

July 2012

Appropriation of Public Personality Held Actionable

St. John's Law Review

Follow this and additional works at: <http://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (2012) "Appropriation of Public Personality Held Actionable," *St. John's Law Review*: Vol. 52: Iss. 1, Article 14.
Available at: <http://scholarship.law.stjohns.edu/lawreview/vol52/iss1/14>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

sons voluntarily may reduce their coverage and hence their premiums for basic economic loss to the extent of their coverage under health insurance plans.¹⁷¹

Although several sections of the recent no-fault amendment appear to deal adequately with provisions of the original statute that were susceptible to exploitation and abuse, the major thrust of the legislation, a change in the definition of a serious injury, probably will not lead to a substantial reduction in litigation. It therefore is hoped that the legislature will monitor closely the operation of the statute and revamp it as necessary to attain the objectives underlying the no-fault concept.

DEVELOPMENTS IN NEW YORK LAW

Appropriation of public personality held actionable.

Section 51 of the Civil Rights Law, which grants a cause of action for damages to "any person whose name, portrait, or picture" is used for commercial purposes without his written consent,¹⁷² con-

¹⁷¹ N.Y. INS. LAW § 672(7) (McKinney Supp. 1977-1978). The new legislation also requires insurers to offer higher deductibles to policy holders. *Id.* § 167(d)(iii); Memorandum of State Executive Department, *reprinted in* [1977] N.Y. Laws 2445 (McKinney), wherein it was stated:

The requirement that insurers offer a variety of higher deductibles, would reduce rates for those retaining the \$200 standard deductible or electing a higher deductible. In many cases those electing higher deductibles will be in a position to utilize tax offsets to greatly minimize the real loss suffered.

Id. at 2457.

It should be noted, however, that there is "considerable indication that any price rise in auto insurance has been due not to difficulties under inadequate no-fault laws, but to rapidly rising prices, a factor applicable to all auto insurance, in fault-based states and no-fault states alike." *No-Fault Auto Laws*, *supra* note 152, at 35. The state, according to former Superintendent of Insurance Harnett, is powerless to prevent premium increases occasioned by the rising price of such items as replacement parts for automobiles. Greenhouse, *Carey Moves to Cut No-Fault Costs*, N.Y. Times, Apr. 21, 1977, at 1, col. 2.

¹⁷² N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976) provides in pertinent part:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.

In addition to the civil cause of action provided by § 51, the Civil Rights Law provides a misdemeanor penalty for the nonconsensual use of a name, portrait, or picture:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having

sistently has been construed by the courts as providing compensation only for emotional injury.¹⁷³ When the legislature enacted this statute in 1903, it probably did not foresee the technological advances which have led to sophisticated forms of media and a concomitant growth of the advertising industry.¹⁷⁴ Prompted by these developments, courts and commentators have begun to recognize that the commercial exploitation of certain public personalities may cause pecuniary loss as well as emotional injury.¹⁷⁵ To afford such individuals a basis for relief, some jurisdictions have fashioned a common law right of *publicity*,¹⁷⁶ infringement of which gives rise to

first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

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

An article written in 1890 by Samuel Warren and Louis Brandeis is widely credited with having prompted legislatures and courts to afford recognition to the right of privacy. The basic thrust of that article was that all persons have a "right to be let alone" and that invasions of this right should be compensable in money damages. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In 1902, the Court of Appeals was presented with its first opportunity to adopt the view enunciated by Warren and Brandeis. In *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), plaintiff alleged that her picture had been used without her consent on 25,000 printed advertisements. *Id.* at 542, 64 N.E. at 442. The court denied relief stating that "the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence . . ." *Id.* at 556, 64 N.E. at 447. In response to the public's disapproval of *Roberson*, the 1903 legislature enacted the predecessors of §§ 50 & 51, *see, e.g.*, *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 327, 221 N.E.2d 543, 544, 274 N.Y.S.2d 877, 878 (1966); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 778, 295 N.Y.S. 382, 384 (Sup. Ct. N.Y. County 1937); *Blair v. Union Free School Dist.*, 67 Misc. 2d 248, 248, 324 N.Y.S.2d 222, 223 (Dist. Ct. Suffolk County 1971), which, 5 years later, were sustained in the face of a constitutional challenge. *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908).

¹⁷³ Although the statute does not specify hurt feelings as the sole element of compensable injury, the courts, relying upon the intent of the enacting legislature, have limited recovery under § 51 to such damages. *See, e.g.*, *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 361, 107 N.E.2d 485, 489 (1952) (Desmond, J., concurring); *Booth v. Curtis Publishing Co.*, 15 App. Div. 2d 343, 356, 223 N.Y.S.2d 737, 749 (1st Dep't) (Eager, J., dissenting), *aff'd mem.*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S.2d 501, 508 (Sup. Ct. N.Y. County 1968). *See note 200 infra.*

¹⁷⁴ A noted commentator has stated that "[t]he innovators of the privacy doctrine could not have foreseen the advent of radio, television and motion pictures, and the concomitant scope and variety of commercial exploitations of names, likenesses and personalities of individuals." Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. REV. 553, 554 (1960) [hereinafter cited as Gordon].

¹⁷⁵ *E.g.*, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Gordon, *supra* note 174, at 554-55; Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 203-04 (1954) [hereinafter cited as Nimmer]; Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 557 (1976) [hereinafter cited as *Right of Publicity*].

¹⁷⁶ *See* Gordon, *supra* note 174; Nimmer, *supra* note 175; *Right of Publicity, supra* note 175.

a cause of action independent of the well-established invasion of privacy action.¹⁷⁷ While acknowledging its desirability, the New York courts have been reluctant to definitively recognize an action premised upon the appropriation of a public personality.¹⁷⁸ Recently, however, in *Lombardo v. Doyle, Dane & Bernbach, Inc.*,¹⁷⁹ the Appellate Division, Second Department, presented with an opportunity to address this area, upheld a cause of action based on a common law right of publicity,¹⁸⁰ while denying relief under section 51 of the Civil Rights Law.¹⁸¹

The *Lombardo* plaintiff was a famous bandleader, especially well-known for his New Years' Eve performances. Defendants, an advertising agency and one of its clients, an automobile manufacturer, attempted to procure plaintiff's services for a television commercial. The commercial was to depict plaintiff leading his band in its famous rendition of "Auld Lang Syne" amidst a New Years' Eve setting while defendant's cars were being displayed to the viewing audience. Following unsuccessful negotiations with plaintiff, defendants produced the commercial, employing an actor and another band.¹⁸² Lombardo thereupon commenced an action, alleging invasion of his privacy under sections 50 and 51 of the Civil Rights Law and appropriation of his public personality.¹⁸³ The Supreme Court, Nassau County, denied a motion to dismiss both causes of action and defendants appealed.¹⁸⁴ While unanimously upholding the right of publicity cause of action, the appellate division, by a 3-2 margin, dismissed the claim based upon the Civil Rights Law.¹⁸⁵

¹⁷⁷ Many commentators favor the creation of a separate right of publicity. See, e.g., Gordon, *supra* note 174; Nimmer, *supra* note 175; Right of Publicity, *supra* note 175; Comment, *Why Not a Relational Right of Privacy?—or Right of Property*, 42 U. Mo. K.C. L. Rev. 175 (1973). In contrast, Dean Prosser proposed a broad right of privacy which would embrace all types of interests including those protected by the right of publicity. See W. PROSSER, LAW OF TORTS § 117, at 804 (4th ed. 1971), wherein it is stated: "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 . . ." The four categories enumerated by Prosser are intrusion on an individual's physical solitude, public disclosure of private facts, false publicity, and appropriation of name or likeness for defendant's advantage. *Id.* at 804-14. This suggested scheme has been incorporated into the second Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS, § 652A, 652C (Tent. Draft No. 22 1976).

¹⁷⁸ See notes 195-196 and accompanying text *infra*.

¹⁷⁹ 58 App. Div. 2d 620, 396 N.Y.S.2d 661 (2d Dep't 1977) (mem.).

¹⁸⁰ *Id.* at 622, 396 N.Y.S.2d 664.

¹⁸¹ *Id.*

¹⁸² *Id.* at 622-23, 396 N.Y.S.2d at 665 (Titone, J., & Suozzi, J., concurring in part and dissenting in part).

¹⁸³ *Id.* at 620, 396 N.Y.S.2d at 663. Plaintiff had included a cause of action for breach of contract which claim was not before the court on appeal. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

In dismissing plaintiff's right to privacy cause of action, the majority observed that the statute, consistent with its express provisions, has been construed to prohibit unauthorized use of only an individual's name, portrait, or picture.¹⁸⁶ Adopting this literal interpretation of the Civil Rights Law, the *Lombardo* court rejected plaintiff's argument that the use of a person's reputation or image should be equated to the use of his name or picture for the purposes of that statute.¹⁸⁷

Justices Titone and Suozzi dissented from the majority's holding with respect to the privacy cause of action.¹⁸⁸ Arguing for a more liberal reading of section 51, the dissent drew on several cases to support its view that the use of plaintiff's actual name or picture is not a prerequisite to recovery. According to Justices Titone and Suozzi, in determining liability a court should examine "the nature and quality of the alleged representation, the medium in which it is presented, and the reasonable understanding of the public with respect thereto."¹⁸⁹ The dissent concluded that a cause of action

¹⁸⁶ *Id.* at 621, 396 N.Y.S.2d at 663-64. Because a criminal penalty may be imposed under § 50, many courts have taken the position that the sections should be strictly construed. *See, e.g.,* *Binns v. Vitagraph Co.*, 210 N.Y. 51, 55, 103 N.E. 1108, 1109-10 (1913); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 476, 178 N.Y.S. 752, 759 (1st Dep't 1919); *Vogel v. Hearst Corp.*, 116 N.Y.S.2d 905, 906 (Sup. Ct. Kings County 1952). *But see* *Jackson v. Consumer Publications, Inc.*, 169 Misc. 1022, 10 N.Y.S.2d 691 (Sup. Ct. N.Y. County), *aff'd mem.*, 256 App. Div. 965, 10 N.Y.S.2d 694 (1st Dep't 1939), wherein the court rejected the argument that §§ 50 & 51 should be strictly construed. The fallacy of this position, the court stated, was that it failed to "separate the penal from the remedial features of the law." 169 Misc. at 1024, 10 N.Y.S.2d at 693. Other courts have found that a strict interpretation would not be in accord with the legislation's remedial purpose. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 280-81, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 779, 295 N.Y.S. 382, 385 (Sup. Ct. N.Y. County 1937). It should be noted, however, that the Court of Appeals has not abandoned the position enunciated in *Binns* that the statute is to be strictly construed.

¹⁸⁷ 58 App. Div. 2d at 622, 396 N.Y.S.2d at 664.

¹⁸⁸ *Id.*, 396 N.Y.S.2d at 665 (Titone, J., & Suozzi, J., concurring in part and dissenting in part).

¹⁸⁹ *Id.* at 623, 396 N.Y.S.2d at 666 (Titone, J., & Suozzi, J., concurring in part and dissenting in part). The dissent relied heavily on *Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108 (1913), to support its position that use of the actual name or picture is not necessary under the statute. In *Binns*, the plaintiff had been responsible for the rescue of hundreds of persons after a shipwreck. Defendant produced films reenacting the events using plaintiff's name and an actor to portray him. *Id.* at 52-53, 103 N.E. at 1109. In addition, plaintiff's name was prominently displayed in advertisements of the films. *Id.* at 57, 103 N.E. at 1110. The Court upheld plaintiff's § 51 claim, *id.* at 58, 103 N.E. at 1111, encountering little difficulty in finding an unauthorized use of plaintiff's picture:

A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person. The picture represented by the defendant to be a true picture of the plaintiff, and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff.

under section 51 had been stated and that the trier of the facts should be given the opportunity to determine whether the public could have reasonably believed that the commercial depicted the plaintiff.¹⁹⁰

In contrast to the privacy cause of action, the second department found that plaintiff's right of publicity claim was predicated upon a common law property right which recognizes the value of an individual's public personality.¹⁹¹ Explaining that plaintiff had spent 40 years developing his image as "Mr. New Years' Eve, an identity that has some marketable status," the court concluded that this image was a valuable property interest entitled to legal protection.¹⁹² To support this conclusion, the appellate division pointed to several decisions which, in its opinion, establish that "there is no question but that a celebrity has a legitimate proprietary interest in his public personality"¹⁹³

It is submitted that the *Lombardo* court's recognition of a distinct cause of action based on the right of publicity marks the final step of a discernible evolution in New York decisional law. Although previous decisions have discussed this right only in dictum, they nevertheless support the ultimate recognition of a valid cause of action premised upon it. Stemming from a decision rendered by a

Id. at 57, 103 N.E. at 1110. The Court seemingly was influenced by the possibility that use of plaintiff's name in connection with the picture of the actor had led the public to believe that it was actually plaintiff whom they were viewing. Although the *Binns* situation was similar to the factual setting in which *Lombardo* arose, the precedential value of the *Binns* Court's discussion of the picture is diminished by the fact that relief was nonetheless available due to the unauthorized use of plaintiff's name.

Of the other cases relied upon by the dissent, two involved use of plaintiff's name, while the third was decided under California law. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (California law); *Uproar Co. v. NBC*, 8 F. Supp. 358 (D. Mass. 1934), *modified on other grounds*, 81 F.2d 373 (1st Cir. 1936) (plaintiff's name used); *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 73 N.Y.S.2d 426 (Sup. Ct. N.Y. County 1947), *aff'd*, 273 App. Div. 947, 78 N.Y.S.2d 224 (1st Dep't 1948) (plaintiff's name used). The *Lombardo* majority similarly distinguished the cases cited by the dissent. 58 App. Div. 2d at 621, 396 N.Y.S.2d at 663-64.

¹⁹⁰ 58 App. Div. 2d at 623, 396 N.Y.S.2d at 666 (Titone, J., & Suozzi, J., concurring in part and dissenting in part).

¹⁹¹ 58 App. Div. 2d at 621, 396 N.Y.S.2d at 664. For a discussion of the differences between the right of publicity and the right of privacy, see notes 200-201, 205 and accompanying text *infra*.

¹⁹² 58 App. Div. 2d at 622, 396 N.Y.S.2d at 664. The majority relied upon, *inter alia*, *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. N.Y. County), *modified on other grounds mem.*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1st Dep't 1973), *discussed in note 195 infra*, in finding that a public personality is entitled to legal protection.

¹⁹³ 58 App. Div. 2d at 622, 396 N.Y.S.2d at 664.

federal court applying New York law in a diversity suit,¹⁹⁴ the New York cases discussing the right of publicity intimate that the right to exploit one's public personality is an interest worthy of protection.¹⁹⁵ Moreover, the courts appear to have rejected incorporation

¹⁹⁴ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). In *Haelan*, plaintiff, a chewing gum manufacturer, had contracted for the exclusive use of a baseball player's picture in connection with the sale of its product. Plaintiff charged that defendant, a rival chewing gum manufacturer, had induced the baseball player to breach his contract. Defendant countered this charge by arguing that plaintiff in effect did not have a binding contract with the ball player. He posited that if plaintiff had used the player's picture without consent, the player's only right in New York would have been an action for invasion of privacy under § 51. Since that right is strictly personal and therefore not assignable, defendant contended that plaintiff's contract with the player amounted to a mere release from potential liability under the statute. *Id.* at 867. In a widely cited opinion authored by Judge Frank, the United States Court of Appeals for the Second Circuit rejected this argument and found that under New York law the ball player validly had contracted with plaintiff for the exclusive use of his picture:

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, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer of a business or of anything else.

Id. at 868.

While the *Haelan* decision has been praised by commentators and adopted by courts of other jurisdictions, its interpretation of New York law seems erroneous. Of the two New York decisions which the court cited as recognizing a right of publicity, one was a contract case while the other was based on a claim of unfair competition. In the contract case, *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), the New York Court of Appeals had held that a plaintiff who had been given the exclusive right to endorse, on behalf of defendant, fashions designed by others, impliedly promised to use reasonable efforts in securing business. *Id.* at 92, 118 N.E. at 215. Although *Wood* implicitly may recognize the individual's right to assign the use of his name, it is submitted that the decision does not support the *Haelan* court's adoption of a broad right of publicity. The other case cited by the Second Circuit, *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938), involved a defendant who allegedly had used pictures of a professional hockey team in a fictionalized movie and falsely advertised the movie as containing actual footage of games played in the plaintiff's arena. *Id.* at 462-63, 7 N.Y.S.2d at 848-49. In holding that plaintiff stated a valid cause of action for unfair competition, the court found that defendant, through its deceptive practices, had misappropriated plaintiff's "property right[s] in its good name, its reputation, and its goodwill." *Id.* at 466, 7 N.Y.S.2d at 851. Thus, although the action involved unfair competition, the court discussed rights similar to those embodied in the *Haelan* court's notion of the right of publicity. A common law action for unfair competition, however, is much more limited than an action premised upon the right of publicity. The former generally requires a showing that the two parties were in actual competition, *Nimmer, supra* note 175, at 210, and that there was a "palming off of the goods or business of one person as that of another," *id.* at 212 (quoting *ABC v. Wahl Co.*, 36 F. Supp. 167, 168 (S.D.N.Y. 1940)). As a result, the actions differ greatly in scope.

Despite its questionable reading of New York law, the *Haelan* decision often has been relied upon by the federal courts in New York. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973); *Chaplin v. N.B.C.*, 15 F.R.D. 134, 139-40 (S.D.N.Y. 1953).

¹⁹⁵ Three major decisions in New York have addressed the issue of a right of publicity. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc.2d 1, 294 N.Y.S.2d 122 (Sup.

of the right of publicity into section 51 as an acceptable means of protecting that right.¹⁹⁶ *Lombardo* thus presented the second department with the opportunity formally to adopt the holding which these decisions foreshadowed: recognition of a separate and independent right of publicity.

The publicity right recognized by the *Lombardo* court essentially is an intangible property interest consisting of an individual's

Ct. N.Y. County 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1st Dep't 1969), the court ultimately dismissed plaintiff's action on the ground that the unconsented-to biography in question was constitutionally protected. In the course of its opinion, however, the court indicated that a separate right of publicity might exist in New York. Recognizing that the plaintiff was claiming violations of the right of privacy *and* the right of publicity, the *Rosemont* court stated that "the various allegations . . . on the one hand . . . appear to fall within the language of the New York 'privacy statute,' and on the other hand . . . have relevance to the separately recognized 'right of publicity.'" 58 Misc. 2d at 3-4, 294 N.Y.S.2d at 126 (citing *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953)).

Seven months later, Justice Frank, who had authored the *Rosemont* opinion, had another opportunity to discuss the right of publicity in *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. N.Y. County 1968). Finding that the right of publicity had "been awarded some . . . recognition," the court went on to declare that New York had shown no intent to "adopt or follow such construction within the context of section 51." *Id.* at 450, 299 N.Y.S.2d at 508. As in *Rosemont*, the remarks concerning the right of publicity were mere dictum, since the court disposed of the case on constitutional grounds. *See id.*

More recently, the Supreme Court, New York County, rendered a decision in *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. N.Y. County), *modified on other grounds mem.*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1st Dep't 1973). While the action in *Urban* was commenced under § 51 of the Civil Rights Law, the court found the right of publicity relevant to the case:

The instant action is quite clearly premised upon an appropriation for commercial exploitation of plaintiff's property rights in his name and career rather than upon appeal to feelings. There is no question but that a celebrity has a legitimate proprietary interest in his public personality.

72 Misc. 2d at 790, 340 N.Y.S.2d at 146. Thus, the court clearly recognized that a public personality is entitled to legal protection. In light of its concluding remarks, however, it is uncertain whether the court granted relief under the Civil Rights Law, the right of publicity, or both: "The court in the present situation has no difficulty in finding that the marketing and publication of the game are violative of the Civil Rights Law." *Id.* at 791, 340 N.Y.S.2d at 147.

¹⁹⁶ *See note 195 supra.* The Appellate Division, First Department, in *Gautier v. Pro-Football, Inc.*, 278 App. Div. 431, 106 N.Y.S.2d 553 (1st Dep't 1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952), had occasion to discuss the limited scope of § 51. The *Gautier* plaintiff alleged that his performance as an animal trainer had been telecast on local television, without his consent, in violation of his right of privacy under § 51. 278 App. Div. at 432-33, 106 N.Y.S.2d at 555. In dismissing plaintiff's claim, the court emphasized that the Civil Rights Law protected against only injury to the person and that a cause of action under that statute could not be established by claiming injury to business or property:

[I]t is clear that this statute was never intended to apply to cases like the instant one. . . . It provided primarily a recovery for injury to the person, not to his property or business. . . . [I]t is the injury to the person not to the property which establishes the cause of action. That is the focal point of the statute.

exclusive right to utilize and alienate his public personality.¹⁹⁷ Similar to an action for appropriation of tangible property, which serves as a vehicle for the recovery of profits generated by the wrongful act,¹⁹⁸ a successful suit founded upon the right of publicity should give rise to a substantial damage award. Although the proper measure of damages must be established by the judiciary in the future, it is suggested that in so doing the courts consider factors such as the profits realized by the defendant and the opportunities lost by the plaintiff.¹⁹⁹ Irrespective of the exact damage formula ultimately adopted, the proprietary nature of the publicity right should afford claimants an avenue for more substantial monetary relief than that provided by the injury-oriented right of privacy theory.²⁰⁰

Id. at 438, 106 N.Y.S.2d at 560 (citations omitted). On appeal the Court of Appeals affirmed on the ground that plaintiff's name and picture had not been used for advertising purposes as required by § 51. 304 N.Y. at 358-59, 107 N.E.2d at 488. In a concurring opinion, Judge Desmond expressed his view that the correct result had been reached for the wrong reasons. Recognizing that plaintiff, a professional entertainer, was not concerned at all with the invasion of his privacy, Judge Desmond found that plaintiff's "real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the the New York 'Right of Privacy' statutes, is that he was not paid for the telecasting of his show." *Id.* at 361, 107 N.E.2d at 489 (Desmond, J., concurring) (emphasis added).

¹⁹⁷ See Gordon, *supra* note 174; Nimmer, *supra* note 175; *Right of Publicity*, *supra* note 175; Comment, *Invasion of Privacy—Recovery for Nonconsensual Use of Photographs in Motion Pictures Based on the Appropriation of Property*, 11 Duq. L. Rev. 358 (1973).

¹⁹⁸ Two basic theories may be invoked in an action for appropriation of tangible personal property. The first theory allows plaintiff to waive the tort and sue in assumpsit, in effect disregarding the wrongfulness of defendant's conduct and consenting to any sale of the property. If plaintiff opts for this theory, he may recover the entire proceeds of the sale, and thus the profits he would have made had he sold the goods himself. D.B. DOBBS, REMEDIES § 5.15, at 414-17 (1973). Under the second theory, the traditional action for conversion, the basic measure of damages is the value of the property "at the time and place of conversion." *Id.* § 5.14, at 403.

¹⁹⁹ Profits generated by defendant's appropriation of plaintiff's public personality should be recoverable as in any wrongful appropriation action. See note 198 and accompanying text *supra*. In addition, since defendant may have misled the public into believing that the plaintiff has endorsed his product, plaintiff might be deprived of other contracts which otherwise would have been available. It is submitted that plaintiff should be compensated for such lost opportunities.

²⁰⁰ While the language of § 51 does not limit the amount of compensatory damages which may be awarded, in most cases large judgments would not be warranted because the courts have consistently interpreted the statute as authorizing compensation for hurt feelings only. In the few opinions indicating the amount recovered under § 51, the amount is relatively small. See *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707, 708, 14 N.E.2d 636, 637 (1938) (mem.) (\$1,500 damages); *Nolls v. Coral Records, Inc.*, 22 App. Div. 2d 955, 956, 255 N.Y.S.2d 912, 913 (2d Dep't 1964) (mem.) (reduction of jury verdict from \$20,000 to \$1,500 in exemplary and \$500 in compensatory damages); Gordon, *supra* note 174, at 567 ("where damages have been awarded, they have been nominal"). Illustrative of the courts' propensity to limit damages in actions under § 51 is the decision in *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. N.Y. County 1964), *aff'd*, 23 App. Div. 2d 216, 260 N.Y.S.2d 451 (1st Dep't 1965), *aff'd on other grounds*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966). In *Spahn*, the trial court had awarded damages of \$10,000 for an unauthorized biogra-

Of further significance is the *Lombardo* court's recognition that the protection provided by the right of publicity extends beyond the name, portrait, and picture aspects of the personality which are covered by the right of privacy.²⁰¹ An influential factor in the second department's decision to sustain the cause of action for infringement of the right of publicity on the facts in *Lombardo* was the presence of public deception.²⁰² Since a significant portion of the viewing audience might have been led to believe that Guy Lombardo was appearing and endorsing defendant's product, the exploitation was as real as if his name or picture were used.²⁰³ While such a holding may raise the specter of frivolous claims, employment of a proper standard for evaluating publicity claims should adequately safeguard against this contingency. The test suggested by the *Lombardo* dissent for judging a section 51 action, under which the court would look to the totality of the circumstances, focusing upon the nature of the representation, the medium used, and the public's understanding of the representation, seems to be an appropriate criterion capable of identifying genuine publicity claims.²⁰⁴

In the final analysis, the *Lombardo* decision, although bold, appears logically sound and supported by strong policy considerations. By recognizing a separate cause of action premised upon the right of publicity, the court has expressly sanctioned a proposition advanced by courts and commentators alike, that an individual has a protectable interest in his public personality. The unique factual situation presented in *Lombardo* illustrates the narrow parameters of section 51 and the difficulties of incorporating a right of publicity

phy of the plaintiff. 43 Misc. 2d at 233, 250 N.Y.S. at 544. While the action was brought under § 51, the court stated that damages under the statute could include recovery for appropriation of property interests protected by the right of publicity. *Id.* at 226, 250 N.Y.S.2d at 537. The appellate division, however, in affirming the award of damages, rejected the trial court's rationale:

Compensation was properly limited to modest proportions because the offending book was a laudatory one Nor is plaintiff entitled to interest on the award since it does not compensate for an external economic interest. . . .

23 App. Div. 2d at 218, 260 N.Y.S.2d at 452-53 (1st Dep't 1965) (citations omitted).

²⁰¹ 58 App. Div. 2d at 622, 396 N.Y.S.2d at 664.

²⁰² *Id.*

²⁰³ There have been surprisingly few right of publicity cases in which the alleged appropriation did not involve the use of a name or picture. In *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 345 (S.D.N.Y. 1973), plaintiff claimed that defendants had used an actress to imitate her well-known voice in a television commercial. The court disposed of plaintiff's right of publicity argument by observing that all of the precedents cited involved an appropriation of name or picture.

²⁰⁴ See 58 App. Div. 2d at 623, 369 N.Y.S.2d at 666 (Titone, J., & Suozzi, J., concurring in part and dissenting in part); text accompanying note 189 *supra*.

into that statute.²⁰⁵ The flexibility of the common law, however, should provide a viable alternative for dealing with the variety of situations likely to arise as long as there are products to be marketed and celebrities to endorse them.

²⁰⁵ Since the rights created by the Civil Rights Law are deemed personal, they are not transferable by assignment and not descendable upon death. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975); *Schumann v. Loew's Inc.*, 135 N.Y.S.2d 361, 365 (Sup. Ct. N.Y. County 1954); *Donenfeld, Property or Other Rights in the Names, Likenesses or Personalities of Deceased Persons*, 16 BULL. COPYRIGHT SOC'Y 17, 17-18 (1968). In *Price*, the court stated the rationale for these limitations as follows:

Since the theoretical basis for the classic right of privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy is not assignable during life.

400 F. Supp. at 844 (footnote omitted).

In contrast, decisions concerning the transferability of the right of publicity are in conflict. The *Price* court held that the right of publicity, because of its commercial nature and categorization as a property right, is assignable during life and descendable upon death. *Id.* at 844. In reaching this conclusion, the court relied heavily upon *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. 541, 551 (Cal. Super. Ct. L.A. County 1972), wherein a California trial court held that Bela Lugosi's right of publicity passed to his heirs under his will, on the ground that it was a property right. Subsequent to *Price*, however, the California Court of Appeals reversed *Lugosi*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (Ct. App. 1977), emphasizing that some of the claims by the heirs were based on rights never exercised by Lugosi himself, and observing further that if the right were held descendable generations could pass before a descendent might claim it. This, the court stated, would be in direct conflict with "society's interest in the free dissemination of ideas." *Id.* at 557, 139 Cal. Rptr. at 40. Although the court seemed to intimate that descendability restrictions should be imposed only upon rights unexercised during the individual's lifetime, its ultimate holding was couched in very broad terms: "We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime." *Id.*

The *Lugosi* decision highlights two important but conflicting interests. Since this society favors the free dissemination of ideas, at some point a celebrity's name, likeness, and personality should become part of the public domain. At the same time, it seems unfair to prohibit an individual from disposing of the property interest in his personality at death. In an attempt to reconcile these two interests, one student author has suggested that the right of publicity should be exercisable during the celebrity's life and for 50 years thereafter. Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. REV. 1103, 1128 (1975).