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Susan G. Bluer

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California Extends The Right of Publicity to Heirs: A Shift From Privacy to Property and Copyright Principles

by SUSAN G. BLUER*

I
Introduction

A growing number of states have adopted the "right of publicity" in recognition of the pecuniary worth attached to a celebrity's name, image, or likeness.1 An offshoot of the law of privacy,2 the right of publicity is "the right of each person to control and profit from the publicity values which he has created or purchased."3 This right has attracted substantial attention from commentators who have criticized its disparate application,4 particularly with respect to whether or not the right of publicity is descendible.5

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* Member, Third Year Class.

1. The states which have adopted the right of publicity either by statute or case law are: California, Florida, Georgia, Massachusetts, Nebraska, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Utah, Virginia and Wisconsin; see infra notes 69-118 and accompanying text.

2. The right of privacy is the personal, nonassignable and nondescendible "right to be let alone." Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890). See, e.g., Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L.J. 1577 (1979); see also infra notes 17-30 and accompanying text.


5. Descendible means "[c]apable of passing by descent, or of being inherited or transmitted by devise." BLACK'S LAW DICTIONARY 400 (5th ed. 1979). Once a right descends, the heir becomes the exclusive manager of the right, and is able to initiate legal action in his or her own behalf. Descendibility should not be confused with survivability of an action; "[s]urvival refers to the continued life of a cause of action
Several societal interests are advanced when the right of publicity is descendible. First, the celebrity is allowed to control who may profit from the commercial use of his image after he is dead. Second, advertisers are discouraged from exploiting a deceased celebrity's image without first obtaining the consent of that celebrity's heirs. Third, heirs may prevent unjust enrichment to advertisers by making them pay for the privilege of exploiting a deceased celebrity's name or likeness. Finally, the public benefits because entertainers are encouraged to develop their talents to the fullest, including the creation of a distinguishable public image. This benefit is illustrated by the role entertainers play in enhancing social diversity.

Until January 1, 1985, it was unclear whether or not there was a descendible right of publicity in California, and if so, how it operated. The leading pre-1985 California case, *Lugosi v. Universal Pictures*, created confusion in California and in other states forced to interpret the case under choice of law rules. While one court interpreting *Lugosi* held that, in California, a publicity right never descends, other courts deter-

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7. See, e.g., Hoffman, supra note 4, at 11.

8. Id.

9. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576-77 (1977) (defendant's broadcast of plaintiff's entire human cannonball act posed a substantial threat to the economic value of that performance by undermining plaintiff's exclusive control over the publicity given to his performance); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir.), cert. denied, 449 U.S. 953 (1980) (allowing the right of publicity to descend fulfills the social policy of encouraging individual creativity); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 839, 603 P.2d 425, 441, 160 Cal. Rptr. 323, 339 (1979) (Bird, C.J., dissenting) (the broader social objective implicit in according judicial protection to the right of publicity is to secure the benefits of intellectual and artistic creation for the entire society); see also Felcher & Rubin, supra note 2, at 1601; Hoffman, supra note 4, at 11.


11. The law of the state where the deceased celebrity was domiciled will be applied in right of publicity cases. See 16 AM. JUR. 2D Conflict of Laws §§ 52-59 (1964); 23 AM. JUR. 2D Descent and Distribution §§ 16-17 (1964).

mined that the right does descend under certain conditions.\textsuperscript{13}

A recently enacted California statute\textsuperscript{14} extends all of the rights of publicity available under section 3344 of the California Civil Code to eligible heirs who have registered their claims with the Secretary of State.\textsuperscript{15} California's new law eliminates the ambiguities in "Lugosi" and provides extensive right of publicity protections that are unsurpassed in any other state. By affirming the descendibility of the right of publicity, California has succeeded in transferring the right from a personal protection under tort law to a commercial asset under property law. In addition, the statute resolves first amendment concerns in limiting free expression, and sets forth clear exceptions to wrongful use of another's publicity rights.\textsuperscript{16}

This Note initially discusses the evolution of the right of publicity, explains the problems caused by "Lugosi" in and out of California, and evaluates the treatment other states have given the issue of descendibility. Part II highlights the key aspects of California's new law and suggests the effect the law will have upon those persons it most directly concerns. Part III concludes that California's legislative action in the area of publicity rights is unique and suggests that the California statute should be a model for other jurisdictions wishing to clarify the descendibility issue.

II

Background

A. From Privacy to Publicity

The right of privacy was first proposed in a law review article by Samuel Warren and Louis Brandeis.\textsuperscript{17} Dean Prosser later subdivided the right into four categories: (1) unreasonable and highly offensive intrusion upon the seclusion of another; (2) public disclosure of private facts; (3) placement of another

\textsuperscript{13} Groucho Marx Prods. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982); Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538 (11th Cir. 1983).

\textsuperscript{14} CAL. CIV. CODE § 990 (West Supp. 1985).

\textsuperscript{15} CAL. CIV. CODE § 3344 (West Supp. 1985) was also amended, effective January 1, 1985, to add misappropriation of another's voice and signature to the formerly protected name, photograph, and likeness. Throughout this Note the terms "name," "likeness," "image," and "identity" will be used interchangeably in reference to a celebrity's publicity rights. There are not yet any published California cases involving the newly protected voice and signature publicity rights.

\textsuperscript{16} See infra note 127 and accompanying text.

\textsuperscript{17} Warren & Brandeis, supra note 2.
in a false light in the public eye; and (4) misappropriation of another's likeness for commercial purposes. A common law right of privacy is recognized in California by both the courts and the state constitution.

The right of privacy protects injury to feelings. Specifically, it gives someone whose personal information, identity or characteristics have been wrongfully disclosed or exploited a cause of action for violation of the right to be let alone. Since the gravamen of a privacy action is injury to feelings, California courts have held that the right of privacy is personal, nonassignable and nondescendible.

In addition to barring transfer of the right of privacy, courts have also been reluctant to allow celebrities to bring a privacy action for misappropriation. The courts' hesitation appears to stem from the restricted scope of the privacy action as a remedy for injured feelings. Since celebrities seek the public limelight, many courts feel they thereby waive any invasion of privacy action when their image is commercially exploited.

For example, in O'Brien v. Pabst Sales Co., the court questioned whether a plaintiff could invoke the right of privacy to prevent a calendar manufacturer from using the plaintiff's photograph on its products. The court concluded that no privacy action existed because the plaintiff, the most publicized football player of the year, had essentially surrendered his right of privacy.

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19. See, e.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (plaintiff brought an action for invasion of privacy against defendant based on the publication of an article disclosing that plaintiff had committed a "hijacking").
20. CAL. CONST. art. I, § 1 provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are... pursuing and obtaining... privacy."
22. See, e.g., Felcher & Rubin, supra note 2, at 1582.
25. See Nimmer, supra note 3, at 205 (citing Warren & Brandeis, supra note 2, at 215) (celebrity only has privacy action with respect to his non-professional life).
26. 124 F.2d 167 (5th Cir. 1941).
vacy by seeking fame and notoriety. The defendant was thus allowed to make money from the unauthorized sales of the calendars containing the plaintiff's name and likeness. The plaintiff was denied damages for injury to his feelings and was unable to receive the profits that were derived from the commercial exploitation of his image.

To a lesser extent, right to privacy actions have been limited by first amendment considerations. Some courts have suggested that a celebrity's right of privacy is outweighed by first amendment interests in freedom of expression. Other courts have recognized a celebrity's economic interest in his commercial image and have held that while the public should have access to biographical and newsworthy information about celebrities, persons should not be entitled to unlimited commercial exploitation of celebrities' images.

Faced with the limitations involved in maintaining a privacy action when there has been a misappropriation of name or likeness, some celebrities have brought lawsuits alleging unfair competition. To a great extent, this theory has also proved inadequate. The following are methods of competition considered unfair in certain suggested legislation:

1. passing off goods or services as those of another;
2. causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
3. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have.

The unfair competition theory is difficult to maintain because many celebrities never endorse any products. Even a celebrity that has endorsed a product will be unable to succeed in

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27. Id. at 170.
28. Id.
31. SUGGESTED STATE LEGISLATION 146 (1970). The Council of State Governments proposed a variety of methods of unfair competition to be used as a guide for states wishing to enact unfair competition laws. Id. at 146-47.
an unfair competition action if the defendant's product is not in
direct competition with the celebrity's.\textsuperscript{32} For example, an ad-
verter may use Barbra Streisand's image to market breakfast
cereal without triggering an unfair competition claim if
Streisand has only previously endorsed a brand of pudding.

Prompted by the inadequacy of the right of privacy and un-
fair competition theories, the Second Circuit introduced the
right of publicity doctrine in \textit{Haelan Labs, Inc. v. Topps Chewing Gum}.\textsuperscript{33} In that case, plaintiff obtained the exclusive right
to use a ball player's photograph in connection with the sale of
gum.\textsuperscript{34} Before the expiration of plaintiff's contract, defendant
induced the ball player to enter into a similar contract.\textsuperscript{35}

The district court dismissed the action, stating that the con-
tract with the plaintiff constituted no more than a release of
liability for what would otherwise be an invasion of the ball
player's privacy.\textsuperscript{36} The Court of Appeals for the Second Circuit
reversed the lower court's decision and held:

\begin{quote}
[I]n addition to and independent of [the] right of privacy, a man
has a right in the publicity value of his photograph . . . . [and
this] right to grant the exclusive privilege of publishing his pic-
ture . . . may validly be made without an accompanying trans-
fer of a business or of anything else.\textsuperscript{37}
\end{quote}

The court thus declared that a right of publicity existed and
was assignable.

Commentators recognize that a right which is severable and
assignable is not personal.\textsuperscript{38} Thus, the logical extension of
\textit{Haelen} is that an interest which is capable of inter vivos trans-
fer, that is to say assignable, is not personal and is therefore
descendible. An examination of California case law prior to
January 1, 1985, and a look at other states' treatment of the
descendibility issue illustrates the courts' unwillingness to em-
brace this conclusion and illuminates the reasons why section
990 was added to the California Civil Code.

\textsuperscript{32} See, e.g. Hoffman, supra note 3, at 19; Nimmer, supra note 3, at 210 (citing
(1939)); Acme Screen Co. v. Pebbles, 159 Okla. 116, 14 P.2d 366 (1932); Scutt v. Bassett,
\textsuperscript{33} 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).
\textsuperscript{34} Id. at 867.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 868.
\textsuperscript{37} Id.
\textsuperscript{38} See, e.g., Nimmer, supra note 3, at 209; Kwall, supra note 4, at 210.
B. California Case Law

The California Supreme Court first addressed the issue of descendibility of the right of publicity in *Lugosi v. Universal Pictures.* In that case, the heirs of Bela Lugosi brought a civil action against Universal Pictures seeking to: (1) recover profits made by the defendant in its licensing of the use of the Count Dracula character to commercial firms, and (2) enjoin the defendant from negotiating future licenses without the heirs' consent. In determining that the decedent had a protectible property right as to his facial characteristics and his individual likeness and appearance, the trial court found that his heirs acquired all right, title, and interest in this property under the decedent's will. The California Supreme Court reversed the trial court's finding that the right of publicity descends unconditionally and held that the right did not descend in Lugosi's case. As a result, Universal was allowed to use Lugosi's image and retain all of the profits from its licensing venture.

The *Lugosi* court initially discussed the right of privacy, emphasizing that the right is personal and nondescendible. Then the majority addressed the right of publicity and concluded that, where a celebrity commercially exploits his name or likeness during his lifetime, he has created a property right that may be assigned.

The court determined that the decedent did not meet this "commercial exploitation requirement" because he failed to use his name or likeness in the operation of a business or to sell a product. The court stated that had Lugosi commercially exploited his name, thereby giving it what the court termed a "secondary meaning," and then transferred his publicity rights to the plaintiffs, the plaintiffs would have had a valid claim against Universal.

The only rationale the court offered for rejecting descendibility to heirs of celebrities who had not exploited their images was:

If rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to
survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served.  

The majority opinion appears inadequate in several respects. First, the court's commercial exploitation requirement inequitably penalizes celebrities who choose not to commercially exploit their names or likenesses, but who also wish to prevent advertisers from receiving the windfall gain from such exploitation. Second, the court failed to specify whether the celebrity must use his image in connection with the same type of product as that promoted by defendant, or whether the commercial exploitation requirement is satisfied as long as the celebrity has commercially exploited his image once. If the former is true, then under Lugosi the plaintiff is clearly entitled to no more protection under the right of publicity cause of action than he is under an unfair competition claim. Third, while the court's interest in maintaining the free flow of information and ideas is laudable, this interest alone is insufficient to rationalize a denial of descendibility solely because a celebrity elected not to exploit his image during his lifetime.

In her frequently cited dissenting opinion, Chief Justice Bird laid the foundation for California's new statute. She argued that unlike the right of privacy, which is personal in nature, the right of publicity concerns a clearly identifiable commercial asset that requires considerable time, energy, and money to develop. She observed that the sale of one's persona in connection with the promotion of commercial products has unquestionably become big business.

Although Chief Justice Bird accepted the possibility of first amendment conflicts in non-commercial uses, she did not hesitate to find that the right of publicity should descend unconditionally whenever misappropriation of a celebrity's name or likeness for advertising purposes is at issue. To hold otherwise would allow advertisers to become unjustly enriched by usurping both profit and control of a deceased celebrity's image.

Finally, recognizing the public's interest in a celebrity's im-

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45. Id. at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.
47. 25 Cal. 3d at 834, 603 P.2d at 438, 160 Cal. Rptr. at 336 (Bird, C.J., dissenting).
49. Id. at 839, 603 P.2d at 441, 160 Cal. Rptr. at 339; see also Kwall, supra note 4, at 223.
age, Chief Justice Bird recommended that the right of publicity, like copyright protection, should last for fifty years following the death of the celebrity. At that time, she suggested, the celebrity's image should enter the public domain.

The California Supreme Court also addressed the descendibility issue in *Guglielmi v. Spelling-Goldberg*. In that case, the nephew of the decedent Rudolpho Guglielmi, known as the sex symbol Rudolph Valentino, initiated a suit for damages and injunctive relief against the defendant for using the decedent's name, likeness, and personality in advertising the film *Legend of Valentino: A Romantic Fiction*. In a two paragraph opinion, the California Supreme Court affirmed the lower court's finding for the defendant.

The *Guglielmi* decision proves that ambiguity is not unique to verbose opinions. The court simply said that under *Lugosi* the right of publicity is not descendible and expires upon the death of the protected person. The court failed to address the applicability of the commercial exploitation requirement.

In her concurring opinion, Chief Justice Bird reiterated that the right of publicity should be descendible, but noted that the right is not absolute. She clarified the first amendment exceptions she alluded to in *Lugosi* by explaining that "works of fiction are constitutionally protected in the same manner as political treatises and topical news stories." Furthermore, she noted that entertainment is worthy of the same constitutional protection as the exposition of ideas. Therefore, she concluded, since the defendant's appropriation was for biographical purposes, it did not constitute an infringement of the right to publicity under the first amendment.

50. Copyright protection is extended to authors of original works that are fixed in a tangible medium. 17 U.S.C. § 102 (1982). Copyright ownership may be transferred in whole or in part by any means of conveyance or operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. 17 U.S.C. § 201(d)(1) (1982). Works enter the public domain 50 years after the author's death. 17 U.S.C. § 302(a) (1982).

51. 25 Cal. 3d at 847-49, 603 P.2d at 446-47, 160 Cal. Rptr. at 344-45.
52. Id. at 847, 603 P.2d at 446, 160 Cal. Rptr. at 344.
53. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979). *Guglielmi*, a companion case to *Lugosi*, was decided two days later on December 5, 1979.
54. Id. at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353.
55. See supra text accompanying notes 47-49.
56. 25 Cal. 3d at 867, 603 P.2d at 459, 160 Cal. Rptr. at 357 (Bird, C.J., concurring).
57. Id., 603 P.2d at 459, 160 Cal. Rptr. at 357.
58. Id. at 864, 603 P.2d at 458, 160 Cal. Rptr. at 356.
The Second Circuit was the first to interpret California publicity law under *Lugosi* and *Guglielmi* in *Groucho Marx Productions v. Day and Night Co.* In that case, heirs of the famous comedy team brought an action to enjoin the defendant's exhibition of a play which featured the comedy style of the deceased brothers. The Second Circuit reversed the district court's holding for plaintiffs on the grounds that the Marx Brothers did not satisfy the commercial exploitation requirement during their lifetime so as to trigger descendibility.

In reaching its conclusion, the court rejected the *Guglielmi* decision as being too broad. The court then attempted to apply the commercial exploitation requirement established in *Lugosi*. Concluding that the right only descends "in connection with particular commercial situations—products and services—that a celebrity promoted during his lifetime," the court held that an original play was outside the scope of California's right of publicity protection.

There are two troubling aspects to the *Groucho Marx* opinion. First, the court's strict interpretation of the commercial exploitation requirement not only bars descendibility to heirs of celebrities who decide not to exploit their images, but bars recovery in instances where there was exploitation of a different product or service than that of defendant. Secondly, it seems that the court's entire discussion of the commercial exploitation requirement was unnecessary since defendant's infringement for entertainment purposes was excusable on first amendment grounds.

The Eleventh Circuit encountered similar confusion when it attempted to apply California law in a diversity action, *Acme Circus Operating Co. v. Kuperstock*. In that case, the decedent entered into an employment contract with the defendant whereby he assigned his right to use the name of Clyde Beatty Circus for a period of ten years. During that time, the decedent died and all rights to payment were transferred pursuant to the contract to the decedent's wife, the plaintiff. After the ten-year

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59. 689 F.2d 317 (2d Cir. 1982). California law was applied because the Marx Brothers were domiciled there. See supra note 11.
60. 689 F.2d at 322.
61. Id. at 320.
62. Id. at 323.
63. Id.
64. See supra text accompanying notes 55-58.
65. 711 F.2d 1538 (11th Cir. 1983).
period, a new contract was signed which recognized the plain-
tiff as the exclusive owner of decedent's name. When the de-
fendant misrepresented itself as owner of the Clyde Beatty
Circus and obtained the federal service mark,66 "Clyde Beatty-
Cole Bros. Circus," the plaintiff commenced an action for viola-
tion of her deceased husband's right of publicity.

The Eleventh Circuit reversed the district court's finding for
the defendant. Ignoring the broad Guglielmi decision, the
court followed the Second Circuit's interpretation of Lugosi.67
The court found that since the decedent had commercially ex-
ploited his name during his lifetime in exactly the same man-
ner as the defendant was attempting, the decedent's position
was distinguishable from Bela Lugosi's. The commercial ex-
ploitation requirement was satisfied and plaintiff was entitled
to recover.68

C. Other Statutory and Case Law

1. States that Reject Descendibility

Several state statutes refuse to extend the right of publicity
to heirs whether or not the deceased commercially exploited
his image during his lifetime. Massachusetts,69 Rhode Island,70
Utah71 and Wisconsin,72 all have statutes that prohibit the mis-
appropriation of another's name, photograph or likeness. How-

66. The term "service mark" means a mark used in the sale or advertising of serv-
ices to identify the services of one person and distinguish them from the services of
67. 711 F.2d at 1542-44.
68. Id. at 1543-45.
69. MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1985) provides:
    Any person whose name, portrait or picture is used within the common-
wealth for advertising purposes or for the purposes of trade without his writ-
ten consent may bring a civil action . . . to prevent and restrain the use
thereof; and may recover damages for any injuries sustained by reason of
such use.
70. R.I. GEN. LAWS § 9-1-28 (1985) provides:
    Any person whose name, portrait or picture is used within the state for ad-
vertising purposes or for the purposes of trade without his written consent
may bring an action . . . to prevent and restrain the use thereof, and may
recover damages for any injuries sustained by reason of such use.
71. UTAH CODE ANN. § 45-3-3 (1982) provides:
    The personal identity of an individual is abused if:
      (1) An advertisement is published in which the personal identity of that
individual is used in a manner which expresses or implies that the individual
approves, endorses, has endorsed, or will endorse the specific subject matter
of the advertisement; and
      (2) Consent has not been obtained for such use from the individual, or if
ever, neither the Massachusetts nor Rhode Island statutes address whether the right of publicity extends to heirs; it is likely, therefore, that the right does not descend in these states. 73 Wisconsin’s statute specifies that the right only applies to “living persons.” 74 Until 1981, the Utah statute provided that written consent from a decedent’s “heirs or personal representatives” must be obtained before the decedent’s name or likeness could be used for advertising purposes. 75 Utah’s current statute, however, does not make any reference to an heir’s right of publicity. 76 This change in Utah’s right of publicity law suggests that the right of publicity does not descend to heirs.

The state of Ohio has rejected descendibility by case law. In Reeves v. United Artists, 77 the plaintiff, the widow of a boxer, commenced suit to recover profits from the defendant’s motion picture reenactment of one of decedent’s fights. The district court granted the defendant’s motion to dismiss for failure to state a claim on which relief could be granted.

The court recognized that the descendibility of the right of publicity depends upon the state’s classification of the right of publicity as a tort under privacy law or as a property right. 78 Applying the reasoning of the Ohio Supreme Court in Zacchini

the individual is a minor, then consent of one of the minor’s parents or consent of the minor’s legally appointed guardian.

72. Wis. Stat. Ann. § 895.50(2) (West 1983) provides:

In this section, “invasion of privacy” means . . . :

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian (emphasis added).

73. Nor has case law in Massachusetts and Rhode Island addressed the descendibility issue.


75. Utah Code Ann. § 76-9-405, repealed by Laws 1981, ch. 95, § 7, provided:

A person is guilty of abuse of personal identity if, for the purpose of advertising any articles of merchandise for purposes of trade or for any other advertising purposes, he uses the name, picture, or portrait of any individual or uses the name or picture of any public institution of this state, the official title of any public officer of this state, or of any person who is living, without first having obtained the written consent of the person, or, if the person be a minor, the written consent of his parent or guardian, or, if the person is dead, without the written consent of his heirs or personal representatives (emphasis added).

76. Utah Code Ann. § 45-3-3.


78. Id. at 1234.
HEIRS' RIGHT OF PUBLICITY

v. Scripps-Howard Broadcasting Co., the court in Reeves specifically rejected the notion that the right of publicity was a property right. The court concluded that "the right of publicity, like the right of privacy, is not descendible." Therefore, although the decedent made his living as a boxer, and thus satisfied the commercial exploitation requirement, Ohio disregarded such commercial exploitation in its rejection of the descendibility of publicity rights.

2. States Where Descendibility is Conditioned Upon Commercial Exploitation During Lifetime

While there are no statutes that limit descendibility to heirs of celebrities who exploited their name or likeness during their lifetime, this condition has been imposed by courts in both New York and New Jersey.

Prior to 1977, New York expressly rejected the commercial exploitation requirement. For example, in Price v. Hal Roach Studios, plaintiffs, the widows of Stanley Laurel and Oliver Hardy, and Larry Harmon Pictures (Harmon)—the assignee in perpetuity of the right to utilize and merchandize the comedians' names, likenesses, characters and characterizations—brought an action against a movie studio that used the Laurel and Hardy characters in violation of Harmon's exclusive agreement. The district court, holding for the plaintiffs, found that the actors had publicity rights separate from the employment contract they had had with the defendant. In determining that the publicity right was descendible, the court emphasized that it is "not [necessary] to exercise the right of publicity during one's life in order to protect it from use by others or to preserve any potential right of one's heirs."

However, New York courts reexamined the descendibility issue and endorsed the commercial exploitation requirement in one of several cases brought by the estate of Elvis Presley, Factors Etc., Inc. v. Creative Card Co. Beginning in 1954, Presley's commercial enterprises were managed exclusively by Tom

79. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), rev'd on other grounds, 433 U.S. 562 (1977); see supra note 9.
80. 572 F. Supp. at 1235.
81. Id.
83. Id. at 841.
84. Id. at 846.
Parker in accordance with a series of merchandizing agreements. Boxcar Enterprises (Boxcar) entered the Presley-Parker relationship in January 1974. On August 18, 1977, two days after Presley's death, Boxcar assigned to Factors Etc., Inc. (Factors) the exclusive right to use Presley's likeness in merchandizing souvenirs.  

Shortly thereafter, the defendant, Creative Card Company, manufactured and distributed posters and other souvenirs of the deceased superstar. Factors subsequently brought an action to enjoin the defendant from commercially exploiting Presley's image on the grounds that it had the exclusive right to exercise Presley's right of publicity. In granting the injunction, the court stated that its legal conclusion was in complete harmony with the holding in the Guglielmi case: "Elvis Presley did in life actively exploit protectible commercial rights which defendant [tried] to invade." 87 While the court did not specifically articulate that the right of publicity is only descendible when there has been commercial exploitation during a celebrity's lifetime, both a New York court and a commentator have so interpreted the case. 88

In Hicks v. Casablanca Records, 89 the Southern District Court of New York again faced the descendibility issue in a case that raised first amendment considerations. Heirs and assignees of Agatha Christie moved to enjoin the defendants from distributing the motion picture and book "Agatha," a fictional account of an eleven-day disappearance of the mystery writer.

Although the court found that Christie had sufficiently exploited her commercial image during her lifetime to enable transfer of her right of publicity to the plaintiffs, the court cautioned that the right does not generally attach where name or likeness is used in connection with a book or movie. 90 Rather, the court held that certain first amendment exemptions em-

86. Id. at 280-81.
87. Id. at 284.
88. See Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288 (S.D.N.Y. 1977) (a companion case involving the marketing of a poster depicting Presley from 1943-1977); Kwall, supra note 4, at 218 (the Creative Card decision did not specifically state that the right of publicity could not survive an individual's death if that person failed to exercise the right while alive, but the clear import of the decision is that the court would not allow descendibility under such circumstances).
90. Id. at 433.
bodied in New York's right of privacy statute are applicable to the right of publicity. These exemptions include "matters of news, history, biography, and other factual subjects of public interest." Thus, had the defendants fraudulently advertised the works as true accounts when in fact they were falsifications, the plaintiffs would have been able to enjoin distribution. However, the court determined that under the facts in question it would have been evident to the public that the depicted events were fictitious and that the right of publicity was outweighed by the first amendment protection accorded novels and movies.

In *Estate of Presley v. Russen*, the descendibility of Elvis Presley's right of publicity was evaluated by the U.S. District Court of New Jersey pursuant to New York and California case law. Plaintiffs sought a preliminary injunction of the defendant's stage production entitled "The Big El Show." The show was a stage production patterned after an actual Elvis Presley show, and featured an individual who impersonated the late singer by performing in his style. The court granted the injunction, finding that the defendant's purpose in using the show was primarily commercial, and was, therefore, not entitled to first amendment protection. The court affirmed the commercial exploitation requirement by stressing that before the right of publicity may descend as an intangible property right, the celebrity must commercially exploit his name or likeness. The court found that Presley had sufficiently exploited his name and likeness during his life through contracts and licenses, including live musical performances, movies, records and television performances, and consumer products such as jewelry and t-shirts.

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93. *Hicks*, 464 F. Supp. at 433.
95. Id. at 1359.
96. Id. at 1355; see also Gleason v. Hustler, 7 Media L. Rep. (BNA) 2183 (D.N.J. 1981) (defendant who published deceased's name and photograph succeeded in motion for summary judgment because deceased had not actively exploited his name and likeness during his lifetime).
97. 513 F. Supp. at 1345.
3. States Where Descendibility is Unconditional

Georgia is the only state with case law authorizing descendibility without requiring lifetime commercial exploitation. In Martin Luther King, Jr. Center for Social Change v. American Heritage Products, King's likeness was appropriated for memorial plastic busts. The district court found for the defendant without reaching the descendibility issue on the grounds that King had not commercially exploited his likeness while alive. The Eleventh Circuit reversed.

The circuit court's decision was based upon responses to certified questions submitted to the Supreme Court of Georgia. The Georgia Supreme Court advised the Eleventh Circuit to embrace the following inquiry in determining whether King's right of publicity was descendible:

1) Is the "right to publicity" recognized in Georgia as a right distinct from the right to privacy?

2) If the answer to question (1) is affirmative, does the "right to publicity" survive the death of its owner? Specifically, is the right inheritable and devisable?

3) If the answer to question (2) is also affirmative, must the owner have commercially exploited the right before it can survive his death?

The Georgia Supreme Court answered the first two questions affirmatively by applying the reasoning set forth in Lugosi and the New York cases discussed above. The court decided, however, that commercial exploitation is not required in Georgia for the right of publicity to descend. The court held that an heir need only show that the deceased could have exploited his image, not that he actually did so. Fearful that denying descendibility to heirs of individuals who had not exercised the right would put a premium on exploitation, the court concluded "[w]e cannot deny [plaintiffs] this right merely because Dr.

98. 694 F.2d 674 (11th Cir. 1983) [hereinafter Martin Luther King I].
99. Answering certified questions is permitted pursuant to GA. CODE ANN. § 24-3902 (1981); see Martin Luther King, Jr., Center for Social Change v. American Heritage Prods., 250 Ga. 135, 296 S.E.2d 697 (1982) (the Supreme Court of Georgia's response to the certified questions regarding the right of publicity propounded by the Court of Appeals for the Eleventh Circuit) [hereinafter Martin Luther King II].
100. Martin Luther King I, 694 F.2d at 674.
101. Martin Luther King II, 250 Ga. at 137-45, 296 S.E.2d at 700-04 reprinted in Martin Luther King I, 694 F.2d at 677-82. See text accompanying notes 35-42 and 65-74.
102. Martin Luther King II, 250 Ga. at 146-47, 296 S.E.2d at 705-06 reprinted in Martin Luther King I, 694 F.2d at 682-83.
King chose not to exploit or commercialize himself during his lifetime.\(^{103}\)

Several states have enacted statutes that permit an unconditional right of publicity. Florida,\(^ {104}\) Nebraska,\(^ {105}\) Oklahoma,\(^ {106}\) and Virginia\(^ {107}\) have statutes that expressly provide for

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\(^{103}\) Martin Luther King II, 250 Ga. at 147, 296 S.E.2d at 706 reprinted in Martin Luther King I, 694 F.2d at 683 (emphasis added).

\(^{104}\) FLRA STAT. ANN. § 540.08 (West 1972) provides:

1. No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph or other likeness of any natural person without the express written or oral consent to such use given by:
   a. Such person; or
   b. Any other person, firm or corporation authorized in writing by such person to license the commercial use of his or her likeness; or
   c. If such person is deceased, any person, firm, or corporation authorized in writing to license the commercial use of his name or likeness, or if no person, firm, or corporation is so authorized, then by any one from among a class composed of his surviving spouse and surviving children.

2. (4) No action shall be brought under this section by reason of any publication, printing, display or other public use of the name or likeness of a person occurring after the expiration of forty years from and after the death of such person (emphasis added).

\(^{105}\) NEB. REV. STAT. § 20-202 (1983) provides that "[a]ny person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy."

\(^{106}\) OKLA. STAT. ANN. tit. 21, § 839.1 (West 1986) provides:

Any person, firm or corporation that uses for the purpose of advertising for the sale of any goods, wares or merchandise, or for the solicitation of patronage by any business enterprise, the name, portrait or picture of any person, without having obtained, prior or subsequent to such use, the consent of such person, or, if such person is a minor, the consent of a parent or guardian, and, if such person is deceased, without the consent of the surviving spouse, personal representatives, or that of a majority of the deceased's adult heirs, is guilty of a misdemeanor (emphasis added).

\(^{107}\) VA. CODE § 8.01-40 (1984) provides:

A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin . . . for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. . . .

B. No action shall be commenced under this section more than twenty years after the death of such person (emphasis added).
descendibility without mentioning a commercial exploitation requirement. The Florida statute specifies that the right terminates forty years after the decedent's death108 while Virginia allows an action only until twenty years after death.109 No duration is provided in the Nebraska110 or Oklahoma111 statutes.

On June 5, 1984, Tennessee became the first state to statutorily guarantee the descendibility of publicity rights while expressly abolishing the lifetime commercial exploitation requirement.112 Until that date, courts applying Tennessee law had unconditionally rejected any descendibility of the right.113

Tennessee's statute is commendable for several reasons. First, it clearly classifies the right of publicity as a vested property right regardless of lifetime commercial exploitation,114 thereby precluding a financial windfall to advertisers. In addition, the statute clarifies that use of a celebrity's likeness in connection with public affairs or news broadcasts rather than for commercial gain are permissible "fair uses."115

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108. FLA. STAT. ANN. § 540.8(4).
109. VA. CODE § 8.01-40(B).
110. NEB. REV. STAT. §§ 20-202 to -208.
111. OKLA. STAT. ANN. tit. 21, § 839.1.
112. TENN. CODE ANN. § 47-25-1103(a) (1984) provides that "[e]very individual has a property right in the use of his name, photograph or likeness in any medium in any manner."
114. TENN. CODE ANN. § 47-25-1103(b) provides that:

The individual rights . . . constitute property rights and shall be freely assignable and licensable, and shall not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

115. TENN. CODE ANN. § 47-25-1107(a) provides that "[i]t shall be deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph or likeness is in connection with any news, public affairs, or sports broadcast or account."

See, e.g., 17 U.S.C. § 107 (1982) ("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"); see also Meeropol v. Nizer, 560 F.2d 1061 (2d Cir.), cert. denied, 434 U.S. 1013 (1977) (the fair use doctrine offers a means of balancing exclusive rights of a copyright holder with the public's interest in the dissemination of information affecting areas of universal concern such as art, science, history, or industry).
One shortcoming of the statute, however, is that heirs may be divested of publicity rights twelve years after the celebrity’s death. While the statute states that heirs are entitled to the rights unconditionally for ten years after a celebrity’s death, it provides that the failure to use the rights for any two consecutive years thereafter will result in termination.\textsuperscript{116} Under this provision, it appears that Tennessee is letting the commercial exploitation requirement “in through the back door.” Heirs who choose not to exploit a celebrity’s image will be penalized and the windfall will, again, go to the advertisers. As Chief Justice Bird suggested in her \textit{Lugosi}\textsuperscript{117} dissenting opinion, the fifty year copyright protection period seems more appropriate for publicity rights because the right of publicity and copyright involve similar intellectual property and first amendment interests.\textsuperscript{118}

III

Important Aspects of California’s New Law

A. Shift to Property Right

California’s new law,\textsuperscript{119} enacted only a few months after the Tennessee statute, provides protection for heirs, while still addressing first amendment concerns.

The most significant section of California’s new law provides that “the rights recognized under this section are \textit{property rights}, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents.”\textsuperscript{120}

By specifying that the right of publicity is a property right, the Legislature has overturned \textit{Lugosi}’s holding that the right is personal and thus incapable of transfer. Unlike the personal right of privacy, the right of publicity apparently may now be assigned or devised in whole or in part. Rather than lying dormant until violated, the right of publicity can also form an inte-

\textsuperscript{116}. \textsc{Tenn. Code Ann.} § 47-25-1104(b)(2) provides that:

The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual’s death.

\textsuperscript{117}. 25 \textsc{Cal. 3d} 813, 828, 603 P.2d 425, 434, 160 \textsc{Cal. Rptr.} 323, 332 (Bird, C.J., dissenting).

\textsuperscript{118}. See supra text accompanying notes 47-52.


\textsuperscript{120}. \textit{Id.} § 990(b) (West Supp. 1985) (emphasis added).
gral part of a celebrity's everyday contract negotiations and estate planning.

Section 990 also contains a provision which clarifies the status of the commercial exploitation requirement in California. In defining the term "deceased personality," section 990 (h) states that it includes:

[A]ny natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name ... on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods or service.121

By eliminating the commercial exploitation requirement, California grants right of publicity protection to all heirs, whether or not the celebrity chooses to exploit his image. The only prerequisite to descendibility under the law is an allegation that the individual had the potential to commercially exploit his image. Unfortunately, the statute does not provide any guidelines for assessing whether a deceased celebrity had a name and likeness with commercial value at the time of his death. Such evaluation will be especially difficult when an heir brings an action for a wrongful right of publicity use many years after the death of a celebrity who never commercially exploited his name or likeness. Nevertheless, although the statute's standard will probably create challenging questions of fact for fact-finders, the equities of not requiring lifetime commercial exploitation outweigh any benefits in preserving the commercial exploitation requirement.

B. Shift to Copyright Principles

California's new law closely resembles the Copyright Act of 1976122 in two important respects. The duration and fair use provisions of the statute mirror those of the Copyright Act.123 Such similarity is desirable in creating uniformity in the rights and limitations conferred upon the intellectual properties. California's statute thus requires that a right of publicity cause of

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121. Id. § 990(h) (emphasis added).
action may only arise during the celebrity's lifetime and for fifty years thereafter. However, persons who bring suits more than one year from the time the misappropriation of the right of publicity should have been discovered arguably will be barred by the applicable statute of limitations. A commentator has persuasively argued that the reason intellectual creations are given finite protection is to balance the competing interests of encouraging creative labor and preserving the first amendment free flow of information. Thus, the statute provides that at the end of fifty years, the celebrity's publicity rights enter the public domain and can then be exploited freely.

The new statute also protects first amendment interests by providing that certain uses do not constitute appropriations of publicity rights. Under the statute, a celebrity's image may be permissibly incorporated into the following:

1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

2) Material that is of political or newsworthy value.

3) Single and original works of fine art.

4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

The "fair use" provisions of the Copyright Act firmly establish that an individual's creative efforts may be copied provided that the infringer's purpose is not substantially commercial. The policy underlying the fair use doctrine assures public access to knowledge of general import. Similarly, the right of publicity exceptions set forth in the California statute should serve to guarantee access to biograph-
ical information about the celebrity without allowing exploitation for purely commercial purposes. Consequently, if the Guglielmi and Hicks cases were now tried in California, the defendants’ use of the celebrities’ names and likenesses in connection with biographical works would be permissible.

Finally, the new statute, not unlike copyright law, states that registration of the successors-in-interest’s claim of rights with the Secretary of State is a prerequisite to commencement of a lawsuit. The statute specifies who, in absence of an inter vivos transfer of the right by the celebrity, the successors-in-interest will be for purposes of a lawsuit. In the event there are no surviving persons as specified by statute, the right terminates and enters the public domain.

133. CAL. CIV. CODE § 990(f)(2) (West Supp. 1985); 17 U.S.C. § 411(a) (1982) (requires that before commencement of a lawsuit, a copyright must be registered with the Copyright Office).
134. CAL. CIV. CODE § 990(d) (West Supp. 1985) provides:
   Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in such rights:
   (1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.
   (2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.
   (3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.
   (4) The rights of the deceased personality’s children and grandchildren are in all cases divided among them and exercisable on a per stirpes basis according to the number of the deceased personality’s children represented; the share of the children of a dead child of a deceased personality can be exercised only by the action of the majority of them. For the purposes of this section, “per stirpes” is defined in Section 240 of the Probate Code.
135. Id. § 990(e) provides that “[i]f any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.”
C. Likely Effect of California's New Law

California's new law extending the right of publicity to heirs will likely be welcomed with gratitude and relief. Courts both in and out of California, celebrities and their heirs, and the citizens of California will all benefit from the clarity and apparent fairness of the law.

Courts required to interpret the law will appreciate the lack of the ambiguity they faced when applying Lugosi and Guglielmi. Since there is no longer a lifetime commercial exploitation requirement, the court need only determine whether the decedent's name, likeness, photograph, voice or signature could have been used for commercial exploitation during the decedent's lifetime. Furthermore, if the use falls into one of the areas protected by the first amendment, the court can simply dismiss the case without further consideration.

Celebrities in California will now be able to devise another property right. Since celebrities often do not reach their peak of fame and fortune until late in life, devising their property rights may be the only way that some celebrities can exert control over the sometimes quite substantial royalties from their publicity rights. In addition, California celebrities will not feel compelled to exercise their publicity rights for the sole purpose of satisfying the former commercial exploitation condition to descendibility.

California will clearly benefit by the new law. Artistic creativity will be encouraged as a consequence of allowing a celebrity to include his publicity rights as part of his estate. Prior to the statute's enactment, many attorneys told their celebrity clients to incorporate or establish domicile in states with more favorable descendibility laws. Now, more celebrities will be encouraged to reside and/or incorporate in California to receive the new statutory protection. Finally, since California contributes so much to the entertainment industry, it should be desira-

139. Telephone interview with 'associate' of Loeb & Loeb, Attorneys at Law, Los Angeles, Cal. (Oct. 10, 1984).
ble for the industry’s participants to remain in California and enjoy the benefits of California’s laws.

IV

Conclusion

In extending the right of publicity to heirs, California has reclassified the right as a commercial asset, thereby adding a new dimension to property law. Celebrities with publicity rights that have potential commercial value will now be able to leave those rights to heirs, or alternatively, be assured that the rights will descend by statute. California has succeeded in statutorily protecting publicity rights without penalizing celebrities who choose not to exercise the right of publicity. California’s law guarantees that those parties with the greatest claim to the decedent’s publicity rights—the heirs and assignees—will control how those rights are commercially exploited. Furthermore, advertisers will be prevented from receiving undeserved windfalls from misappropriation of celebrities’ images. What was once a reproachable area of California law should now serve as a statutory guideline for other states wishing to extend the right of publicity to heirs.