COUNT DRACULA AND THE RIGHT OF PUBLICITY

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» » ON JANUARY 31, 1972, Los Angeles Superior Court Judge Bernard S. Jefferson ruled that Universal Pictures is liable to the widow and son of Bela Lugosi for the profits it earned by licensing his features to manufacturers of Dracula novelty products.[1] Judge Jefferson's 12,000-word written opinion was printed in full in the February 4th edition of the *Metropolitan News*, along with a six paragraph introductory summary which said the decision is "believed to be the first of its kind in the nation. . . ."[2] As recently as 1968, an article by Alice Donenfeld concluded: "In summary, the law as it now stands does not afford any right of action for the use of the name, likeness or personality of a deceased person. The personal representatives and heirs of a personality are without recourse to the courts unless their own right of privacy has been infringed."[3] Nevertheless, it is the thesis of this article that Judge Jefferson's decision is correct, is compelled by economic realities, and is supported by substantial academic opinion and judicial precedent—including California cases.

I. THE OPINION

The plaintiffs in the lawsuit were the widow and son of Bela Lugosi, the actor who portrayed "Count Dracula" in motion pictures produced by the defendant, Universal Pictures. Beginning in 1960, Universal entered into licensing agreements with manufacturers of such items as shirts, cards, games, kites, bar accessories and Halloween costumes and masks, authorizing those manufacturers to use the features of Count Dracula as portrayed by Lugosi. The plaintiffs contended that these licenses violated their contract and property rights, and they therefore sought recovery of Universal's profits and an injunction barring any additional licenses without their permission.

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[1]Bela George Lugosi, *et al.*, Plaintiffs, v. Universal Pictures Company, Inc., etc., *et al.*, Defendants, LASC No. 877 975 (Memorandum Opinion), 172 U.S. P.Q. 541 (1972).

[2]*Los Angeles Metropolitan News*, February 4, 1972, p. 1.

[3]Donenfeld, "Property or Other Rights in the Names, Likenesses or Personalities of Deceased Persons," 16 *Bulletin of the Copyright Society of the U.S.A.* 17, at 25 (1968).

As articulated by Judge Jefferson, the issues thus raised were whether such merchandising rights were ever granted to Universal by Bela Lugosi; if not, the nature of the rights retained by him; and whether any such rights passed to his widow and son at his death.

A. The Grant of Rights

In 1930, Lugosi and Universal entered into an artist's services contract which contained a "grant-of-rights" clause.[4] The plaintiffs maintained that the contract did not grant merchandising rights to Universal, and therefore did not authorize Universal to license Lugosi's features to product manufacturers; Universal, of course, argued that it did. From all of the evidence, including the contract itself, and expert testimony introduced by both sides, Judge Jefferson concluded that "Bela Lugosi had granted to defendant Universal Pictures the right to use his likeness and appearance as Count Dracula *only* in connection with the advertising or exploitation of the photoplay 'Dracula.' "[5]

B. The Nature of Rights Issue

While Judge Jefferson's decision that the grant-of-rights clause in question did not authorize Universal to license Lugosi's features was significant, particularly to those artists and producers still using similar clauses in their contracts, that part of the opinion was in essence a relatively unremarkable piece of straightforward contractual interpretation. Having determined that Lugosi had not granted Universal these merchandising rights, Judge Jefferson moved on to more interesting questions.

It was not disputed that such merchandising rights actually existed at some time; Universal, of course, had argued that Lugosi had once granted them to it, and thereafter it purported to license those rights to others for a fee. However, the *nature* of such rights was in dispute: they could have been contract rights, property rights or personal rights.

Since Lugosi's 1930 contract with Universal did not grant these merchandising rights, the plaintiffs argued that an implied term of the contract was that Universal would not license Lugosi's features to others. But Judge Jefferson disagreed; such an implication was not necessary for the effective performance of the express provisions.

Thus, Lugosi's rights in his own likeness were either property or personal rights. The plaintiffs argued for the former; Universal for the latter. Judge Jefferson cited and discussed

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[4]"The producer shall have the right to photograph and/or otherwise produce, reproduce, transmit, exhibit, distribute and exploit in connection with the said photoplay any and all of the artist's acts, poses, plays and appearances of any and all kinds hereunder, and shall further have the right to record, reproduce, transmit, exhibit, distribute, and exploit in connection with said photoplay the artist's voice, and all instrumental, musical, and other sound effects produced by the artist in connection with such acts, poses, plays and appearances. The producer shall likewise have the right to use and give publicity to the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical, and other sound effects produced by the artist in connection with such acts, poses, plays and appearances. The producer shall likewise have the right to use and give publicity to the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical, and other sound effects produced by the artist hereunder, in connection with the advertising and exploitation of said photoplay."

[5]172 U.S.P.Q. at 544.

several cases on the question and then came to the following conclusion:

"Cases such as *Uhlaender, Cepeda* and *Haelan Laboratories* present the better view in holding that a celebrity's interest in his name, appearance, likeness and personality which has a publicity pecuniary value, should be considered a property right separate and apart from the right of privacy, and that a person who, without authorization, appropriates such a person's name, appearance, likeness or personality, has appropriated the property of such person and has caused a pecuniary loss for which damages may be recovered."[6]

C. The Descendibility Issue

Though many cases have held that the right of privacy—like the reputational right which is protected by defamation law—is personal and does not descend to heirs, *property*, of course, does descend. Thus, the following three paragraphs are the kernel of Judge Jefferson's lengthy decision:

"To hold that a celebrity's interest or right in his name [is property] which descends to his heirs or beneficiaries under his will, is not at all a farfetched theory. New rights are readily created by the courts when circumstances call for a creation. Thus, in *Donahue vs. Ziv Television Programs, Inc.*, 245 Cal. App. 2d 593, 54 Cal. Rptr. 130 (1966), it was recognized that an idea for a television story may not be protectible as a common law copyright but still is something of value. The court stated that although an idea for a television story is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed and such disclosure can provide consideration for a promise to pay.

"If an idea is recognized in the law as something of value which may be the subject of a contract, a celebrity's interest in his name and likeness has great publicity value. Attaching labels to kinds of rights or interests is simply a convenient method of describing the degree of protection which the law will afford. If a disclosure of ideas for a play, movie, or a television performance, though not subject to exclusive ownership, has sufficient value to provide the consideration for a contract of payment, the right or interest of a celebrity in his name, likeness, and appearance should be deemed to have sufficient standing and value so that the concept of a descendible property right may be bestowed upon it.

"It is this court's holding that Bela Lugosi's interest or right in his likeness and appearance as Count Dracula was a property right of such character and substance that it did not terminate with his death but descended to his heirs. Plaintiffs have established that they are the beneficiaries of such property right by distribution under Bela Lugosi's will."[7]

Judge Jefferson further held that the applicable statute of limitations was the two-year period set forth in Section 339 (1) of the Code of Civil Procedure for actions upon a liability not founded upon an instrument in writing, and that each licensing agreement entered into by Universal constituted a separate violation of the plaintiffs' rights. Therefore he concluded that the plaintiffs were entitled to damages arising out of each of the

[6] *Id.* at 548-549.
[7] *Id.* at 551.

licensing agreements entered into within two years of the date the lawsuit was filed.[8]

II. THE ECONOMIC REALITIES

Judge Jefferson ruled that Universal had to provide the plaintiffs with an accounting so that the extent of their damages could be determined, and nowhere in the opinion is there any indication of even the approximate amount of money thought to have been at stake. Nevertheless, it is apparent from other sources that the amounts that can be involved in cases of this sort make Judge Jefferson's ruling of more than academic interest. The case was by no means a tempest in a teapot.

As was pointed out in Donenfeld's 1968 article mentioned above:

> "In recent years the values of certain famous names have become inestimable. This needs no illustration when consideration is given to the prices paid by companies for the use of a celebrity's name in conjunction with a product. Licensing corporations have been established which do nothing but promote the financial value of the name of a celebrity by granting licenses for the use of such name on a myriad of products."[9]

Where the "product" in question has been a motion picture, some tax cases have revealed the precise amounts of money involved. After Glen Miller's death, for example, Universal Pictures entered into an agreement with his widow whereby she granted Universal the exclusive right to produce, distribute and exhibit motion pictures based on her husband's life. In 1954 she was paid some $400,000 as her share of the income from such a movie.[10]

Similarly, the son of author Damon Runyon was paid $25,000 by a motion picture producer for the right to produce a movie based on his deceased father's life. The movie was never made, though had it been the son would have been employed as a technical adviser for a minimum of fifteen weeks at $500 per week, and he would have received a percentage of the profits.[11]

Likewise, Loew's Inc. once paid two daughters of a naval commander $2,400 for the right to make a movie about their father, and one of the daughters was later paid an additional $5,800 when "The Wings of Eagles" was produced and distributed.[12]

Professor Nimmer has described the value of the use of a prominent person's name, photograph or likeness in advertising a product or in attracting an audience as a "publicity value"; in most instances, he writes:

> "... [A] person achieves publicity values of substantial pecuniary worth only after he has expended considerable time, effort, skill, and even money. It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."[13]

III. ACADEMIC OPINION

The existence of the rights asserted in *Lugosi v. Universal* can be traced

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[8]*Id.* at 556.

[9]Donenfeld, *supra* note 3, at 19-20.

[10]Miller v. Commissioner, 299 F.2d 706 (2d Cir. 1962).

[11]Runyan v. United States, 281 F.2d 590 (5th Cir. 1960).

[12]Starrells v. Commissioner, 304 F.2d 574 (9th Cir. 1962).

[13]Nimmer, "The Right of Publicity," 19 *Law & Contemp. Prob.* 201, 214 (1954).

to Warren and Brandeis' famous law review article, "The Right to Privacy."[14] Asserting that "The press is overstepping in every direction the obvious bounds of propriety and of decency," the authors argued that privacy—separate and apart from property or reputation—is worthy of legal protection. Twelve years after their article was published, the New York Court of Appeals denied the existence of such a right and held that an attractive young lady had no right of recovery, though her picture had been used to advertise the defendant's flour without her consent.[15] The decision met with widespread disapproval, and the New York legislature responded in 1903 with a statute designed to overrule it. The statute prohibits the use of the name, portrait or picture of any living person for advertising or trade purposes, without his or her written consent.[16] Similar statutes have been enacted in other states—including California in 1971[17]—but in the majority of states the now-recognized right owes its existence to judicial decision.

Over the years, numerous "privacy" decisions have been rendered, recognizing, according to Dean Prosser, four distinct aspects of the tort which have nothing in common with one another except their "invasion of privacy" label. Prosser's four categories of privacy invasions are: (1) intrusion upon seclusion or solitude, or into private affairs; (2) public disclosure of embarrassing private facts; (3) placing a person in a false light in the public eye; and (4) appropriation of a person's name or likeness for commercial use.[18]

It was the fourth category that came into play in *Lugosi v. Universal*; and, again according to Dean Prosser, the cases falling within this category indicate that a person has ". . . a species of trade name, his own, and a kind of trade mark in his likeness," and that these assets have value upon which a person " . . . can capitalize by selling licenses."[19]

The reason these cases were of only limited help to the plaintiffs in *Lugosi v. Universal* is that it has repeatedly been said that the right of privacy cannot be asserted by any person other than the one whose privacy has been invaded, and that therefore an heir of a person whose name or likeness is used without consent is without recourse.

Such a result was criticized as long ago as 1932 by Dean Green in an article entitled "The Right of Privacy."[20] After pointing out that early decisions denying recovery to heirs were based on the historical policy against the survival of defamation actions, Dean Green said:

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[14]4 *Harvard L. Rev.* 193 (1890). This chapter of the law has become quite lengthy. For most, if not all, of the cases bearing on the issues raised in the Lugosi case, see: Annotation, "Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes," 30 A.L.R. 3d 203 (1970); Annotation, "Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising," 23 A.L.R. 3d 865 (1969); Annotation, "Invasion of Privacy by Publication Dealing with One Other than Plaintiff," 18 A.L.R. 3d 873 (1968).

[15]Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[16]N.Y. Civil Rights Law, §§ 50, 51.

[17]California Statutes Ch. 1595 (1971), adding Section 3344 to the Civil Code, effective March 4, 1972; see Comment, 3 *Pacific L.J.* 651 (1972).

[18]Prosser, "Privacy," 48 *Calif. L. Rev.* 383, 389 (1960).

[19]*Prosser on Torts* (3d ed. 1964), at 832.

[20]27 *Illinois L. Rev.* 237 (1932).

"But in the case of exploiting the personality of an individual for profit, the courts might well overlook the defamation and allow the surviving relatives an action on the basis of profit-making from the exploitation of a deceased relative's personality."[21]

Similarly, in 1954 Professor Nimmer argued in his article entitled "The Right of Publicity":

"The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee. . . . Likewise, the measure of damages should be computed in terms of the value of the publicity appropriated by the defendant rather than, as in privacy, in terms of the injury sustained by the plaintiff."[22]

Attorney Harold Gordon also argued in an exhaustive article published in 1960 that a person's right to the exclusive use of his own name and likeness was property, and that as such it had all the attributes of property, including descendibility.[23] Even the 1968 Donenfeld article previously mentioned observed that it seemed inequitable that "An actor, or author or comedian can spend thousands of dollars publicizing his name during his lifetime, and upon his death his relatives are left with no way of protecting or exploiting that valued name."[24]

IV. JUDICIAL PRECEDENT

A. Property Right Theory

1. *Cases Relied upon by Judge Jefferson*

After discussing several cases which have dealt with the nature of the rights involved in the *Lugosi* case, Judge Jefferson decided that *"Uhlaender, Cepeda* and *Haelan Laboratories* present the better view. . . ." These three cases were similar to *Lugosi,* and treated the rights asserted as "property."

Both parties to *Haelan Laboratories* manufactured chewing gum. The plaintiff obtained an exclusive right to use the photographs of famous baseball players of the day, and thereafter one of the ballplayers also contracted with another who assigned his rights to the defendant. The defendant argued that the plaintiff could not assert an invasion of privacy claim, because privacy is personal and nonassignable. In holding for the plaintiff, the court stated:

"We think that, in addition to and independent of that right of privacy (which in New York derives from statute), 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. . . . This right may be called a 'right of publicity.' "[25]

In *Cepeda* the court stated that it was not a matter of dispute that baseball player Orlando Cepeda had a

(Continued on page 399)

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[21]*Id.* at 249.

[22]Nimmer, *supra* note 13, at 214.

[23]Gordon, "Right of Property in Name, Likeness, Personality and History," 55 *Northwestern U. L. Rev.* 553 (1960). Irwin O. Spiegel, the attorney for the plaintiffs in the Lugosi case, has been quoted as saying, "The work we did in establishing this tort relied in great measure on the spadework of Harold R. Gordon. I am delighted that I was able to establish the theory to which he has devoted most of his professional life." *Los Angeles Metropolitan News,* February 8, 1972, p. 1.

[24]Donenfeld, *supra,* note 3, at 22.

[25]Haelan Laboratories Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

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valuable property right in his name, photograph and image and that he may sell these property rights";[26] the dispute was, rather, whether the contract between Cepeda and Wilson Sporting Goods Company authorized Wilson to license Swift & Co. to use Cepeda's photograph in connection with a special premium offer to sell Cepeda baseballs. (The court held the contract did permit such licensing).

In *Uhlaender*,[27] the plaintiffs were baseball players whose names, pictures and statistics had been used by the defendants in a baseball game they manufactured and sold. The court, in holding for the plaintiffs, said they had a property right in the things used by the defendants, and the appropriation of that right was a tort distinct and independent from invasion of privacy.

2. *Other California Cases*

Though not cited by Judge Jefferson, at least five prior rulings of Los Angeles Superior Court judges support his decision that Bela Lugosi had a property right in his features.

In *Sennett v. Prosser*,[28] the plaintiff, a motion picture director, filed a "Complaint for Damages for Unauthorized Use of Name" against the producers of "High Button Shoes." The production allegedly featured a "Mack Sennett Ballett" using characters created by the plaintiff: the "Keystone Cops" and "Mack Sennett Bathing Beauties." The first cause of action was for unauthorized use of the plaintiff's name in violation of California law, and the second cause of action was for the violation of New York Civil Rights Act, Section 51. The defendants demurred to the first cause of action on the ground that it did not state facts sufficient to state a cause of action for unfair competition or for invasion of privacy, and on the ground that there was no cause of action for the unauthorized use of a name in California. They demurred to the second cause of action on the ground that it could not be sued upon in California. Superior Court Judge Stanley N. Barnes ruled that any trademark or trade name must, if used professionally, be considered in this state to have at least nominal value as personal property. He further stated that it may be transferred as personal property and is entitled to protection by law. Judge Barnes therefore ruled that the plaintiff had stated a cause of action, based upon an alleged unauthorized use of his name. The case was thereafter settled, and dismissals were filed.

In *Douglas v. Walt Disney*,[29] plaintiff pleaded that Douglas and his two sons had visited Walt Disney at his home, and while there rode on Disney's toy train; Disney took home movies of the Douglases which were later broadcast on the nationally-televised "Disneyland" program. Douglas objected and was told it would not happen again. However, the movie was broadcast again, and Douglas filed a "Complaint for In-

[26]Cepeda v. Swift and Company, 415 F.2d 1205, 1206 (8th Cir. 1969).

[27]Uhlaender v. Henricksen, 316 F.Supp. 1277 (D. Minn. 1970).

[28]LASC No. 541 049, filed February 20, 1948.

[29]LASC No. 664 346, filed August 1, 1956.

vasion of Privacy, Unfair Competition, and Reasonable Value of Services." The defendants demurred, and the demurrer was overruled in a memorandum opinion. The decision stated in part:

"If pictures or photographs of an individual have a unique commercial value due to his professional character, the non-authorized use thereof commercially . . . may be actionable as a special wrong in itself, according to an increasing number of authorities. . . . Where the personality of a performer is of commercial value, courts increasingly are giving him legal protection against unpermitted uses. The dedication of his personality to the public domain is limited to the consent which has been given."[30]

This case also was thereafter settled and dismissed.

Harrison v. Hearst Publishing Co., Inc.[31] involved actress Susan Harrison, who filed a "Complaint for Invasion of Right of Publicity" as a result of the publication by the defendant's *Examiner* of a photograph of her captioned "Susan Harrison uses the new Puff-Ets." The photo accompanied an article by the *Examiner's* Beauty Editor on the need for clean powder puffs, in which it was suggested that Puff-Ets would solve the "dirty puff" problem. Suit was filed more than one but less than two years after the photograph was published. The defendants demurred on the ground that the suit was barred by the statute of limitations, arguing that the right of publicity, "if it exists in California, is merely a division of the right of privacy," and thus subject to the one-year limitation period for personal rights. The plaintiff argued that the right of publicity was separate from the right of privacy, and that the two-year limitation period applied. The demurrer was overruled without opinion, and the case was settled prior to trial.

In *Willard v. Columbia Broadcasting System*,[32] the former heavyweight champion filed a "Complaint for Invasion of Right of Privacy and Infringement of Right of Publicity," alleging damages as a result of the defendant's unauthorized broadcast of old films of his boxing matches. A demurrer by the defendants was overruled. Some time thereafter, Willard's attorneys successfully moved to withdraw from the case, on the ground that Willard had authorized them to settle the case on certain terms (which they did), and thereafter Willard refused to sign the settlement documents. Willard, who was then *in pro. per.*, did not bring the case to trial, and five years after it was filed the defendants successfully moved to have it dismissed.

Fisher v. Hartfield Stores, Inc.,[33] involved Elizabeth Taylor's "Complaint for Unfair Competition" against Hartfield Stores; Hartfield stores allegedly had made unauthorized sales of ladies' and children's blouses under the style and designation "Liz Taylor Blouses," "Liz Taylor Look," "Liz Look," "Liz Frill," and "The Frizzy Liz Taylor Robe." The defendant filed an answer containing affirmative defenses, alleging that the complaint failed to state a cause of action and based upon waiver, estoppel and consent. Taylor demurred to the affirma-

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[30]*Los Angeles Daily Journal*, Report Section, December 31, 1956, p. 27.

[31]LASC No. 789 788, filed February 15, 1962.

[32]LASC No. 800 781, filed July 24, 1962.

[33]LASC No. 815 716, filed March 22, 1963.

tive defenses, and the court struck the affirmative defense alleging the complaint failed to state a cause of action. The slip opinion stated: "Whether or not a cause of action for invasion of privacy is well pleaded, the complaint contains sufficient allegations relating to an action for unfair competition to withstand general demurrer." The demurrers to the waiver, estoppel and consent affirmative defenses were sustained with leave to amend. They were in fact amended, but the case was settled and dismissed before any further rulings were required.

B. Descendibility Theory

Having determined that Bela Lugosi's right to his own features was a property as opposed to a personal right, it would logically follow that the right descended to his heirs at his death. The *Haelan Laboratories v. Topps Chewing Gum* case, upon which Judge Jefferson relied for the proposition that the right was "property," also supports the argument that such property descends. In that case, it was not the baseball player that was the plaintiff, but rather the company to which the ballplayer had licensed the exclusive right to use his picture. Those cases which have not permitted heirs to assert a right of privacy also would not have permitted licensees to assert such a right, because the theory behind the refusal in those cases was that privacy is personal. However, if a right of "publicity" may be licensed during life, there is no reason why it should not be transferable after death by will or by operation of law.

Although the *Metropolitan News* reported that the *Lugosi* case was believed to be the first of its kind in the nation, there is in fact one trial-level precedent squarely in point. In that case, the administratrix of the estate of fight trainer "Chappie" Blackburn sued on the basis of unjust enrichment, because of the defendant's unauthorized portrayal of Blackburn in the motion picture "The Joe Louis Story." The defendant moved to dismiss the case on the ground that a public figure has no privacy, and even if he did it could not descend to his or her heirs. The plaintiff argued that she was not suing for invasion of privacy, but for appropriation and conversion of the property rights of Blackburn in his name, likeness and incidents of his life which accrued to his estate. In an unpublished memorandum decision, Federal District Court Judge John P. Barnes stated:

> "Exhaustive briefs were filed by counsel and have been read and considered. . . . To add anything to the literature which is growing upon the questions presented by the motion to dismiss . . . would require more time than the court can find to give this case at the moment. The interesting questions have been considered, and the Court feels that it will be sufficient for the Court to express the ultimate conclusion to which it has come, and that is that the motion to dismiss should be denied. . . ."[34]

Thereafter the parties settled out-of-court.

V. CASES WHICH APPEAR TO BE CONTRA

There is no denying that many cases appear to be contrary to *Lugosi v. Universal.* Judge Jefferson, in fact, discusses in his own opinion two such

[34]Shaw v. United Artists Corp., 54 C 290 (N.D.E.D. Ill., 1954), discussed and quoted in Gordon, *supra* note 23, at 600.

California cases: *James v. Screen Gems, Inc.*,[35] and *Kelly v. Johnson Publishing Co.*[36] In *James*, the widow of Jesse James, Jr. filed suit against the producer of a movie broadcast on television, alleging that the picture cast her deceased husband in a bad light and brought ridicule and scorn upon herself. The court held that Mrs. James was asserting a right of privacy on behalf of her husband which did not survive his death, and since she was not portrayed in the movie there was no invasion of her own privacy. Similarly, in *Kelly* it was held that the sisters of Jack Thompson, a fighter described in a magazine as a "dope-sodden derelict," had no cause of action, either for libel or invasion of privacy, because the article did not refer to the sisters in any way.

As Judge Jefferson pointed out, in neither of these cases was there any assertion of a pecuniary loss due to the appropriation of the deceased's name, likeness, appearance or personality. The injury asserted was to feelings and emotions of privacy—injuries which traditionally have been held to be purely personal and nonredressible by heirs or assignees.

It is the thesis of Mr. Gordon's article that " . . . much of the confusion and conflict in the decisions arose because litigants chose to sue in almost every case for invasion of privacy (premised on injury to feelings), rather than for the appropriation for commercial exploitation of property rights in name, likeness, etc., in situations where injury to feelings had only secondary application."[37] He therefore surveys cases involving appropriations "so as to trace the thread of 'property rights' throughout and to point out pertinent instances where the filing of suits on the basis of appropriation of property rights alone (without the additional elements of privacy and injured feelings) might have avoided some of the confusion and conflict in the decisions. . . ."[38]

Gordon also analyzes cases where heirs were denied a right of recovery, and points out that in several of them the person whose name or likeness had been used would himself have been denied recovery under the particular circumstances.[39] Thus, those cases can hardly be considered sound precedent in situations where the person himself would have an enforceable right and the only question is whether his heirs do as well.

One case that is sometimes cited for the proposition that a person's interest in his name and likeness is not a property right and does not descend at his death is *Miller v. Commissioner*.[40] In that case, Glen Miller's widow sought to treat the more than $400,000 she received from Universal Pictures (as her share of the profits of a motion picture based upon her husband's life) as proceeds from the sale of a capital asset, and therefore subject to capital gains tax rates. The Internal Revenue Service maintained that the money was ordinary income, and the court agreed. The basis for the court's decision was that no "property" had been sold; rather, the court stated, Universal purchased freedom from the fear that a court might find that Glen Miller's widow had some sort of right which could be enforced by suit in the event a movie was made of his life

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[35]174 Cal. App. 2d 650, 344 P.2d 799 (1959).

[36]160 Cal. App. 2d 718, 325 P.2d 659 (1958).

[37]Gordon, *supra* note 23, at 554.

[38]*Id.* at 557.

[39]*Id.* at 595-597.

[40]*Supra*, note 10.

without her permission.

Significantly, the court also asserted: " . . . in order to avoid creating more problems than we resolve, we wish to emphasize that throughout the ensuing discussion, our analysis of the term 'property' is made within the context of capital gains taxation; universality in definition is not only unlikely, but undesirable."[41] Judge Jefferson seized upon the foregoing caveat to explain why the *Miller* decision had no application to the *Lugosi* case; it is interesting to note, however, that certain kinds of property simply do not qualify for capital gains treatment, and copyright, the kind of property which is most similar to the right of publicity, is one kind which does not[42]— thus, the court could have accepted Mrs. Miller's argument that she had a property right in her husband's name and likeness, and still have held that she was not entitled to capital gains treatment under the tax law.

The comparison between the right of publicity and copyright suggests what is perhaps the most basic argument in support of the conclusion reached in *Lugosi v. Universal.* Prior to the publication of Warren and Brandeis' article in 1890, invasions of what broadly may be termed "privacy" were protected on the theory that a "property" right was at stake. A very important example of this was the theory that a writer had a property right in his writings and could therefore prohibit their publication if he wished. This right is today recognized as common law copyright, or an author's right to control the first publication of his work.[43] It was Warren and Brandeis' thesis that the real interest being protected by that rule was not property but, rather, privacy, and they therefore argued for an outright recognition of a right of privacy which would be broader than the property right.

Warren and Brandeis were of course successful with their plea, and a right of privacy has now been recognized in most states. Unfortunately, however, the newer privacy right began to swallow the older property right and to take on characteristics of its own, which in some situations are narrower than the characteristics Warren and Brandeis intended it to embrace. It would be more appropriate to return to the "source," to recognize that the right to one's name and likeness is comparable to common law copyright with all of the attributes thereof, including descendibility.

VI. LIMITS OF THE RIGHT OF PUBLICITY

A. Limits in Time

The decision in *Lugosi v. Universal* at first might suggest that the heirs of Abraham Lincoln have a cause of action against Lincoln Savings, or that the heirs of Benjamin Franklin have a cause of action against Franklin National Bank. That, of course, is not and could not be the law. The decision does not stand for such a proposition. The right to name and likeness is property like any other, and like any other property it can be abandoned. Thus, any plaintiff in a right of publicity case who seeks to recover for appropriation of the publicity right of a relative must first demonstrate that he or she actually received the right.

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[41]299 F.2d at 708.

[42]Internal Rev. Code of 1954, § 1221(3).

[43]For the California codification of this common law right, see California Civil Code §§ 655 and 980-985.

In *Schumann v. Loew's Inc.*,[44] some of the great-grandchildren of composer Robert Schumann brought an invasion of property suit against the producers of the movie "Song of Love." The court determined that even if such rights descend to heirs, the plaintiffs had not shown they owned them. Robert Schumann's will, if he had one, may have disposed of his publicity rights; and even if he did not have a will, there was no showing by the plaintiffs that they had inherited such a right under the laws of the country where the composer was living at his death.

The plaintiffs in *Lugosi*, on the other hand, did make such a showing, having gone so far as to reopen Bela Lugosi's estate to allow for the specific distribution of his publicity rights to them. According to Gordon, "The line of demarcation (between heirs who can assert such a right and those who cannot) lies in the existence, creation or re-opening of a valid estate in which the next of kin can make an authentic proof of heirship."[45]

B. Limits in Scope

The potential plaintiff in a right of publicity case is likely to be anyone from a professional athlete to a Presidential candidate, and the offending commercial appropriation may be anything from a T-shirt to a biography. The issues involved in determing the scope of the right—that is, in determining what kind of a person is entitled to recover for what type of a use—are perhaps as broad as those under the First Amendment itself, and are worthy of an entire article of their own. Nevertheless, certain factual patterns would seem to call for results beyond dispute.

For example, it seems safe to say that the photograph of a professional baseball player cannot be used on bubble-gum trading cards without his consent. And it seems equally safe to say that a Presidential candidate cannot complain of an unauthorized biography of his life.

But what about an unauthorized biography of a professional baseball player or other public but non-political figure? In *Spahn v. Julian Messner, Inc.*[46] the biography was fictionalized, and on that ground the famous pitcher was held to be entitled to recover against the publisher under the New York statute. However, in *Rosemont Enterprises v. Random House*,[47] there was no showing that the biography of Howard Hughes was inaccurate, and therefore it was held that the plaintiff (to which Hughes had sold the exclusive right to his life story) had no right of recovery.

What about recovery by reason of a poster of a comedian who has developed a comedy routine about his running for President? In *Paulsen v. Personality Posters*,[48] such a poster was held privileged, and Pat Paulsen was denied an injunction barring its unauthorized distribution.

What, finally, about a wrist watch, dartboard, or T-shirt bearing the likeness of the Vice President of the United States? Though suit was threatened, none was filed.[49] Such a fact situation would be a law professor's delight. « «

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[44]135 N.Y.S.2d 361 (1954).

[45]Gordon, *supra*, note 23, at 601.

[46]21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840 (1967).

[47]294 N.Y.S.2d 122 (1968).

[48]299 N.Y.S.2d 501 (1968).

[49]*See* Smith and Sobel. "The Mickey Mouse Watch Goes to Washington: Would the Law Stop the Clock?," 8 *A.B.A. Law Notes* 51 (1972), to be reprinted in 62 *The Trademark Reporter* (1972)