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Privacy Rights of Entertainers and Other Celebrities: A Need for Change

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PRIVACY RIGHTS OF ENTERTAINERS AND OTHER CELEBRITIES: A NEED FOR CHANGE

I. INTRODUCTION

The growth of mass media tends to make the world seem like a relatively small global community. As such, it has become increasingly difficult for individuals to remain isolated from events and people around them. One consequence of this is that people often lose some of the privacy they once enjoyed. The situation is analogous to a small town compared to a large city. The smaller the town, the more everyone knows about everyone else's business. No one class of individuals suffers more of a loss of privacy than entertainers and other celebrities such as professional athletes. Public officials also come under close scrutiny with a resulting loss of privacy. Public officials, however, do not usually have to worry about anyone using their names or pictures in a commercial advertisement.

There are numerous entertainment trade magazines that have a tendency to reveal matters to the public that celebrities would rather keep to themselves. Have entertainers lost all of their privacy rights? If not, what type of protection does the law give celebrities? In fact, there have been hundreds of cases that have dealt with entertainers' privacy rights. The results have not been overly successful from the celebrity's point of view. While the privacy

rights of such public figures are important, there are also rights vested in those people who have disturbed the privacy of the celebrity.

All individuals retain some degree of a right to privacy. At the same time, these rights must be balanced with our first amendment rights of free speech and press. It is now evident that an individual's right to say whatever he wants often overrides, to a substantial degree, the privacy rights of another individual. This situation is especially true in cases involving entertainers. Thus, in a privacy action, the first amendment provides the strongest defense a defendant can maintain.

This paper will attempt to illustrate the various methods of privacy analysis that take place throughout the United States. After a brief explanation of the historical development of privacy law, the required elements of a privacy claim will be set forward. The next topic of discussion will focus on the difference between the right of privacy and the right to publicity. Following these introductions into the law of privacy, there will be a detailed study of the elements of a privacy law claim. The special problems involving credit disputes will also be examined. A study of the various defenses to privacy claims will be discussed last. Throughout the paper, an attempt to suggest possible reforms in privacy law will be included.

II. Nature Of The Right Of Privacy

A. *Historical Development*

The doctrine that an individual has the "right to be let alone"[1] was not developed until the late nineteenth century. The cornerstone of privacy law development was a Harvard law review article written by Samuel Warren and Louis Brandeis in 1890.[2] The article stressed the need for an enforceable right of privacy due mainly to excesses committed by the press.

Although the article apparently influenced the legal scholars of the time, the first major court case to be decided after the article's publication rejected the "right" of privacy.[3] The opinion was widely criticized and led to the enactment in New York of the nation's first privacy statute. The law prohibited persons to use the name, portrait, or picture of another for advertising purposes with-

1. T. Cooley, Law of Torts 29 (2d ed. 1888).
2. Warren & Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890).
3. Roberson v. Rochester Folding Box Co., 171 N.Y. 38, 64 N.E. 442 (1902).

out that person's written consent. The act called for the imposition of criminal and civil penalties.[4]

Courts throughout the country also began to recognize a common law right of privacy. In *Pavesich v. New England Life Insurance Co.*,[5] the court held that a distinct right of privacy existed. Today, all states except Minnesota recognize a right of privacy, either by statute or the common law.[6]

The right has been characterized as the "right to be let alone."[7] The right of privacy exists to compensate the mental distress caused by the disclosure of private facts, even though the disclosure may be true.

> Two distinct interests appear to be protected under the general rubric of a 'right to privacy.' The first protects that right in its more conventional sense, and permits a private individual to recover damages for injured feelings and general embarrassment if . . . he is unjustifiably subjected to the harsh . . . and unwelcome glare of publicity. The second — almost obverse of the first — protects public figures from having the publicity value of their names and reputations unlawfully appropriated by others.[8]

A corporation does not have a right of privacy.[9]

Four types of protected privacy rights arise from these two general interests. The first is that of unreasonable intrusion.[10] This occurs when an individual's solitude or seclusion is disturbed, including interference with the person or his private affairs.[11] Eavesdropping is an example of such a privacy violation. Some commentators have said that the prevention of unreasonable intrusion is most deserving of the term "privacy," as it most directly protects the right to be let alone.[12]

A second privacy invasion occurs when there is a public disclosure of a private fact.[13] Although individuals may not expect to keep all events in their lives a secret, the law recognizes that there

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4. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1987).
5. 122 Ga. 190, 50 S.E. 68 (1905).
6. Hendry v. Conner, 303 Minn. 317, 226 N.W.2d 921 (1975).
7. Cooley, *supra* note 1, at 29.
8. Grant v. Esquire Inc., 367 F. Supp. 876, 879-80 (S.D.N.Y. 1973) (citations omitted).
9. Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (1947). *But c.f.* United States v. Morton Salt Co., 338 U.S. 632 (1950) (A corporation "cannot claim equality" with individuals in the enjoyment of a right to privacy).
10. W. Prosser & W. Keeton, The Law of Torts § 117 (1984).
11. *Id.*
12. Davidson & Kunkel, *The Developing Methodology for Analyzing Privacy Torts*, 6 Hastings J. Comm. & Ent. L. 43, 63 (1983).
13. W. Prosser & W. Keeton, *supra* note 10, at 856.

is a line to be drawn when the event concerning the person is not deemed to be of "public interest."[14] The third privacy invasion recognizes that an individual has a right not to be put before the public in a false light.[15] Courts recognize that it is wrong to say that an individual endorses something when in fact the individual does not endorse it. The defendant in such a case has put the plaintiff in a "false light."

The final and most common privacy invasion is called appropriation.[16] Appropriation occurs when the defendant uses the plaintiff's name or likeness for the defendant's benefit or advantage.[17] The plaintiff need not be a celebrity in an appropriation suit, but such is usually the case.

The general principles of privacy law, however, are given special limitations when the plaintiff involved is a public figure. It is clear today that such individuals do not have the same amount of privacy protection afforded to "private" persons. There are three reasons for this result. First, the public figures have sought publicity and have consented to it. Second, their personalities and affairs have become "public" and are no longer their private business. Third, the press has a right to inform the public about those who have become matters of public interest.[18]

As to the third explanation above, "public interest," courts and legislatures have tried to define when something should be classified as such. In *Ali v. Playgirl*,[19] the court held that an unauthorized use of an individual's picture is not violative of New York's privacy statute if the use is newsworthy or in connection with an item of news.[20] The "public interest" standard, therefore, seems to be a standard of newsworthiness.

The question then becomes what is the standard of newsworthiness? In *Virgil v. Time, Inc.*,[21] the Ninth Circuit defined a newsworthiness standard:

> In determining what is a matter of legitimate public interest, account must be taken of customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. The line is to be drawn when the publicity

14. *Id.*
15. *Id.* at 863.
16. *Id.* at 851.
17. *Id.*
18. Prosser, *Privacy*, 48 CAL. L. REV. 383, 411 (1960).
19. 447 F. Supp. 723 (S.D.N.Y. 1978).
20. *Id.* at 727.
21. 527 F.2d 1122 (9th Cir. 1975).

> ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[22]

Another major issue is that of damages. If the privacy violation is one of the first three types — unreasonable intrusion, public disclosure of a private fact or false light — the damages likely will be nominal.[23] The theoretical basis for these privacy torts is that there has been an injury to personal feelings. Most courts have found such damages to be uncertain at best and have refused to allow substantial damage awards.[24] However, when the injury results from an appropriation, the damages will be greater because celebrities have a monetary value associated with their name, image, or likeness.[25] Their "personality" may be worth a large sum of money.

B. Elements of a Privacy Claim

There are three basic elements necessary to maintain a privacy claim. 1) The use of one's name, image, or likeness, 2) without consent, 3) for another's benefit, usually a commercial benefit.[26]

These elements will usually arise in an appropriation case. The elements can also be used in false light and public disclosure of private facts cases. The unreasonable intrusion scenario will not normally trigger this type of privacy claim, unless the "gains" of such interference are publicized. For example, no one would argue that it is an unreasonable intrusion when a photographer jumps over a fence in a celebrity's backyard and takes a picture of the person in a very unflattering position. The photographer may sell the picture to a trade magazine. If the picture is published, a number of privacy rights are violated. Not only is there a possible cause of action for appropriation and public disclosure of a private fact, there is also a cause of action for unreasonable intrusion.

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22. *Id.* at 1129.

23. *E.g.*, Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

24. *But see* Jonap v. Silver, 1 Conn. App. 550, 561, 474 A.2d 800, 807 (1984) (plaintiff recovered $32,000 in damages for mental distress).

25. *See, e.g.*, Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974).

26. T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW 18-18 & 18-19 (1986).

C. *Right Of Privacy Distinguished From a Right to Publicity*

Courts recognize a cause of action called the right to publicity. This is the right of an individual to control and profit from the value of his own identity.[27] Privacy claims are usually brought to compensate for the hurt feelings or embarrassment of the plaintiff. However, this is not usually the case when the privacy claim is based on an appropriation theory. In this sense, appropriation and the right to publicity are very similar and hard to distinguish. The privacy and publicity rights are nevertheless usually held to be separate.[28]

The functions of each right are different. The distinctive aspect of the right to publicity is that it recognizes the commercial value of the name or likeness of a public figure and protects his proprietary interest in the profitability of his public reputation or "persona."[29] Therefore, a publicity action is based upon the defendant's attempt to broadcast or publish that which the performer usually gets paid for.[30] The Eighth Circuit held that a professional baseball star, Orlando Cepeda, had a valuable property right in his name, image, and photograph which he could sell.[31]

It is also true, however, that a celebrity may bring a privacy action for appropriation. In fact, a celebrity may have to bring his suit as a privacy claim rather than a publicity claim if the "appropriated" attribute was one that the celebrity had never commercially exploited himself.[32] In most cases, however, celebrities want to profit from the publicity value of their names, and are not as concerned with compensation for emotional harm. Private individuals do not really have the same choice between the two theories because the commercial value of their names and likenesses is minimal. For those lacking fame, therefore, a privacy action against appropriation is adequate.

There are several other differences as well. The right to publicity is transferrable and assignable, unlike the right of privacy.[33] Furthermore, most courts hold that the right to publicity survives

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27. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

28. *Id. But see* Stephano v. News Group Publications, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984) (right of publicity considered an aspect of the right to privacy).

29. Ali v. Playgirl, 447 F. Supp. 713, 728 (S.D.N.Y. 1978).

30. Lerman v. Flynt Distributing Co., 745 F.2d 123, 134 (2d Cir. 1984).

31. Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969).

32. *Ali*, 447 F. Supp. at 727.

33. *Cepeda*, 415 F.2d at 1205.

the death of the individual,[34] whereas the right of privacy does not.[35] Many courts have confused the two theories. This is not surprising given the theoretical similarities between appropriation and the right to publicity. In *Lugosi v. Universal Pictures*,[36] Bella Lugosi's property interest in his "persona" terminated upon his death. The court said that the right of privacy, not publicity, was at stake. The probable reason for this was that the plaintiffs, relatives of the deceased actor, characterized the action as a privacy action and not a publicity action. The court felt bound to use an invasion of privacy analysis.

A more reasoned approach can be seen in *Brinkley v. Casablancas*.[37] Fashion model Christie Brinkley filed an invasion of privacy suit for the unauthorized publication of posters featuring the plaintiff.[38] The court felt that Brinkley should have brought a publicity action. Nevertheless, the court allowed the case to continue as a privacy action because the facts and issues were basically the same for both types of actions. The New York Court of Appeals has continued to hold that the state's privacy statute encompasses the right to publicity after the decision in *Brinkley*.[39] While this supports the court's analysis in *Brinkley*, it also brings doubt upon the precedential value of previous New York decisions which found publicity violations but no statutory privacy violations.[40] Other commentators agree that the appropriation doctrine does not protect privacy per se, but publicity.[41]

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34. Price v. Hal Roach Studios, 400 F. Supp. 836 (S.D.N.Y. 1975); Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Products, 694 F.2d 674 (11th Cir. 1983).

35. *See, e.g.*, Flynn v. Higham, 149 Cal. App. 3d 677, 680, 197 Cal. Rptr. 145, 149 (1983). There is no common law action for a violation of a deceased's right of privacy. At least five states do provide for such a cause of action by statute. *See* NEB. REV. STAT. § 20-208 (1983); OKLA. STAT. ANN. tit. 21, § 839.1 (West 1983); VA. CODE ANN. § 8.01-40 (1984); FLA. STAT. § 540.08 (1972); TENN. CODE ANN. § 47-25-1104 (1984).

36. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

37. 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

38. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1987).

39. Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584, 485 N.Y.S.2d 220, 224 (1984). *See also* Note, *A Legendary Private Affair*, 5 CARDOZO ARTS & ENT. L.J. 315 (1986).

40. *See, e.g.*, Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

41. Davidson & Kunkel, *supra* note 12, at 89.

III. Elements Of A Privacy Action In Detail

A. *Use of a Person's Name, Image or Likeness*

For an entertainer or celebrity to prevail in a privacy action, the individual must have been identifiable and the received publicity undesirable.[42] Pictures are not required. Representations which are recognizable as the likeness of the plaintiff are sufficient.[43] For example, in *Ali v. Playgirl*,[44] *Playgirl* magazine published a nude cartoon caricature which, though not directly naming him, was meant to be a likeness of boxer Muhammad Ali. Privacy actions also include fictional works where the identity of the plaintiff can be rationally suspected.[45]

There are a growing number of cases that allow a cause of action in situations where a look-a-like of a celebrity has been used to advertise the defendant's product. In *Onassis v. Christian Dior-New York, Inc.*,[46] Jacqueline Kennedy Onassis sued a clothing manufacturer for using an actress that looked like Ms. Onassis in one of its television commercials. The court noted that even though the privacy statute was to be strictly construed as to the "name, portrait or picture" requirement, the use of other "real" celebrities in the advertisement gave the overall impression that the Onassis look-a-like was in fact Jacqueline Onassis.[47]

A similar case is *Allen v. National Video, Inc.*,[48] where the court found for the plaintiff, Woody Allen, by applying section 43 of the Lanham (Trademark) Act.[49] The Lanham Act prohibits the use of advertising that creates a likelihood of consumer confusion. Since the actor in the commercial looked similar to Woody Allen, the court found that there was a likelihood of consumer confusion. The court also gave a privacy analysis, stating that a look-a-like may not actually represent himself to be the person he looks like.[50] The court also stated that the privacy statute did not require an actual "picture" as long as most persons recognized the picture of the look-a-like to be that of Allen.[51]

Although a celebrity's name, image, or likeness is protected,

42. Negri v. Shering Co., 333 F. Supp. 101 (S.D.N.Y. 1971).
43. Ali v. Playgirl, 447 F. Supp. 713, 728 (S.D.N.Y. 1978).
44. 447 F. Supp. 713 (S.D.N.Y. 1978).
45. Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).
46. 122 Misc. 2d 603, 472 N.Y.S.2d 254 (1984).
47. 122 Misc. 2d at 610; 427 N.Y.S.2d at 260.
48. 610 F. Supp. 612, 628 (S.D.N.Y. 1985).
49. 15 U.S.C. § 1125(a) (1982).
50. *Allen*, 610 F. Supp. at 623.
51. *Id.* at 624.

his voice is not.[52] In *Lahr v. Adell Chemical*,[53] actor Bert Lahr filed a privacy action to prohibit a cosmetics company from using Lahr's distinctive style of vocalization. Lahr's voice was being imitated by a voice impersonator in a series of commercials featuring the voice as belonging to a cartoon duck. The court declined to extend privacy rights to a person's voice, even though the voice "identified" the plaintiff as being the speaker.[54]

Similarly, an entertainer's mannerisms and style of performance are generally not protected under privacy laws. In *Lombardo v. Doyle, Dane & Bernbach, Inc.*,[55] orchestra conductor Guy Lombardo was an unsuccessful privacy plaintiff. He brought suit against a company that produced a car commercial featuring a man directing an orchestra at a New Year's Eve party. Lombardo claimed that this was a "trademark" of his. Although the actor in the commercial did not physically resemble Lombardo, he did use Lombardo's recognizable mannerisms while conducting the orchestra. Lombardo sued for breach of contract, invasion of privacy, and violation of his right to publicity. In rejecting the privacy claim, the court said that the New York privacy statute did not include "personality" and "style of performance," and thus refused to read those attributes into the "name, portrait or picture" provisions.[56]

If a celebrity is not directly recognizable in a picture, he may still have a cause of action if the context around the pictured individual would lead a person to believe that the individual was the plaintiff.[57] In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,[58] the plaintiff, a well known race car driver, sued Reynolds for appropriation of his likeness in a cigarette commercial. The plaintiff himself could not be recognized, but his racing car could be recognized, thus enabling people to infer that the driver was the plaintiff. Motschenbacher's car had such a distinctive look and well-known racing number that alterations made to "disguise" the car in the commercial failed. The court ruled in favor of the plaintiff.

When use of a celebrity's name is at issue, most jurisdictions hold that the name used does not have to be the actual name of the plaintiff. As long as the name is associated with the plaintiff

52. Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962).

53. 300 F.2d 256 (1st Cir. 1962), *vacating* 195 F. Supp. 702 (D. Mass. 1961).

54. *Lahr*, 300 F.2d at 258.

55. 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

56. *Id.* at 622, 396 N.Y.S.2d at 664 (Lombardo's breach of contract and publicity claims were not dismissed).

57. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

58. *Id.*

and "identifies" him, an action will lie. In *Hirsch v. S.C. Johnson & Son*,[59] Elroy "Crazylegs" Hirsch, a former professional football player, sued when the defendant named one of its products "Crazylegs." The court held that the name was so identified with the plaintiff that people may take the product's name as an endorsement of the product by Hirsch or think that he was associated with it.[60]

Dean Prosser supports this position by giving an interesting hypothetical. He contends that it would be ridiculous to believe that Samuel Clemens would have a cause for action for appropriation and yet that Mark Twain would not.[61] The absurdity is realized when one considers the publicity value of "Samuel Clemens" compared to that of "Mark Twain." Yet despite the inherent logic of this approach, a minority of courts require that the name appropriated be the plaintiff's actual name.[62] In *Geisel v. Poynter Products, Inc.*,[63] the court ruled that Theodor (Dr.) Seuss Geisel could not bring an action to prohibit a company from producing "Dr. Seuss" dolls without his consent because the New York statute did not protect assumed or trade names.[64] However, the use of a surname without more is actionable if it identifies the plaintiff.[65]

B. Lack of Consent

For an action to lie in privacy, the use of the name, image or likeness of the celebrity must be without the celebrity's consent. In the states that recognize a common law right of privacy, written consent is not required.[66] Most states that create a statutory right of privacy require written consent to be given.[67] Two notable exceptions are California and Tennessee.[68] Oral consent will not pro-

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59. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

60. *Id.* at 398-99, 280 N.W.2d at 137-38.

61. Prosser, *supra* note 18, at 404 n.174.

62. *See* Geisel v. Poynter Products, Inc., 295 F. Supp. 331 (S.D.N.Y. 1968); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (court implied that the phrase "Here's Johnny" on defendant's portable toilets would not violate the privacy statute because the phrase was neither the name nor likeness of Johnny Carson. The court found for Carson on a right to publicity theory).

63. 295 F. Supp. 331 (S.D.N.Y. 1968).

64. *Id.* at 355.

65. Adrian v. Unterman, 281 A.D. 81, 118 N.Y.2d 121 (1952), *aff'd*, 306 N.Y. 771, 118 N.E.2d 477 (1954) (the plaintiff, a fashion designer, was known only by his last name and labeled his merchandise as such).

66. *See* Buzinski v. DoAll Co., 31 Ill. App. 2d 191, 197, 175 N.E.2d 577, 580 (1961).

67. *See, e.g*, Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981)

68. CAL. CIV. CODE § 3344 (West Supp. 1987); TENN. CODE ANN. §§ 47-25-1101-08

tect a defendant in such a jurisdiction. It is also wise for a person who consents to use of the name, image, or likeness, to create an express contractual provision limiting the ways in which use may be made.[69]

It is clear that substantial alteration to what was consented to will vitiate that consent.[70] In *Russell v. Marboro Books*,[71] the court held that a photograph that had been retouched so as to put the plaintiff, a model, in a different situation than the one in which she was actually photographed vitiated her consent to have the photograph published. However, if the alteration is not substantial, the consent of the plaintiff is not vitiated, even if the result is "exaggerated" and "objectionable."[72]

In some states an infant cannot disaffirm a parent's consent.[73] In *Shields v. Gross*,[74] actress/model Brooke Shields sued to disaffirm the consent given by her mother to a photographer to publish certain nude pictures taken of Ms. Shields when she was a young girl. After a lengthy legal battle, the court said that once a parent gives consent to another on behalf of a child, such consent cannot be revoked under New York statutory law by the child, even when she reaches the age of majority. When a photograph is at issue, the general rule is that the consent of the person(s) photographed is necessary and the mere consent of the photograph's owner will not protect the defendant.[75] Not even the agent of the person photographed has authority to grant permission to publish the photograph.[76]

C. *The Defendant Must Have Benefitted From the Invasion*

Most jurisdictions hold that the benefit incurred by the use of a celebrity's name, image, or likeness must be commercial in na-

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(Michie 1984).

69. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-56.

70. *Id.* at 18-50.

71. 18 Misc. 2d 166, 183 N.Y.S.2d 8 (1959).

72. Dahl v. Columbia Pictures, 12 Misc. 574, 166 N.Y.S.2d 708 (1957), *aff'd*, 7 A.D.2d 969, 183 N.Y.S.2d 992 (1959). *See also* Faloona v. Hustler Magazine, 607 F. Supp. 1341 (N.D. Tex. 1985) (Hustler magazine had the right to publish two young girls' nude pictures which accompanied a book review of other works in which the girls had consented to be photographed in the nude).

73. Shields v. Gross, 58 N.Y.2d 338, 345, 448 N.E.2d 108, 111, 461 N.Y.S.2d 254, 257 (1983).

74. 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254, (1983).

75. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-58.

76. Wilk v. Andrea Radio Corp., 200 N.Y.S.2d 522 (1960), *modified*, 13 A.D.2d 745, 216 N.Y.S.2d 662 (1961).

ture, such as use by a profit-making business venture.[77] Some courts rule by analogy, however, that the benefit does not have to be financial in nature, as when a name is falsely added to a petition.[78]

In *Allen v. National Video, Inc.*,[79] the court set a standard to determine commercial use.

> [The] use in an advertisement of a [picture] which has no other purpose than to represent its subject, must give rise to a [privacy claim], because it raises the obvious implication that its subject has endorsed or is otherwise involved with the product being advertised. There is no question that this amounts to an appropriation of another's likeness for commercial advantage.[80]

When the use is commercial in nature, it must be directly related to the commercial gain by the defendant.[81] An incidental use of the plaintiff's name, image, or likeness is not enough.[82] In *Gautier v. Pro-Football, Inc.*,[83] a famous animal trainer performed at a halftime show of a professional football game. His contract specifically prohibited the telecast of his act. However, the halftime show was aired and Gautier sued for invasion of privacy. The court ruled that there was no appropriation because it was not used for commercial purposes inasmuch as the act was just part of the football game's "overall spectacle," and thus, its use was incidental to the commercial gain of the defendant.[84]

D. Appropriation and False Light Causes of Action

Problems arise when a celebrity's name, image or likeness is used to indicate that the person is somehow involved with the "product" being exploited. The product may be a motion picture, literary work, or a simple "everyday" commercial product. This list, of course, is not all inclusive. In credit disputes, two of Prosser's privacy rights, appropriation and false light, are usually involved.[85]

False light cases usually occur when a celebrity is given a false

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77. *See, e.g.*, Wallace v. Weiss, 82 Misc. 2d 1053, 1054, 372 N.Y.S.2d 416, 420 (1975) (a student run, non-profit organization not liable because their use was non-commercial).
78. *Cf.* Schwartz v. Edrington, 133 La. 235, 62 So. 660 (1913).
79. 610 F. Supp. 612 (S.D.N.Y. 1985).
80. *Id.* at 622.
81. Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952).
82. Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (1947).
83. 304 N.Y. 354, 107 N.E.2d 485 (1952).
84. *Id.* at 360, 107 N.E.2d at 488-89.
85. W. PROSSER & W. KEETON, *supra* note 10, at 851, 863.

attribution of authorship or his name is used without consent in a false endorsement. Appropriation usually occurs when a celebrity's name, image, or likeness is associated with a product without consent. Although the line between false light and appropriation seems confusing, Prosser has attempted to distinguish the two causes of action.[86] First, he argues that false light is usually defamatory whereas appropriation is not.[87] Second, he points out that a false light action requires "falsity" but appropriation does not. Finally, he contends that the defendant is advantaged in an appropriation case but not in a false light case.

It seems, however, that there is a growing resistance to false light actions.[88] False light actions are tougher to win compared to appropriation actions. Indeed, at least as far as celebrity plaintiffs are concerned, there is usually no need for a separate false light cause of action. In most instances an appropriation theory will be adequate to compensate the celebrity-plaintiff. For instance, in one case the plaintiff's name was included in an advertisement that listed several of the product's "satisfied customers."[89] In fact, the plaintiff, an attorney, was not at all satisfied with the product and had previously informed the defendant of his dissatisfaction.[90] He was therefore put before the public in a false light.[91] At the same time, however, it cannot be said that the plaintiff was defamed.[92] Furthermore, the false endorsement was also an appropriation of the plaintiff's name for commercial purposes.[93] Thus, the first and third of Prosser's distinguishing characteristics between false light and appropriation are not as distinguishing as they would first appear to be.

Prosser's second distinguishing characteristic is also easily attacked. In *Hirsch v. S.C. Johnson & Son*,[94] the plaintiff, a well known football player, sued to have his recognized nickname,

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86. *Id.* at 814.

87. It is clear, however, that the false light need not be defamatory. It is enough that the false light is offensive and objectionable to a reasonable person. *See* Williams v. ABC, Inc., 96 F.R.D. 658 (W.D. Ark. 1983).

88. *See, e.g.*, Strutner v. Dispatch Printing Co., 2 Ohio App. 3d 377, 442 N.E.2d 129 (1982) (plaintiff, whose picture was used in an article about drug use in schools, unable to maintain a claim because the picture was used to illustrate a non-commercial newsworthy event).

89. Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

90. *Id.* at 91, 291 P.2d at 200.

91. *Id.* at 87, 291 P.2d at 197.

92. *Id.*

93. *Id.*

94. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

"Crazylegs," removed from one of the defendant's products. The plaintiff did not want people to think that he was associated with the product.[95] He claimed the defendant's use of his nickname put him in a false light with regard to the product.[96] At the same time, the use of his name was also an appropriation. The appropriation was effected without the consent of the plaintiff. Thus, this action also involved "falsity" in a real sense, because, the defendant company falsely appropriated Hirsch' nickname.

The previous two cases illustrate that all three of Prosser's distinguishing characteristics are not truly effective when the privacy rights of a celebrity are at stake. Therefore, courts should be reluctant to use false light reasoning when there is also a good argument that appropriation should be the real issue before the court. Such judicial restraint would be helpful for celebrities and would actually protect to some extent what few privacy rights that remain. Such a conclusion follows from the fact that different standards are used depending on whether the case is characterized by the court as a false light case or an appropriation case.

The standard to be applied by the court in a false light case was set forth in *New York Times Co. v. Sullivan*.[97] A plaintiff must prove that the defendant acted with knowledge of the publication's falsity or with a reckless disregard of the truth of the matter published.[98] It has been historically difficult for plaintiffs to meet this burden when the defendant is a media enterprise. In an appropriation case, the *New York Times Co. v. Sullivan* standard is not applicable.[99] In *Zacchini v. Scripps-Howard Broadcasting Co.*,[100] the Supreme Court of the United States held that the commercial use of one's fame was a recognizable property right that an individual could keep from being exploited. This is because in many cases, the person's fame goes to his ability to earn a living as an entertainer. An appropriation case thus appears to be easier to win than a false light case. An entertainer may enjoy more of a right of privacy by protecting his or her rights with the appropriation cause of action. Although the effects of applying one or the other of these

95. *Id.* at 385, 280 N.W.2d at 132.

96. *Id.*

97. 376 U.S. 254 (1964).

98. Douglass v. Hustler Magazine, 769 F.2d 1128 (7th Cir. 1985).

99. *Cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

100. *Id.* at 576. This case represents a classic "right to publicity" action. However, it is likely that a privacy action based on appropriation would receive the same standard, because the rights and issues in both types of cases are essentially the same. *See also* Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981).

causes of action may not be drastic, any reprieve from the virtual total lack of privacy that exists today would be a step in the right direction.

IV. CREDIT DISPUTES

There are generally five factual situations where problems concerning credit, also known as "billing," arise.[101] They are 1) false imputation of authorship or affiliation; 2) false endorsement; 3) commercial tie-ins; 4) where the credit itself is the exploited merchandise; and 5) premiums.[102]

A false imputation of authorship occurs when a celebrity's name is added to a work implying the celebrity's input into the work when in fact the celebrity had nothing to do with it. A cause of action for false imputation of affiliation occurs when a defendant is unjustly enriched by having the celebrity associated with the product without consent.[103]

A false endorsement occurs when an individual's name, image or likeness is used with a product in such a way that it is inferred that the individual approves of the product.[104] The courts have ruled that such "pretended endorsements" are a violation of one's right to privacy.[105]

A commercial tie-in is the use of a celebrity's name, image or likeness in physical proximity to the defendant's product so as to attract attention to the product.[106] No express endorsement is usually indicated, but it can easily be implied. Such a violation was at issue in *Grant v. Esquire, Inc.*[107] Actor Cary Grant sued *Esquire* magazine for invasion of privacy when *Esquire*, without Grant's consent, superimposed a picture of the actor's head on a picture of a model's body in a clothing advertisement. The picture of Grant had been cut from a previous authorized picture of the actor that had appeared in *Esquire* some years before. The caption of the advertisement did not suggest that Grant was endorsing the clothing. On cross motions for summary judgment, the court ruled that Grant could prevail if a jury concluded that the picture was used

101. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-103 & 18-104.

102. *Id.*

103. Hirsch v. S.C. Johnson & Son, 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

104. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-106.

105. *See, e.g.*, Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 87, 291 P.2d 194, 197.

106. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-108.

107. 367 F. Supp. 876 (S.D.N.Y. 1973).

for a commercial purpose.[108]

There are situations where the credit itself is the merchandise being exploited. This occurs when the person's name, image, or likeness represents the very subject matter of the disputed property.[109] An example would be a poster for sale featuring the likeness of the celebrity.[110]

The final credit violation occurs when a celebrity's name, image, or likeness is used in connection with a "premium" without consent.[111] A premium is a special offer or giveaway used by a company to promote the sale of a product.[112] In *Cepeda v. Swift & Co.*,[113] the court ruled that by granting Wilson Sporting Goods Company the "exclusive right" to make baseballs with the plaintiff's name on them and "to license others to do so" without any specific restrictions upon the right, Orlando Cepeda was therefore foreclosed from asserting that Swift & Company could not use the baseballs to promote its meat products. Swift had legally obtained the right to do so through Wilson.[114] *Cepeda* stands for the proposition that if a celebrity wishes to restrict his consent, he had better say so specifically — in writing.

V. Defenses To Privacy Actions

Although celebrities seem to have several ways to protect their privacy rights, their suits are not always successful. There are several defenses a violator may use to shield himself from liability: the first amendment, truthful credit attribution, and incidental use.

A. First Amendment

The courts have held that when a person's name, image, or likeness has been used with a matter which has been given first amendment protection, the privacy claim will not be used to constrict the free flow of ideas.[115] Matters subject to first amendment protection include items that are informative and educational, cur-

108. *Id.* at 881.

109. T. Selz & M. Simensky, *supra* note 26, at 18-108.

110. Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (N.Y. App. Div. 1981) (Model Christie Brinkley won her suit where the defendant had distributed posters of the model without her consent).

111. T. Selz & M. Simensky, *supra* note 26, at 18-109 & 18-110.

112. *Id.*

113. 415 F.2d 1205 (8th Cir. 1969).

114. *Id.*

115. Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (the first amendment transcends the right of privacy).

rent news, and articles of public interest, including those that convey information about public figures.[116]

Therefore, a publication's defense in a false light action is analogous to that in libel law.[117] The plaintiff must show actual malice if he is to win his privacy suit.[118] This is also true because most courts have found entertainers and other celebrities to be at least limited purpose public figures.[119] Thus it was held that actress Ann-Margret did not have a valid privacy claim when *High Society* magazine reproduced a movie "still" in which the plaintiff was semi-nude. The court ruled that the magazine had a right to publish the photograph as it depicted a public performance by a public figure.[120] If the medium employed is traditionally protected by the first amendment, such as a newspaper, then the particular format conveying the information for which the plaintiff seeks damages is also exempt from liability. Cartoons, comic books and gossip columns are examples of such protected formats.[121]

If the medium used to convey the information is a commercial product and not one that has traditionally enjoyed first amendment protection, then a privacy action will probably succeed. For instance, board games have been held not to be protected.[122] Thus, newsworthy articles may disclose a professional athlete's statistics without compensation to the athlete, but other types of commercial products may not. In *Stephano v. News Group Publications*,[123] the court held that it is the content of a published article and not the defendant's motive to increase circulation that determines if the article is newsworthy, as opposed to the trade usage. In *Stephano*, the plaintiff, a model, sued when his picture appeared

116. Donahue v. Warner Bros. Pictures, 194 F.2d 6, 12 (10th Cir. 1952).

117. Lerman v. Flynt Distributing Co., 745 F.2d 123, 137-38 (2d Cir. 1984).

118. Douglass v. Hustler Magazine, 769 F.2d 1128, 1140 (7th Cir. 1985). *Cf.* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988) (emotional distress claim arising from published parody also must meet the standard established in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See supra* note 97 and accompanying text.)

119. *See, e.g., Ann-Margret*, 498 F. Supp. at 404 (actress Ann-Margret ruled a public figure); *Douglass*, 769 F.2d at 1141 (entertainers can be public figures for first amendment purposes); and *Lerman*, 745 F.2d at 132 (author Jackie Collins Lerman held to be a limited purpose public figure for purposes of sexual discussions).

120. Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401, 406 (S.D.N.Y. 1980).

121. Molony v. Boy Comics Publishers, Inc., 277 A.D. 166, 171, 98 N.Y.S.2d 119, 122 (N.Y. App. Div. 1950) (publisher had the right to portray plaintiff's heroic deeds in a comic book).

122. *See, e.g.*, Uhlaender v. Henrickson, 316 F. Supp. 1277 (D. Minn. 1970); Palmer v. Schonhon Enterprises, 96 N.J. Super. 72, 232 A.2d 458 (1967).

123. 64 N.Y.2d 174, 185, 474 N.E.2d 580, 585, 485 N.Y.S.2d 220, 225 (1984).

in an article on men's fashions. Because prices were listed along with locations where the clothes could be purchased, the model argued that the article was only an advertisement.[124] However, the court ruled that the article was a matter of legitimate public interest concerning the latest fashion trends.[125]

If the plaintiff-celebrity is no longer a current subject in the public's eye, the defendant may have first amendment protection if the plaintiff is still a subject of public interest.[126] In *Sidis v. F.R. Publishing Corp.*,[127] the plaintiff, a once famous child prodigy who later went into seclusion, sued the *New Yorker* when it published a biography of him. The court held that Mr. Sidis was still a subject of public interest and that the *New Yorker* had a first amendment right to print his life's story.[128]

There are four requirements necessary to invoke a first amendment defense in a privacy suit.[129] First, the presentation using the person's name, image, or likeness must be subject to first amendment protection, such as articles that are newsworthy.[130] The second requirement is that the relationship between the underlying presentation and the use of the person's name, image, or likeness may not place the person in a false light. The usage must also be representative or illustrative of the subject matter of the presentation. In *Metzger v. Dell Publishing Co.*,[131] the court held that the publishers of *Front Page Detective* did not have the right to use the young plaintiff's picture in a story entitled "Gang Boy" when there was no evidence that the boy was indeed involved in gang activity. The court noted that while the story was of legitimate public interest, the publishers did not have the right to drag the plaintiff into the discussion.[132]

The court in *Arrington v. New York Times Co.*[133] held that the unauthorized use of the plaintiff's picture in an article about the black middle class was permissible because the article was

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124. *Id.* at 185-86, 474 N.E.2d at 585, 485 N.Y.S.2d at 275-76.

125. *Id.*

126. Sidis v. F.R. Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940).

127. *Id.*

128. *Id.*

129. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-78 & 18-79.

130. Stephano v. News Group Publications, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S. 220 (1984).

131. 207 Misc. 182, 136 N.Y.S.2d 888 (1955).

132. 207 Misc. at 185, 136 N.Y.S.2d at 890.

133. 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941, *reh'g denied*, 57 N.Y.2d 669, 439 N.E.2d 884, 454 N.Y.S.2d 75 (1982), *cert. denied*, 459 U.S. 1146 (1983).

about a matter of public interest and the plaintiff was indeed a member of the black middle class. Therefore, his picture was illustrative of the article. However, the court only extended the privilege to the newspaper and not to the free lance photographer who took the picture or the photographic agency which sold the picture to the *Times*.[134]

The third requirement is that the underlying presentation must not be falsified. Thus, a fictionalized account of an actual historical event does not merit "privileged" use in a privacy suit.[135] However, if the publisher has made clear that the work is fictional, he may escape liability.[136] Thus, millionaire Howard Hughes was held to have no cause of action for an admittedly fictional "autobiography."[137]

Minor errors of historical fact do not amount to a falsification. When actress Janet Leigh wrote an article on her life for the trade magazine *Motion Picture*, she set the date of her marriage back one year as well as her own age.[138] Her ex-husband sued for an invasion of privacy claiming, among other things, that the story had been falsified. The court held that such errors were unsubstantial and were made by the actress to emphasize how very young she was when she was first married.[139]

It is also very clear today that substantial errors which falsify the presentation may also be defended if the errors were not made knowingly or with reckless disregard of the truth, and if the subject concerns a public figure or a matter of public interest.[140] In *Time, Inc. v. Hill*,[141] the plaintiff sued *Life* magazine when it reported on a play concerning a hostage incident in which the plaintiff was involved. The plaintiff claimed that the play had been fictionalized from the actual events. Indeed, it had been. However, the Supreme Court held that the public's interest in the story was strong, and that the *New York Times Co. v. Sullivan* standard[142]

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134. 55 N.Y.2d at 443, 434 N.E.2d at 1323-24, 449 N.Y.S.2d at 945.

135. *E.g.*, Youssoupoff v. CBS, 19 A.D.2d 865, 866, 244 N.Y.S.2d 1, 2 (N.Y. App. Div. 1963) (Steuer, J., concurring)(fictionalized play about the killing of Rasputin was not immune in privacy action as "informative" matter).

136. Rosemont Enterprises, Inc. v. McGraw-Hill Book Co., 85 Misc. 2d 583, 587, 380 N.Y.S.2d 839, 844 (1975).

137. *Id.*

138. Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962).

139. *Id.* at 738, 748, 20 Cal. Rptr. at 410, 420.

140. Time, Inc. v. Hill, 385 U.S. 374 (1967).

141. *Id.*

142. *See supra* note 97 and accompanying text.

of actual malice was the appropriate standard to apply in such cases. However, courts have held that the actual malice defense is not available when the person's name, image, or likeness is used in a completely exploitative, commercial manner.[143] Thus, when the presentation is not really made for "news" purposes, liability may attach.[144]

The final requirement necessary to invoke a successful first amendment defense is that the presentation may not constitute an advertisement in disguise. In *Reilly v. Rapperswill Corp.*,[145] a commercial for the defendant's products used a part of the plaintiff's newscast that featured the defendant. The court found a selfish, commercial exploitation of the newscast by the defendant and refused to extend to the defendant a privileged first amendment use of the newscast.[146]

B. Truth

When a person has given another the right to use their work, the person using the work has the right to tell the public that the author or artist is the creator or is otherwise associated with the work. In *Shaw v. Time-Life Records*[147] the court held that Time-Life had the right to say in a commercial for "Swing Era" records that Artie Shaw arrangements were included, as the arrangements had been previously placed in the public domain.[148]

C. Incidental Use

There are two types of incidental use defenses. The first is called *de minimis* use. This defense is available when the use of a person's name, image, or likeness is sufficiently inconsequential. In *Delan v. CBS, Inc.*,[149] the court held that a four second appearance of the plaintiff, a mental patient, and the use of the plaintiff's first name in a sixty minute television documentary about the deinstitutionalization of mental patients was too fleeting and incidental

143. T. SELZ & M. SIMENSKY, *supra* note 26, at 18-93.

144. *See, e.g.*, Eastwood v. Superior Court, 149 Cal. App. 3d 409, 425, 198 Cal. Rptr. 342, 352 (1983) (actor Clint Eastwood won a privacy suit against the *National Enquirer* magazine when it published a fabricated story about a "love triangle" between Eastwood, the actress Sondra Locke, and country music singer Tanya Tucker).

145. 50 A.D.2d 342, 344, 377 N.Y.S.2d 488, 491 (1975).

146. *Id.* at 345, 377 N.Y.S.2d at 492.

147. 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975).

148. *Id.* at 205, 341 N.E.2d at 820, 379 N.Y.S.2d at 394.

149. 91 A.D.2d 255, 260, 458 N.Y.S.2d 608, 614 (N.Y. App. Div. 1983).

to be actionable.[150]

The second incidental use defense arises when the person's name, image, or likeness is used to illustrate and advertise the quality and content of a traditionally protected first amendment presentation. Such use is considered incidental to the dissemination of the information in the presentation which is itself privileged. In *Namath v. Sports Illustrated*,[151] football star Joe Namath sued *Sports Illustrated* when it used his picture in conjunction with a subscription campaign. The photos had previously been used by the magazine in the coverage of sporting events. The court held that there is no privacy violation if the use of one's name and photo are limited to establishing the news content and quality of the media which uses the name and photograph.[152]

VI. CONCLUSION

Privacy law is relatively new when compared to other legal doctrines. Perhaps this explains why the law of privacy is in such a state of constant change, and, at times, uncertainty. These laws may vary greatly from state to state. What one court may call a privacy violation, another court may call a constitutionally protected publication.

Out of the confusion there can be seen a need for at least two changes in the area of privacy law. First, there should be a unification of the privacy tort of appropriation and the tort for a violation of one's right to publicity. The two torts, in fact, do deal with the same rights and issues and are interchangeable. Yet the results of a suit may be strikingly different depending on how the action is characterized. It is time to merge privacy and publicity and create a new set of rules that will be equally applied in both types of situations. New York has declared that privacy and publicity are now one and the same; however, the state must now redefine the rules so that each action is consistent with the privacy statute. As the law now stands, many of the common law attributes of the right to publicity are not yet subsumed by the privacy statute. This situation needs to be rectified. Once this has been accomplished, other states should adopt the New York model.

The second change that should be made is to allow the celebrity-plaintiff to decide whether he wants his case to be character-

150. 91 A.D.2d at 260, 458 N.Y.S.2d at 614.

151. 80 Misc. 2d 531, 363 N.Y.S.2d 276, *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 877, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

152. *Id.* at 534, 363 N.Y.S.2d at 278.

ized as a false light case or an appropriation case. There are, as mentioned, many instances which can be classified as either false light or appropriation. Yet, the likelihood of success depends on what standard the court uses to judge a defendant's action. If the actual malice standard is used, then the chance of victory for a celebrity-plaintiff is greatly diminished. This result is not fair to a celebrity who has already suffered enough of a loss of his privacy rights.

Individuals deserve a certain amount of privacy, and celebrities are no exception. Steps like the two proposed need to be taken in order to stop the erosion of privacy rights and give back some privacy rights that have already been taken away.

*L. Lee Byrd**

* To my mother and father, they know what they have done and I thank them.