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A Survey of the Right of Publicity: An Overview

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A SURVEY OF THE RIGHT OF PUBLICITY: AN OVERVIEW

I. INTRODUCTION

This comment surveys the development of California law concerning the right of publicity. Although its roots are found in the right of privacy, the right of publicity has become a distinctly different cause of action which has evolved in a relatively short period of legal history. This phenomenon suggests that the expansion of the right of publicity is a response to the growing needs in this century to protect the public personality.

Whether the status was attained voluntarily or by some incident deemed newsworthy, the right of privacy previously had not proven to afford the necessary safeguards nor the appropriate remedies. For this, the right of publicity is uniquely fashioned. This comment, therefore, proposes to highlight some of the issues involved: to whom does it apply; what is the scope of the right; is the right descendible, and if it is descendible, under what circumstances, and for what duration. The objective of this comment will be to outline the law concerning the right of publicity in California, analyze current legal trends and suggest some guidelines for the future.

A person's right to the use of his name, photograph, or likeness has long been afforded protection by the courts.[1] Initially, this right was called the right of privacy and was intended to prevent injury to a person's feelings, or to protect his "right to be left alone."[2] Dean Prosser, in discussing the right of privacy, separated invasions of this right into four distinct categories.[3] His fourth category dealt with those cases involving "[a]ppropriation, for the defendant's advantage, of the plain-

1. *See* Pavesich v. New England Life Ins., Co., 122 Ga. 190, 50 S.E.68 (1905); Melvin v. Reid, 112 Cal. App. 285, 297 P.91 (1931); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-84 (1960) [hereinafter cited as Prosser].

2. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 821, 603 P.2d 425, 430, 160 Cal. Rptr. 323, 328 (1979); Kelly v. Johnson Pub. Co., 160 Cal. App. 2d 718, 721, 325 P.2d 659, 661 (1958); *see* Prosser, *supra* note 1, at 389.

3. *Id.*, the four categories are:

a. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
b. Public disclosure of embarrassing private facts about the plaintiff;
c. Publicity which places the plaintiff in a false light in the public eye;
d. Appropriation, for the defendant's advantage of the plaintiff's name or likeness.

tiff's name or likeness."[4] Gradually, the right of publicity evolved from this fourth category. It protected a person's right to receive compensation for the use of his name, photograph or likeness by another.[5]

Confusion arose when individuals brought actions under the right of privacy, but sought the protection of the, as yet, unrecognized right of publicity.[6] These individuals were seeking protection of their right to be compensated for the use of their name, photograph, or likeness without their permission; the right of privacy was only intended to protect a person from emotional injuries caused by this unconsented taking.

The right of publicity evolved when well-known people were found without a remedy in the right of privacy.[7] In most cases, the courts determined that these individuals lost their right of privacy when they voluntarily entered the public spotlight. While they were deemed no longer to have the protection of the right of privacy, equity demanded a remedy be fashioned to compensate for injury and the unlawful taking of their right of publicity.[8] The courts then reasoned that placement in the public eye granted these individuals a monetary value in their name, photograph or likeness; this value arose from the goodwill which was created by the public's recognition of the individual.[9] "A name is commercially valuable as an endorsement of a product[10] or for financial gain only because the public recognizes it and attributes goodwill and feats of skill or accomplishments of one sort or another to that personality."[11] To protect this commercial value, the courts recognized the right of publicity to compensate the plaintiff, not for injury to his feelings, but for this unconsented taking; or misappropriation. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill [inherently belonging to the individual seeking protection.] . . . No social

4. *Id.*

5. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843 (S.D.N.Y. 1975); Lugosi, 25 Cal.3d at 818-19, 603 P.2d at 428-29, 160 Cal. Rptr. at 326-27; Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1976).

6. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U.L. REV. 553, 554-56 (1960) [hereinafter cited as Gordon].

7. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1279-81 (D. Minn. 1970); *see* Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 486-87 (3d Cir. 1956).

8. *See* Ettore, 229 F.2d at 486-87 and Price, 400 F. Supp. at 843-44.

9. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); Price, 400 F. Supp. at 846-47 [quoting Gordon, *supra* note 6, at 607 (1960)].

10. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.10 (9th Cir. 1974) [citing Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970)].

11. *Id.*

purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[12] The fact that the manner in which the plaintiff's name, photograph, or likeness was used, was not derogatory or deleterious does not defeat his cause of action.[13]

II. THE UNCONSENTED TAKING OF ONE'S NAME, PHOTOGRAPH, OR LIKENESS HAS STATUTORY PROTECTION IN CALIFORNIA

Since 1972, California Civil Code section 3344[14] has protected an individual from the unconsented taking of his name, photograph, or likeness. This statute was influenced greatly by a New York statute[15] which made it "both a misdemeanor and a tort to make use of the name, portrait or picture of any person for 'advertising purposes or for the purpose of trade' without his written consent."[16] Thus far, however, section 3344[17] has received little attention by the California courts.

Like the New York statute, the California statute applies to any person whose name, photograph, or likeness was appropriated without their consent.[18] For a cause of action to arise under the statue, the defendant must have knowingly made the appropriation "for a commercial purpose."[19] Subsection (g) of the statute states that any remedies the statute provides for, are to be in addition to other legal remedies.[20] This would seem to indicate that an equitable cause of action for an unconsented appropriation can still be maintained in conjunction with, or separate from, this statutory cause of action. Thus, although this cause of action is more difficult to bring because of the knowledge requirement, it has the advantage of providing for a minimum recovery of $300.00.[21] There is a possibility that, as with other tort actions, "[p]unitive damages are allowed on finding by the trial

12. Zacchini, 433 U.S. at 576 [citing Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326, 331 (1966)].

13. *See generally*, Haelan Laboratories, 202 F.2d 866; Lugosi, 25 Cal.3d 813, 603 P.2d 423, 160 Cal. Rptr. 323; Price, 400 F. Supp. 836; Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

14. CAL. CIV. CODE § 3344 (West Supp. 1980).

15. 1903 N.Y. Laws, ch. 132, §§ 1-2, as amended in 1921, now N.Y. CIV. RIGHTS LAW §§ 50-51.

16. Prosser, *supra* note 1, at 385.

17. CAL. CIV. CODE § 3344 (West Supp. 1980).

18. CAL. CIV. CODE § 3344(a) (West Supp. 1980).

19. *Id.*

20. CAL. CIV. CODE § 3344(g) (West Supp. 1980).

21. CAL. CIV. CODE § 3344(a) (West Supp. 1980).

court that the defendant acted with fraud, . . . malice, or oppression."[22] As yet, punitive damages have not found significant use in the courts. Perhaps future actions will more effectively utilize this tool to deter potential defendants.

III. THE RIGHT OF PUBLICITY APPLIES TO PUBLIC FIGURES

As a result of the rationale underlying the right of publicity, courts have limited the right to those individuals who have a commercial value in their name, photograph or likeness. This commercial value is an inherent part of being a public figure.[23] The right of publicity "usually becomes important only when the plaintiff. . .has achieved in some degree a celebrated status."[24] However, this right has been limited somewhat and held not to apply to corporations, partnerships or animals.[25]

Motschenbacher v. R.J. Reynolds Tobacco Co.[26] involved the unconsented use of a public figure's photograph for advertising purposes. The advertisement depicted the plaintiff in his race car; and despite alterations of the photograph by the defendant the court found that it was still recognizable as that of the plaintiff.[27] The court held that California recognizes an individual has a legally protected interest in his own identity.[28]

California's "right of publicity" doctrine evolved from several cases decided in other jurisdictions. The first case to use the name "right of publicity," thus differentiating a person's commercial interest in his own identity from his right of privacy, was *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[29]

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22. Note, *Commercial Appropriation of An Individual's Name, Photograph or Likeness: A New Remedy for Californians*, 3 PAC. L.J. 651, 662 (1972); see also Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, 52 L.A.B.J. 430, 456 (1977). For detailed analysis of the statute, see those two articles.

23. *See* note 5 *supra*.

24. Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, 52 L.A.B.J. 430, 446-47 (1977) offers a good example.

> If a famous actor received an Academy Award for appearing in John Doe's movie and John puts the actor's acceptance speech into his advertisement for his new picture, which the actor doesn't appear in, then the acceptance speech is being used for commercial purposes and not as news. Therefore, the actor may bring an action for invasion of his right of publicity.

25. Price, 400 F. Supp. at 846-47 (quoting Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U.L. REV. 553, 607 (1960)).

26. 498 F.2d 821 (9th Cir. 1974).

27. *Id.* at 826-27.

28. *Id.* at 825.

29. 202 F.2d 866, 868 (2d Cir. 1953).

In *Haelan*, a chewing gum company which had been granted an exclusive right to use a baseball player's photograph on its baseball cards, sued another chewing gum manufacturer that subsequently used the same baseball player's photograph on its baseball cards. The court held that "in addition to, independant of that right of privacy, a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."[30] The significance of this recognition of a relatively new cause of action may be that it provides greater control for the individual. It grants individuals the power to convey their publicity value to those they wish and deny that same value to others.

IV. THE RIGHT OF PUBLICITY APPLIES TO NEWSWORTHY PEOPLE WHOSE NAMES, PHOTOGRAPHS, OR LIKENESS WERE USED FOR A COMMERCIAL PURPOSE WITHOUT THEIR CONSENT

Closely related to the concept of a "public figure" is the concept of "newsworthiness." If an event is "newsworthy" the person involved in that event becomes similar to a "public figure" in that he loses his right of privacy with regard to those facts which have been disclosed regarding the incident.[31] An understanding of "newsworthiness" helps in a determination of whether there is a cause of action for an invasion of the "right of publicity." If a person has given up his "right of privacy"[32] with regard to a specific event, then the disclosed facts of that event and the person enter the public domain and can be used by anyone.[33] When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private."[34] In California, the criteria used to determine if an incident is "newsworthy" are: (1) The social value of the facts published; (2) The depth of the article's intrusion into ostensibly private affairs; and (3) The extent to which the party voluntarily acceded to the position of public notoriety."[35]

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30. *Id.*

31. *See* Coverstone v. Davis, 38 Cal. 2d 315, 323, 239 P.2d 876, 880-81 (1952) and Smith v. Nat'l Broadcasting Corp., 138 Cal. App. 2d 807, 811-12, 292 P.2d 600, 603-04 (1956).

32. Ettore, 229 F.2d at 486-87.

33. Coverstone, 38 Cal. 2d at 323, 239 P.2d at 880-81.

34. Melvin, 112 Cal. App. at 290-91, 297 P. at 93; see Smith, 138 Cal. App. 2d at 811-12; 292 P.2d at 603-04, Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 230, 253 P.2d 441, 443 (1953).

35. Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 891, 118 Cal. Rptr. 370, 378-79 (1974); Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971) [citing Kapellas v. Kofman, 1 Cal. 3d 20, 36, 459 P.2d

In an examination of a situation involving an unconsented taking of a "newsworthy" person's name, photograph or likeness it is important to determine whether it was used for a commerical purpose.[36]

In *Johnson v. Harcourt, Brace, Jovanovich, Inc.*,[37] Johnson found $240,000 in cash and then received a $10,000 reward for returning the money. A magazine article, recounting the incident, was republished in an English textbook. The plaintiff brought an action for the invasion of his right of privacy based on the defendant's use of the plaintiff's name for a commercial purpose. The court held that the plaintiff had failed to state a cause of action because the author had only used the article as an illustration of poor grammar. The court also found the article to be an insubstantial motivation behind student purchases of the book.[38] Thus, the court required that a direct connection or nexus be shown between the use of the name, photograph or likeness and the commercial use.[39]

In *Ettore v. Philco Television Broadcasting Corp.*,[40] the plaintiff, a professional boxer, fought Joe Louis and was paid a fee for granting the motion picture rights to the fight. In ruling for the plaintiff, the court found that, at the time the contract was entered into, neither party had contemplated the existence of commercial television. Although the court did not call the right involved, the "right of publicity," it clearly distinguished between the "right of privacy" which applies to private persons, and that right which applies to public figures.[41]

They are fundamentally dissimilar rights: the former arises when an event involving an average person becomes known to the public, "and makes him arguably, newsworthy."[42] A private person does not obtain a right of publicity merely by his involvement in a newsworthy inident, nor does he forego all rights to privacy. The criteria outlined by the court suggest that private or undisclosed facts may still be protectible. The determining factor as to whether a right of publicity exists is whether the person's name, photograph or likeness is used for a commercial purpose.[43]

912, 922, 81 Cal. Rptr. 360, 370 (1969)]; see Gill v. Curtis Pub. Co., 38 Cal. 2d 273, 278-79, 239 P.2d 630, 634 (1952).

36. *See* note 23 *supra*.

37. 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974).

38. *Id.* at 895, 118 Cal. Rptr. at 381 (emphasis added).

39. *Id.*, CAL. CIV. CODE § 3344(e) (West Supp. 1980).

40. 229 F.2d 481 (3d Cir. 1956).

41. *Id.* at 486.

42. *Id.*

43. Johnson, 43 Cal. App. 3d 880, 118 Cal. Rptr. 370.

This latter right of publicity "involves the appropriation of the performance or production of a professional performer."[44] Here, the person involved is a public figure and, as such, has a right of publicity. This right only extends to appropriations of his name, photograph or likeness when it is used for a commercial purpose or when the appropriation involves the taking of his entire act or performance.[45]

The First Amendment of the United States Constitution has been held to allow the press to publish or broadcast matters of public interest or concern.[46] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court stated that where these First Amendment rights conflict with the right of publicity, the courts must weigh the effects of enforcing one right over the other.[47] The *Zacchini* case involved an entertainer, Hugo Zacchini, who performed a "human cannonball" act. Against his request, a television newsreporter filmed Zacchini's act and showed it on the news. Zacchini sued for unlawful appropriation and the United States Supreme Court held that Zacchini had a "right of publicity" in his act and the defendants had violated this right by televising the entire act without his consent.[48] This ad hoc balancing test clearly favored a recovery for the plaintiff but may not provide a similar remedy when the facts are less one-sided. It also leaves open the issue of just how much could effectively be appropriated in the interest of news dissemination.

It is important to note that the court specifically stated that it was only deciding the First and Fourteenth Amendment issues.[49] It left the question of whether there was a privileged invasion of Zacchini's right of publicity to the state court because Zacchini's right was based on Ohio law.[50] This indicates that each state may have its own requirements for a right of publicity cause of action. In response to this suggestion, state legislatures have enacted New York Civil Rights Law, sections 50-51, and California Civil Code, section 3344.[51]

V. THE RIGHT OF PUBLICITY IN CALIFORNIA MAY BE DESCENDIBLE IF EXERCISED DURING ONE'S LIFE

A major question involving the right of publicity is whether an

44. Ettore, 229 F.2d at 486.
45. *Id.*; Zacchini, 433 U.S. at 565-68.
46. Zacchini, 433 U.S. 562.
47. *Id.*
48. *Id.* at 573, 575-78.
49. *Id.* at 566-68.
50. *Id.*
51. *See* notes 14 and 16 *supra*.

assignment of this right, made while a performer is alive, will survive beyond his death. The most important California case to address this issue was *Lugosi v. Universal Pictures*.[52] *Lugosi* involved Bela Lugosi's widow and son bringing an action against Universal Pictures for allegedly appropriating property which they had inherited from the deceased. Universal had been using Bela Lugosi's portrayal of Dracula to advertise other Dracula films in which Lugosi did not appear. The California Supreme Court found that Lugosi had never exercised his right by exploiting his name and likeness in association with the Dracula character.[53] The court stated that Lugosi could have brought the action himself, had he been alive, and suggested that if he had exercised his right by using his representation of Dracula to advertise himself or a business, then he may have been able to assign his right.[54]

> Assignment of the right to exploit name and likeness by the "owner" thereof is synonymous with its exercise. . . . Assertion by the heirs of the right to exploit their predecessor's name and likeness to commercial situations he left unexploited simply is *not* the exercise of that right by the *person* entitled to it.[55]

The court ruled against the plaintiff because the right to exploit a "name and likeness is personal to the artist."[56] Conceivably the person entitled to exercise the right of publicity of the deceased may be an assignee. Thus, whether or not a person has exercised his right of publicity during his lifetime has become the test for determining descendibility of this right in California.[57]

Justice Mosk's concurring opinion in *Lugosi*[58] suggests that *Price v. Hal Roach Studios, Inc.*,[59] may be distinguished on the basis that the actors Laurel and Hardy were representing themselves and developed their own characters, whereas Bela Lugosi portrayed a character that

52. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

53. *Id.* at 818-20, 603 P.2d at 428-29, 160 Cal. Rptr. at 326-27.

54. *Id.*

55. *Id.* at 823, 603 P.2d at 431, 160 Cal. Rptr. at 329.

56. *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329; *see* Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 861, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979), in which Rudolph Valentino's nephew sued for misappropriation of his uncle's right of publicity. The State Supreme Court affirmed the lower court's dismissal of the action and affirmed the ruling in *Lugosi*.

57. *Id. See* Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1618-19 (1979) [hereinafter cited as Felcher & Rubin].

58. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Mosk, J., concurring).

59. *Id.* [citing Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 845 (S.D. N.Y. 1975).]

Bram Stoker created in his novel *Dracula*. "Merely playing a role. . . creates no inheritable property right in an actor absent a contract so providing."[60] In *Price*, the court ruled on the basis of sections 50-51 of the New York Civil Rights Law[61] that it is not necessary for a person to exercise his right of publicity in order to preserve it for one's heirs.[62] Although the California and New York statutes appear similar on their face, there has been a major distinction in state court application of them. California, in the absence of direct legislative intent, has refused to make the right of publicity descendible.

In *Factors Etc., Inc. v. Pro Arts, Inc.*,[63] the plaintiff sued the defendant for publishing a memorial poster of Elvis Presley. The plaintiff had purchased the exclusive right to use Presley's name, photograph or likeness for commercial purposes. The plaintiff purchased its rights in several merchandising agreements from Presley's partner and from the executor of Presley's estate. The defendant purchased the copyright to a photograph from a photographer and used it on a memorial poster. The court found that Presley's partner had a property right which did not terminate upon Presley's death.[64] The court also held that the plaintiff's exclusive right to exploit the Presley name and likeness, because exercised during Presley's life, survived his death.[65] Thus, the death of Presley did not result in the termination of the exclusive right to use Presley's name, photograph or likeness which the defendant's poster had appropriated.[66]

In opposition to the Second Circuit Court of Appeals decision in *Pro Arts* is the Sixth Circuit decision in *Memphis Development Foundation v. Factors Etc., Inc.*[67] The *Memphis Development* case involved a non-profit company that sold miniature statues of Elvis Presley after his death. As in the *Pro Arts* case, Factors was trying to enforce what it claimed to be an exclusive right to Presley's name, photograph or likeness. Here, the court held "that the right of publicity should not be given the status of a devisable right, even where. . .a person exploits the right by contract during life."[68] Therefore, it was held that Presley's right of publicity terminated upon his death. These inconsisten-

60. *Id.*
61. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1948).
62. Price, 400 F. Supp. at 846.
63. 579 F.2d 215 (2d Cir. 1978).
64. *Id.* at 220-22.
65. *Id.* at 222.
66. *Id.* at 220-22.
67. 616 F.2d 956 (6th Cir. 1980).
68. *Id.* at 958.

cies, should they continue, may require a final determination by the United States Supreme Court or action by Federal legislation.[69]

VI. THE RIGHT OF PUBLICITY IS ANALOGOUS TO COPYRIGHT LAW AND, AS SUCH, SHOULD BE DESCENDIBLE FOR A LIMITED PERIOD.

When analyzing right of publicity cases, more and more courts refer to this right as a property right.[70] The right of publicity seems to be a property right in the same way in which copyrights are property.[71] This analogy naturally arises because the policies underlying copyright law and the right of publicity are the same. This policy is that "encouragement of individual effort by personal gain is the best way to advance public welfare,"[72] or in other words, "the right of the individual to reap the reward of his endeavors."[73] Copyright also bears a similarity to the right of publicity in its potential conflicts with the First Amendment.[74] Though information should be readily accessible both to the press and the public, it should not infringe on the property rights of an individual who has obtained commercial value in his name, photograph or likeness.

Copyright laws protect an individual's creative efforts. This protection allows for the descendibility of the copyright to the creator's heirs, or for its assignability or copyright sale to a third person. While the copyright is in effect, it is the "property" of the owner; thus, he holds all of the property rights and benefits. It is readily apparent that this type of system would lend itself equally well to the right of publicity.[75]

An individual works to create a proprietary interest in his name or likeness just as an author labors over his creative efforts. The author achieves statutory copyright protection by fixing his work in a tangible form. This is similar to the "exercising" of the right of publicity alluded to in *Lugosi v. Universal Pictures*.[76] To protect his right of pub-

69. Prior to publication the United States Supreme Court denied a hearing in *Memphis Development*.

70. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221; Price, 400 F. Supp. at 844.

71. Zacchini, 433 U.S. at 573, 576; Lugosi, 25 Cal. 3d at 846-47, 603 P.2d at 446-47, 160 Cal. Rptr. at 344-45; *see also* Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1129-32 (1980).

72. Zacchini, 433 U.S. at 576 citing Mazer v. Stein, 347 U.S. 201, 219 (1954).

73. *Id.* at 573.

74. Zacchini, 433 U.S. at 576.

75. *Id.* at 575.

76. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

licity, its owner must go to some lengths to "exercise" it. If not "exercised," the right dies with the owner; if "exercised," it may be descendible in California.

In *Lugosi*, the California Supreme Court expressed an unwillingness to determine the extent of any such descendibility.[77] The court suggested that it would be, "beyond the scope of judicial authority" to make a determination and further suggested that the legislature, if it so desired, might appropriately amend California Civil Code, section 3344.[78] Thus far, the legislature has declined to do so.

Chief Justice Rose Bird, in her dissent in *Lugosi*, suggested that the court follow the copyright analogy and adopt the rule that "the right of publicity should be recognized during the subject's life and for fifty years thereafter."[79] Whether it be by judicial or legislative enactment, the best course for the future may be to use this copyright analogy when dealing with the right of publicity.[80]

VII. CONCLUSION

The right of publicity is still in its early stages of development. It has been held to apply to both "public figures"[81] and to "newsworthy" individuals.[82] As yet, no California court has held the right of publicity to be descendible; however, in *Lugosi*, the California Supreme Court suggested that the right may be descendible if exercised during one's lifetime.[83] Thus, the court failed to extend the right of publicity by its own action and deferred to the Legislature for further clarification.[84] There has been no clear guide for when a person is deemed to have "exercised" the right—is it only by assignment in contract or may he personally exercise the right of publicity sufficient to meet the "exercise" standard? Many questions remain unanswered.

In her dissent in *Lugosi*, Chief Justice Bird advocates the court's adoption of a copyright analogy but this has not been actively pursued by the State Legislature.[85] The U.S. Supreme Court previously supported this approach in *Zacchini* but deference to the state court for final determination has resulted in the inconsistencies noted in the Cir-

77. *Id.* at 822, 603 P.2d at 430, 160 Cal. Rptr. at 344-45.
78. *Id.*
79. *Id.* at 847, 603 P.2d at 446-47, 160 Cal. Rptr. at 344-45.
80. *Accord*, Felcher & Rubin, *supra* note 64.
81. *See* notes 22-29 *supra*.
82. *See* notes 30-38 *supra*.
83. *See* note 56 *supra*.
84. *See* notes 75 and 76 *supra*.
85. *See* note 77 *supra*.

cuit Court decisions.[86]

Clearly, the right of publicity is an area which requires further guidelines and some effort to create unanimity. When decisions necessarily affect public figures who are regionally or nationally known and whose property rights are not central to one jurisdiction, there is a desire to achieve uniformity when affecting those rights. The answer may lie in a further determination by the United States Supreme Court or action by the Congress.

The future form of the right of publicity in California is unsettled and the California Civil Code, section 3344,[87] has not been the solution one would hope to derive from legislative activism. One can only be certain that this is an area of law requiring further development for the protection of individuals caught in a twentieth century phenomenon—the media.

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86. *See* notes 62 and 68 *supra*.

87. CAL. CIV. CODE § 3344 (West Supp. 1980).

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