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Lucy Duff-Gordon occupied the fringes of modernism, a movement defined by a prominent group of radical writers, musicians and artists who reveled in the new century's atmosphere of no formal constraints and constant reinventing. [1] But, while those at modernism's centre may have been anti-bourgeois, those at the fringes converted modernism's radical agenda to a more bourgeois agenda of hard work, ingenuity and profit.[2] As a fashion designer, Lucy incorporated modernist styles and motifs into her designs and sold them to a flourishing middle-class market as examples of a modernist ideal of form (simple elegance) following function (wearability).[3] Her colourful, softly revealing, "personality" dresses broke with traditional dress-styles of the nineteenth century and conveyed the new mood of freedom and modernity. A gown, she said, must simply "express the wearer's taste and individuality."[4] She embraced the

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1. The movement included, for instance, Expressionism, Dadaism, Surrealism and Cubism—the last especially influential for fashion design. *See* RICHARD MARTIN, CUBISM AND FASHION (1998).

2. Raymond Williams, a luminary source on the defining values and contradictions of modernism, says this happened "quite rapidly." Raymond Williams, *When Was Modernism?* 1/175 NEW LEFT REV. 48, 51 (1989).

3. *See* REBECCA MATHESON & MOLLY SORKIN, DESIGNING THE IT GIRL: LUCILE AND HER STYLE 17 (The Museum at FIT, New York, 2005) ("Many of Lucile's designs anticipated the simplicity of line and the active lifestyle of the later twentieth century" and "Lucile's modernity was most evident in evening dresses and teagowns that clung to the body, revealing slender, uncorseted figures. Lucile relied on precise cut and drape of fabric to create her version of modern elegance.").

4. Lady Duff-Gordon, *For the Theatre*, HEARST'S SUNDAY AMERICAN, Mar. 4, 1917.

efficient production techniques of an industrial age and adapted them to her artistic-commercial ends. Her workshops were factories, by 1912 employing some 2,000 staff worldwide.[5] And there were constant border crossings as she moved between London, New York, that "eponymous city of strangers,"[6] and Paris, the centre of fashion.[7] Portrayed as "the famous Lucile of London,"[8] her identity was really cosmopolitan and highly constructed. She created her identity, revealing herself through her designs, writings and endorsements as the ultimate arbiter of taste and style.[9] Her label was simply Lucile. Lucy *was* Lucile, whose "favor helps a sale," as Justice Cardozo said in *Wood v. Lucy, Lady Duff-Gordon*.[10] "Dressed by Lucile" was "a magic pass-word in drawing rooms everywhere."[11] "In her heyday, Lucile's artistry was unique, her influence enormous," Cecil Beaton observed.[12]

This paper is about law's treatment of personality as a way of selling fashion design. To an extent, we suggest, law responded sympathetically to the creativity, commercialism and cosmopolitanism of the modernist fashion designers' world, especially in the metropolises of London, New York and Paris which formed the shifting central focuses of their interlinked lives. *Wood v. Lady Duff-Gordon*[13] and its lesser known companion case, *Poiret v. Jules Poiret Ltd.*,[14] are perfect examples of personality rights in early modern New York (in Lucy's case) and London (in Poiret's). The cases show contracting parties being supported, protected and held to contracts by which they seek to exploit their personalities for commercial ends; and *non*-contracting parties granted control over those with whom they

5. Randy Bryan Bigham, *Madam Lucile: A Life in Style*, Encyclopedia Titanica, 2003, http://www.encyclopedia-titanica.org/articles/lucile.pdf.

6. Williams, *supra* note 2, at 50.

7. Powerful, prosperous, populous and of international reputation, Paris was undoubtedly the center of the luxury industries in the early twentieth century, according to fashion writer and fashion historian Francois Baudot. FRANCOIS BAUDOT, A CENTURY OF FASHION 30 (James Brenton trans., Thames & Hudson Ltd. 1999).

8. *See* Lady Duff-Gordon, *supra* note 4.

9. Bigham, *supra* note 5.

10. 118 N.E. 214, 214 (N.Y. 1917).

11. Obituary of Lucy Duff-Gordon, THE TIMES, Apr. 23, 1935, at 12.

12. CECIL BEATON, THE GLASS OF FASHION 33-34 (1954).

13. 118 N.E. 214, 214 (N.Y. 1917).

14. (1920) 37 R.P.C. 177 (U.K.).

might deal in exploiting their personalities, if they choose to deal at all. Moreover, the protagonists' constant interplay between dealing and not dealing leads us to conclude that the genesis of what were later to be called publicity rights[15] may have as much to do with these contemporary practices as with, as sometimes suggested, the right to be "let alone."[16]

I. Lucile and her Advertising Agent

On September 21, 1916, *Printer's Ink* announced that Lucy Duff-Gordon had entered into a contract with Sears Roebuck and Company to sell dresses made to Lucy's designs through the Sears catalogue. The venture was said to be "by far the most spectacular bid for prestige which this daring advertiser had made since it first announced the new handy edition of the Encyclopedia Britannica."[17] For Lucy's part, as reported in the *Ladies Home Journal* (running an advertisement by Sears), her "*one dream* [was] to make clothes for the women who have not hundreds of dollars to spend on one frock" and the arrangement with Sears would enable her "to design clothes for women who have twenty-five or fifty dollars or ten to spend."[18] This arrangement was a remarkably modern example of exploitation of a personality right—the "prestige" of the "Lucile" name enhanced the value of goods beyond the quality-guarantee which came with Lucy's association with the design and manufactur-

15. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953); Melville Nimmer, *The Right of Publicity,* 19 LAW & CONTEMP. PROBS. 203 (1954) (citing Samuel Warren & Louis Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193, 204 (1890)); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

16. The latter was suggested especially by Nimmer, *supra* note 15, who takes as his starting point from the classic article by Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 204 (1890), to argue that a right of publicity is "the reverse side of the coin of privacy." *See also* J. Thomas McCarthy, *Melville B Nimmer and the Right of Publicity: A Tribute,* 34 UCLA L. REV. 1703, 1710 (1987) ("The modern view of the right of publicity is that it is an inherent right of identity possessed by everyone at birth. The majority of modern courts have followed Nimmer's approach . . . .").

17. *See* Walter Pratt Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 439 (1988) (quoting *Sears-Roebuck's Latest Advertising Coup,* PRINTER'S INK, Sept. 21, 1916, at 28).

18. *See* Victor Goldberg, *Reading* Wood v. Lucy, Lady Duff-Gordon *with Help from the Kewpie Dolls, in* FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 56 (2006).

ing process.[19] Her commitment that she would not only design but would ensure "garments will be made up under my personal supervision" only added to the personal character of her association.[20] While in the end the venture may have been considered a failure for Sears, the fact that "Sears sold about $90,000 worth of Lucy's dresses in six months"[21] indicates the potential for mass-production of fashion and also the potential to use a highly personalized fashion label as a selling device.

Unfortunately for Lucy, the arrangement with Sears also placed her in breach of her contract with her advertising agent, Otis F. Wood, who had contracted to provide his services in searching out endorsement opportunities in exchange for exclusivity and a share of the profits of endorsements obtained. Apparently, after the first year, Wood had failed to achieve much by way of results.[22] Whether he tried very hard is not clear. On the one hand, he had earlier faced a claim for want of "best efforts" from another client, Rose O'Neill, who entrusted him with merchandising her popular Kewpie dolls.[23] On the other, Lucy's defection could be seen as part of a general pattern of the 1910s when "advertisers found it extremely difficult to prevent celebrities from endorsing other products or abandoning their business obligations outright . . . often working in league with an agent who sought endorsement opportunities on their behalf,"

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19. Such prestige value is now well-understood. *See* Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1242-43 (1986) (the "economic associative value" that a celebrity brings to a brand is the transfer of the perceived attributes of the celebrity–for example, success, glamour, beauty and talent–directly to the brand he or she is associated with); Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310 (1989); Mary Walker, Lynn Langmeyer & Daniel Langmeyer, *Celebrity Endorsers: Do You Get What You Pay For?*, 9 J. CONSUMER MARK. 69 (1992). And, for associative value understood in early advertising theory, see WALTER DILL SCOTT, THE THEORY OF ADVERTISING: A SIMPLE EXPOSITION OF THE PRINCIPLES OF PSYCHOLOGY IN RELATION TO SUCCESSFUL ADVERTISING ch. 3 (1904).

20. *See* Goldberg, *supra* note 18.

21. *Id.* at 57.

22. *Id.* at 56. Goldberg states that, according to Randy Bigham, Wood placed a number of commercial endorsements in the first year of the contract, but then "[t]hings began to unravel in year two when Lucy bypassed Wood and directly entered into a contract with Sears . . . ." *Id.*

23. *Id.* at 55 (the case did not proceed to trial after Wood failed in a procedural motion).

the practice here turned against the agent.[24] Her feeble and ultimately ineffectual defense to his suit for damages was want of mutuality. There is a certain irony in her argument that a contract that was supposed to provide her with the benefit of Wood's "business organization adapted to the placing of such indorsements [sic] as the said Lucy, Lady Duff-Gordon, has approved"[25] was unenforceable—as much on her side, if it came to it, as on his. The result of the dispute are well-known: the trial court found Wood "obliged to exercise his 'bona fide judgment,'"[26] the appellate division reversed on the basis that "the defendant gives everything and the plaintiff nothing,"[27] and the court of appeals restored the trial court's decision on the basis that the contract was "'instinct with an obligation,' imperfectly expressed"[28] that Wood should provide "reasonable efforts."[29] According to Walter Pratt Jr.:

> The disagreement between the two lower New York courts precisely reflected the fluid state of contract doctrine at the turn of the century. Poised between the traditional rule of the appellate division and the modern rule of the trial court, judges throughout the country strove to articulate values in response to the new contractual devices. The 'open' nature of the contract between Lucy and Wood challenged the venerated rule of contract law that there could be no contract unless the obligations of the parties were mutual.[30]

In fact, as Pratt acknowledges, the modern rule was a mainly New York rule. [31] New York's industries and practices were rapidly developing and with this came uncertainty, reflected in open contract terms. Some of its new industries were by their nature uncertain. The advertising industry, which de-

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24. Marlis Schweitzer, *The Mad Search for Beauty: Actresses' Testimonials, the Cosmetics Industry, and the "Democratization of Beauty,"* 4 J. GILDED AGE & PROGRESSIVE ERA 255, 276 (2005).

25. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 222 (N.Y. 1917).

26. *See* Pratt, *supra* note 17, at 440.

27. Wood v Lucy, Lady Duff-Gordon, 164 N.Y.S. 576, 577 (App. Div. 1917).

28. *Wood,* 118 N.E. at 222 (citing McCall Co. v. Wright, 117 N.Y.S. 775 (App. Div. 1909); Moran v Standard Oil Co., 105 N.E. 217 (N.Y. 1914)).

29. *Id.*

30. Pratt, *supra* note 17, at 440.

31. *Id.* at 448-49 ("Significant statements of the new doctrine came from New York . . . .").

pended upon emotion rather than "rationality" for success,[32] was one of these, and perhaps it was thought that, if such industries were to flourish, New York courts needed to "respond to the demands of practical convenience."[33] It took a while for the modern rule to catch on in the rest of America. Samuel Williston gave *Wood v. Duff-Gordon* a narrow reading in his 1920 treatise on *The Law of Contracts*, *viz* "the promise of either party may be optional, if the exercise of the option not to employ or to serve involves a detriment to the promisee, or benefit to the promisor."[34] But in his more New York focused *Principles of Law of Contract*,[35] William Richardson saw its broader lasting implications: "[t]he promises need not necessarily be expressed. One may be expressed and the other implied from the particular circumstances of the case."[36] This was to be the perfect approach for personal endorsement contracts, where open contract terms—express as well as implied—were a direct result of parties' inabilities to predict the level of public demand for endorsed products.[37]

It is noteworthy that the modern rule of *Wood v. Duff-Gordon* was stated in a case concerned with the commercial exploitation of personality. Commercial personality interests featured in other cases as well. A particular example is the 1919 English case of *Hepworth Manufacturing Company, Ltd. v. Ryott*.[38] Ryott was an actor who had become a star of silent films, his fame second to Charlie Chaplin in a national newspaper poll.[39] His contract with his employer was open in stating that

32. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165, 1165-66 (1948) (modern advertising employs "threats, cajolery, emotions, personality, persistence"). *See also* POYNTZ TYLER, ADVERTISING IN AMERICA (1959).

33. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-99 (1921) (the rule in *Wood v. Duff-Gordon* responded to "the demands of practical convenience").

34. SAMUEL WILLISTON, THE LAW OF CONTRACTS 219 (1920).

35. WILLIAM RICHARDSON, ROWE'S COMMERCIAL LAW (2nd ed. 1920) (William Richardson served as the Dean of Brooklyn Law School).

36. *Id.* at 178.

37. *See* Pratt, *supra* note 17, at 432 (characterizing the contract between Wood and Lucy).

38. Hepworth Mfg. Co. v. Ryott, (1919) 1919 WL 13690 (Austl.).

39. *Id.* at *7-9. *See also* Obituary of Wernham Ryott, THE TIMES, Mar. 2, 1965, at 14 (stating that "with sentimental eyes and strong jaw," Rome was "more or less the prototype of today's cinema star").

if he were advertised it would be under his stage name Stewart Rome. But there was no question as to mutuality or certainty of the contract, Judge Astbury pointing out that film producers had obvious interests in advertising their "star performers."[40] Rather, the covenant giving Hepworth control of the Stewart Rome name was held unenforceable as a restraint of trade, being both "injurious" and "oppressive" in appropriating a name that had become "merged . . . in the identity of another person."[41] In *Hepworth*, the court showed an early appreciation of the special value that lies in a star's image once it is merged in the identity of a person, incorporating a human quality (which, as Richard Dyer says, is the star's appeal),[42] but also introduced a note of personal vulnerability regarding its use. A few months later the implications of acknowledging the combination of commercial and human interests that lie in the protection of a star's image would be more thoroughly tested in *Poiret v. Jules Poiret, Ltd.*

II. Poiret's War on Piracy

When Lucy Duff-Gordon's major business rival, Paul Poiret,[43] returned from the War and resumed work as a fashion designer in Paris, he found that the Poiret name had been used by Alexander Nash, a former actor, to conduct a fashion business in London since 1914. By the time proceedings for passing off were launched in London Nash's company, Jules Poiret Ltd., had developed a "very high reputation, especially for costumes

40. *Hepworth Mfg. Co.*, 1919 WL 13690, at * 7 (noting that stars were of "first-rate importance" as between rival producers).

41. *Id.* at *13-15. *See also id.* at *25 (Warrington, L.J.) ("I am glad to think that by our decision that object [to bind a particular actor to a particular employer] will probably be defeated."); *Id.* at *32 (Atkin, L.J.); *Id.* at * 34 (Eve, J.). The fact that Ryott was being paid an artisan's wage of £10 a week under the contract was clearly a factor in the decision. *See id.* at *9-10 (Ryott compelled to accept less than market value).

42. RICHARD DYER, STARS 20 (2nd ed., with supplementary chapter by Paul McDonald, 1998). *See also* ELLIS CASHMORE, CELEBRITY/CULTURE 165-87 (2006); HAMISH PRINGLE, CELEBRITY SELLS 51-74, 94-103 (2004).

43. Poiret has been credited with creating "the first dresses that could be put on without assistance," narrowing the silhouette, and forging "the way forward for all his successors." *See* FRANCOIS BAUDOT, POIRET 12 (Caroline Beamish trns., Thames & Hudson 1997). *See also* Nancy Troy, *Poiret's Modernism and the Logic of Fashion*, *in* HAROLD KODA & ANDREW BOLTON, POIRET (2007).

for theatrical productions."[44] Paul Poiret argued that the Poiret name contributed to this success but at the cost of his own reputation with the English public which had long associated the famous Poiret name with fashion design—to the English public a "Poiret" gown meant "a dress designed or made by Paul Poiret of Paris."[45] Nash argued that French names were "usual" in the fashion trade,[46] that without a local place of business, Poiret was not entitled to protect the reputation associated with his name and that any business activity in England had ceased in 1914 when the Paris fashion house closed. P.O. Lawrence J. rejected these arguments, commenting that:

> The Defendant Nash seems to consider that because *Paul Poiret* has no place of business in London, he is not entitled to protect his reputation in business in this country, and that he, the Defendant *Nash*, is at liberty to take the name of 'Poiret' and use it in respect of his goods in spite of the fact that the plaintiff's goods are known in the English market as 'Poiret' gowns and 'Poiret' creations. In my opinion this view is entirely mistaken. *Paul Poiret* is, in my judgment, in the circumstances of this case entitled to protect his goods and the reputation he has acquired in this country . . . .[47]

Interestingly, there were indications of at least local business activity in *Poiret,* but they were sketchy and incomplete. Dealings with private clients and theatres and an exhibition of gowns at Number 10 Downing Street were mentioned.[48] Poiret also gave evidence of pre-war wholesale customers whose representatives would "come to Paris and purchase my models and designs, which they can reproduce and sell" with "no conditions."[49] In fact, sales and reproductions were happening on a reasonably wide scale—for instance, it was not uncommon from 1910 to 1914 to see advertisements in *The Times* from London department stores such as Debenham & Freebody promoting

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44. Poiret v. Jules Poiret Ltd., (1920) 37 R.P.C. 177, 181 (U.K.).

45. *Id.* at 182.

46. THE TIMES, July 10, 1920, at 5.

47. *Poiret*, (1920) 37 R.P.C. at 187.

48. *Id.* at 183-84.

49. THE TIMES, July 8, 1920, at 5. Andrew Bolton comments that this was common practice for couturiers and "[o]ften these foreign buyers paid a special price for the gowns that included the right to make and market multiple copies." Andrew Bolton, *Response to Multiple, Movement, Model, Mode, in* FASHION AND MODERNITY 149 (Christopher Breward & Caroline Evans eds., 2005).

Poiret gowns at marked down prices as well as their own "scarcely distinguishable" copies made "by our own workers from high grade materials."[50] We might wonder why Poiret did not mention this in court. Nancy Troy says that Poiret consistently sought to portray himself as an artist and feared this image might be undermined by references to multiple sales.[51] He may also have thought his reputation in England as a French couturier should be sufficient for its protection when his couturier trade had fallen off with the war. In any event, reputation was considered sufficient by P.O. Lawrence J. who condoned the (literally false) idea that "a Poiret gown, or a Poiret creation, meant a dress designed, or manufactured, by Paul Poiret."[52] It was only sixty years later, in a case involving the French restaurant *Maxim's*,[53] that reputation was so wholeheartedly protected by an English court.[54]

The recognition of Poiret's cosmopolitan reputation as transcending business presence and activity finds parallels in the treatment of damage. P.O. Lawrence J. said Poiret should not have to "submit to the confusion and deception and damage" which would arise if Nash continued to trade under the Poiret name "now that it has again become possible for Paul Poiret to place his goods on the English market."[55] The precise nature of the damage when parties were trading at different ends of the market—Poiret's dresses said to be "very expensive" and exclu-

50. *See* Debenham & Freebody, *Display Advertising*, THE TIMES, Oct. 19, 1910, at 11; *see also* THE TIMES, May 3, 1913, at 11. The copies were sold for about half the price of the sale price of the originals. Compare, for instance, the 1910 advertisement (a "copy" of a Poiret tea gown priced at 6½ gns) and Whitely's sale price for a similar garment (model wrap, advertised as "by" Paul Poiret, "no two alike," priced at £12, "less than half cost price") in Whiteley's, display advertising. THE TIMES, Jan. 15, 1912, at 10. Debenham & Freebody also advertised original Poiret lines for similar prices. *See Display Advertising*, THE TIMES, July 8, 1911, at 13 ("Paul Poiret" coat and skirt advertised on sale for 12½ gns, marked down from £40).

51. *See* NANCY TROY, COUTURE CULTURE: A STUDY IN MODERN ART AND FASHION 302 (2002) (arguing the dilemma for Poiret was resolving "the contradiction between art and industry").

52. Poiret v. Jules Poiret Ltd., (1920) 37 R.P.C. 177, 185 (U.K.).

53. Maxim's Ltd. v. Dye, [1977] 1 W.L.R. 1155 (Eng.). *Cf* Globe Elegance BV v. Sarkissian, [1974] R.P.C. 603 (Eng.) (Valentino).

54. Conagra, Inc. v. McCain Foods, (1992) 22 I.P.R. 193, 203-19 (Austl.) (Lockhart, J.) (adding that later the position in the United Kingdom became less clear on the sufficiency of reputation).

55. *Poiret,* (1920) 37 R.P.C. at 188.

sive, Nash's less so[56]—was not spelt out. Nor was it explained in contemporary cases in which courts oversaw the expansion of passing off and like doctrines to a plaintiff and defendant trading in even more different fields of activity. For instance, the American Vogue cases, *Vogue Co. v. Bretano's*[57] and *Vogue Co. v. Thompson-Hudson Co.*,[58] had remarkably little discussion of the nature of damage flowing from unauthorized use of style-synonymous Vogue trade marks for fashion plates and hats (the magazine not in the business of selling either), although it was accepted that unfair competition, the "convenient name for the doctrine that no one should be allowed to sell his goods as those of another," is not dependent upon actual "market competition."[59] A few years later, Frank Schechter was to argue that damage in such cases is "the gradual whittling away or dispersion of the identity or hold on the public mind of the mark or name by its use upon non-competing goods."[60] But Poiret may have had a more particular concern in bringing an action against Nash. On a trip to America in September 1913 he had observed uncontrolled copying of his designs, with many of the copies sold under Poiret labels.[61] His response was a flurry of letters and advertisements, warning against "false labels," demanding an end to "pirating of fashion," which threatened the Paris dress-makers, and announcing policies of "prosecuting to the full extent of the law" and generally using all methods at his disposal to prevent wholesalers and others from engaging in

56. *Id.* at 194 ("Paul Poiret's dresses were very expensive, and the class who bought them a limited class . . . . The Defendant's business is the largest or one of the largest in London."). We might speculate as to whether he meant the largest in clothing generally or rather in theatrical costumes–the second perhaps more likely than the first, given this was his main line of business.

57. 261 F. 420 (S.D.N.Y. 1919).

58. 300 F. 509 (6th Cir. 1924).

59. *See Brentano's,* 261 F. at 421; *Thompson-Hudson,* 300 F. at 512. In *Thompson-Hudson* a separate "technical" trademark claim failed because of the different goods, the court assuming, without deciding, that was a sufficient bar. *Id.* It was also thought that "Vogue" was too descriptive to function as a trademark and that a "forceful secondary meaning" had not been established (the unfair competition claim succeeding on the basis of the distinctiveness of the "V" and "V-girl" trademarks). *Id.* Interestingly, a different view was taken on the latter issue in *Vogue Co. v. Bretano's. Brentano's*, 261 F. at 421.

60. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1926) (rejecting the rationale sometimes suggested in the cases that the harm came from the fact of trade in related fields of activity).

61. *See* TROY, *supra* note 51, at 232 (detailing the visit and its aftermath).

and supporting (non-authorized) copying.[62] The experience suggests that, by the time of the proceedings in *Poiret v. Jules Poiret Ltd.*, Poiret's desire was to control the market for Poiret labels, which Jules Poiret Ltd. was busily exploiting, and this was seen as imperative from both a business and personal point of view. The reasoning resonates with P.O. Lawrence J's reference to Poiret's injury from the passing off as found in his forced submission to confusion, deception and (thus) damage.[63]

Reference to forced submission anticipated the way English and American courts later would adapt language of damage in passing off to accommodate unauthorized commercial use of personality. Damage came to be couched in terms of loss of "the ability to decide who, if anyone, can use . . . [his reputation] alongside him,"[64] the right to "withhold or bestow at will" a "professional recommendation,"[65] to permit or refuse to permit another to borrow reputation and exploit it "as the symbol of its possessor and creator."[66] It is a small step from there to see the ability to contract effectively about personal endorsements, which lay at the heart of *Wood v. Lucy, Lady Duff-Gordon*, as the other side of the coin from the right to deny an endorsement, upheld in *Poiret v. Jules Poiret, Ltd.*

Indeed, the close nexus between contracting and the right to deny must have been evident to the determined artist-entre-

62. *See Warning Against False Labels, in* TROY, *supra* note 52 at 237; *To Stop Pirating of Dress Fashions: Paul Poiret Heading a Movement Among Leading Paris Concerns*, N.Y. TIMES, May 29, 1914, at 4. In the New York Times advertisement Poiret's broader concern was copying of designs not just false labeling practices (although fashion piracy, without fraud or deceit, was notoriously difficult to address under United States law). *See* Montegut v. Hickson, 178 A.D. 94 (N.Y. App. Div. 1917); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929).

63. Poiret v. Jules Poiret Ltd., (1920) 37 R.P.C. 177, 188 (U.K.).

64. Irvine v. Talksport Ltd., [2002] 2 All E.R. 414, 425 (U.K.), *aff'd,* [2003] 2 All E.R. 881 (U.K.) (racing driver's name promoting a radio station). Although the judge did not distinguish personal and merely commercial reputation the language suggests he had personal reputation in mind. *Id.*

65. Henderson v. Radio Corp. Pty. Ltd., (1969) 1A I.P.R. 620, 638 (Austl.) (the ballroom dancers' case). The full Supreme Court of New South Wales rejected the authority of the English case *McCulloch v. Lewis A. May,* (1947) 65 R.P.C. 58 (Eng.), that a common field of activity, however remote, must exist before a passing off could be found. The New South Wales court's reasoning was preferred in *Irvine v. Talksport Ltd. See Irvine,* [2002] 2 All E.R. 414.

66. Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) (talking about dealings "with a proper name" shown "to denote the defendant when applied to flash-lights").

preneur in the teens and twenties. Passing off, unfair competition, trade mark registrations, privacy (and in New York the statutory right of the individual to claim false endorsement) were certainly common weapons against pirates.[67] These seemed more effective than corrective advertising when labels were fraudulently used—although Poiret tried this as well,[68] as did Lucy Duff-Gordon when dresses that were not designed by her were falsely advertised in New York.[69] But Poiret, even more than Lucy, showed how the persuasive methods of contract might be used in tandem to exercise control over use of a celebrity fashion designer's image as a selling device. Poiret's pre-war arrangements with wholesalers, who gained freedom to copy with purchase of the original, were very loose arrangements by today's standards. However, according to Francois Baudot, the arrangements were recast after his American visit so that "[o]nly firms agreeing to sell his models could use the Poiret label and royalties would be paid for each model reproduced."[70] He also sold perfumes and furnishings under his daughters' names, an early (successful) effort at brand extension.[71] And he even had a brief experiment with ready-to-wear. In October 1916, a month after Lucy's announced deal with Sears (which incidentally had been following Lucile's styles for years),[72] *Vogue* carried Poiret's advertisement for a collection of affordable suits, coats, wraps, skirts, evening and afternoon gowns designed by him for "the women of America" and made under special license by the Max Grab Fashion Company in New York.[73] In ready-to-wear, Poiret's designs were produced

67. *See, e.g.,* Chaplin v. Amador, 269 P. 544 (Cal. Dist. Ct. App. 1928) (unfair competition); Loftus v. Greenwich Lithographing Co., 182 N.Y.S. 428 (App. Div. 1920); Harris v. H.W. Gossard Co., 185 N.Y.S. 861 (App. Div. 1921) (although only six cents in damages were awarded because the claimant actress had consented to similar uses). *See also* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (privacy).

68. *See Warning Against False Labels, in* TROY, *supra* note 51, at 237.

69. *See Lady Duff-Gordon's Bankruptcy*, THE TIMES, Feb. 15, 1923 at 5.

70. BAUDOT, *supra* note 7, at 13.

71. *See id.* at 9-11 (Rosine perfume label and Martine decorative arts, the latter sold in department stores).

72. *See Introduction* to EVERYDAY FASHION: 1909-1920 AS PICTURED IN SEARS CATALOGS (JoAnne Olian ed., Dover Publications 1995) ("Nineteen fourteen showed the marked influence of Irene Castle, Lucile and the reigning French couturier, Paul Poiret").

73. *See* TROY, *supra* note 51, at 303 (copy of Poiret's advertisement in VOGUE).

for the mass-market in direct competition with the pirates. Perhaps resort to intellectual property protection was thought inadequate to prevent mass-copying, given it was happening on such a wide-scale. And, as Andrew Bolton says, "[i]llegal piracy made it difficult for couturiers to charge high prices based on the rarity of their designs because copies were widely available at much reduced prices."[74] On the other hand, the popularity of the mass-produced items may have shown couturiers an untapped market, where it made sense to use contract, share profit, exercise control over production and quality, and claim authenticity—Poiret's garments labeled "genuine reproductions"—a modernist's attempt to privilege his personally approved copies over the pirated versions.[75]

Poiret's ready-to-wear fashion line was abandoned after the war.[76] But his steps into mass-production, like Lucy Duff-Gordon's, set the path for the "Ford" of the fashion design world, Coco Chanel with her eminently copyable "little black dress" and her lucrative Chanel No 5 perfume.[77] Later, after the next war, endorsement practices fractured. Fashion designers became more famous. Their fame started to be used to "sell" products solely on account of fame.[78] Their labels were applied not just to dresses, perfumes and home furnishings (although such uses obviously continued), but to restaurants (as with *Maxim's*

74. Bolton, *supra* note 49, at 149.

75. *See* TROY, *supra* note 51, at 303 (copy of Poiret's advertisement in VOGUE).

76. Troy suggests that Poiret later saw the experiment as a failure and "quickly reverted to ways in which he had always privileged originality." *Id.* at 312; *but see* Bolton, *supra* note 49, at 150 (a practical option).

77. *See* Nancy Troy, *Chanel's Modernity, in* HAROLD KODA & ANDREW BOLTON, CHANEL 19, 20-21 (2005).

78. Reaching a high point with Pierre Cardin who in 2003 was endorsing "more than 900 products—from olive oil to frying pans, floor tiles, sardines, and orthopaedic mattresses—in more than 140 countries." Jamie Huckbody, *Pierre Cardin: He's Everywhere*, THE AGE, Aug. 1, 2003, http://www.theage.com.au/articles/2003/08/01/1059480531338.html (last visited Feb. 8, 2008). *See also* RICHARD MORAIS, CARDIN: THE MAN WHO BECAME A LABEL (1991). Gianni Versace is another example of an endorser. *See* Reka Buckley & Stephen Gundle, *Flash Trash: Gianni Versace and the Theory and Practice of Glamour in* Stella Bruzzi & Pamela Church Gibson, *Fashion Cultures* (2000). By contrast, Giorgio Armani has maintained tighter control over licensing and often exercised creative control over products. *See, e.g.*, Giorgio Armani Beauty Homepage, http://www.giorgioarmanibeauty.com/index.html (last visited Jan. 22, 2008) (beauty products); Giorgio Armani Casa Homepage, http://www.armanicasa.com (last visited Jan. 22, 2008) (home furnishings).

by Pierre Cardin), jet planes (Versace), mobile phones (for instance, Prada and Dolce & Gabbana) and more.[79] Intellectual property rights expanded in support.[80] At the same time, in cultural studies circles, questions were being asked about the star's image, some suggesting it was wholly constructed and had nothing to do with the person or products over which it was used.[81] Such questions were to pose an even greater challenge to the star's control over "personality" than the artists' manageable challenge of merging art and industry in the machine age, or the judges' manageable challenge of adapting laws to allow them to do so.

III. Legal Modernism

While privacy, framed simply as the right to be "let alone" by Samuel Warren and Louis Brandeis in 1890,[82] might have reflected the mood of the *fin de siècle*, by 1920 it appears to have been largely superseded by a more sophisticated understanding of personality, exemplified in the practices and legal disputes of celebrity fashion designers Lucy Duff-Gordon and Paul Poiret. As argued in this paper, their attitudes towards image as something to be cultivated and controlled for commercial and personal ends influenced their conduct and the responses of judges in the cases which tested out the implications of their modernist

79. *See* Maxim's de Paris Homepage, http://www.maxims-de-paris.com/p2us.htm (last visited Jan. 22, 2008) (Cardin and Maxim's); Versace Homepage, http://www.versace.com (last visited Jan. 22, 2008) (Versace); Prada Phone by LG Homepage, http://www.pradaphonebylg.com (last visited Jan. 22, 2008) (Prada); Motorola Dolce & Gabbana Phone, http://www.store.motorola.com/mot/en/US/adirect/motorola?cmd=catDisplayStyle (last visited Jan. 22, 2008) (Dolce & Gabbana).

80. In particular, there was a rise of trade mark and publicity rights in the United States and the expansion of passing off in the United Kingdom (and Australia). *See supra* note 65 & 66; David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913 (2008).

81. Beginning with Daniel Boorstin's famous statement: "A celebrity is a person who is known for his well-knownness . . . . He is the human pseudo-event." DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1961). See also Dyer who (in typical postmodernist fashion) characterized the image, or rather multiple images, of the star as "produced images, constructed personalities." DYER, *supra* note 42, at 20. For various implications of the reasoning, found in later 'schools' of cultural studies, see Tan, *supra* note 80.

82. Warren & Brandeis, *supra* note 16.

ideas—in *Wood v. Duff-Gordon,* endorsing Lucy's initial, albeit not ultimate, desire to cede partial control of her image to her advertising agent and in *Poiret v. Jules Poiret Ltd.,* supporting Poiret's right to control sales of gowns under his personal label. In both cases judicial language of freedom and control captured the mood of an era in which material and personal well-being were seen to depend on the creative talents, entrepreneurship and above all personality of the individual.

Perhaps it is not surprising that judges responded to the modernist mood of the early twentieth century. They were becoming more modern in their outlook including in their outlook on the law as, to an extent, a product of the commercial, social and intellectual environment. In January 1917 Arthur Corbin had already announced, in legal realist fashion, that legal decisions may "depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious."[83] But such notions were far from inarticulate and subconscious in *Wood v. Duff-Gordon*, where Judge Cardozo said, "[t]he law has outgrown its primitive stage of formalism."[84] Nor were they inarticulate and subconscious in *Hepworth v. Ryott*, noted in the *Law Quarterly Review* for its refreshingly "vigorous" language.[85] They may have been more muted in P.O. Lawrence J's judgment in *Poiret v. Jules Poiret Ltd.*, although the descriptions there of Poiret's couturier business show a fine awareness of the commercial environment. But they were rather well expressed by Judge Denison in *Vogue Co. v. Thompson-Hudson Co.*, who said, "[t]he invocation of equity" rests vitally on "unfairness" ("unfairness" a code word for Corbin's "notions of the court").[86] In this paper we have suggested that law adapted in multiple ways to the impulses which shaped the modern fashion industry. In reality, we have done little more than draw on the words of judges whose insights into the world of fashion and stars, like fashion itself, "blaze[d] for a while before gradually dying out."[87]

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83. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169, 206 (1917).

84. Wood v. Lucy Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

85. Case Comments, 36 L.Q. REV. 101 (1920).

86. Vogue Co. v. Thompson-Hudson Co., 300 F. 509 (6th Cir. 1924).

87. BAUDOT, *supra* note 7, at 8.