supra* note 7, at 203.

39. *Id.* at 204, 215-16.

40. Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958).

41. *Id.* at 69.

identity or experience,[42] even though NBC had capitalized on that value. Not only did the court reject Nimmer's theory that the right of publicity was a property right, the court rejected the claim that the right existed at all.[43]

In 1960, six years after Nimmer first began to promote the classification of the right of publicity value as a property right, William Prosser proclaimed that even though such a right in publicity value existed, it was unnecessary to dispute whether the right was personal or one of property.[44] Prosser echoed the rationale of the United States Court of Appeals for the Second Circuit in *Haelan* and stated that, once protected by law, the right of publicity became a right of value upon which a plaintiff could capitalize by selling licenses for the use of that value.[45] Prosser returned to the concept that Warren and Brandeis had called the "right to privacy" and classified the invasion of the right to privacy as four distinct torts:

1. Intrusion upon the plaintiff's seclusion, 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; and

4. Appropriation for the defendant's advantage of the plaintiff's name or likeness.[46]

Prosser notes differences in the case law regarding the right of privacy and blames this on the failure of the courts and the legislature to separate and distinguish these four forms of invasion of privacy.[47] The first three reflect torts against an individual through trespass, intentional infliction of mental distress and defamation. These are the torts that Warren and Brandeis claimed had created, by negative implication, a "right to be let alone."[48] The fourth tort, while still implying that an individual has a right to be let alone, further implies that a particular individual's name or likeness has value. This value extends the right against misappropriation of an individual's name or likeness into a broader right than that encompassed by

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42. *Id.* at 70-71.

43. "This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity." *Id.* at 70.

44. Prosser, *supra* note 2, at 406.

45. *Id.*

46. *Id.* at 389.

47. *Id.* at 407.

48. Warren & Brandeis, *supra* note 1, at 195 n.4 (quoting *Cooley on Torts*, 2d ed.).

the general right of privacy. The right protecting individuals against such misappropriation constitutes what Nimmer has defined as the right of publicity or, more specifically, a right to the value of that publicity.[49]

In 1971, eleven years after Prosser's article (and sixteen years after Nimmer's), the California Legislature provided a cause of action for Prosser's fourth invasion of privacy classification or Nimmer's "right of publicity."[50] This statute provided an individual with a cause of action against anyone who used the individual's photograph, name or likeness without consent for advertising or solicitation purposes. This statute treats the rights of privacy and publicity similarly and has been interpreted to make unnecessary the classification of either right as a personal or a property right.[51]

Under this statute, a race car driver successfully sued a cigarette manufacturer for using a retouched photograph of his car in one of their cigarette advertisements.[52] Although the court recognized the driver's proprietary interest in his identity and likeness (and thereby rejected the precedent set in the 1958 case against NBC), the court followed Prosser's rationale and declared it unnecessary to classify this interest as either one of privacy or property.[53]

The United States Supreme Court also refused to classify and provide a proper foundation for the right of publicity. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[54] a human cannonball sued a television company after his entire performance at a county fair was televised during a news program without his knowledge or permission. The Court recognized the validity of state courts' actions protecting a public figure's right of publicity and even compared the right of publicity to the rights protected by patent and copyright laws. The Court defined the right of publicity only as a "valuable, enforceable right" and refused to classify it further.[55]

By describing the right of publicity as a "right of value," the Court merely stated the obvious: if there were no value in an individ-

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49. Nimmer, *supra* note 7, at 204.

50. CALIF. ANN. CIV. CODE § 3344 (West Supp. 1990).

51. *Cf.* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 861, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (The court held that the right of publicity protects against the unauthorized use of one's name, likeness, or personality, but that this right is not descendible).

52. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

53. *Id.* at 825-26.

54. 433 U.S. 562 (1977).

55. *Id.* at 574-77. The Court did not believe the performance was "news" and therefore the telecast was not protected by the first amendment freedom of press claim.

ual's name, likeness or persona, no one would use that name, likeness, or persona in advertisements or publications.[56] Courts adhering to this rationale believed,[57] as Prosser believed, that as long as the right is protected, further definition or classification of that right becomes an exercise in semantics. Thus, according to these courts, the treatment of the right of publicity does not necessitate a classification of that right. Yet, without a specific classification, courts merely protect the right of publicity to the same extent and in the same way that they protect privacy rights, *i.e.*, as a right personal to each individual. The future of the right of publicity and the extent to which courts can protect that right, however, necessarily depends upon such classification. Even if a public figure can protect his or her name, likeness or persona from invasion during his or her own lifetime, that person cannot determine the future treatment of this right (*i.e.*, whether this "right of value" lasts longer than the celebrity or public figure does), unless this right properly is classified and given a proper foundation.

C. *The Foundation Reevaluated*

Personal rights such as the right of privacy end when the individual claiming that right dies. If the right of publicity represents a personal right, that right will also end when the public figure dies. The value of the public figure's name, likeness and persona, earned and achieved during his or her lifetime, is left free for anyone to use. If the right of publicity is classified and treated as a property right, however, the public figure will be able to assign the value of that right to his or her heirs.[58] The courts that continually refuse to clas-

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56. *Id.* at 576. The Court compared the telecast of the performers' show to unjust enrichment. No social purpose is served by having the defendant get free that which has value and would naturally be paid for.

57. *See* Prosser, *supra* note 2, at 406.

58. One New York court stated the argument succinctly:

> Since the theoretical basis for the classic right of privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy is not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right . . . . There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."

Price v. Hal Roach Studios, 400 F. Supp. 836, 844 (S.D.N.Y. 1975). *See also* Cepeda v. Swift and Co., 415 F.2d 1205, 1206 (8th Cir. 1969); Gordon, *Right of Property*, 55 Nw. U.L. Rev. 553, 607. *But see* Haelan Laboratories v. Topps Chewing Gum, 202 F.2d at 868 (property right label is immaterial).

sify the right of publicity as a property right can only treat it as a right of value while the public figure lives. These courts base their decisions upon existing privacy laws and the fact that the right to privacy is a personal right. Thus, classification of the right as a property right becomes crucial to protect the investment made by a public figure in providing the value of his or her image, name, and persona.

Two 1979 California Supreme Court decisions dealing with this issue exemplify this conclusion. In *Lugosi v. Universal Pictures*,[59] actor Bela Lugosi's heirs sought recovery of profits from the producers of the Dracula films in which Lugosi had starred after the producers began to market the Dracula character in Lugosi's image.[60] The court held that Lugosi's heirs had no cause of action, as Lugosi's right to market his image died with him.[61]

Months later, the same court decided that even if a public figure had marketed his or her image while alive, the right to continue to market the image died with the public figure.[62] Through these decisions, the California court essentially held that the right of publicity, like the right of privacy, remained personal to each individual and could only be treated as a property interest during the lifetime of the individual.

Perhaps the outcome and effect of these decisions prompted the California Legislature to enact a statute, in 1984, recognizing a property interest in a deceased personality's name, voice, signature, photograph, or likeness.[63] This statute allows a public figure to grant, upon death, the value of any aspect of his or her persona to his or her heirs for up to fifty years following the death of the public figure, even though the 1971 statute which protects this interest during the lifetime of the public figure fails to classify the interest as one of property.[64]

Similarly, the New York courts also hesitated to classify the right of publicity. Their reluctance resulted in cases in which public figures could obtain injunctions and personal damages for infringe-

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59. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

60. *Id.*

61. "Such . . . 'a right of value' to create a business, product or service of value is embraced in the law of privacy and is protectable during one's lifetime but it does not survive the death of Lugosi." *Id.* at 818.

62. Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

63. CAL. CIV. CODE § 990 (West Supp. 1990).

64. CAL. CIV. CODE § 3344 (West Supp. 1990).

ments of their right of publicity, but not compensatory damages or restitution. In 1975, Jets' quarterback Joe Namath sued for compensatory and punitive damages when Sports Illustrated used photographs of him in advertisements soliciting subscriptions.[65] The New York court denied him compensation and justified its decision by asserting that the first amendment prohibited the court from interfering with the publishing of a newsworthy item. The court considered Namath's photograph, in any form, to be newsworthy and stated that the constitutional guarantee of the freedom of the press would always take precedence over an individual's right of privacy.[66] The fact that Namath claimed a property interest in his photograph and previously had made hundreds of thousands of dollars by selling his image and persona to endorse other products did not sway the court from its belief that he had no right to the value of the image.

Had Namath sought only an injunction, he may have been successful despite the Court's first amendment justification. Only two years later, band conductor Guy Lombardo succeeded in his lawsuit against an advertising agency which had appropriated in a television commercial "his style and likeness" as Mr. New Year's Eve.[67] Unlike Namath, who had sought only monetary damages, Lombardo had asked for an injunction to stop the commercial.[68]

During the same period, New York courts began to recognize a transferable property right in a celebrity's publicity value if that value had been marketed during the celebrity's lifetime. One court proclaimed that the personas of slapstick comedians Laurel and Hardy represented a transferable property right because they were created and exploited by the two during their lifetimes.[69] The court held that a television producer who had made animated cartoons of the two comedians could not televise them without the consent and permission of the comedians' heirs, because the heirs effectively owned the licenses to the publicity value of the Laurel and Hardy personas.[70] Elvis Presley's estate also won its claim against a com-

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65. Namath v. Sports Illustrated, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (N.Y. Sup. Ct. 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

66. 80 Misc. 2d at 534-35, 363 N.Y.S.2d at 280.

67. Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (N.Y. App. Div. 1977).

68. *Id.*

69. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975).

70. *Id.* The court further held that it was not possible for:

> Laurel and Hardy to lose rights in their own names and likenesses through 'non-use.' If a person chooses not to exercise the right of publicity, there is the attendant

pany distributing posters of the deceased singer because the distributor had not obtained permission from the estate, which owned the rights to Presley's image.[71]

Both decisions were based partially upon the fact that the celebrities involved were being portrayed as themselves and Elvis Presley had licensed others to do so during his lifetime.[72] Thus, it appeared that when the right of publicity or the value of that right was translated into a tangible entity such as a license, New York courts recognized its property aspect, classified the right as property and treated it so. Without this tangible form, however, the courts refrained from classifying it as property and could choose whether or not to treat it as such.

In 1981, the New York Supreme Court, Appellate Division, addressed the confusing state of the law in the areas of privacy and publicity in a case involving model Christie Brinkley.[73] In that case, the court specifically stated what the earlier cases already had revealed; that is the distinction between the two rights lay in the remedies sought. The private individual who claims that his or her right of privacy has been violated seeks redress for a personal injury, an injury to his feelings. The public figure who claims that his or her right of publicity has been violated, however, seeks redress for an injury to property.[74]

By treating the remedies sought by private individuals and public figures differently, the New York court effectively recognized that different rights flowed from private and public figures. A more recent New York decision recognized the right of publicity as a devisable property right regardless of whether or not the public figure had exploited the right during his lifetime. This development provides enormous protection to the estate and/or heirs of public figures by empowering the estates or the heirs with a cause of action to prevent others from using the publicity value created by a public figure.

> statutory right of privacy . . . which protects that person from commercial exploitation by others. There cannot, therefore, be any necessity to exercise the right of publicity during one's life[time] in order to protect it from use by others or to preserve any potential right of one's heirs.

Id. at 846.

71. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

72. *Id.* at 219; *Price*, 400 F. Supp. at 845.

73. Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981).

74. *Id.* at 443-44.

By classifying the right of publicity as a property right, the New York courts, through an extension of common law, and the California courts, through a revision of statutory law, protect the property interest of value in a public figure's name, persona and image. As a result, these courts also protect the persona and image, and, thereby, protect the general public from being misled to believe that a certain public figure supports or recommends a particular product, thus providing society with assurances as to the quality of a product being promoted by a public figure. This aspect of the protection afforded by treating the right of publicity as a property right is similar to the protections afforded society by trademark law, where the quality of the mark is protected from misuse which leads to misrepresentation.

Only through the classification of the right of publicity as a property right are courts able to enforce the rights which flow from that property right. By adhering to the Supreme Court's belief that the right can be treated and protected without classification, courts cannot act when faced with a question of the descendibility of that right, inevitably leaving anyone other than the public figure who asserts such a right without a cause of action. This classification scheme is exemplified by Judge Noonan's opinion regarding Bette Midler's lawsuit.[75] In reversing the dismissal of the United States District Court for the Southern District of California and remanding the case, Judge Noonan held that "[t]o impersonate [Ms. Midler's] voice is to pirate her identity."[76] Although he placed a value on both Ms. Midler's voice and identity, he refrained from classifying that value as either one of property or personalty, and thereby left the determination of the classification of this value for another court.[77]

The California Deceased Personality Statute[78] has paved the way for future treatment of the right of publicity. By requiring that the heirs to the rights of the publicity value of a deceased public figure register their claims with the Secretary of State, and by allowing the rights to the value of the name, likeness and persona of a public figure to exist for up to fifty years following the public figure's death, California law treats the right of publicity like a copyright. Borrowing from the rationale behind copyright laws, this California statute protects the right of publicity value in a public figure's name,

75. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); *see supra* note 10.
76. *Id.* at 463.
77. *Id.* at 463-64.
78. CAL. CIV. CODE § 990.

likeness, and persona as an original work of authorship, albeit in an intangible form. In light of Ms. Midler's recent victory, this law should be expanded to cover voices as part of an individual's persona.[79]

A decision of the United States Court of Appeals for the Seventh Circuit also points toward a better future for the right of publicity.[80] In dicta of that decision, the court echoed the California statute and analogized between the interest represented by the right of publicity and the interests represented by a copyright.[81]

Following this rationale to its logical conclusion, any public figure with value in his or her name, likeness, or persona owns an interest in his or her name, likeness, or persona which can be treated as a copyright. Like a copyright, that interest, whether exploited or not during the public figure's lifetime, will become part of the public figure's estate when he or she dies. The public figure's heirs or representatives have the choice of whether to market this name, likeness, or persona for up to fifty years following the public figure's death. After fifty years, their exclusive interest no longer exists and the value in the name, likeness, or persona becomes available for the public to use.

But why limit this right to celebrities and other public figures? If the courts or legislatures held that each individual possesses a legally recognized copyright interest in his or her own name, likeness, and persona that could be treated and protected as a copyright, each individual's privacy interests would also be protected.[82] This theory finds its roots in a dissenting opinion in the 1902 New York case where the plaintiff sued a flour company for using a picture of her face on the bags of flour:

> Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him . . . as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of [the

79. Midler v. Ford Motor Co., No. CV862683 (C.D. Cal. Aug. 17, 1987) (LEXIS, Genfed library, Dist file).

80. Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n., 805 F.2d 663 (7th Cir.) *cert. denied*, 480 U.S. 941 (1986).

81. *Id.* at 677.

82. The argument can be made that to apply these privacy interests to *all* individuals would be an administrative nightmare because one name may be shared by numerous people. However, this would not be a problem, because obscure and unknown names have no value, and thus there would be no misrepresentation if one of these names were involved.

> law] is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right.[83]

Referring to the plaintiff's picture on the bags of flour, Judge Gray continued: "[I]f her face . . . has a value, the value is hers exclusively; until the use be granted away to the public."[84]

Judge Gray's dissent, had it been adopted, would have given the right of privacy the protection of property rights without need of a statute creating and protecting the right of privacy. It also would have provided a basis for the subsequent protection of the right of publicity. If courts and legislatures today agree with the theory behind this dissenting opinion, the right of privacy and the right of publicity would have the same foundation: both would be classified as property rights and both would be treated and protected as property rights. Anyone who alleges violation of either right would then have the choice of whether to sue for an injunction, restitution, compensation, or a combination of the above.

CONCLUSION

Only with the firm support of a foundation based upon a specific copyright-type property classification will the right of publicity evolve as a fully protected right. Treating the right as one of property without such classification has provided insufficient protection for the right and has stagnated its future protection. By extending this protection to include the right of privacy, the need to distinguish between private and public persons and their respective causes of action would be alleviated because the law protecting property rights would govern both.

With such a foundation, Bette Midler's initial lawsuit would not have been dismissed. Although it was not her voice in the television commercial, the imitation of her voice, like the copying of copyrighted material, would have permitted her (or her heirs) to present the issue of appropriation to a jury. Despite the fact that Ms. Midler eventually did present that issue to a jury, the cost of appealing could have been alleviated with a proper foundation. With a number of other celebrity appropriation lawsuits waiting in the wings, the California legislature or judiciary should consider paving the way of

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83. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 564, 64 N.E. 442, 450 (1902) (Gray, J., dissenting).

84. *Id.*

the future with a proper classification of the rights of privacy and publicity.[85]

85. Anderson, *Soundalike Suit*, 76 A.B.A. J. 24 (Jan. 1990).