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Publicity and Privacy—Distinct Interests on the Misappropriation Continuum

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If a man builds a better mousetrap than his neighbor, the world will not only beat a path to his door, it will make newsreels of him and his wife in beach pajamas, it will discuss his diet and his health, it will publish heart throb stories of his love life, it will publicize him, analyze him, photograph him, and make his life thoroughly miserable by feeding to the palpitant public intimate details of things that are none of its damned business.¹

Although many famous people would agree with the above statement, others seek publicity to gain recognition from the “palpitant public.” Both types of famous persons have recently asserted a “right of publicity” to protect themselves and their interests from unauthorized and intrusive exploitation. The right of publicity is a relatively new term which defines rights in a person’s name or likeness. Only a handful of courts have expressly recognized or even considered the existence of this right. The right of publicity, however, is certain to become a subject of frequent litigation. Modern electronic and print media have enormous capability to catapult an individual into the glare of the public eye. Businesses, particularly merchandisers, have achieved great commercial success by linking their products with the publicity generated by and about certain individuals.² As a result, commercial value has become attached to these names and likenesses. The use and misuse of these valuable rights inevitably results in litigation.

As with most new common law rights, substantial confusion exists concerning the source of, and the limitations upon, the right of

¹ Levy, The Right To Be Let Alone, American Mercury (June 1935).
² For example, everyone is aware of Reggie Jackson, the baseball player, as well as Reggie Jackson candy bars, athletic equipment, posters, and the like.
publicity. This confusion is the result of inconsistent judicial development in various states. The disagreement in judicial interpretation diminishes the value of the right of publicity to the inter-state business or merchandiser.

This article will appraise the current status of the law on the right of publicity, focusing particularly on how various jurisdictions have characterized the source of the right and the implications of recognition of a particular source for defining the right. The initial determination of the source of the right of publicity not only affects whether the right is enforceable, but also has significant repercussions for the future development of the evolving right of publicity. In order to illustrate the potential implications of adopting a particular theory behind this right, Illinois will be used as a representative example of a jurisdiction which has not yet recognized the right to demonstrate how the right could originate in that jurisdiction. Finally, the distinction between the right of publicity and the right of privacy will be explored.

DERIVATION AND RECOGNITION OF THE RIGHT OF PUBLICITY

Jurisdictions recognizing a right of publicity have derived the right from two distinct sources. Several jurisdictions have characterized the right as a property interest in a name or likeness that exists independent of the personal right of privacy. In contrast, other jurisdictions have viewed the protection of a name or likeness purely as an outgrowth of the right of privacy and treat the right strictly as a personal right. To fully appreciate the significance of this distinction, it is necessary to examine how courts have utilized each source as a basis for the right of publicity.

The Right of Publicity as a Property Right

Recognition of the right of publicity as a property right is consistent with accepted theories of misappropriation, unjust enrichment, and unfair competition that have evolved from the seminal case of International News Service v. The Associated Press. In that case, International News Service engaged in wholesale misappropriation of news acquired in wholesale misappropriation of news acquired by its competitor, the Associated Press. The United States Supreme Court found that, although not

4. Associated Press complained that: (1) International News Service bribed employees of Associated Press newspapers to obtain Associated Press news before it was published; (2) induced Associated Press members to violate the by-laws of the Associated Press and give
protected by copyright, a protectible property interest existed in the news gathered by the Associated Press by virtue of the "expenditure of labor, skill and money." The Court characterized the defendant's conduct as an effort to "reap where it had not sown." The Court affirmed the injunction granted in favor of the plaintiff, as justified by the principle "that he who has fairly paid the price should have the beneficial use of the property."

The theory of misappropriation and the underlying equitable principles expressed in *International News Service* have been applied by state and federal courts in a number of situations involving intellectual property. The gist of these cases is that through the expenditure of money, time and effort, "property" is created having widespread public recognition, and that recognition is entitled to protection against misappropriation. The same concept provides a basis for the right of publicity. Indeed, several courts have attributed the source of the right of publicity to a property interest independent of related personal privacy rights.

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5. *Id.* at 239. The Court called the property interest "quasi-property." *Id.* at 236.
6. *Id.* at 239.
7. *Id.* at 240.
10. "Full and fair competition requires that those who invest time, money and energy into the development of goodwill and a favorable reputation be allowed to reap the advantages of their investment." Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1215 (8th Cir. 1976).
The earliest case expressly recognizing and enforcing a right of publicity is *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹² There, the plaintiff was a chewing-gum manufacturer which had purchased the exclusive right to use a baseball player's photograph to sell gum. The defendant, a competitor of the plaintiff, subsequently obtained contracts for the same right from the same ball player. The Second Circuit held that the plaintiff did not possess and could not claim a violation of the right of privacy under New York statutes,¹³ since that right was personal and non-assignable from the ball player. Nevertheless, the court recognized an alternative basis for liability: "We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph. . . . This right might be called a 'right of publicity.'"¹⁴

The right of publicity was also considered a property right in *Ettore v. Philco Television Broadcasting Corporation.*¹⁵ There, the plaintiff was a professional boxer who sold the motion picture rights of his bout with Joe Louis. Unauthorized film of the bout was taken without the plaintiff's knowledge or consent. Subsequently, this unauthorized film, which contained some objectionable editing, appeared on television. The plaintiff's suit against the television broadcaster, the sponsor of the program, and the advertising agency, was dismissed by the trial court for failure to state a claim.¹⁶

On appeal, the Third Circuit characterized the state of the law applicable to the plaintiff's claim as "a haystack in a hurricane."¹⁷ The court attempted to clarify the law by examining the underly-
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ing rationale for the right. First, the court stated, "[t]here are . . .
two polar types of cases. One arises when some accidental occu-
rence rends the veil of obscurity surrounding an average person
and makes him, arguably, newsworthy. The other type involves the
appropriation of the performance or production of a professional
performer or entrepreneur." Furthermore, the court reasoned
that where a "professional performer is involved, there seems to be
a recognition of a kind of property right in the performer to the
product of his services." The court then inquired whether such a
right was recognized by the relevant jurisdictions in this diversity
case. Finding that Pennsylvania, New Jersey, Delaware and New
York all would recognize a property right of some sort and would
grant relief under the theory of unfair competition, the court held
that plaintiff had stated a cause of action.

The distinction between the source of privacy and publicity
rights once again was critical in Uhlaender v. Henricksen. Major
league baseball players and their licensing agent sought injunctive
relief against manufacturers of parlor games. The defendants had
used the plaintiffs' names and publicly disseminated statistical in-
formation about the plaintiffs in connection with their games.
The defendants argued that because this information was publicly
broadcast and in the public domain, plaintiffs had waived their
right to compensation, and, therefore, to any judicial relief.
Acknowledging that such an argument "may or may not have some
weight against a right of privacy claim," the court nevertheless
rejected the argument on the ground that the rights in issue were
commercially valuable precisely because of public dissemination
and recognition. The court held that plaintiffs had an enforceable

18. Id. at 486. The distinction between the two types of cases was an important element
of the court's decision. Had a property right not been found, relief would have been denied.
As noted in the dissenting opinion, the critical test for finding liability under the laws of
privacy was not met since defendants' use of plaintiff's name and likeness was not one that
would ordinarily be considered offensive to a reasonable person's sensibilities. Id. at 496
(Hastie, J., dissenting).
19. Id. at 487.
20. Id. at 495.
21. Id. at 496.
23. Data such as the player's batting, fielding and earned run averages were utilized by
defendants.
25. Id. at 1283.
26. Id.
27. Id.
right for injunctive relief, for which "the basis and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference."28

The Right of Publicity as a Personal Right

An alternative source for the right of publicity is the right of privacy.29 The right of privacy, or "right to be let alone," encompasses a range of recognized causes of action. Dean Prosser classified invasions of the right of privacy into four categories: (1) intrusion upon physical solitude; (2) public disclosure of private facts; (3) publicity placing a party in a false light; and (4) misappropriation of one's name or likeness for another's benefit.30 It is the fourth category which has provided a basis for the recognition of the right of publicity in some jurisdictions.

An example of a case reflecting Prosser's theory is Zacchini v. Scripps-Howard Broadcasting Co.31 The Ohio Supreme Court in that case considered a claim for invasion of privacy brought by an entertainer at a county fair against the owners of a television station. The defendant had taped the plaintiff's complete perform-

28. Id. at 1282. Other jurisdictions have similarly recognized a value or property right in a name or likeness existing independently and evolving separately from the right of privacy. See, e.g., Cepeda v. Swift and Company, 415 F.2d 1205 (8th Cir. 1969). These decisions seem to implicitly recognize "[t]he rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right." International News Service v. Associated Press, 248 U.S. 215, 236 (1918).

29. The concept of the right of privacy was first best articulated in the classic article by Samuel Warren and Louis Brandeis, published in 1890, Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). Warren and Brandeis urged that there exists in the law a broad principle of a "right to life" upon which enforcement of the "right of an individual to be let alone" can be premised. Invasion of this right, it was argued, constitutes a legal injury. Although Warren and Brandeis were apparently most concerned with the unauthorized publication of private facts by the press and intrusions of the press into an individual's life, the right of privacy as recognized today encompasses more than just the disclosure of private facts. The "privacy" seed planted by Warren and Brandeis has grown to include several different causes of action and is now recognized in the vast majority of jurisdictions either under common law or by statute. See note 77 infra. As Dean Prosser has noted, "no other tort has received such an outpouring of comment in advocacy of its bare existence." W. PROSSER, LAW OF TORTS 802-3 (4th ed. 1971)[hereinafter cited as PROSSER].

30. Id. at 804-814; Restatement (Second) of Torts, § 652A (1976).

As it has appeared in the cases thus far decided, it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'.

PROSSER, supra note 29, at 804.

31. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976).
ance as a "human cannonball" and then broadcast the tape during a newscast. Relying on Ohio right of privacy cases and the Second Restatement of Torts, the court determined that the plaintiff's claim was for "invasion of the right of privacy by appropriation." The court did not consider it anomalous that the plaintiff performed his act before large crowds yet sought to protect his privacy. To the contrary, the court recognized that the right sought to be protected was "personal control over a commercial display and exploitation of his personality and the exercise of his talents . . . . [Another court] has aptly called this aspect of privacy 'the right of publicity.'"

The Ohio Supreme Court held that despite the plaintiff's right of publicity, the defendants were constitutionally privileged under the first amendment to film and televise the plaintiff's act because the act was a matter of legitimate public interest. This holding was reversed on appeal by the United States Supreme Court. The Supreme Court, perhaps recharacterizing the nature and derivation of plaintiff's claim, stated that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act." The Court stressed that protection of this proprietary interest provides an economic incentive to produce a performance of interest to the public. The Court concluded that the first and fourteenth amendments do not grant a privilege to the media to impinge upon this interest by broadcasting a performer's entire act without his consent.

The right of publicity also was treated as a personal right in *Memphis Development, Etc. v. Factors Etc., Inc.* In that case, the name and likeness of Elvis Presley were used by the defendant on a large statue and miniature pewter replicas. Although Presley had licensed use of his name and likeness to others during his life-

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32. Restatement (Second) of Torts § 652C (Tentative Draft No. 13, 1967) provides that, "one who appropriates . . . the name or likeness of another is subject to liability to the other for invasion of his privacy."
34. *Id.* at 459.
35. *Id.* at 462.
37. *Id.* at 573.
38. *Id.* The protection of a proprietary interest as an economic incentive to produce is similar to that of the patent and copyright laws.
39. *Id.* at 575.
40. 616 F.2d 956 (6th Cir. 1980).
time, the defendant’s unauthorized use occurred after Presley’s death.41

The Sixth Circuit refused to enforce a right of publicity on behalf of Presley’s assignee, holding that Presley’s death extinguished the right.42 The court appeared to reject cases construing the right of publicity as a property right.43 Instead, the court determined that the “law of defamation . . . provides an analogy.”44 The opinion extensively focused on unsettled issues surrounding the right of publicity, such as the potential conflict between the right with the first amendment, and the undetermined temporal scope of the right.45 The court viewed these problems as the consequences of extending recognition of the right of publicity beyond death of the principal.46 In essence, the court was concerned that a decision in the plaintiff’s favor would likely spur future litigation, and that survival of the right “is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture.”47

41. Id. at 957.
42. Id.
43. Id. at 958.
44. Id. at 959.
45. Id.
46. Id. See also text accompanying note 89 supra.
47. Id. The Court’s reasoning, however, is squarely in conflict with the Second Circuit’s first opinion in Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). In that case the court enforced a claim under New York law based on Presley’s right of publicity asserted after his death. See text accompanying notes 125-128 infra.

Since both the Sixth and Second Circuits ruled in diversity cases, construing Tennessee and New York law, respectively, it might be argued that the decisions are not in conflict. Both cases, however, relied on essentially the same sparse body of law. On the second appeal following issuance of a permanent injunction, the Second Circuit first considered the question of applicable state law. The Court agreed with defendant that Tennessee law should apply, and in deference to the Sixth Circuit’s interpretation of Tennessee law, ruled that the right of publicity was not descendible after Presley’s death. Factors Etc., Inc. v. Pro Arts, Inc., No. 80-7692 (2d Cir. June 29, 1981).

On the eve of publication of this article, a Tennessee state court ruled that the right of publicity of Lester Flatt, a famous bluegrass musician, survived his death. Commerce Union Bank v. Coors of the Cumberland, Inc., No. 81-1252-III (Tenn. Ch. Ct. Oct. 2, 1981). The court explicitly rejected the Sixth Circuit’s interpretation of Tennessee law and held that the right of publicity is a property right distinct from the right of privacy. This opinion casts doubt on the precedential value of the Sixth Circuit’s opinion in Factors.

Yet another example of a court viewing the right of publicity as a branch of the right of privacy is Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401, 407 (E.D. Pa. 1963). Defendant used a photograph of plaintiff, a well-known professional basketball player, in connection with advertisements for beer. The judgment for defendant rested upon an interpretation of releases for the photograph signed by plaintiff. Id. at 408.
An attempt to combine the personal and property right-theories to the right of publicity was made by the California Supreme Court in *Lugosi v. Universal Pictures*. Suit was brought by the heirs of the actor Bela Lugosi against the motion picture company which produced the movie in which Bela Lugosi portrayed Count Dracula. The defendant had acquired, by contract from Lugosi, the right to use Lugosi's name and likeness in connection with the movie. The defendant, however, also licensed Lugosi's likeness as Count Dracula in connection with merchandise. The plaintiffs argued that Lugosi had a property interest in his name and likeness which plaintiffs had inherited. Thus, they sought defendant's profits from the merchandise licenses and an injunction against issuance of further licenses without their consent.

The court first considered the right of privacy cases where there had been a refusal to find a cause of action asserting the privacy rights of a dead person. These cases were based on the rationale that the right of privacy is a personal right which does not survive death. The court then stated, however, that determining the "personal" or "property" nature of the right in question is "pointless." The court concluded by straddling both positions, reasoning that while Lugosi, during his lifetime, could have created a business or property interest in his name and likeness by selling licenses, the decision whether to exploit his name and likeness was a personal one. Since Lugosi did not license, assign, or otherwise exploit his right of publicity, the court ruled that his heirs were not entitled to exclusive use of Lugosi's name and likeness after his death.

A mixture of personal and property right theories also is reflected in *Hirsch v. S.C. Johnson & Son, Inc.* The plaintiff in that case was a well-known sports personality nicknamed "Crazylegs" who objected to defendant's use of "Crazylegs" as a trade-

49. 603 P.2d at 427.
50. *Id.*
51. *Id.* at 430.
52. *Id.*
55. The court suggested, however, that after Lugosi's death another party, like defendant, could adopt Lugosi's name or likeness, establish secondary meaning in it, and protect it.
56. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).
mark for women's shaving gel. The Wisconsin Supreme Court held that "the right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts. . . . [It] is different because it protects primarily the property interest in the publicity value of one's name." Interestingly, the court did not conclude that the right of publicity was derived independently of the right of privacy. Rather, the court merely decided that the right protected a property interest rather than a personal one.

Summary

In each of the cases discussed above, the gist of the cause of action was misappropriation of a name, likeness or performance. By the time suit was filed, the person whose rights were asserted had established public recognition of his name or likeness. These were not unknown individuals thrust unwillingly into the public glare, as in the usual right of privacy case. Rather, they had sought and even generated public attention. These plaintiffs were not seeking relief to prohibit all public use of their names and likenesses, but were attempting to prohibit only unauthorized public use and to recover for misappropriation. In each case, the successful plaintiff was either in the business of publicly exploiting his name, likeness or personal performance or had derived rights from such a person. In effect, the defendant was claimed to have misappropriated a business opportunity of plaintiff.

The courts' decisions are best explained by their basic understanding of the right of publicity. When the right of publicity is viewed as a "property" interest independent of the law of privacy, the courts generally grant relief. When the right of publicity is viewed as a branch or outgrowth of the law of privacy, the courts either refuse to recognize the claim or engrat the personal nature

57. Wisconsin had not previously recognized the right of privacy, and the trial court dismissed the case partially on that basis. Id. at 130. In addition, the trial court concluded that plaintiff failed to show prior use of "Crazylegs" as a trademark, and this fact defeated plaintiff's trademark claim. Id.
58. 280 N.W.2d at 132.
59. See text accompanying note 4 supra.
60. Contra Carson v. National Bank of Commerce Trust & Savings, 501 F.2d 1082 (8th Cir. 1974), where the court failed to distinguish between the four forms of privacy and held that the Nebraska Supreme Court's previous refusal to recognize a "false light" privacy action also barred an action governed by Nebraska law for misappropriation of one's name or likeness, whether labeled a right of privacy or publicity.
61. It is believed that only Nebraska and Minnesota still do not recognize the right of
of the privacy right onto the right of publicity, which often precludes relief. The courts' decisions to grant or deny relief, therefore, have been strongly affected by their views on the distinction between "personal" and "property" rights.

**THE ILLINOIS EXAMPLE**

The preceding discussion illustrates how some courts have wrestled with the right of publicity. In jurisdictions where the right of publicity has not yet been squarely confronted, two possible derivations of the right are available. Chances for enforcement of the right seem best when the independent property origin of the right is recognized. Chances for enforcement dim when the law of privacy is relied upon and the personal nature of the right is emphasized. To try to determine how each of the many jurisdictions that have not dealt with the right of publicity would treat such a cause of action is beyond the scope of this article. It may be helpful, however, to examine how a typical jurisdiction that has not directly addressed the issue, Illinois, could characterize the right of publicity and the implications of adopting the property or personal right rationale.

**The Property Basis in Illinois**

Recognition of the right of publicity as a property right finds support in Illinois law antedating recognition of the right of privacy. Illinois courts have long recognized the right of a person to the exclusive benefit of his labor and skill. This right has been

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62. Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979) is an apparent exception to this observation.


64. Doremus v. Hennessy, 176 Ill. 608, 52 N.E.2d 924 (1898); Braceville Coal Co. v. Peo-
characterized by some courts as "the highest form" of property right.\textsuperscript{65}

Although no case has recognized this type of "property" in terms of a right of publicity, one Illinois court has dealt with a closely analogous issue that supports the recognition of the publicity right as a property interest. In \textit{Pendleton v. Time, Inc.},\textsuperscript{66} the plaintiff was the first artist to paint the portrait of Harry Truman. The portrait was presented to Truman, but the plaintiff retained all rights to reproduce it. Subsequent to the unveiling and presentation of the portrait, the plaintiff conducted unsuccessful negotiations with several publishers, including defendant Time, for reproduction of the portrait in a magazine of national circulation. Subsequent to these negotiations, Time published, in \textit{Life} magazine, a reproduction of a portrait of Harry Truman by another artist. A caption accompanying the reproduction claimed that it was the first portrait painted of Truman.\textsuperscript{67}

The plaintiff's complaint charged that Time's caption was made with the intent to injure the plaintiff and destroy his reputation. As a result of the defendant's actions, the plaintiff claimed that the reproduction and sale rights of his portrait had been damaged and that he had lost commissions to paint portraits of other prominent persons.\textsuperscript{68} The trial court granted Time's motion to dismiss the complaint for failure to state a cause of action.\textsuperscript{69} The First District court reversed, noting that this was not an ordinary libel case.\textsuperscript{70} Rather, the case involved injury to a property right of the plaintiff derived from the publicity and reputation that he had

\textsuperscript{65} Mowrey v. Mowrey, 328 Ill. App. 92, 65 N.E.2d 234 (1946), where the court stated that "the right to labor is a property right and that the property which every man has in his own labor is the highest form of property." Such a right was recognized as early as 1898. In Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924 (1898), the court declared:

\begin{quote}
Every man has a right under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and anyone who invades that right without lawful cause of justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong.
\end{quote}

\textit{Id.} at 615, 52 N.E. at 926.

\textsuperscript{66} 339 Ill. App. 188, 89 N.E.2d 435 (1949).

\textsuperscript{67} \textit{Id.} at 192, 89 N.E.2d at 437.

\textsuperscript{68} \textit{Id.} at 193-94, 89 N.E.2d at 437-38.

\textsuperscript{69} \textit{Id.} at 190, 89 N.E.2d at 436.

\textsuperscript{70} \textit{Id.} at 196, 89 N.E.2d at 438-39.
gained as a result of being the first artist to paint Truman's portrait.71

In Pendleton there was no claim for injury or damages as a result of mental anguish.72 The only injury alleged was to the artist's reputation. The plaintiff's reputation had pecuniary value to him and, perhaps, to purchasers of his works. The plaintiff was entitled to benefit financially from his efforts free from interference by others. Similarly, in a right of publicity case, a person who has established a famous personality through his or her skill and labor, such as an athlete or a movie star, also is entitled to protect the pecuniary value of that personality as a property right. The Pendleton case, therefore, provides support for the recognition by Illinois courts of a right of publicity as a property right.73

71. We find in the allegations of this complaint a definite statement of property right in the value attained in the painting of the 'first' portrait of Harry S. Truman, the loss of potential income from reproduction and sale of rights of this portrait, as well as the loss of earnings from commissions to do portraits of other prominent persons. Id. at 194-195, 89 N.E.2d at 438.

The court based its decision on Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924 (1898), an Illinois unfair competition case recognizing that a person has a property right in his or her labor and skill, as well as upon similar cases from other jurisdictions. Dunshee v. Standard Oil Co., 152 Iowa 276, 132 N.W. 371 (1911); Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909); Advance Music Corp. v. American Tobacco Co., 51 N.Y.S. 2d 692 (1945), aff'd, 296 N.Y. 79, 70 N.E.2d 401 (1946).

72. In contrast, mental anguish is often claimed as an injury in right of privacy cases. See notes 74-78 infra and accompanying text.

73. This type of property interest was also recognized in a different situation in Capitol Records, Inc. v. Spies, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970). There, the defendant pirated plaintiff's phonograph records and magnetic tapes by duplicating them and selling the copies. Although the musical performances were not copyrighted, the court, relying on the principles of International News, found that the defendant had unlawfully appropriated the plaintiff's property, which had been created as a result of the expenditure of labor, skill and money. Id. at 434, 264 N.E.2d at 877.

The same equitable principles have also surfaced in common law trademark cases in Illinois. In Universal City Studios, Inc. v. Montgomery Ward & Co., Inc., 207 U.S.P.Q. (B.N.A.) 852 (N.D. Ill. 1980) the plaintiff, Universal, brought suit for trademark infringement, dilution, and unfair competition under federal and Illinois law. The complaint was based on Ward's use of plaintiff's famous JAWS trademark on a line of garbage disposers. In holding for the plaintiff, the court found that plaintiff's extensive promotional efforts and the wide success of its two movies, JAWS and JAWS 2, had created merchandising properties in the marks JAWS and JAWS 2. Id. 854-55. These marks were thus entitled to protection under Illinois law against misappropriation by Ward. Id. at 858.

The essence of the cause of action in Universal, as with the right of publicity, was the recognition of the pecuniary value in a name or trademark resulting from the great public acceptance and fame of that mark after having been built up through the expenditure of skill, labor and money. The court's reasoning is equally applicable to the right of publicity. See also National Football League Properties, Inc. v. Consumer Enterprises, Inc., 211 Ill.
Illinois right of privacy cases suggest an alternative basis for recognition of the right of publicity. The first case to recognize the right of privacy in Illinois was *Eick v. Perk Dog Food Company*. In *Eick*, the defendant company used a photograph of the plaintiff, a young girl not previously known to the public, without her consent in an advertisement promoting its dog food. The plaintiff charged that her likeness was misappropriated and that publication of the photograph caused her humiliation and mental anguish. The trial court dismissed the complaint for failure to state a cause of action.

The First District appellate court reversed, finding overwhelming support for recognition of a right of privacy among decisions from other jurisdictions and from numerous authorities. The court explained that “recognition of the right to privacy means that the law will take cognizance of an injury, even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish.” Despite the fact that *Eick* did not involve a publicly known person, the governing principle expressed by the court would be equally applicable to the right of publicity: “A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for . . . damages which the appropriation causes.”

Although the right of privacy thus clearly provides a basis for recognition of the right of publicity in Illinois, such recognition would be coupled with limitations tied to the privacy rationale. On
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the basis of the first amendment guarantee of freedom of expression, Illinois courts have repeatedly restricted assertion of the right of privacy where matters of public interest are concerned.60 The Illinois Supreme Court explored this area in Leopold v. Levin.81 There, the court indicated that the first amendment limitation applies not only where factual accounts of public events are reported by newspapers and magazines, but also to fictionalized accounts of matters in the public record.82 The plaintiff in that case, Nathan Leopold, brought an action for violation of his right of privacy for publication and distribution of a novel, a play, and a related motion picture, all of which were entitled “Compulsion.”83 These works were based on the exploits of Leopold and Richard Loeb, who together had gained wide notoriety as the convicted kidnappers and murderers of a young boy in 1924. As the court explained, the crime “became an historical cause celebre.”84 Although neither Leopold’s nor Loeb’s name appeared in the novel or movie, their names were used in advertising to suggest that the novel and movie were derived from the famous Leopold-Loeb murder case.85

The court dismissed Leopold’s contention that his right of privacy had been violated by the defendant’s use of his name and likeness in advertising to promote the novel and movie.86 The court stated that the references to Leopold in the advertising concerned a crime to which he had pleaded guilty as a matter of public record. “That conduct [which admittedly constituted a crime] was

82. Id. at 439, 259 N.E.2d at 253.
83. Id. at 435-36, 259 N.E.2d at 252.
84. Id. at 436, 259 N.E.2d at 252.
85. Id. at 437, 259 N.E.2d at 253.
86. Id. Leopold also claimed that the novel and movie were so offensive as to outrage the community’s notions of decency. As such, Leopold argued that the defendants should not be permitted to associate his name with the novel or the movie. The court rejected this contention noting that fictionalized aspects of the novel and movie had been drawn from and were comparable to matters of public record and interest. Id. at 443, 259 N.E.2d at 255.
without benefit of privacy.”\(^8\) The court also emphasized Leopold’s status as a public figure. *Eick v. Perk Dog Food Co.*\(^8\) was distinguished on the grounds that the complainant there was not a public figure and that her picture had been used to promote “a purely commercial” product.\(^9\) This distinction suggests that when misappropriation of a name or likeness is alleged, the public or private status of the plaintiff and the nature of the alleged misuse will be carefully examined to determine whether a first amendment defense exists.

Another important limitation on the right of privacy in Illinois is that no direct or derivative cause of action exists for invasion of privacy after the death of the principal.\(^9\) For example, in *Carlson v. Dell Publishing Company*,\(^9\) a right of privacy action was brought by the administrator and the children of a woman who had been raped and murdered. The plaintiffs sought damages for the publication of an article in the defendant’s magazine about the crime. The trial court dismissed the complaint. The appellate court affirmed,\(^9\) holding that the administrator had no cause of action for invasion of the decedent’s right of privacy because the right is personal and the claim at issue arose after death.\(^9\)

There is one Illinois case that has considered whether the appropriation of a public figure’s name or likeness is based on the right of privacy or an independent property right, but that case is limited by its unusual facts. In *Maritote v. Desilu Productions, Inc.*,\(^9\) the administratrix of Al Capone’s estate, Capone’s wife and his son brought a diversity action in federal court in response to television

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\(^8\) *Id.* at 444, 259 N.E.2d at 256.


\(^9\) 45 Ill. 2d 434, 444, 259 N.E.2d 250, 256 (1970). Similarly, the court in *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960), restricted the impact of *Eick*: “Its holding is limited to its final conclusion - that a private person would be protected against the use of his portrait for commercial advertising purposes.” *Id.* at 333, 168 N.E.2d at 65.


As used herein, the term “principal” refers to the person in whom the right of privacy or publicity arises. The principal is generally the owner of the right unless there has been an assignment or other transfer.


\(^9\) *Id.*.

\(^9\) *Id.* at 213, 213 N.E.2d at 42.

broadcasts by the defendant of "The Two-Part Drama—The Untouchables" and the weekly series "The Untouchables." The plaintiffs sued in part on the basis of "quasi-contract", claiming that defendants were unjustly enriched through the appropriation of plaintiffs' property interest in Al Capone's name, likeness and personality. Capone's wife and son additionally sought recovery for an alleged invasion of their own right of privacy, although they were not publicized in the telecasts. The defendants moved to dismiss the complaint for failure to state a cause of action.

Addressing the wife and son's privacy claim, the district court held that Illinois law would not recognize the right of a decedent's relatives to claim invasion of their right of privacy by publications about the deceased. Further, the court characterized the plaintiffs' quasi-contract theory as actually constituting a claim for misappropriation based on an invasion of privacy. Such a claim similarly failed under Illinois right of privacy law because it did not survive the death of Al Capone.

Several significant facts limit any broad application of this case. First, it is doubtful that Al Capone had any right of publicity in his name and likeness as asserted by the plaintiffs. It can be assumed that Capone had never commercially exploited his personality while alive. Therefore, he never created any protectible property interest in his name or likeness that would survive his death. The court's apparent rejection of the "property right" la-

95. Id. at 722.
96. Id.
97. Id.
98. Id.
99. Id. at 725-26.
100. See text accompanying note 29 supra. The court explicitly rejected the argument advanced by plaintiffs that the case involved an appropriation of a property right:

Plaintiffs have attempted to evade the personal nature of an invasion of privacy suit, by attaching to it a new label, that of appropriation of a property right. Yet, despite the label, such an action remains one for invasion of privacy, under Illinois law, and must be subject to the restrictions imposed thereon.

230 F. Supp. at 723.
101. Id. at 724-25.
102. Al Capone's notoriosity was generated as a result of his criminal activities. Thus, even if Capone had commercially exploited his name and likeness during his life, it is questionable whether any court would recognize a protectible property interest in his personality. Courts generally will not aid a wrongdoer seeking to take advantage of his own wrongs. Diversey Corp. v. Charles Pfizer & Co., 255 F.2d 60 (7th Cir. 1958); Plenderleith v. Gloss, 329 Ill. 283, 160 N.E.2d 745 (1958); Mother Earth, Ltd. v. Strawberry Camel, Ltd., 72 Ill. App. 3d 37, 390 N.E.2d 393 (1979); Metcalf v. Altenutter, 53 Ill. App. 3d 904, 369 N.E.2d 498 (1977). One federal court denied relief where a bank robber claimed property rights in
bel is, therefore, proper under the facts before it. Second, first amendment considerations also limit the impact of the case. The subject matter of defendant's television programs, even though fictionalized, apparently was based on matters of public and historical record. As such, the programs may be viewed as forms of expression protected by the first amendment. Finally, the federal court expressly acknowledged that although a wrong had been committed by defendants, it was bound to apply the law as formulated by the Illinois courts. Since no Illinois appellate court had recognized the type of property right asserted by the plaintiffs, the district court felt constrained against recognizing such a right. The court found merit in the plaintiffs' arguments, but urged that they be made in the state courts to enable Illinois to consider whether to recognize such a right.

Summary

In sum, in Illinois a cause of action seeking relief for the unauthorized appropriation of a public figure's name or likeness could be based either on (1) a property right, derived from unfair competition cases or (2) a personal right, derived from the law of privacy. If based on the right of privacy, the foregoing cases suggest that the right of publicity would be subject to first amendment defenses and abatement of the cause of action upon death of the principal. Such limitations probably would not be applicable to the same extent if the right of publicity is viewed as an independent property interest protectible under the theory of unfair competition. If the property theory is to succeed, the Maritote decision suggests that a suit should be brought in a state court rather than in a federal court. While no prediction can be made as to what result the Illinois courts may reach when confronted with the right of publicity issue, it is important to recognize the consequences that may follow from a choice of one path over the other.


103. 230 F. Supp. at 722.
104. See text accompanying note 80 supra.
105. 230 F. Supp. at 726.
106. Id. at 724-26.
107. Id. at 726.
108. These bases need not be mutually exclusive, however, as demonstrated by the Lugosi and Hirsch decisions. See notes 48-60 supra and accompanying text.
From the foregoing survey of the right of publicity in various jurisdictions and the discussion of the possible bases for the right in Illinois, it is apparent that misappropriation is the underlying cause of action whether this is considered under the rubric of the right of publicity or the right of privacy. Both the right of publicity and the right of privacy stem "from Court recognition that an individual has the right to control the use of his own name and image and the publication of information about himself." The question naturally arises, however, as to which label, privacy or publicity, should be applied to a cause of action, and whether it makes any difference.

Two cases illustrate the point that a plaintiff may assert both the right of privacy and the right of publicity in a cause of action arising out of a single set of facts. In Ali v. Playgirl, Inc., Muhammad Ali objected to a nude portrait of an unnamed boxer published in Playgirl magazine. Ali claimed that this portrait was unmistakably recognizable as himself and filed suit alleging violation of his rights of privacy and publicity. The court found that, in regard to Ali's statutory right of privacy under New York law, Ali's status as a public personality did not foreclose application of the right of privacy to prevent unauthorized commercialization of his personality. The court also found that the picture had been used for the "purpose of trade" because it was "an illustration falling somewhere between representational art and cartoon, and is accompanied by a plainly fictional and allegedly libelous bit of doggerel." Thus, the court concluded that both the right of privacy and the right of publicity had been violated, and issued a preliminary injunction restraining further distribution of the pertinent issue of the magazine.

In a similar case, but with an opposite result, actress Ann-Margret sued to enjoin publication of a magazine which printed a pho-
photograph of her nude from the waist up.\textsuperscript{115} Ann-Margret alleged violation of her rights of privacy and publicity.\textsuperscript{116} The district court noted that plaintiff is a "public figure" and that the photograph was taken from a publicly displayed and authorized movie.\textsuperscript{117} These facts, coupled with the conclusion that the appearance of Ann-Margret partially nude in a movie was a newsworthy event, led to the finding that subsequent reproduction and publication of her photograph in the magazine was not actionable under New York's privacy law.\textsuperscript{118} For the same reasons, and with the additional factor that defendants' use did not constitute a use for advertising or trade purposes, the court also granted summary judgment against a claim for violation of the common law right of publicity.\textsuperscript{119}

These cases indicate that in certain situations both privacy and publicity rights are present and should be asserted. Moreover, the same factors may be determinative of both rights. The cases also demonstrate that the right of privacy is not necessarily inconsistent with the right of publicity. There are a number of circumstances, however, in which both rights will not be available to a plaintiff. These circumstances demand an understanding of the differences between these rights and may require an election between the rights.\textsuperscript{120}

\textit{Death of the Principal}

Privacy actions are categorized as actions wholly personal to the principal, and usually a right of privacy action will be barred if the cause of action arises after the death of the principal.\textsuperscript{121} It is unclear, however, whether death of the principal will bar all actions based on misappropriation of name or likeness.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 404.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} at 406. The court did not discuss \textit{Ali}, but merely cited the case and in a parenthetical noted that it involved a drawing as opposed to a photograph, and was accompanied by fictional and allegedly libellous language. \textit{Id.} at 404.
\item \textsuperscript{119} \textit{Id.} at 406.
\item \textsuperscript{120} Because Illinois is believed to be a typical state which has not yet recognized the right of publicity, it is frequently used hereafter for illustrative purposes.
\item \textsuperscript{121} See text accompanying note 89 supra.
\item \textsuperscript{122} Suppose, for example, that a well-known person, John Jones, has been licensing use of his name on merchandise for many years. When he dies, XYZ Corp. begins use of that name on similar merchandise. A right of privacy action against XYZ Corp. would not be available in Illinois to the administrator or executor of John Jones' estate. Assuming, however, that an action based on right of publicity would be available for a living John Jones,
In *Price v. Hal Roach Studios, Inc.*, the heirs of the comedians Laurel and Hardy successfully asserted the right of publicity after the comedians' death. The court, noting that other decisions have labeled the right of publicity a property right, found "no logical reason to terminate this right upon death of the person protected." Similarly, in *Factors Etc., Inc. v. Pro Arts, Inc.*, the assignee of the entertainer Elvis Presley successfully asserted the right of publicity under New York law after Presley's death in obtaining a preliminary injunction. The court particularly emphasized the fact that Presley had exercised his right during his lifetime.

In contrast, the court in *Memphis Development Foundation v. Factors Etc., Inc.*, denied relief to Presley's assignee. This court emphasized the personal nature of the right of publicity. The court found that the principal social policy behind the right, encouragement of individual enterprise and creativity, would not be promoted by recognizing the right after the individual's death.

To predict the position of the courts of Illinois or other jurisdictions if faced with a similar claim would be sheer guesswork at this point. Certainly, the holding of the Illinois federal court in *Maritote v. Desilu Productions, Inc.*, indicates that under the current state of Illinois law, the right of publicity would not survive. For an Illinois plaintiff to succeed in a case involving a deceased principal, it must be established that the right of publicity has a distinct basis from the right of privacy. Further, the plaintiff should emphasize the property nature of the right, and, if applicable, the fact that the right was assigned or at least used in some way during the principal's life. Otherwise, the personal nature of the right of privacy will surely limit a claim for misappropriation of a name or likeness.

124. *Id.* at 844.
126. *Id.* at 216. See note 47 supra.
127. 616 F.2d 956 (6th Cir. 1980).
128. The court also discussed various problems with the right of publicity despite the fact that no such problems existed in the case at issue. One problem noted, that of the scope and duration of the right, is discussed at notes 132-144 infra and accompanying text.
129. *Id.* at 758-59.
Exercise and Duration of the Right

Another critical issue in several of the right of publicity cases has been whether or not the principal had exercised his or her right of publicity as of the time of suit. Exploitation or commercialization of a person's name or likeness during the person's life potentially has twofold significance: (1) it triggers the existence of the right of publicity and (2) in at least one jurisdiction, it preserves the right upon the death of the principal.

In this respect, the right of publicity parallels the law of trademarks, by requiring use of the name or likeness by the principal in order to become protectible. At least one court has appeared to carry the trademark analogy one step further. In dictum in Lugosi v. Universal Pictures, the California Supreme Court stated that upon Bela Lugosi's death, "anyone, related or unrelated to Lugosi, . . . could, in [his or her] own name or in a fictitious name, or a trade name coupled with that of Lugosi, have impressed a name so selected with a secondary meaning and realized a profit." The

a two part test to determine the survival of a negligence action: (1) if the interest to be protected was primarily a property interest, it survived; if the interest was primarily personal, it abated; and (2) if the right asserted is assignable, then it survives death. This test is consistent with analyses applied in other jurisdictions to determine survival of the right of publicity.


In all likelihood, Hugo Zacchini did not possess a right of publicity until he began his "human cannonball" act for the public. The fact that the public paid to see his act demonstrated that he had a proprietary interest in his act which a court could determine to be protectible from appropriation by another. Similarly, entertainers such as Elvis Presley and athletes such as Muhammad Ali have established rights of publicity through efforts involving labor and skill.


"There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed." United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918).

Theoretically, any person, whether publicly known or not, could establish a right of publicity upon exercise of that right in a recognized manner. Public figures, however, obviously have a greater "potential" for exercise than private figures not well known to the public, because the names and likenesses of public figures are more likely to be marketable.


Id. at 822-23, 603 P.2d at 430 (1979)(emphasis added).
court did not state whether this name "impressed with secondary meaning" would be protectible as a trademark or as a right of publicity, but in many circumstances this distinction may be unimportant in terms of ultimate relief.\textsuperscript{138}

Once the right of publicity exists, the duration of that right becomes a troublesome problem.\textsuperscript{139} The courts seem willing to accept, and indeed assume, that the right of publicity extends at least for the life of the principal. This assumption is probably justified in most instances, because a name or likeness is inherently associated with a particular individual and will remain identified with that individual for his life.\textsuperscript{140} Assuming that the right survives the death of the principal, the difficult question is how long after death the right should be extended.\textsuperscript{141}

One suggestion which has been made is that the right exist for the same period as the term of a copyright (author's life plus fifty years) on the basis that these are similar types of intangible property rights.\textsuperscript{142} This solution, although not altogether illogical, is not the best resolution of the problem. First, the copyright term begins with creation of the copyrighted work. In contrast, the right of publicity comes into existence upon exploitation of the name or likeness. Furthermore, the length of the copyright term originally was selected to conform with copyright laws existing in a majority of other countries.\textsuperscript{143} Similar considerations do not exist with respect to the right of publicity to mandate the adoption of a fifty-year term. Finally, the copyright term defines a period of permiss-

\textsuperscript{138} Under certain circumstances, however, this distinction may be very important. In New York, for example, a grant of the right of publicity may validly be made "in gross" and without an accompanying transfer of business or anything else. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Accordingly, a plaintiff seeking to protect a name or likeness which was acquired without simultaneous transfer of a business interest would be best advised to rely on the right of publicity rather than trademark rights, if possible.

\textsuperscript{139} The duration question was one of a "whole set of practical problems of judicial line-drawing," which influenced one court to hold that the right of publicity was not inheritable. Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980).

\textsuperscript{140} An exception to this rule may occur if the name or likeness asserted is not an individual's own name or likeness but rather, a nickname, a stage appearance, or the like. Compare John W. Carson v. Here's Johnny Portable Toilets, Inc., 498 F. Supp. 71, (E.D. Mich. 1980); Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979); \textit{with} Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425 (1979).

\textsuperscript{141} This problem does not arise with the right of privacy because that right lasts only for the lifetime of an individual.

\textsuperscript{142} Lugosi v. Universal Pictures, 25 Cal.3d 849, 603 P.2d 425, 446 (Bird, C.J., dissenting).

\textsuperscript{143} H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 135 (1976).
sible monopoly which, when applied to the right of publicity, may be unnecessarily long. Where, for example, the commercial value of the right of publicity is derived not from labor and skill but, rather, from fortuitous circumstances, it seems neither fair nor necessary to extend the right of publicity for the principal’s life plus fifty years.

A better solution to the problem is to limit the duration of the right to the period of use or exploitation. Like a trademark, the right of publicity stems from the initial use or exercise of the property right. Protection of the right preserves the commercial interest in a name or a likeness. Therefore, protection of the right of publicity should endure for the life of the principal and then, like a trademark, cease when use of the name or likeness terminates. So long as the property is exploited, it should be subject to the exclusive control of the principal or one whose rights are derived from the principal.

This solution would avoid creating an unnecessarily lengthy monopoly of the right of publicity. Moreover, it has the advantage of providing the courts with an existing common law trademark precedent to serve as a guide in publicity cases, and for that reason is more likely to meet with uniform acceptance in each of the states. Finally, this solution would be consistent with those decisions requiring exercise of the right of publicity in order to transfer or assign the right at death.

Defenses

Stating a cause of action under the rights of privacy or publicity may raise different problems, but there are common defenses to both claims. In addition to abatement due to death of the principal, these defenses include consent, first amendment protections

144. For example, the returned Iranian hostages probably have substantial potential to exploit a right of publicity. The fame and the commercial value in their names and likenesses is not derived from their labor and skill. Until they use their names or likenesses commercially, their rights of privacy remain available.

145. In many circumstances, the name or likeness may serve as a trademark and, in such cases, should be protectible as a trademark as well as a right of publicity.

146. By analogy to trademark law, exploitation of the right of publicity would cease when definite acts indicate the owner’s intention to permanently give up use of the name or likeness. Once exploitation ceases, trademark and first amendment principles would govern situations where another adopts the name or likeness in connection with merchandise, the media, or some other use. See J. McCarthy, Trademarks and Unfair Competition § 17:3 (1973).

147. See notes 120-131 supra and accompanying text.
and statute of limitations.

The defense of consent is premised on the argument that the plaintiff agreed to the use of his name or likeness. The issue most likely to be disputed when this defense is raised is the scope of the consent. For example, if a person agreed to "pose for a man that takes a movie" and that movie is later shown on television in the context of a commercial, a question of fact exists as to whether the scope of the consent extended to the alleged misuse. Similarly, an agreement to transfer the right to use an actor's name and likeness in connection with the advertising of a motion picture may not include the right to use that same name and likeness in connection with the sale of merchandise. These issues are to be determined by the parties' intent and are not peculiar to either the right of privacy or publicity.

A first amendment defense frequently appears in both right of privacy and right of publicity cases. The defense is framed in terms of the public's right to know, and focuses on the newsworthiness of the event or the status of the plaintiff as a public figure. The Supreme Court has indicated that a first amendment defense may be less successful when raised against the right of publicity than against the right of privacy. In Zacchini v. Scripps-Howard Broadcasting Co., the Court concluded that different interests warranted different analysis under the first amendment. The Court distinguished the plaintiff's proprietary interest in his act as fundamentally different from an individual's interest in his reputation and peace of mind, which is the essence of "false light" privacy cases. While the Court recognized that the first amendment consistently has been held to protect media use of a name or likeness in "false light" cases, the Court refused to apply that same protection where the interest invaded constituted the plaintiff's

148. PROSSER, supra note 29, at 804.
151. One article has suggested that the first amendment is the most important social policy limiting both the rights of privacy and publicity. P. Felcher and E. Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L. J. 1577, 1596 (1979).
153. Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the first and fourteenth amendments do not immunize the media when they broadcast a performer's entire act without his consent. Id. at 574-75.
154. Id. at 576.
It may be argued that the Zacchini case is unique among right of publicity cases because it involved misappropriation of a performer’s entire act, not just his name or likeness. The Court’s reasoning, however, is equally persuasive in the more common right of publicity cases, where the plaintiff’s name or likeness has been misappropriated for a commercial use rather than for a news broadcast. First Amendment protection traditionally has been stronger when the media are involved than when strictly commercial interests are at stake.\textsuperscript{155}

Finally, another defense which commonly is raised in privacy and publicity cases is that the cause of action is barred by the statute of limitations. This defense is tied to characterization of the interest to be protected. Statutes of limitations are commonly framed in terms of “injury to feelings,” i.e., slander and libel, versus “injury to property.” In addition, because the interest to be protected in privacy cases is generally similar to the interest in defamation cases, many states have included actions for privacy, slander and libel in the same statute of limitations.\textsuperscript{156} This limitation period is generally relatively short in comparison to other tort and contract claims.\textsuperscript{157} The characterization of the interest, therefore, may be determinative of whether the action can be brought at all.\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{155} See, e.g., Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978), where the court held that first amendment interests in defendant’s movie outweighed plaintiff’s right of publicity.
\item \textsuperscript{156} But cf. Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538 (D. Conn. 1953)(privacy action held to be covered by the longer general statute of limitations).
\item \textsuperscript{157} In Illinois, the applicable statute of limitations for privacy cases provides a period of one year after the cause of action accrued. Ill. Rev. Stat. ch. 83, ¶ 14 (1979). The current Illinois statute of limitations covering injury to property is five years after the cause of action accrued. Ill. Rev. Stat. ch. 83, ¶ 16 (1979).
\item \textsuperscript{158} The importance of the property-privacy distinction is illustrated by the case of Carnessa v. J. I. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62 (1967). There, a critical issue was whether the two year New Jersey statute of limitations covering “injury to the feelings” or the six year statute for tortious injury to “property” was applicable to a case involving the use of plaintiff’s name and likeness for advertising purposes. Id. The court concluded that the action was for invasion of property rights and not for injury to the person: therefore the longer period was held to apply. Id. at 359, 325 A.2d at 80. In contrast, Maritote v. Desilu Productions, Inc., 230 F. Supp. 721 (N.D. Ill. 1964), refers to an unpublished decision of the circuit court in Leopold v. Levin, No. 59 C 14087 (April 15, 1964), quoted in Maritote v. Desilu Productions, Inc., 230 F. Supp. 721, 729 (N.D.Ill. 1964). In Leopold, the court characterized the appropriation of a name and likeness for use in a novel, play, and movie as a privacy action. Id. The action was thus covered by the short defamation statute of limitations. Id.
\end{itemize}
Relief

In general, there appear to be only minimal differences in the types of relief available in right to privacy and right of publicity cases. The most common relief granted in right of privacy cases is damages for mental anguish.\footnote{159} The right of privacy preserves the “right to be let alone,” and the invasion of that right frequently causes only mental distress. This does not mean, however, that the defendant is not also liable for the “actual pecuniary damages which the appropriation causes,”\footnote{160} or for unjust enrichment.\footnote{161} One court, in an apparent right of privacy case, made separate awards for the value of a misappropriated endorsement, mental and physical pain and suffering, exemplary damages, and defendant’s profits.\footnote{162}

The measure of damages in right of publicity cases usually is plaintiff’s lost value in the proprietary interest in his name or likeness, or the amount by which defendant has unjustly benefitted by the misappropriation. Measuring damages depends upon how the right of publicity has been exercised, and whether the defendant has used the misappropriated right for profit. For example, where the right has been exercised through an existing licensing program, damages may be a reasonable royalty and/or payment of the defendant’s profit.

In both privacy and publicity cases, injunctive relief also may be available. The tort can be a continuing one and relief at law may be difficult to ascertain. Moreover, the plaintiff in a right of publicity case, like his counterpart in a privacy case, may wish to be “let alone”, at least with respect to a particular defendant with whom he does not wish to be associated. Also, punitive damages should be available on the same basis as other torts, i.e., where wrongful motive or state of mind is shown.\footnote{163}

The reason for overlap of available relief in privacy and publicity cases is that usually the compensated injury is not only an injury to feelings, but also represents a pecuniary loss to the plaintiff or, even more likely, a pecuniary gain to the defendant.\footnote{164} The inter-

\footnote{160. Eick v. Perk Dog Food Co., 347 Ill. App. at 299, 106 N.E.2d at 745.}
\footnote{161. PROSSER, supra note 29, at 815.}
\footnote{163. PROSSER, supra note 29, at 815.}
\footnote{164. Uhlaender v. Henricksen, 316 F. Supp. 1277, 1280 (D. Minn. 1970).}
ests to be protected in privacy and publicity cases are not inconsis-
tent, and, consequently, the available forms of relief in such cases
will probably be the same regardless of whether the cause of action
asserted is based on privacy or publicity.165

**CONCLUSION**

While some commentators have urged a particular basis for the
right of publicity, the courts have not been uniform in recognizing
a single source of the right. In some instances, the courts appear to
have premised the right of publicity on more than one source. Con-
sequently, there appears little chance in the near future for the
development of a uniform body of law on the right of publicity.

An understanding of the primary interests involved in privacy
and publicity cases may be the most helpful way to deal with this
area of the law and to explain the apparent inconsistencies in its
development. In many cases, privacy and publicity rights are both
present but are not separately defined. As a result, the reasoning of
the courts has been less than clear.

The confusion that prevails, however, is unnecessary. The rights
of privacy (the misappropriation category) and publicity should be
viewed as distinct but not mutually exclusive interests on a single
continuum of the cause of action for misappropriation of a name or
likeness. Before a person commercially exploits his or her personal-
ity, a personal interest exists in the control of his or her name and
likeness, which is entitled to protection against misappropriation.

165. One example of a plaintiff seeking to protect both his privacy and publicity inter-
1980). The entertainer Johnny Carson sued to prevent use of the term "Here's Johnny" in
connection with the sale or lease of portable toilets. The evidence showed that plaintiff had
used the term for many years to introduce his nationally televised program and had licensed
others to use the term as a trademark on clothing and toiletries. *Id.* at 76. Although the
court found that plaintiff had popularized the mark and that a substantial segment of the
public associated the mark with the plaintiff, the court held that "Here's Johnny" was not a
strong mark and was not entitled to protection against defendant's non-competitive use. *Id.*
at 77.

The court disposed of plaintiff's privacy and publicity claims by concluding that the term
at issue did not specifically identify plaintiff. *Id.* at 78. Nevertheless, the case is illustrative
of privacy and publicity interests present in the same plaintiff and in the same set of cir-
cumstances. See also text accompanying notes 110 and 115 *supra*. The indelicate nature of
defendant's product was obviously one which could be considered distasteful and embar-
rassing to plaintiff and to the ordinary sensibilities of a reasonable person, and probably
sufficient to justify an injunction. In addition plaintiff's established proprietary interest in
the term "Here's Johnny" was being used to defendant's advantage and was being diluted in
much the same way as a trademark is diluted when the mark is used by another without
authority. See note 73 *supra*.
This interest is more properly labeled a right of privacy and is a personal right which can be asserted only by the person subject to an invasion of privacy. This right exists regardless of whether or not the person is a so-called public figure. The publicity right arises once a person has commercially exploited his or her name and likeness. A legitimate property interest in the person's personality is created which is entitled to protection from unauthorized appropriation and commercialization under the theory of unfair competition. This right should endure for the person's lifetime and thereafter until authorized exploitation of the name or likeness ceases. Simply because a person has chosen to commercially exploit his personality does not mean he has forfeited his right of privacy. Under certain circumstances, therefore, a plaintiff's assertion of both the right of publicity and right of privacy in the same case may be entirely consistent. Perhaps the most that can be hoped for in the near future as the "right of publicity" continues to evolve is that the courts recognize the significance of the different interests to be protected in privacy and publicity cases, no matter what label is applied to the cause of action.