

Cause of action for misappropriation of likeness is assignable and not preempted by federal copyright law.

FACTS AND PROCEDURAL POSTURE

The plaintiff in this case is a company specializing in the protection of personal image rights. In July 2011, some models discovered that Defendants had been using their images on Defendants' website to advertise cosmetic medical services, without the models' permission. The models assigned their rights to bring suit for misappropriation of their images to the plaintiff. Plaintiff sued defendant for common law and statutory misappropriation of likeness.

Defendants moved for judgment on the pleadings on the grounds that plaintiff lacked standing to sue because a cause of action for misappropriation of likeness is personal in nature and thus cannot be assigned. Defendants also argued that plaintiff's claims were preempted by the federal Copyright Act. Relying largely on *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, the trial court granted defendants' motion, explaining that any assignment of a "personal" tort is invalid, and a cause of action of misappropriation of likeness is personal in nature. Plaintiff appealed.

DISCUSSION

There are two sources of a misappropriation of likeness claim in California: the common law tort that arose out of invasion of privacy, and Civil Code section 3344, which provides in part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

The court noted that nothing in section 3344 expressly prohibits assignment of the rights and remedies established by the statute. The court explained that while the *Lugosi* decision held that the right to publicity was not inheritable¹, it expressly acknowledged the right of the individual to assign that right during his lifetime. Accordingly, under California law, the right of publicity may be assigned.

Defendants then argued that even if the right to sue was assignable, the right to sue alone, without anything more, does not give plaintiff standing to bring a claim. Here, defendants claimed, no other rights were transferred to plaintiff by the models. The general rule is that causes of action are assignable; non-assignability is the exception, and is confined to wrongs done to the person, the reputation, the feelings of the individual person, and contracts of a purely personal nature such as promises of marriage. Defendants argued that a misappropriation of likeness cause of action falls within the exception for wrongs of a personal nature, absent some indication that other rights or duties have

¹ This rule has since been changed by statute: Civil Code section 3344.1

been assigned. Defendants also claimed that plaintiff could only pursue this claim if plaintiff has an exclusive license to the use of the models' likenesses, and plaintiff had no such exclusive license.

The court explained, however, that the damages claimed in this case were not of a purely personal nature. The claims involved purely pecuniary interests: the usurpation of the models' rights to commercially exploit their images, and the dilution in value of their likenesses. There was no claim of emotional distress or injury to reputation. The complaint's allegations were sufficient to reasonably infer that the assignment encompassed not just the right to sue, but also the underlying pecuniary interest in exploiting the models' likenesses.

Finally, the court rejected defendants' preemption claim on the grounds that the models' likenesses are not copyrightable and the right of publicity does not fall within the subject matter of copyright.

The court reversed the judgment and vacated the order granting defendants' motion for judgment on the pleadings.