

they are systematically enddistanced, episodic, and, with the exception of *An American Family*, lacking in intimacy.

6. Some theorists and film-makers argue that for documentary to be truly ethical, collaboration must extend to editing, distribution, and promotion. This relates to disclosure and control discussed above.

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7

Images as Property

JOHN DAVID VIERA

The invention of the photographic apparatus and subsequent film and television image-fixation systems separated the visual image from its real-life subject and allowed for the mass production and consumption of images far beyond the range of painting and lithography. The mechanical reproduction of our visual world made possible the commoditization of the image. Actors' performances, individual visages, dances, rituals, nature, vacation trips, the family, in short the entire visual phenomenological world, were capable of being fixed in material forms and exploited over time.

The impact of all this on the individual has been startling. The average citizen, whose visual aspects had always been essentially public domain—a transient phenomena in the minds of others, free for the looking—not only became "Kodaktized," but he encountered a variety of problems in his relationship to society in the form of how to protect his/her privacy from the omniscient media, and how to prevent the exploitation of his image by others for their own commercial uses, as with photographs used in advertising.

Famous persons also had their relations to fans and society altered. For one thing, the new media/art forms created new types of entertainment stars (cf. the rise of motion picture stars in the teens and twenties or the rise to stardom of broadcast journalists today). For another, the important historical figure, the notorious, the hero, and the celebrity alike, became the central content of the new image society, to the extent that the almost total loss of privacy became the price for media stardom. Fixation of images also enhanced the possibilities for society-wide, commercial exploitations of "personalities" in whom the public, for however short a term, was interested.

This expansion of the image domain generated a number of legal and ethical problems. In the legal area, two doctrines protecting personhood developed in this century: the right of privacy and the more recent property right in personality called the right of publicity. Both developments center on the concept of the 'individual' and what that 'individual' may assert as private, a feature of personhood, and what s/he must concede to society and the higher good of the group.

A range of ethical concerns has surfaced as well, often in conflict with the established legal norms governing the 'individual.' One central ethical dilemma involves the question of image *ownership*: who does own one's image and who should own it? Another area is the ethics of image *use* and the relation between the subject portrayed and the user of his/her image. Tied in with this is the problem of delineating the scope of the subject's authorization and whether consent, once given, is revocable. Another area of concern centers on *how* images are gathered, since many film and photographic techniques involve means that violate our sense of individual privacy—for example, hidden cameras and microphones or spying via telephoto lenses.

This essay investigates the questions of who owns a person's image and who should own it. I shall point out where the law (which grants minimal individual protections in this area) and ethics diverge as our society attempts to deal with these new media-society problems. Following the traditional legal distinction, Part I will concentrate on privacy and the individual and Part II on publicity and the celebrity. Part III will deal with the relation between the First Amendment and a celebrity's right to control his/her "life story" in the context of docudramas.

Privacy and the Individual

Privacy and publicity represent complementary relationships between the individual and society. Privacy is passive, something guaranteed to the individual by society's legal and political concepts. The individual says: "You can't do that. I have a certain privacy domain you can't make public." Nothing proprietary is assumed, just a socially granted and legally protected right.

Publicity, on the other hand, is something demanded by the individual. Unlike privacy, which is passive, publicity is assertive. In the case of publicity, the individual says: "I own that. It's my property and society should protect it." This is obviously a more, aggressive position.

It also implies that the image being protected has economic value, usually the case only with celebrities.

Prior to the right of privacy, which was explicitly formulated in 1890, protections for the individual were centered on physical well-being (assault and battery) and reputation (libel and slander). Individual property rights had also been recognized in artistic creation, photographic likeness, and personal history, though these recognitions were in the minority.

With the concept of privacy came the idea of "inviolable personality," the notion that the individual had the right to be an individual, with his/her own unique and secret, private side. Interestingly, this "need" for an expansion of the individual's domain was a reaction to life in the nascent media society of the late nineteenth century.¹

The right of privacy is essentially the right to be left alone, free from unwanted publicity. The press privilege represents a limit on the boundaries of an individual's privacy. Generally, broadcasters can photograph and report on any matter of legitimate public or general interest, particularly where a public person is involved. Obviously news photos are privileged. Other educational and informational portrayals, such as in documentaries and "soft news," are also generally privileged. Fictional uses, such as in feature films, are less clear since the producer may lose the privilege if it appears he is exploiting an individual for his own commercial gain.

Private persons in private places are relatively well protected. But if they enter a public place (a street, a store) they are usually said to have lost their privacy rights. The mass media (and individual) privilege to photograph persons in public places and to use such photos in factual-type reportage is protected, even if the person is unaware of being photographed.² This even includes unauthorized man-in-the-street photos used to illustrate feature articles that put the subject in a context inconsistent with his values and opinions.³

In contrast, the privilege to cover "public figures"—public officials, celebrities, notorious persons thrown into the limelight—is almost unlimited. A public figure has few privacy rights.⁴ With stars, politicians, athletes, and historical figures, this seems fair; but what about those individuals who are *involuntarily* thrown into the public limelight, for example, victims of crime? It is in this area that ethical concerns arise, but not legal ones. The media is generally free to report such matters, even for years after the event.⁵ Besides the press, artists, documentarians, film and video makers also assert claims to an individual's visual image.

An overpowering, omniscient, minority-controlled media is always a danger to both the individual and society; therefore, limits on the press privilege have been delineated. They are particularly important in light of recent developments in the electronic media such as voice editing techniques and computer-controlled photographic enhancement and manipulation systems. For example, consider the motion picture, *Zelig*, and its ability to intermix the present and past while hiding the manipulation.

The conflict between the individual's right to privacy and the use of his/her historical image-continuum by others in documentaries, docudramas, and feature films arises because our lives have public and private aspects. Courts have been forced to draw the boundary between what is private (protected) and public. Courts have had to balance intrusions on individual privacy, the rights of media producers to create from reality-based data, and the needs of the mass audience to know. Judges can only draw these boundaries by reference to internal moral standards and external ethical canons, often buried under historical traditions of law. In attempting to adjudicate rights in this area, the law has essentially taken ethical positions, forbidding commercial exploitations on the one hand, but permitting extensive unauthorized uses in news, documentary, and docudrama.

Ownership of Image

The standard contractual relationship between subject and photographer/film-maker works to the disadvantage of the subject in a number of ways. Typically, a person who consents to being photographed or filmed signs a release granting the image-fixer the rights to any and all uses of the image in perpetuity, in any medium now known or ever developed. Usually a person signs these waivers for a nominal sum, say one dollar. The release works as a waiver of privacy rights. The photographer is the owner of the negative and, hence, the particular concrete image.

Current practices are unfair. This is because the ordinary person does not share in subsequent increases in the economic value of the photo as professional models do via residuals. For example, suppose a person consents to being filmed for a documentary on miners. The photographer may freely use the photo in a magazine article, sell it to a picture agency, sell it to another film producer for use in a documentary on miners, or sell the print to a collector. It is possible that, over time, the photo could generate revenues of several thousand dol-

lars, none of which would go to the subject unless s/he had insisted upon those conditions in his/her waiver. Most likely, the subject just signed the standard waiver and sold his/her image for one dollar. Not only does the subject not share in the economic benefits flowing from the photo, s/he loses any control as to the political and social contexts in which the image may be placed.

Some of the most famous photographs in this century have been of the above, documentary, man-in-the-street type. Consider the work of the Farm Security Administration and their documentation of the Depression. Several of those images have been widely disseminated throughout our society and currently function as symbols of the Depression. A few photographers, for example, Dorothea Lange, made careers out of those photos. Yet the subjects gained no economic benefits from their loss of privacy and subjection to eternal, symbolic, image existences. The famous photo by Lange, "Migrant Mother," is one such example. On the other hand, society could claim that such uses of images—to document our national heritage—are of such value that it becomes a civic duty to be photographed.

There is also the issue of consent buried in these sorts of situations. When you consent to having your photo taken, you are probably not considering the full implications of the release. As mentioned, the photographer may sell the photo to a picture agency where it may have a media half-life of many years. He might also place it in a context alien to you as subject. Your most basic values may be contradicted by how the photo is used. A media-naive person all too often releases his privacy for a nominal amount, unaware of the potential, perpetual media-life the image might have.

On the other side of the coin, society presumably wants to encourage photographic art and such uses as photographic exhibitions and documentation of historical events. The almost automatic waiver system functions to promote that goal. We would be a poorer world absent the work of Cartier-Bresson who built his art from mostly unauthorized, often secretly snapped, documentary photographs.

There are good arguments for both subject and media producer on this question. Perhaps the only solution, as society becomes more 'mediatized,' is the institution of a compulsory license scheme for images, whereby consenting and non-consenting subjects alike would share in subsequent economic benefits via royalties. On the other hand, a photographer might well argue that the value in a photograph derives not from the subject, but from the artist.

It must be remembered that photographers themselves (and more

often so, painters) are generally excluded from sharing in the subsequent rise in value of their work also. Most of the money made in the resale of paintings and photographs goes to investors/owners and galleries. Of course, this situation also presents serious ethical difficulties. Current commercial practices, which are quite legal, are innately unfair. Attempts to correct this situation through Fine Art Residuals legislation (*droit de suite*) are only beginning to bring the U.S. into line with European countries.

Early Notions About Use of Image

As said previously, privacy is a right guaranteed by society which allows the individual to have a core "personality domain" in the midst of the social context in which s/he exists. The 1902 case of *Roberson v. The Rochester Folding Box, Co.*⁶ exemplifies early twentieth-century judicial notions about privacy and individual control of image. The Box Company had used Roberson's baby picture, without her consent, on a calendar advertising the company's flour mill. She sued for "injury to feelings."

The court refused to recognize a right of privacy and could find no other basis for relief. Roberson did not claim she had been libeled. The likeness, in fact, was flattering to her. Today, of course, the claim would not be for "injured feelings," but rather for commercial appropriation of name/likeness.

The *Roberson* decision became historically important because as a result, the New York legislature passed the New York Privacy Statute.⁷ A dissenting judge in *Roberson* expressed the view more prevalent today. He used property and proprietary concepts in discussing a person's rights to his image. It was assumed that Roberson's image belonged to her initially.

I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively; until the use be granted away to the public.⁸

In 1905, the state of Georgia in a case involving a similar unauthorized use of a person's image in advertising, first recognized the right of privacy as an independent personal right.⁹ Subsequently, in

1907, a New Jersey court laid out what today is the ordinary right the individual has to his name and likeness in commercial-use situations.

If a man's name be his own property, and no less an authority than the United States Supreme Court says it is . . . difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it.¹⁰

Even at this early date, there was a tendency to protect against unauthorized commercial exploitations while intermixing notions of privacy as personal and proprietary. One large loophole became a legal truism and that was that famous, public persons had lost their right to privacy, even where there was an unauthorized advertising use.

In the 1942 Texas case, *O'Brien v. Pabst Sales Co.*,¹¹ plaintiff David O'Brien, a famous football player of the time who had been picked as an All-American in 1938, sued the Pabst Blue Ribbon Beer Company. Pabst Blue Ribbon had been distributing yearly football calendars with photos of the All-Americans prominently featured amidst the ads for Pabst beer. Today we would require that Pabst secure O'Brien's permission, but the court in 1942 found that even if:

the mere use of one's picture in truthful, respectful advertising, would be an actionable invasion of privacy in the case of a private person, the use here was not, as to plaintiff, such an invasion, for as a result of his activities and prowess in football, his chosen field, and their nationwide and deliberate publicizing with his consent and in his interest, he was no longer, as to them, a private but a public person, and as to their additional publication he had no right of privacy.¹²

The decision exemplifies how public figures were treated by judges, the theory being simply that anyone who promoted himself as a star or famous person or athletic hero had waived his right to privacy. In the case of O'Brien, this was held in spite of the fact that O'Brien established that he worked with an organization whose goal was the elimination of alcoholic consumption amongst young people and that he, O'Brien, had refused to endorse beer ads in the past and was ashamed of the implications that might arise from his photo being on the calendar. The court emphasized that O'Brien could prove no pecuniary damages.

Ethically, to allow this use of O'Brien's photograph seems wrong,

but legally, Pabst was on solid ground. It had purchased O'Brien's photo from the publicity department of Texas Christian University, where O'Brien had attended when All-American. Besides, the lower court had held, in a somewhat naive view of the power of personal endorsements:

[T]here was no representation or suggestion of any kind that O'Brien or any of the other football celebrities whose picture it showed were beer drinkers or were recommending its drinking to others; the business of making and selling beer is a legitimate and eminently respectable business and people of all walks and views in life, without injury to or reflection upon themselves, drink it, and that any association of O'Brien's picture with a glass of beer could not possibly disgrace or reflect upon or cause him damage.¹³

It would take plaintiffs another eleven years to establish the concept of the right of publicity which would give image control and ownership back to the famous person on a basis equivalent to the private individual's control.

Current Privacy Parameters

The right of privacy is a state-granted right, thus, the scope of the right varies from state to state. However, most follow a standard similar to the Restatement of Law Sec. 652(d) which is:

That a person is liable for invasion of privacy if the matter publicized is:

- (A) Highly offensive to a reasonable person,
- and*
- (B) Not of legitimate concern to the public.

In cases where falsity is an issue and the person doing the publishing is a media organization, as is almost always the case, the plaintiff must also show that the organization intentionally, or with reckless disregard for the truth, made the publication. This is the same standard applied to allegations of media libel and one that makes it very difficult to win against a media defendant for invasion of privacy, a problem particularly vexing for stars who are continually laid out in front of the public by *National Enquirer*-type magazines.¹⁴

The famous writer on torts, Prosser, identified four categories of privacy invasions: (1) intrusions, such as wire taps or trespasses; (2)

the public disclosure of private facts, where the issue is always whether the facts were truly "private" or whether the plaintiff had lost his privacy cloak; (3) false light, the publication tends to place the plaintiff in a position, as with O'Brien, of appearing to endorse or hold a view he does not in fact hold; and (4) the appropriation of name or likeness, which we have discussed above.

The above legal standards give little value to individual privacy rights outside of commercial appropriations of name or image. Throughout the century, privacy protection has only been begrudgingly granted by judges and then only under outrageous circumstances. A look at the famous *Farmers' Market Lovers* case is illustrative of judicial attitudes.

This 1953 California Supreme Court case involved a husband and wife whose photo had been taken without their knowledge, little alone their consent, while they were relaxing at work in Los Angeles' Farmers' Market. The photographer was Cartier-Bresson. The photo revealed the couple seated in an affectionate pose at their place of business, an ice cream concession.

The photograph was originally used in a full page blowup in *Harper's Bazaar* in a 1947 article entitled "And So the World Goes 'Round," a short commentary centering on the idea that love makes the world go around. Plaintiffs were presented as the quintessential "couple in love."

The publishers of *Harper's Bazaar* subsequently sold the photo to the *Ladies' Home Journal* which, in 1949, used it to illustrate an article on "Love" which claimed that of the several kinds of love, love at first sight was 100 percent sexual attraction and sure to end in divorce. The photo was used to symbolize this love-at-first sight syndrome and was accompanied by the following caption: "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."¹⁵

Plaintiffs objected to this use by the *Ladies' Home Journal* and contended that they were depicted in an uncomplimentary pose, that their right of privacy had been invaded, and that they had been subjected to humiliation and annoyance to the sum of \$25,000. The case was decided upon a procedural ground, but the California Supreme Court took the opportunity to state its position on the right of privacy:

The recognition of the plaintiffs' right to proceed involves the further observation that mere publication of the photograph standing alone does not constitute an actionable invasion of plaintiffs' right of privacy. . . . The right of privacy may not be extended to prohibit any publication of matter which may be of public or general interest.¹⁶

The Supreme Court noted that the photo had not been surreptitiously snapped on private property, but had captured a pose voluntarily assumed in a public marketplace.

By their own voluntary action plaintiffs waived their right of privacy so far as their particular public pose was assumed for "there can be no privacy in that which is already public."¹⁷

The court said that the effect of the photograph was merely to extend and increase the number of members of the public who could view plaintiffs in their romantic pose. Their affection had in effect become part of the public domain. Once part of the public domain, they could no longer later "rescind their waiver and attempt to assert a right of privacy."¹⁸ As well, the court noted there was nothing particularly offensive about the photograph. If anything the plaintiffs were shown in a complimentary light. The event disclosed a romantic couple, something so ordinary as to have no need for protection.

The court made no mention of the fact that perhaps plaintiffs "owned" their image. The court said that to find that plaintiffs had the right to prevent publication of a voluntary pose taken in a public place with nothing offensive about it, would mean that they had the absolute legal right to prevent the publication of their photograph. This might not be such a bad idea on an ethical scale, since the publisher could easily have utilized models and posed them for the image, particularly where, as here, the image was used for its entertainment value not its news authenticity.

The one dissenting justice noted that the fact that they revealed their intimacy to a small group of people in the Farmers' Market, perhaps people who knew them or worked with them, did not mean that they intended their photo be conveyed to millions of readers in the publishers' magazines.¹⁹

In effect the majority holding means that anything anyone does outside of his own home is with consent to the publication thereof, because, under those circumstances he waives his right of privacy even though there is no news value in the event.²⁰

With few exceptions, the majority holding in the *Farmers' Market* case is still the law today. This "public place" doctrine coupled with the press privilege has virtually eliminated effective recovery for media intrusions on individual privacy.

Personality as Property

The rise of the mass media and the efficacy of advertising created the possibility for exploitation of public personalities in the form of merchandising rights. Individuals, particularly entertainment and sports stars, commoditized their images, separated their personalities (which privacy would protect) from their public personae and deliberately exploited the latter in a variety of concrete forms (from merchandising and personal endorsements to posters and fan clubs).

Such media images represent a new form of intangible intellectual property. They exist in the minds of others and their value derives from the public's willingness to buy concrete copies (posters, magazines, music videos) or pay to see the celebrity-image in films or on television. Media images exist society-wide in a shared cultural plane. For example, we all have a mental image of certain famous people or stars such as Elvis Presley.

Ownership claims to non-concrete, transcendent aspects of personality (such as a star image or unique character) have been the source of much legal confusion. Protection of intangibles runs counter to our society's concretistic, empiricist bias. On the other hand, our sense of fairness tells us the person should own his image, at least in the commercial context.

Courts today, following their sense of morality, have striven to protect these images with neighboring legal doctrines (privacy, copyright, unfair competition), while slowly hammering out a new doctrine specifically geared for the protection of an individual's intangible value—his/her right of publicity. Other courts have resisted the new expansion and have refused to recognize the property aspects of a person's image.

Since the value of one's image is related to the degree of one's fame, only celebrities have valuable media images. Celebrities have attempted to expand control over their images in a variety of contexts: from claims to personality-type, name, and character-portrayals ("Dracula"), to attempts to control the commercial exploitation of the live star-image ("Elvis"). Stars even assert ownership over their life stories in a docudrama area by threatening to sue the media. In this section I shall discuss representative examples of character claims ("Dracula") and live image claims ("Elvis"). The docudrama assertions will be examined below.

Who Owns "Dracula"?

From the days of radio and movie serials to current television series and film sequels, the industry has long recognized and fought over the rights to use a certain "character" in a production. Characters are a valuable form of media image. The law pertaining to "characters" is likely to be the law applied to "media images."

It is undeniable that characters have value. The law, however, provides little protection for characters. Copyright does not protect characters independent of the underlying work unless they are concrete expressions (animated figures like Mickey Mouse). What then happens if an individual so endows a character-type with his/her specific, unique, and particular concrete features that this expression in effect becomes the character-type? And what if that specific character-expression is part of a film, but of such value outside the film, that the image per se is merchandisable? Can the actor claim his character-expression back from the film's copyright holder? These are the complicated questions that faced the courts in the Bela Lugosi/"Count Dracula" series of cases.²¹

An examination of the "Dracula" saga reveals many of the law's tacit premises. There may have been an historical "Count Dracula" from the sixteenth century or so and, of course, the archetypal "Vampire" has been around at least since the early Christian era. Who owns this character? Our law posits: no one.

In 1897 Bram Stoker wrote a novel, *Dracula*. We allow him to copyright the novel and under that legal umbrella the expressions of the characters therein. Stoker does not own the "Dracula" character-type but the concrete expression of Dracula that he has created (in the case of a novel, Stoker owns his verbal descriptions of Dracula—nothing else—and even that only for a limited time span). Others are quite free to write about "Draculas" and certainly about Counts who are vampires and wear capes, since the essence/idea of vampire and Dracula belongs to all.

Stoker's novel is a concrete expression, a "writing" under the copyright laws, and incorporates plot, sequence, and a host of other additions to Dracula so that we grant him the more general right to prevent others from copying his novel, that is, from creating derivative works based on his plot, characters, and structure. Unless a novel is in the public domain, film producers/distributors will purchase the right to make and exhibit a film (film rights) and possibly subsequent films (sequels). The film is a derivative work and is itself independently

copyrightable, although its copyright only extends to those portions that are new, unique, original, and different from the underlying work (the novel).

In 1931, Universal made its film and copyrighted that. It then owned all the new "expressions" it had added to the novel. The character "Dracula" still belongs to all, but you cannot copy the particular expressions as embodied in the novel or the film. This means you can make a new film about "Dracula" the vampire and he can have strange teeth, wear a black cape and speak in an East European accent (because that's all just vampireness), but he can't look or talk exactly like Bela Lugosi in Universal's film.

To make its film, Universal had to contract with Lugosi for certain of his rights/claims to his image (acts, poses, plays, and appearances). In turn, Universal paid Lugosi for his performance. The actual contract reads as follows:

The producer shall have the right to photograph and/or otherwise produce, reproduce, transmit, exhibit, distribute, and exploit in connection with the said photoplay *any and all of the artist's acts, poses, plays and appearances of any* and all kinds hereunder. . . . The producer shall likewise have the right to use and give publicity to the artist's *name and likeness, photographic* or otherwise . . . in connection with the advertising and exploitation of said photoplay.²² [emphasis added]

What actually happened with the film is history. Lugosi was so good that his interpretation of "Count Dracula" (his character-expression) became synonymous with "Dracula" the character-type. Lugosi's expression became a transcendent media-image which completely escaped the copyrighted film. Once Lugosi's image and manner of speaking reached this cultural status, Universal attempted to exploit that value.

In 1960, Universal began to license its stable of horror film "characters" and their likenesses. Universal controlled "The Wolfman," "The Mummy," "The Hunchback," and others beside "Count Dracula." Authorized manufacturers tied these character-images to a variety of products: shirts, games, kites, and Halloween masks and costumes. In the case of "Dracula," Universal licensed Lugosi's likeness as it appeared in their film.

All of this seemed quite natural. Universal owned the copyright to the films and hence, presumably, the right to exploit the characters from the films. No actor complained of being exploited, not even Lugosi; probably because that was how it had always been. An actor tra-

ditionally lost all rights to his performance and character-expression once it was in a film.

In the case of certain types of character-expressions this is probably the way it should be. For example, to merchandise the "Wolfman" is to merchandise the creature's costume and makeup as developed by studio personnel, not the actor's likeness and performance. But "Count Dracula" is different. With that character you are merchandising Lugosi's image and likeness along with the cape and costume. This, according to Lugosi's widow and son (the plaintiffs in the case), constituted both a violation of the original contract and an invasion of their rights (as heirs) to Lugosi's "property." The widow and son went to court in 1972 to recover Universal's past profits from its "Dracula" merchandising program and to enjoin future unauthorized licensing of Lugosi's image.

The first issue raised was exactly what did Lugosi grant to Universal in the original contract? The contracts themselves (both 1930 and 1936) are silent as to merchandising rights for Lugosi's name, likeness, and appearance as "Count Dracula." Does this mean that Lugosi did not grant them to Universal, or does this mean that he failed to reserve them for himself and thus they belong to Universal?

. . . Universal Pictures was given the right to reproduce and exploit in connection with the photoplay "Dracula" any and all of the actor's "acts, poses, plays and appearances of any and all kinds," and to use the actor's "name and likeness, photographic or otherwise" *in connection with the advertising and exploitation of said photoplay*. . . . [t]he Bela Lugosi contract, by express language, limits the producer's right to use the actor's acts, poses, appearances, and likeness in connection with the photoplay "Dracula" or in connection with the advertising and exploitation of this photoplay.²³

Thus, the trial ruled Lugosi had retained all merchandising rights to his "acts, poses, appearances and likeness" as "Count Dracula." Universal only got what it had bought: the rights to Lugosi's image in the film and advertising therefore. Lugosi himself had owned the rights to other uses of his particular character expression, but did those rights survive his death?

The basic theory of privacy is that a person's feelings and peace of mind, the "inviolable personality," should be protected. Privacy does not concern itself with property, business, or economic interests. Privacy rights die with the individual. Property rights, however, transcend his death. After discussing the case precedents, the trial court followed

the property view and held that Lugosi's right to control the publicity value of his name, likeness, appearance, and personality should be considered separate and apart from his right of privacy.

The court concluded its discussion of the "Dracula" character by pointing out that Universal's copyright gave them precious little to merchandise apart from Lugosi's specific likeness. The specific Lugosi expression was the thing of value. That was why manufacturers were willing to pay license fees to use a character already in the public domain.

. . . [T]he very essence of the Count Dracula character in the photoplay, *Dracula* produced by defendant, consists of the *characteristics, makeup, appearance and mannerisms* of Bela Lugosi in the role. Only the dress is not created by the actor. In licensing the use of the Count Dracula character's *characteristics, makeup, appearance and mannerisms*, of necessity Bela Lugosi's appearance and likeness in the role are the things being licensed. The horror character, Count Dracula, as taken from the films, *Dracula* and *Dracula's Daughter*, cannot be divorced from Bela Lugosi's appearance in the role.²⁴

Needless to say, Universal appealed the decision. While tacitly agreeing that the right of publicity *could* be a property right, the appellate court held, however, that what Lugosi had actually had was the *personal right to convert* his image-value into a property right.²⁵ Because Lugosi had not exploited his image via merchandising while alive, he had not actually converted the right from personal to property. The right to convert had expired with him in 1956 and couldn't pass to his heirs. Universal was thus the owner of Lugosi's specific character-expression, of the "Dracula" media-image, by default. Universal was not only free to use Lugosi's image, but it could prevent use by others by virtue of its film copyright.

The appellate court wanted more business and property-like activity on Lugosi's part before it would recognize his right to control the value of his media-image. This is fine as long as we realize the arbitrariness of this position; for example Lugosi did exploit his image in a variety of ways (via film and a wax bust), at what point did his property right crystallize? The court is actually saying that the copyright holder gets the rights to character expressions not specifically allocated in a contract. No mention was made of any possible public claim to the media-image it had helped create. The effect of the reversal is to give exclusive rights in the Lugosi media-image to Universal at the expense of both his heirs and society.²⁶

Elvis Presley and The Right of Publicity

Elvis was an American original who . . . was merchandised as "a commodity, a can of tomato soup right off the conveyor belt."

*People Magazine*²⁷

Perhaps the most exploited imago to be found in the case law is Elvis-the-King, whose contractual, economic, and merchandising empire fell apart only with his untimely death when various licensees suddenly found themselves with nothing as unlicensed rivals churned out the Elvis memorabilia by the boxcar load.

With Elvis, there is no question that he exploited his image while alive and thus the issues of descent and transferability have to be faced. As might be expected, the courts arrived at contradictory decisions with the result that the 'law' and scope of protection for the Elvis image varies from state to state.

Federal courts applying New York law have been at the forefront in developing the right of publicity. Confronted with a set of facts that show the deliberate development of a valuable media image subsequently pirated by outsiders, these courts hammered out the right of publicity, a right which protects a star's right to exploit his/her name and image by converting his personality into property.

In the case of Elvis, a typical New York result is found in the *Creative Card* case, in which, on October 12, 1977, slightly less than two months after Elvis Presley died, a Federal court granted a preliminary injunction enjoining Creative Card from "manufacturing, distributing, selling or by any other means profiting from souvenir merchandise bearing the name or likeness of the late Elvis Presley. . . ."²⁸ Defendants challenged the validity of the August 18, 1977, license agreement on the grounds that it had occurred two days after Elvis's death and that, therefore, there had been nothing to assign. The court concluded that "the 'right of publicity' inhered in and was exercised by Elvis Presley in his lifetime, that it was assignable by him and was so assigned, that it survived his death and was capable of further assignment."²⁹

The *Creative Card* court, aware that the "Lugosi" case in California had denied descent of the right of publicity, relied on a case involving Laurel and Hardy under New York law and said, "There is no reason why the valuable right of publicity—clearly exercised by and financially benefiting Elvis Presley in life—should not descend at death

like any other tangible property right."³⁰ The court clearly differentiated between Elvis-the-person and Elvis-the-image. "The instant action does not present the Presley name or his face *enhancing* a product—Presley *is* the product."³¹

But "Elvis" ran into problems back home in Memphis, Tennessee. There, the Sixth Circuit Court of Appeals, interpreting Tennessee law, ruled straight out that the right of publicity was not devisable and that "after death the opportunity for gain shifts to the public domain, where it is equally open to all."³² In this case, the Memphis Development Foundation, a nonprofit corporation, brought suit to enjoin an "Elvis" licensee's interference with its attempts to advertise and sell small statuettes of Elvis to raise money for a large statue of Elvis to be given to the city of Memphis. At the time of the case, the city had no relationship with the Development Foundation.

The *Memphis Development* court phrased the central question in the case as "Who is the heir of fame?" and then went on to state that a person's fame belongs to the public at large (read commercial competitors). "Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image."³³ The court pointed out that media reportage plays a large role in the spreading of fame and that fame may arise out of bad and good conduct alike. The court said that all these reasons "combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public."³⁴

The *Memphis Development* court viewed the right of publicity as a new kind of *personal* right and stated that "the memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."³⁵ The court seems to confuse "fame" with "commercialized image" and nowhere does it discuss or refute the theories and rationales put forward by the proponents of the property side of the argument in New York.

After *Memphis Development*, we were left with two Federal Circuits in direct opposition on the same set of issues. The situation got worse, however, when a Second Circuit court ruled that the Sixth Circuit's holding should be applied to a New York case which had been in the courts since 1977.³⁶ To complicate matters, a Tennessee lower state court ruled that the right of publicity *did* descend in Tennessee.³⁷ This not only added to the Elvis confusion, but opened up formal issues of court procedure and jurisdiction whose importance (to the courts) may overwhelm the substantive issues themselves.

In *Zacchini v. Scripps-Howard Broadcasting*,³⁸ the Supreme Court identified the right of publicity as a state right. It has refused to hear the leading "Elvis" cases. Apparently, the Court is prepared to leave the various Federal Circuits at odds over the descendibility issue raised in the right of publicity area. In view of the national character of our media society, this may not be such a good idea since it can lead to the loss of a great deal of time and expense, particularly where one Circuit defers to another Circuit itself merely guessing the true situation under state law. By analogy to copyright, a uniform Federal right of publicity would best serve society's needs.

Ultimately, the New York versus Tennessee conflict represents two differing views as to what constitutes an "individual" and the extent of society's claim to that individual. The decision to give "Elvis" to the public domain, in itself morally noteworthy, is actually an allocation of economic value away from exclusive control by the Presley estate (what Elvis wanted) to license free exploitation rights for other commercial entities.

The Sixth Circuit was certain society's best interests were being served by public domain status, but to argue that the right is personal, and thus terminates with death, is to create a contradiction and to ignore the "purely commercial nature" of the right of publicity. One cannot assign one's defamation rights or one's right to privacy. If the right of publicity is personal, then it should not be assignable (of course, if it is not assignable its value is slight). If we allow assignment, we have allowed the creation of a property right. To deny that right the traditional scope of other intangible property rights is confusing and vitiates contract tradition.

To allow assignability, but to declare its automatic evaporation at the moment of death, creates more problems than it solves. For one thing, we have altered the stability of long established contract principles. For another, we have created an unnecessary market uncertainty. Elvis might have died at anytime. The price one would be willing to pay for the assignment and the capital one would be willing to invest on speculation would be greatly affected by this termination risk. Also, other assignable, intangible property rights transcend the death of their creator, why should it be any different for the right of publicity?

Hate-enacted Legislative Solution

Legal battles for control over the Elvis media image continued well after that media image had lost much of its immediate value. The slowness of the court system in dealing with the phenomenon (eight years) and the irreconcilability of the two positions indicate a legislative policy is necessary. Several states have taken first steps toward the right of publicity problems with legislation, though there is little uniformity of approach. Of particular interest are the Tennessee and California personhood statutes.³⁹

In 1984, Tennessee enacted its "Personal Rights Protection Act" which explicitly provides that an individual has a property right in name, photograph, personality, and likeness that survives death. Though not expanding the image concept to characters and performance style, the Tennessee legislation does provide that "every individual has a property right in the use of his name, photograph or likeness in any medium in any manner." This is a very important clause in that it places initial ownership with the image bearer, thus overruling the current presumption of public domain status for most images. Also the phrase is not limited to celebrity images and arguably could be used to prevent non-commercial, but exploitative, uses of personal images. This statutory property right is assignable and licensable and survives death even if not exploited during life. Unless assigned, it passes to the estate for ten years. A fair-use exemption is provided for news, sports, and public affairs.

California's "Celebrities Rights Act," which became effective January 1, 1985, differs significantly from the Tennessee version. For example, the California statute provides for an after-death duration of fifty years, forty years longer than the Tennessee counterpart. In addition, the explicit list of fair-use exemptions is expanded to include political campaigns, plays, books, films, and works of fine art. The statute also requires a deceased personality's heirs or assignees to register with the state in order for the right to become effective.

Unlike the Tennessee statute which applies to all individuals living and dead, the California version applies only to deceased "personalities." This leaves open the question of who is a "personality." The statute defines a "deceased personality" as "any natural person whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death. . . ." The statute overrules the *Lugosi* majority's conclusion that the right of publicity did not descend in California.

The use of different terms, definitions, and provisions in these two statutes results in separate and independent protection systems with differing degrees of coverage for the same image. If all fifty states enact similar statutes, a national media image, like "Elvis," will still be treated differently in differing jurisdictions even though those jurisdictions are a part of our national media network. Media images are national phenomena. Most are delivered via films, television, and magazines. Though individual state statutes are welcomed, they will tend to Balkanize personhood rights, as happened with the right of publicity case law. Only federal legislation can construct a consistent, all-encompassing statute which would give positive definitions to an individual's privacy rights and proprietary rights to his/her public aspects.

Docudrama: Where First Amendment and Right of Publicity Collide

In theory, the right of publicity applies strictly to commercial exploitations, the type of exploitation of no interest to the First Amendment. Concern has been expressed that stars will attempt to extend the bounds of "commercial" to the point that assertions of their right of publicity will conflict directly with the freedom of the media to report events of public interest. Stars could use the right to shield themselves from public scrutiny and frustrate society's right to know about its cultural icons.

In the leading case, the U.S. Supreme Court ruled that the First Amendment did not shield a television station from liability for showing its viewers Hugo Zacchini's human cannonball act in its entirety (fifteen seconds).⁴⁰ Zacchini had performed in public at the local county fair. The Ohio Supreme Court had found a privilege.

A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.⁴¹

The Ohio court interpreted earlier U.S. Supreme Court decisions to mean that the press is privileged to report matters of public interest even "when an individual seeks to publicly exploit his talents while

keeping the benefits private."⁴² Zacchini's principal contention was that the station had not merely reported the occurrence of his performance but had "filmed his entire act and displayed that film on television for the public to see and enjoy."⁴³ The station was, in effect, using the news as a pretext for "entertainment."

The U.S. Supreme Court stated that the right of publicity and the copyright laws have similar goals: to encourage the creation of entertainment. Both also focus on the "right of the individual to reap the reward of his endeavors."⁴⁴ In a case like this, the issue was *not* whether the event gets reported at all (which would present First Amendment problems) but only a conflict as to *who* gets to do the publishing, of little direct concern to the public interest. In short, the station could easily and fairly pay for a license to show Zacchini's act. The First Amendment does not "immunize the media when they broadcast a performer's entire act without his consent."⁴⁵

Entertainment as well as news enjoys First Amendment protection, but not to the extent that a television station can appropriate Zacchini's entire performance. Can it then appropriate a star's life story? This is the central issue in docudrama as stars argue that television's uncompensated dramatizations of their "public lives" impact on the economic value of their images.

Most of the cases applicable to docudrama derive from unauthorized biographies in book form. Such cases show that the factual reporting of public persons and events is protected and in the public interest. A star has no "right of biography." Thus, there is no prevention of unauthorized docudramas for public figures. However, this "right" is limited to "factual" public occurrences. Fictionalizations of the private events in such figures' lives are not allowed.

Fact v. Fiction

In a leading case under New York law, a baseball pitcher, Warren Spahn, successfully restrained the publication of an unauthorized biography which contained a mixture of factual and fictionalized material.⁴⁶ The book was restrained on the grounds that an unauthorized, fictionalized exploitation of personality for purposes of trade was prohibited by the privacy statutes of New York. A biography with fictional elements held out as true amounted to a reckless disregard for the truth and thus the publisher could be held liable for exploiting Spahn's name. The true, factual portions, based on his public life, were of course publishable.

The court distinguished Spahn's public, professional life from his private life. The public life was available to any biographer. The private life would be protected by the privacy statutes. The fictional elements defendant invented to cover gaps in Spahn's public life were not protected as news.

Defendants claimed they had invented the dialogue and various scenes in good faith to flesh out the known facts and create a good biography.⁴⁷ The court found the accuracy of their facts to be so false as to defeat this claim. But this leaves open the question of how then do you portray inner events, emotions, and states of mind as well as the mundane details necessary to take the book past the "report" stage to that of biography? This issue is still unanswered.

The *Leopold v. Levin*⁴⁸ case concerned the movie *Compulsion*. Leopold claimed that the producers had knowingly fictionalized part of his crime and that those episodes were offensive and outrageous to the community's sense of decency. The court distinguished *Spahn* on the grounds that there the biography had fictionalized Spahn's private life; but here, Leopold's public life had been fictionalized and this was allowable. Again left open is how does a writer determine what is public and what is private? Aren't all inner moments "private"? By categorizing Leopold as public, the court predetermined the outcome of the case. But this categorization is more likely based on the ethical position that a criminal should not object to subsequent public treatment of his character.

Docudrama

Elizabeth Taylor yesterday filed suit in federal court here against ABC. . . . Taylor said in her request for injunction relief against the broadcast that the fictional made-for-TV film would cause irreparable damage to her by exploiting her name, likeness and public and professional reputation and image. "I am my own commodity and industry. . . . This is my industry and if someone else portrays me and fictionalizes my life, it is taking away from my industry."⁴⁹

The Hollywood Reporter

It is difficult to determine the extent to which a producer can utilize "public" events and the extent, if any, s/he may fictionalize "gaps" in the story and "inner" events of a public person's life. Fiction and docudrama present the same uncertainty. Elizabeth Taylor has aggressively

challenged ABC's right to docudramatize her life by asserting a proprietary interest in her own life-story, a right of biography as it were.

Taylor's central claim is that docudramas about her life compete against the films she chooses to appear in for an audience's attention, that is, that unauthorized docudramas impact unfairly on her means of making a living since she, in effect, is forced to compete against herself (with someone else perhaps garnering the profits).

Taylor's position foregrounds arising contradictions inherent in the relationship between the public's First Amendment "right to know" and this century's expansion of the concept of "personhood," which grants to the individual certain privacy rights (and corresponding power to prevent media attention) and publicity rights.

Competing against Elizabeth Taylor's asserted right to control her life story are the rights of the journalist to document its public aspects, the docudramatist to re-create it, and the feature producer to fictionalize it. Does society have the right to docudramatize its own heroes, its own famous people? Can/should the star be allowed to prevent this?

Obviously, these questions are only answerable by policy positions. The courts' responses have been very consistent here, however.

Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity. Moreover the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author.⁵⁰

Fiction Films

In 1976 Agatha Christie died. In 1977 film producers made a movie fictionalizing a true incident from her life, a mysterious disappearance in 1926. In the film, the eleven-day hiatus is used to plot the murder of her husband's mistress. In 1978, Agatha Christie's heirs arrived in court on a right of publicity theory.

The court found under New York law that the right of publicity had descended to her heirs and assignees, but then had to face the question of the relation between the right of publicity and expressions in books or movies. The court said:

The question is novel in view of the fact that more so than posters, bubble gum cards, or some other such "merchandise," books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded "merchandise."⁵¹

The court stated it was necessary to balance the individual's interests and society's needs. Its holding does not bear too well for Elizabeth Taylor's docudrama claim:

[T]he right of publicity does not attach . . . where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious.⁵²

Conclusion: The Need for a Federal Personhood Statute

In purely commercial contexts, there is no reason for treating person-as-product images differently from product images. "Who should own these images?"—the creator.

The law carefully distinguishes the private individual from three types of public individuals: the famous, the involuntarily notorious (e.g. victims of crime), and stars (manufactured). The last are big business. Who should own these star media-images—the public who 'creates' them, the producers who exploit them, or the image bearer himself?

Does the public have the right to know about its stars? Of course, but only if the star-image is part of an "expression" (book, film, news) rather than another commercialization (bubble gum cards). Complicated value problems arise at this point. Should the businessman/producer be allowed to exploit our psychological desires/needs projections with his media-image dream-placebos? Does the viewer/consumer have a moral duty not to project his inner existence onto outside media images? These questions are only answerable by reference to the basic values of our society and our preference for free and unfettered expression.

One thing is clear. A star is not an involuntary phenomenon. Star status results from a combination of luck and hard work. The price a star pays for this stardom is the diminution of his/her right to privacy. By capitalizing on society's interest, the star's life becomes a matter of

public concern and public record. Elizabeth Taylor, in her attempts to prevent unauthorized docudramas about her life, is trying to have both stardom and privacy, to have it both ways. This seems intrinsically unfair.

Judicial interpretations of current law, with their reliance on legal case precedent, fail to clearly resolve the media image controversy. Images have both personal and property aspects. What is needed in the legal discourse is a theoretical framework which can provide guidance for the allocation of economic value while ensuring the integrity of the person, a scale capable of differentiating between the use of personal images (implicating privacy concerns and fame issues) and fungible images (triggering ownership claims).

Such a statute would commence by defining and distinguishing personal images from media images, since the interests to be protected are quite distinct, the former being essential to an individual freedom assumed by the First Amendment and the latter, in essence, a commercial property interest.

A personhood statute would allocate initial ownership of both rights to the image bearer and simultaneously define the rights of the media to access those images so the First Amendment's goals would be well served. This would mean that absent a valid consent, waiver, or privilege in the case of a personal image, or a contract in the case of a publicity claim, a copy of a person's image, including name, life story, and other characteristics besides likeness, would be subject to the control of the image bearer in the name of individual integrity and legal personhood.

If the statute presumes that ownership of a media image rests with the image bearer, the legal discourse would have a definite starting point for allocating ownership in disputed cases. This conceptual starting point is what is currently lacking. The statute would have to deal with the question of ownership since an image is often constructed by a variety of "authors." One solution would be to require a claimant (e.g. a film studio) to explicitly contract with the image bearer. This is the common industry practice as between actors and agents/personal managers. Rights in the media image could be severed and divisible and proportioned as rights to a movie are today, as when the director gets ten points, the star ten points of the gross, and so forth.

A registration system could be required in order to establish an ownership claim. One advantage of a statutory allocation would be that in the area of characters like "Dracula," the image bearer's rights

would be given a fairer analysis since the presumption would be that the image bearer, and not the copyright holder, should reap the value from the intangible media image embedded in that character.

Once the media image is declared an intellectual property by statute, devisability is a moot issue. Control and ownership of media images would pass through one's estate like other property interests. In the *Lugosi* case, California's Chief Justice Bird analogized to copyright and argued that the right of publicity should exist, that is, be managed and controllable, for the life of the author plus 50 years. This seems reasonable though many arguments have been made that this limits its entry into the public domain; but public domain arguments usually result from the confusion of celebrity fame with celebrity image exploitation.

The proposed legislation would have to distinguish access to "fame" from commoditization and exploitation uses of that fame. It is difficult to differentiate the two since the celebrity tends to claim that all uses exploit the commercial value of the media image. By differentiating three categories of "famous" images (the newsworthy, the cultural hero, and the celebrity), society can grant public domain status to the first two types and uses, thus preserving traditional media rights to images of the famous, and restrict property status to the fabricated celebrity image.

If, as a society, we are genuinely concerned, as was the *Memphis Development* court, with the rights of the public, then a personhood statute could also provide a compulsory license/royalty scheme for the use of the celebrity media image.⁶³ Thus, no one would be excluded from use of the "Elvis" image, and its creators/fabricators, though losing the absolute controls available to "owners," would receive fair compensation for their efforts.

Notes

1. Warren and Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).
2. See discussion and annotations in 86 ALR 3d 374, 57 ALR 3d 16.
3. *Arrington v. New York Times*, 8 Media L. Rptr. 1351 (1982).
4. See discussion in W. Prosser, *Law of Torts* (4th ed., 1971), 822-30.
5. See *Leopold v. Levin*, 259 N.E. 2d 250 (1970); and *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940).
6. 171 N.Y. 538, 64 N.E. 442 (1902).

7. N.Y. Civil Rights Laws, Secs. 50 and 51.
8. 171 N.Y. at 564.
9. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).
10. *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 141 (1907).
11. 124 F.2d 167 (1941).
12. *Id.* at 168.
13. *Id.* at 169.
14. See "Court Reduces Carol Burnett's Award for Libel," *Los Angeles Times*, July 19, 1983. Much of Burnett's saga against the *National Enquirer* is chronicled in the *Los Angeles Times*, 1981-83.
15. *Gill v. Curtis Pub. Co.*, 239 P.2d 630, 632 (1952).
16. *Gill v. Hearst Pub. Co.*, 253 P.2d 441, 443 (1953).
17. *Id.* at 444.
18. *Id.*
19. *Id.* at 446.
20. *Id.*
21. *Lugosi v. Universal Pictures*, 172 USPQ 541 (1972) (the trial case); 139 Cal. Rptr. 35 (1977) (The appellate decision reversing the trial court's ruling in favor of Lugosi's heirs); 25 Cal. 3d 813, 160 Cal. Rptr. 323 (1979) (The California Supreme Court decision upholding the appellate decision in favor of Universal by a 4-3 majority.).
22. 172 USPQ at 542.
23. *Id.* at 543.
24. *Id.* at 553.
25. 139 Cal. Rptr. at 38.
26. See discussion by Chief Justice Bird in dissent commencing at 160 Cal. Rptr. at 332.
27. *People Magazine*, Aug. 31, 1981, p. 19.
28. *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp 279, 288 (1977).
29. *Id.* at 282.
30. *Id.* at 284.
31. *Id.* at 283, note 3.
32. *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir. 1980).
33. *Id.* at 959.
34. *Id.*
35. *Id.* at 960.
36. *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981).
37. *Commerce Union Bank v. Coors*, 7 Media L. Rptr. 2204 (1981).
38. 433 U.S. 562, 97 S.Ct. 2849 (1977).
39. California Civil Code, Section 990+3344 (1984); Tennessee Trade Practices Code, 47-25 1101 (1984); Oklahoma, title 21, sec. 839.2 (1983);

Utah, sec. 45-3-1 (1981); Virginia, sec. 8.01-40 (1977) and Florida, sec. 540.08 (1972).

40. 433 U.S. 562, 97 S. Ct. 2849 (1977).
41. 351 N.E. 2d 454, 455 (1976).
42. *Id.* at 461.
43. 433 U.S. at 569.
44. *Id.* at 573.
45. *Id.* at 575.
46. 233 N.E. 2d 840 (1967).
47. *Id.* at 842.
48. 259 N.E. 2d 250 (1970).
49. "The Week in Review," *The Hollywood Reporter*, Oct. 26, 1982, p. 8.
50. *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 872, 160 Cal. Rptr. 352, 359 (1979).
51. *Hicks v. Casablanca*, 464 F. Supp 426, 430 (1978).
52. *Id.* at 433.
53. A compulsory license means the user has the right to use the image as long as a royalty is paid to the image owner.

8

A Study in Multiple Forms of Bias

THOMAS BEAUCHAMP AND
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"The Uncounted Enemy: A Vietnam Deception," a CBS documentary alleging that General William C. Westmoreland falsified reports of enemy strength, is a textbook case of various forms of bias and distortion that are common to television. What follows is a brief history of the genesis of the program and an analysis of the motives and techniques that shaped its production. We have also included an appendix excerpted from an interview conducted for "The Uncounted Enemy" to illustrate how such material can be manipulated to suit the producer's purposes.

The months leading up to the major North Vietnamese and Vietcong assault known as the Tet offensive at the end of January 1968 were intensely political in the United States. It was a presidential election year, and the predominant campaign issue was the Vietnam War. A consensus was building in the press that the war was unwinnable. President Lyndon B. Johnson was increasingly identified as the chief hawk, and Democrats with presidential aspirations were beginning to attack him. Official reports from the war zone were more encouraging from the president's perspective. In November 1967, the Johnson administration launched a high-powered campaign to spread the word that the tide was turning. Ambassador Ellsworth Bunker, the U.S. envoy in Saigon, Ambassador Robert Komer, the president's special representative for Vietnam, and Gen. William Westmoreland, commander of U.S.

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