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## Privacy, Appropriation, and the First Amendment: A Human Cannonball's Rather Rough Landing

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## COMMENTS

### Privacy, Appropriation, and the First Amendment: A Human Cannonball's Rather Rough Landing

It should be obvious at once that these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, *and confusion may follow*.<sup>1</sup>

#### I. INTRODUCTION

When Dean Prosser first delineated his by-now-famous four categories of invasion of privacy,<sup>2</sup> he was careful to add the above caveat. A plaintiff complaining of appropriation of his name or likeness might well be asserting completely different interests than a plaintiff seeking redress for public disclosure of private facts. Distinct differences also exist between the other categories, intrusion upon physical solitude or seclusion and publicity placing the plaintiff in a false light. If these varying interests and differences are not recognized, confusion could well follow.

And Hugo Zacchini, for one, has no doubt that confusion indeed did follow.

Mr. Zacchini occupies a rather special niche in the entertainment field, that of a human cannonball. He allows himself to be hurtled from the mouth of a cannon into a net some 200 feet away to the awe of onlookers at county fairs and other places of amusement.<sup>3</sup> On August 30, 1972, Zacchini was performing his feat at the Geauga County Fair in Burton, Ohio. Also present that day was a reporter for the Scripps-Howard Broadcasting Company, operator of television station WEWS in Cleveland. The reporter was carrying a small movie camera. Zacchini noticed the reporter

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1. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (emphasis added).

2. Prosser delineated these categories as:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

*Id.*

3. *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849, 2851 (1977).

and requested that his act not be filmed.<sup>4</sup> The reporter responded that Zacchini had no right to restrict filming of a newsworthy event.<sup>5</sup> Over Zacchini's express objection, the act was filmed the following day and presented as a 15-second segment of the station's 11 o'clock news program. Zacchini then filed a lawsuit, charging that use of the film clip constituted an "unlawful appropriation of his professional property."<sup>6</sup> The trial court granted the defendant's motion for summary judgment,<sup>7</sup> and Zacchini undauntedly petitioned the Ohio Eighth District Court of Appeals.<sup>8</sup>

It was at that point that the labels attached to the case were first tossed into the air<sup>9</sup>—terms such as "privacy," "right of publicity," and, ominously, "*Time, Inc. v. Hill*."<sup>10</sup> And not until the United States Supreme Court handed down *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>11</sup> on June 28, 1977 was anyone quite sure just which labels stuck where.

This Comment will detail briefly the origins of what is lumped together in the law of torts as the "right of privacy." Next, the emergence of the "right of publicity," an offshoot of one of Prosser's four branches of privacy—appropriation of the plaintiff's name or likeness—will be given special attention. This right, protecting a celebrity's proprietary interest in his personality, has been recognized by a growing number of jurisdictions.<sup>12</sup> As this Comment will show, however, jurisdictions adopting the new tort unfortunately have not always succeeded in clearly separating it as a distinct branch of the privacy rubric. For example, the first amendment privilege attached by the Supreme Court in *Time, Inc. v. Hill*<sup>13</sup> to "false light" privacy cases,<sup>14</sup> has been applied

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4. *Id.*

5. Brief for Petitioner at 4, *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977).

6. *Id.* at 3.

7. *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. at 2851.

8. *Zacchini v. Scripps-Howard Broadcasting Co.*, No. 33,713, slip op. (Ohio Ct. App., July 10, 1975), *rev'd*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd*, 97 S. Ct. 2851 (1977).

9. As the trial court did not issue an opinion, its treatment of the privacy, right of publicity, and first amendment issues in the case is unknown. Brief for Petitioner at 4.

10. 385 U.S. 374 (1967); see notes 75-84 and accompanying text *infra*.

11. 97 S. Ct. 2851 (1977).

12. Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976).

13. 385 U.S. 374 (1967).

14. *Hill* held that publication of a matter of "public interest" was privileged by the first amendment "in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88.

indiscriminately by many courts to appropriation privacy cases.<sup>15</sup> Clarification of this confusion, which when unresolved often led to absurd results,<sup>16</sup> is the focus of this discussion.

This Comment follows the somewhat tortuous path travelled by the courts in *Zacchini*. The case began as a seemingly simple appropriation privacy case, underwent without major difficulty a transformation into a right of publicity case,<sup>17</sup> and then ran head-on into false light privacy's first amendment privilege—hardly a case history of orderliness. In light of this confusion, it is ironic to note that in 1974 two legal scholars wrote, "If there is certainty in any area of privacy law, it is in the area of appropriation."<sup>18</sup>

## II. PRIVACY AND APPROPRIATION

### A. *Origins of the Right of Privacy*

The state of privacy law has been described as that of a "haystack in a hurricane."<sup>19</sup> Whatever its present state, however, it is generally agreed that the right of privacy had its genesis with perhaps the most influential of all law review articles,<sup>20</sup> *The Right to Privacy*,<sup>21</sup> written by Samuel Warren and Louis Brandeis in 1890. The topic has since been the subject of innumerable law review articles<sup>22</sup> and a burgeoning number of cases.<sup>23</sup>

The common law in its "eternal youth"<sup>24</sup> was called upon by

15. See notes 75-101 and accompanying text *infra*.

16. See notes 94-101 and accompanying text *infra*.

17. Several courts have noticed inherent differences between privacy theory and the interests protected by the right of publicity. Some propose that the right of publicity be recognized as an independent tort:

Although misappropriation of one's name, likeness or personality for commercial use has been considered as one species of the general tort of invasion of privacy, many authorities suggest that misappropriation is a distinctly independent tort. The reasoning behind this approach is that Prosser's first three categories involve the incidence of specific personal harm (i.e., injury to feelings), while the fourth is generally considered to involve a pecuniary loss, an interference with *property*.

*Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-80 (D. Minn. 1970) (footnote omitted); see also *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879-80 (S.D.N.Y. 1973); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314, 315-16 (Pa. C.P. 1957).

18. *Pember & Teeter, Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 87 (1974).

19. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

20. Prosser, *supra* note 1, at 383.

21. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

22. Prosser, *supra* note 1, at 384 & n.6.

23. *Id.* at 386-89.

24. Warren & Brandeis, *supra* note 21, at 193.

Warren and Brandeis to secure to the individual the right to be "let alone."<sup>25</sup> They stated that while there were superficial resemblances between common law actions for libel and slander and their espoused "right of privacy," defamation protected "material" interests, while the rights protected by the law of privacy were "spiritual."<sup>26</sup> This "material-spiritual" dichotomy led one critic to charge that the right of privacy may be merely a petty offspring of prissy Victorian morality.<sup>27</sup>

Whatever the foundation of the right, it was rejected in 1902 by the first court to consider a distinct privacy action. In *Roberson v. Rochester Folding Box Co.*,<sup>28</sup> the New York Court of Appeals was confronted with a complaint that use of the plaintiff's picture on the defendant's box of flour without her consent invaded her right to privacy. The court, noting that recognition of any such right was the job of the legislature, denied recovery.<sup>29</sup> The New York legislature reacted one year later by enacting sections 50 and 51 of the New York Civil Rights Law, dealing specifically with the right of privacy.<sup>30</sup> This statute, fundamental to many cases considered later in this comment,<sup>31</sup> provided relief for appropriation of a person's name or likeness for advertising or purposes of trade.

Warren and Brandeis' new tort was received more warmly in Georgia. On facts quite similar to those in the *Roberson* case, that state's supreme court held in 1905 that, within constitutional limits of free speech and press, one has the right to be free from unwanted publicity and that use of one's picture in an advertisement without consent violates the right.<sup>32</sup> Thus, *Pavesich v. New*

25. *Id.* at 195.

26. *Id.* at 197.

27. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 329 (1966).

28. 171 N.Y. 538, 64 N.E. 442 (1902).

29. *Id.* at 545, 64 N.E. at 443.

30. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). Following New York's lead, four other jurisdictions have passed similar statutes. Of the five appropriation statutes, four are essentially identical and make appropriation of the name, picture, or portrait of another "for the purpose of advertising" or "for trade purposes" a misdemeanor and the basis of a right of action for damages. *Id.*; OKLA. STAT. ANN. tit. 21, §§ 839.1-.2 (West Supp. 1976); UTAH CODE ANN. §§ 76-9-405 to 406 (1953); VA. CODE § 8-650 (1950). The major distinction between the four statutes is that under the New York law the right of action is restricted to "any living person" whose name, picture, or portrait is appropriated for commercial use. In the Oklahoma, Utah, and Virginia statutes, the right of action survives the person whose name or likeness is appropriated. The major distinction of the California appropriation statute, CAL. CIV. CODE § 3344 (West Supp. 1977), is that it contains no penal provision.

31. See notes 85-107 and accompanying text *infra*.

32. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 220, 50 S.E. 68, 80-81 (1905).

*England Life Insurance Co.* became the leading case in the area of privacy.<sup>33</sup>

It is apparent that the early privacy cases and statutes were mixing two arguably discrete ideas: Warren and Brandeis' classical right to be "let alone," and unauthorized appropriation of personality to secure a profit for the appropriator.<sup>34</sup> Failure to recognize fundamental differences inherent in these two ideas contributed to confusion complicating later cases<sup>35</sup> and ultimately *Zacchini*.

An important exception engrafted upon the right of privacy by Warren and Brandeis and thereafter accepted by the courts<sup>36</sup> was that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."<sup>37</sup> Warren and Brandeis observed that:

[t]he general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.<sup>38</sup>

Development of the law of privacy was rapid.<sup>39</sup> By the time Dean Prosser wrote his article entitled *Privacy*<sup>40</sup> in 1960, he asserted there were well over 300 privacy cases on the books.<sup>41</sup> These cases, moreover, could be classified into four distinct categories "which are tied together by the common name, but otherwise have almost nothing in common."<sup>42</sup> These four categories, as mentioned earlier, include: (1) intrusion upon the plaintiff's physical solitude or seclusion, (2) public disclosure of private facts, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage. Prosser, in spite of

33. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 *Nw. U.L. Rev.* 553, 558-59 (1960).

34. Kalven, *supra* note 27, at 331.

35. *See, e.g.*, *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1941); *Man v. Warner Bros. Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952).

36. *See, e.g.*, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966); *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

37. Warren & Brandeis, *supra* note 21, at 214.

38. *Id.* at 215 (footnote omitted).

39. For a list of states and cases recognizing the right of privacy, see Prosser, *supra* note 1, at 386-88.

40. Prosser, *supra* note 1.

41. *Id.* at 388.

42. *Id.* at 389.

a careful warning that principles applicable to one branch of the tort may not apply to another and directly after the statement above that they have almost nothing in common, perhaps unfortunately added, "except that each represents an interference with the right of the plaintiff . . . 'to be let alone'."<sup>43</sup>

*B. Right of Publicity: Protecting the Nonprivate Person*

As courts were soon to discover, many privacy cases involving appropriation of the plaintiff's name or likeness did not involve the right to be "let alone," but rather the right to be paid for being "bothered."

One of the first celebrities to invoke privacy theory to redress unprivileged use of his name and likeness was Thomas Edison. In *Edison v. Edison Polyform Manufacturing Co.*,<sup>44</sup> plaintiff Edison sought an injunction against the use of his name and likeness on bottles of the defendant's medicinal preparation. The court, holding for Edison, vindicated his proprietary interest in his name and likeness:

If a man's name be his own property, as no less an authority than the United States Supreme Court says it is . . . it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.<sup>45</sup>

Apparently without much difficulty, the court classified appropriation of this *property* interest as an invasion of *privacy*.<sup>46</sup> But the shoals of privacy theory, hidden in the semantic baggage of the word privacy, soon became apparent when the theory was invoked by other celebrities.

In *O'Brien v. Pabst Sales Co.*,<sup>47</sup> the plaintiff was a well-known collegiate football star whose photograph had been taken and circulated by the university's publicity department. Defendant Pabst used the photo on a calender advertising its beer.<sup>48</sup> The plaintiff had turned down a similar offer from another beer company that had offered \$400 for use of his photo.<sup>49</sup> The court

43. *Id.*

44. 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907).

45. *Id.* at 141, 67 A. at 394.

46. *Id.*

47. 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1941).

48. *Id.* at 168.

49. *Id.* at 170 (Holmes, J., dissenting).

refused relief, holding that by becoming a famous personality the plaintiff had in a sense "waived" his right to privacy:

Assuming then, what is by no means clear, that an action for right of privacy would lie in Texas *at the suit of a private person*, we think it clear that the action fails; *because plaintiff is not such a person* and the publicity he got was only that which he had been constantly seeking and receiving; . . . and there were no statements or representations made in connection with it, which were or could be either false, erroneous or damaging to plaintiff.<sup>50</sup>

In contrast to the *Edison* court, the *O'Brien* court, blinded by the word "privacy," had failed to see that what the plaintiff was seeking to redress was appropriation of a proprietary interest. Judge Edwin R. Holmes in his dissent, however, saw through the privacy label to what was actually at issue. The right to receive a royalty, not be left alone, was what plaintiff sought:

The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal value; but it is a personal right, which may not be violated with impunity.<sup>51</sup>

In addition to imputed waiver of privacy, other problems confronted the public figure who sought redress under privacy theory for appropriation of his personality. As a personal right, privacy was deemed to be nonassignable.<sup>52</sup> As such, a person did not sell a license to use his name or picture, but merely made a promise not to bring suit for invasion of privacy<sup>53</sup>—a suit which, if the person was a public figure, would in many jurisdictions probably be ineffective anyway. In addition to being nonassignable, the right was not descendible—it expired with the celebrity, and a surviving spouse could not redress even blatant appropriation of personality.<sup>54</sup> As long as appropriation was fixedly catego-

50. *Id.* (majority opinion) (emphasis added).

51. *Id.* (Holmes, J., dissenting).

52. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 209 (1954).

53. *See, e.g.*, *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763 (5th Cir.), *cert. denied*, 296 U.S. 645 (1935).

54. *Miller v. Universal Pictures Co.*, 201 N.Y.S.2d 632 (Sup. Ct. 1960), *aff'd*, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1961); *see also Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975). In *Price*, the court observed:

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



rized as usurpation of a privacy instead of a propriety interest, courts would often turn their heads, for one reason or another, when celebrities sought relief. The animal trainer, who performed during halftime of a football game and discovered that his act had been broadcast without his consent and contrary to his contract, was dismissed with the observation that as he was already performing before a large crowd, he had no privacy to assert.<sup>55</sup>

The situation was not to go unremedied. In 1953, the Second Circuit first coined the phrase "right of publicity" to deal with appropriation of a celebrity's personality. The case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>56</sup> involved the right to use a ballplayer's photograph on chewing gum cards. The plaintiff had made a contract with an athlete for the exclusive right to his picture for a stated time. The defendant, a rival chewing gum company, deliberately induced the player to authorize its use of his picture. The defendant, arguing classical privacy theory, asserted that the athlete's contract with the plaintiff was no more than a release, without which the plaintiff would be liable under the New York privacy statute for use of the photograph.<sup>57</sup> The court rejected this reasoning:

We think that, *in addition to and independent of that right of privacy* (which in New York derives from statute), *a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . .* Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements . . . . This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.<sup>58</sup>

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*Id.* at 844 (footnote omitted). The court, however, rejected such reasoning, holding that as the right of publicity was a "property right," it was freely assignable and descendible. *Id.*

55. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952).

56. 202 F.2d 866 (2d Cir. 1953).

57. *Id.* at 868.

58. *Id.* (emphasis added). *But see* *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 766 (5th Cir.), *cert. denied*, 296 U.S. 645 (1935) (personality's interest in his

Thus, because appropriation of a celebrity's personality involved considerations distinct from appropriation of a private person's personality, the appropriation branch of privacy law had sprouted its own limb. While appropriation of a private person's picture may involve, as Prosser noted when he first devised the category, intrusion on that plaintiff's right to be "let alone,"<sup>59</sup> appropriation of the celebrity's personality involved a pecuniary loss to the celebrity—an interference with a proprietary interest.<sup>60</sup> The quite-different considerations involved in appropriation of a private person's personality and appropriation of a celebrity's personality raise the question of whether it might not be better to completely sever this new limb from appropriation privacy theory altogether.

In view of the argument made by the court in *Haelan*, it may even be questionable whether Warren and Brandeis would place the appropriation of a celebrity's personality under the privacy rubric. In their article, they made a rather detailed analysis of the common law protection given literary property, often noted as common law copyright.<sup>61</sup> From this analysis they extrapolated a common law protection, *i.e.*, privacy, for forms of expression that formerly could not be readily placed under the common law literary property rules. In the course of this discussion they noted where the recognized common law rules do not extend and where the right of privacy begins:

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. *They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term.*<sup>62</sup>

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name and likeness not vendible in gross, as it is not "property"). *Hanna*, however, has been generally ignored. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

59. Prosser, *supra* note 1, at 389.

60. See note 17 *supra*.

61. Warren & Brandeis, *supra* note 21, at 200-01.

62. *Id.* (emphasis added) (footnote omitted).

True, the right of publicity does not entail, in most cases, reproduction of "literary and artistic compositions," but it certainly encompasses the other criteria set forth by Warren and Brandeis as descriptive of a property interest. The right of publicity, where recognized, is transferable. The common experience of celebrities selling their endorsements to the highest bidder shows, aside from transferability, that the right has a value. Publication, or controlled exposure by the celebrity, is how he makes a profit from the right. Its value is certainly neither in the celebrity's "peace of mind" nor in his ability to prevent any publication at all about himself. While the considerations involved in appropriation of a truly "private" person's name or likeness may fall on the privacy side of this analysis, Warren and Brandeis probably would not include a celebrity's right of publicity under the right of privacy. Continued use of the "privacy" label by courts dealing with the right of publicity issue may be unfounded as well as unwise.

Some courts, noting the basic differences between the concepts of privacy and right of publicity, may be about to remove the right of publicity from the general privacy rubric.<sup>63</sup> In *Uhlaender v. Henricksen*,<sup>64</sup> the plaintiff sued on behalf of all major league baseball players to enjoin the use of their names in the defendant's table baseball game. The defendant sought to treat the matter as a privacy action, but the court quickly clarified what could have become muddy waters:

Although misappropriation of one's name, likeness or personality for commercial use has been considered as one species of the general tort of invasion of privacy, many authorities suggest that misappropriation is a distinctly independent tort. The reasoning behind this approach is that Prosser's first three categories involve the incidence of specific personal harm (i.e., injury to feelings), while the fourth [appropriation] is generally considered to involve a pecuniary loss, an interference with property.<sup>65</sup>

In a more recent federal case from the Southern District of New York, the widows of Stan Laurel and Oliver Hardy brought an action for appropriation of the right of publicity against the

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63. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1955); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967); *Hogan v. A.S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314 (Pa. C.P. 1957).

64. 316 F. Supp. 1277 (D. Minn. 1970).

65. *Id.* at 1279-80 (footnote omitted).

holders of copyrights to certain of the comedians' films.<sup>66</sup> The court held for the plaintiffs and firmly distinguished the right of publicity from the right of privacy:

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation, on the other hand, are different in theory and scope.<sup>67</sup>

The court extended the right of publicity to its logical end, holding that since it could be termed a property right, it survived the death of the comedians and descended to their wives.<sup>68</sup> A California court has reached a similar conclusion concerning Bella Lugosi's right of publicity.<sup>69</sup>

C. *Privacy, Appropriation, and the First Amendment:  
Confusing the Disparate Branches*

While the right of publicity is clearly separable from the right of privacy, most courts have refused to make a clean break with the privacy rubric. The right of publicity, therefore, hovers somewhere as a subdivision of the appropriation privacy tort, which in turn is a subdivision of general privacy theory. Aside from semantic difficulties involved in classifying a celebrity's proprietary interest in his personality as a privacy interest, courts have had some problems keeping the various branches of privacy theory distinct from each other. A pronounced difficulty in this area was encountered when courts began balancing the first amendment against the diverse privacy torts.

As has been noted, Warren and Brandeis did not believe the right of privacy protected matters of public interest.<sup>70</sup> The Supreme Court, consistent with this reasoning, held that in false light privacy cases matters of public interest are privileged unless published with knowing falsity or reckless disregard for the truth.<sup>71</sup> But the fact that the privilege attached to the "discrete context"<sup>72</sup> of false light cases was often forgotten, and courts ap-

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66. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975).

67. *Id.* at 843 (footnote omitted).

68. *Id.* at 844.

69. *Lugosi v. Universal Pictures Co.*, 172 U.S.P.Q. 541, 551 (Cal. Super. Ct. 1972).

70. Notes 36-38 and accompanying text *supra*.

71. *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

72. *Id.* at 390-91.

plied the privilege to privacy cases generally.<sup>73</sup> And courts, committed to "privacy-includes-appropriation" reasoning, have not always resisted the temptation to transfer the first amendment privilege for false light cases over to appropriation cases since, after all, they both involve "privacy." Similar reasoning led the Ohio Supreme Court into error when balancing first amendment concerns against the right of publicity in *Zacchini*.<sup>74</sup>

The verbal thicket in this area of privacy law is dense, and the confusion palpable. An examination, therefore, of one jurisdiction's confusion of the false light first amendment privilege with the appropriation tort and the subsequent resolution of that confusion will shed light on what happened in *Zacchini*. New York has been chosen for this dubious honor, for no particular reason other than that the evolution and ultimate resolution of the confusion is clearly demonstrated by cases from that jurisdiction.

At this point it becomes necessary to consider the oft cited, sometimes maligned<sup>75</sup> case of *Time, Inc. v. Hill*.<sup>76</sup> One of the major Supreme Court pronouncements on privacy, the case began in the New York courts as what Prosser would classify as a "false light" tort. The Hill family had undergone the harrowing experience of being held captive in the Hill home by escaped convicts. The family's experience was dramatized in a book and later produced as a Broadway play. *Life* magazine took actors from the play to the home where the incident occurred to reenact scenes from the play. These scenes were published as if depicting the actual experiences of the family, while in reality there was substantial fictionalization. The Hill family brought an action under the New York statute for invasion of privacy. Recognizing that the first amendment commanded some protection of the speech involved, the New York Court of Appeals allowed the Hills to recover only upon a showing of material and substantial falsification.<sup>77</sup> The Supreme Court reversed, holding

that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the

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73. Notes 85-101 and accompanying text *infra*.

74. Notes 130-41 and accompanying text *infra*.

75. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

76. 385 U.S. 374 (1967).

77. *Id.* at 386-87.

defendant published the report with knowledge of its falsity or in reckless disregard of the truth.<sup>78</sup>

The language, "knowledge of its falsity or in reckless disregard of the truth," was borrowed directly from the famous libel case of *New York Times Co. v. Sullivan*.<sup>79</sup> That case, involving the alleged libel of a public official, held that a state under the first and fourteenth amendments could not award damages to a public official for "defamatory falsehood relating to his official conduct unless he proves 'actual malice'—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false."<sup>80</sup> The *New York Times* case was the beginning of a string of Supreme Court cases dealing with first amendment impact on defamation.<sup>81</sup> The court in *Hill* expressly stated that its use of the falsity standard from *New York Times* was not a "blind application,"<sup>82</sup> but a studied one made after consideration of the factors arising in the particular context of privacy actions: "Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context."<sup>83</sup> Thus, for false light privacy cases involving matters of public interest, *Hill* commands substantial first amendment protection.<sup>84</sup> Application of *Hill* to other cases has, however, some-

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78. *Id.* at 387-88.

79. 376 U.S. 254 (1964).

80. *Id.* at 254.

81. Some of the more prominent of these defamation cases, cited by the Supreme Court in *Zacchini*, 97 S. Ct. at 2856, include: *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (*New York Times* actual malice test extended to matters of "public interest"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("public interest" test for application of the actual malice standard reviewed; defamed private individuals may recover on a lesser showing than knowing or reckless falsity); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (*Gertz* substantially reaffirmed).

82. 385 U.S. 374, 390 (1967).

83. *Id.* at 390-91.

84. However, the present status of the *Hill* test even in false light privacy cases is questionable due to the recent contraction in application of the *New York Times* actual malice standard in defamation cases involving private individuals. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Court has questioned the broad applicability of the standard in false light privacy cases involving private individuals. In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court reviewed a false light privacy case involving a newspaper follow-up story on the family of a bridge collapse victim. Because the jury had been adequately instructed on the *Hill* falsity standard, the Court wrote:

Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases.

times engendered confusion, because instead of applying *Hill's* falsity test in the "discrete context" of false light privacy cases, courts have often applied it much more broadly.

The New York Court of Appeals was struggling with another privacy case contemporaneously with the Supreme Court's deliberation of *Hill. Spahn v. Julian Messner, Inc.*<sup>85</sup> involved a rather liberally fictionalized, unauthorized biography of the well-known baseball star, Warren Spahn. He brought an action to enjoin publication and recover damages under the New York privacy statute. The New York court had two opportunities to set down its opinion of this case, since after the first disposition the Supreme Court vacated the decision and remanded it for consideration in the light of *Hill*. There was in the two opinions some mixing of appropriation and false light privacy theory.

In the first opinion the court outlined the reasons typically cited for acknowledging a right of publicity:

The size of the audience attracted to each game, whether in person or by transmission, is the profession's [baseball's] bread and butter. The individual player's income will frequently be a direct reflection of his popularity and ability to attract an audience. *Professional privacy is thus the very antithesis of the player's need and goal.*<sup>86</sup>

The court next summarized the purposes behind the New York privacy statute and emphasized one of its important exceptions—that the law affords the public figure's privacy "little protection."<sup>87</sup> The court differentiated, however, the plaintiff's *privacy* interest and his right to be paid for and control the use of his *personality*:

But it is erroneous to confuse privacy with "personality" or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected . . . . Thus it may be

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*Id.* at 250-51. Subsequently, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), also a privacy case, Justice Powell in his concurring opinion noted:

The Court's abandonment of the "matter of general or public interest" standard as the determinative factor for deciding whether to apply the New York Times malice standard to defamation litigation brought by private individuals, *Gertz v. Robert Welch, Inc.* . . . calls into question the conceptual basis of *Time, Inc. v. Hill*.

*Id.* at 498 n.2.

85. 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated*, 387 U.S. 239, *on remand*, 20 N.Y.2d 752, 229 N.E.2d 712, 283 N.Y.S.2d 119, *on reargument*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969).

86. *Id.* at 327, 221 N.E.2d at 544, 274 N.Y.S.2d at 878 (emphasis added).

87. *Id.* at 328, 221 N.E.2d at 545, 274 N.Y.S.2d at 879.

appropriate to say that plaintiff here, Warren Spahn, is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his "personality" may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography.<sup>88</sup>

Holding that a "substantially fictitious" biography would not run afoul of first amendment requirements,<sup>89</sup> the court allowed recovery by the plaintiff. Arguably, then, the New York court was vindicating an interest similar to the right of publicity. Fatefully, however, the court mentioned that it did not believe the *New York Times* test had any application to the case.<sup>90</sup>

The Supreme Court vacated the decision and ordered reargument of the case<sup>91</sup> in light of *Hill*. On remand, *Spahn*, which up to this point may well have been a right of publicity case, was treated as a false light privacy case, ignoring the previous right of publicity discussion.

The court wrote:

We hold . . . that, before recovery by a public figure may be had for an unauthorized presentation of his life, it must be shown . . . that the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth.<sup>92</sup>

The court held the evidence supported a finding of requisite falsity, and again awarded relief to the plaintiff.<sup>93</sup>

The boundaries between the false light privacy tort and the right of publicity tort in cases such as *Spahn* are admittedly tricky. Is a fictionalized biography an appropriation of Spahn's interest in his name and personality (right of publicity), or is relief granted for the untruthful manner in which his life story is presented to the public (false light)? Resolution of this quandry is beyond the scope of this Comment, but acknowledgment of the difficulty avoids untempered criticism of the seeming confusion of the court in *Spahn*. Whatever the difficulties in the factual context of *Spahn*, however, New York courts floundered in cases

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88. *Id.*

89. *Id.* at 329, 221 N.E.2d at 545, 274 N.Y.S.2d at 880.

90. *Id.*

91. 387 U.S. 329 (1967).

92. 21 N.Y.2d at 127, 233 N.E.2d at 842, 286 N.Y.S.2d at 834.

93. *Id.* at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836.



where distinctions between false light privacy and appropriation were not nearly so fine.

In *Paulsen v. Personality Posters, Inc.*,<sup>94</sup> comedian Pat Paulsen sought an injunction under the New York privacy statute against the defendant's distribution of a campaign poster during Paulsen's mock candidacy in the 1968 presidential race. The case was most definitely not a false light case. The defendant allegedly had appropriated a photograph of Paulsen and reproduced it with the words "For President" beneath it. The court wrote that the privacy statute was to protect a "person's right to be let alone," and was not enacted to afford relief for "various . . . species of property rights."<sup>95</sup> Since the plaintiff was not seeking redress for "privacy," the privacy statute could not help him. Moreover, the court observed that even were the privacy statute applicable, the appropriation in the case would be privileged by the first amendment:

[W]hether the poster involved be considered as a significant satirical commentary upon the current presidential contest, or merely as a humorous presentation of a well-known entertainer's publicity gambit, or in any other light, be it social criticism or pure entertainment, it is sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected and "deserving of substantial freedom."<sup>96</sup>

The reasoning of the court is inexorable. Because of first amendment principles, the right of privacy cannot redress publication of matters of public interest. If the appropriation here is styled as an invasion of privacy, it is therefore privileged by the first amendment. Thankfully, at least for credulity's sake, the court spared the discussion of possible results were the poster published with knowing "falsity" or reckless disregard of whether it was "true."

Two years after *Paulsen*, a federal court in New York was confronted with another appropriation suit under the New York privacy statute. The plaintiff in *Man v. Warner Brothers, Inc.*<sup>97</sup> sought damages for the defendant's unauthorized use of his 45-second performance of "Mess Call" on the flugelhorn during the renowned Woodstock rock festival. The segment, filmed by the defendants during the festival, had been inserted into the com-

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94. 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

95. *Id.* at 450, 299 N.Y.S.2d at 508.

96. *Id.*

97. 317 F. Supp. 50 (S.D.N.Y. 1970).

pany's commercial film of the event. It would appear that a clearer case of commercial appropriation would indeed be difficult to find. Yet the court denied relief.

The court explained that the New York privacy statute was designed to protect persons from the unauthorized use of their pictures for purposes of trade.<sup>98</sup> The court noted, however, that subsequent cases had engrafted exceptions onto the rule to avoid abridgment of the constitutional right of free speech:

These cases establish that in light of the constitutional guarantee of free speech, Section 51 may not be applied to afford relief either to a public figure or in a matter of public interest in the absence of proof that the defendant published false material with knowledge of its falsity or in reckless disregard of the truth. *Time, Inc. v. Hill* . . . .<sup>99</sup>

The plaintiff, unless he could show that the defendants knowingly appropriated a "false" performance, or used one in reckless disregard of its "truthfulness," was precluded from relief.

In 1968, one noted scholar writing on the impact of the first amendment in the privacy area, noted that the appropriation branch of privacy would probably not raise any first amendment problems.<sup>100</sup> The rationale was that "[t]his right, sometimes called the right of publicity, involves the commercial appropriation of values which, whether or not labeled as 'property,' may not be freely plundered under the banner of the first amendment."<sup>101</sup> But, nevertheless, the plunderers had waved the banner—and had won.

New York appellate courts were to redraw the line between first amendment privileges and appropriation three years later. In *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*,<sup>102</sup> a corporation formed by Howard Hughes to exploit his name and personality sued the defendants for their use of Hughes' name and biographical data in its "The Howard Hughes Game." The defendants, predictably, placed heavy reliance on *Paulsen*. The *Rosemont* court dismissed this argument, stating that the "*Paulsen* case is unique to its facts and must be so considered."<sup>103</sup>

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98. *Id.* at 51.

99. *Id.* at 51-52.

100. Nimmer, *supra* note 75, at 957-58.

101. *Id.* (footnotes omitted).

102. 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973) (injunction limited to state of New York).

103. *Id.* at 790, 340 N.Y.S.2d at 146.

In contrast to the *Paulsen* court, the *Rosemont* court had little difficulty in extending protection of the New York privacy statute to appropriation of a celebrity's personality.<sup>104</sup>

Then, after concluding that a celebrity's right of publicity was worthy of protection, the court asked the question in this area that, because left unasked, had caused confusion and absurd results: "The question apparently is *where does one draw the line between the right of the public to 'know' and an act of appropriation.*"<sup>105</sup> The court, however, declined to draw any definite line, preferring to leave the question to resolution by the courts on an ad hoc basis:

As the *Paulsen* case, *supra*, would indicate this area of the law is plastic. Each case must be decided by weighing conflicting policies; the public interest in free dissemination of information, against the interest in the preservation of inviolate personality and property rights. Among the relevant factors in such decisions are the media used, the nature of the subject matter, and the extent of the actual invasion of privacy . . . .<sup>106</sup>

The ad hoc balance in the present case favored the plaintiff, the court held, as the defendants were really not disseminating news, but rather a game of chance.<sup>107</sup>

New York, it appears, had finally battled its way through the sematic jungle of the privacy-appropriation-publicity cases to where the actual interests at stake in such cases could be identified and, importantly, balanced against possibly competing first amendment interests. There had been a few casualties along the way,<sup>108</sup> but even though the line between first amendment interests and the right of publicity was not crystal clear, the general highway was safely marked out.

The Supreme Court in *Zacchini* saved Ohio, and other states, similar difficulties.

104. *Id.*:

The instant action is quite clearly premised upon an appropriation for for commercial exploitation of plaintiff's property rights in his name and career rather than upon an injury to feelings. There is no question but that a celebrity has a legitimate proprietary interest in his public personality. He must be considered as having invested years of practice and competition in a public personality which eventually may reach marketable status. That identity is a fruit of his labors and a type of property . . . .

105. *Id.* (emphasis added).

106. *Id.* at 790, 340 N.Y.S.2d at 147.

107. *Id.*

108. See, e.g., *Man v. Warner Bros. Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952).

### III. *Zacchini* in STATE COURT: PRIVACY'S BRAMBLE BUSH

After summary judgment for defendant in the trial court, *Zacchini* took his cause to the Ohio Eighth District Court of Appeals. That court held for him.<sup>109</sup>

The court's opinion began with Prosser's division of privacy into four branches, and noted that while the plaintiff claimed an invasion of his privacy, "we think none of Professor Prosser's categories provide a logically adequate embrace for the wrong the plaintiff claims has been done."<sup>110</sup> The court, noting that there was no privacy statute in Ohio, stated that common law privacy theory would not affect the case as *Zacchini's* claim "does not involve his privacy in any usual sense of the word."<sup>111</sup> The court evidently had recognized the inherent differences between *privacy* and *right of publicity*:

The performance which constitutes an "act" is the product of the actor's talent and is his property. And, if his act is appropriately considered a dramatic or creative production, it involves a property right entitled to the same protection under the common law as any other property right . . . .<sup>112</sup>

The court wrote that while critical reviews or announcements of an act were to be distinguished, appropriation of an entire act on videotape was a consequence of "appalling perspective."<sup>113</sup> Then, the court groped for pigeonholes in which to categorize the tort. Stretching the concepts to the breaking point, it chose conversion<sup>114</sup> and common law copyright.<sup>115</sup>

The court noted that in "ancient history" only tangibles could be converted,<sup>116</sup> but stated that the concept had been expanded to cover such symbols as promissory notes, checks, and stock certificates and that cases like *Zacchini* demanded a further extension. As for common law copyright, the court noted that this principle gives the creator of "intellectual productions" an inter-

109. *Zacchini v. Scripps-Howard Broadcasting Co.*, No. 33,713, slip op. (Ohio Ct. App. July 10, 1975).

110. *Id.* at A30.

111. *Id.* at A32.

112. *Id.* at A33.

113. *Id.*

114. *Id.* at A34.

115. *Id.* at A35. The Supreme Court, in the course of its opinion in *Zacchini*, analogized the right of publicity to patent and copyright laws. 97 S. Ct. at 2856-57. The state appellate court, however, went further than analogy—it claimed that common law copyright law was directly applicable to the conflict before it.

116. *Zacchini v. Scripps-Howard Broadcasting Co.*, No. 33,713, slip op. at A34 (Ohio Ct. App. July 10, 1975).

est in his works until lost by general publication.<sup>117</sup> The court wrote that dramatic productions have been protected as literary property, and by "clear analogy the performance with which this case is concerned falls within the category of dramatic production."<sup>118</sup> As for the defendant's contention that public performance at the fair constituted publication eliminating protection of common law copyright, the court wrote that such an issue "is one which must be resolved at further proceedings in the trial court."<sup>119</sup>

In response to the defendant's first amendment contentions, the court succinctly stated "the First Amendment provides no defense to the taking of private property against the owner's explicit denial of permission."<sup>120</sup> The court explained further that the first amendment was "not properly an issue here."<sup>121</sup>

There is no suggestion of a limitation on the defendant's right to comment. This case is not controlled by the reasons for reversing the plaintiff's verdict in *Time, Inc. v. Hill* . . . . For that case involved a right to privacy to "redress false reports of matters of public interest" under the New York statute . . . .

. . . The constitutional protection for free dissemination of ideas is neither threatened nor diminished by protecting the owner of property from its seizure under the guise of free expression.<sup>122</sup>

A concurring opinion by Judge Manos added that the proper basis for recovery in the case was violation of the plaintiff's common law right of publicity.<sup>123</sup>

The state supreme court disagreed with the intermediate court on the issues of conversion and common law copyright.<sup>124</sup> The state high court noted that since the "distinguishing characteristic of conversion is the forced judicial sale of the chattel or right"<sup>125</sup> wrongfully taken, extending conversion to the facts of the instant case where only "[j]udicial ingenuity" could find a res to be sold would be "confusing, unnecessary, and improper."<sup>126</sup> As

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117. *Id.* at A35.

118. *Id.* at A37.

119. *Id.*

120. *Id.* at A40.

121. *Id.* at A39.

122. *Id.* at A39-A40.

123. *Id.* at A41 (Manos, J., concurring).

124. *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 226, 351 N.E.2d 454, 456 (1976).

125. *Id.* at 227, 351 N.E.2d at 457.

126. *Id.*

for common law copyright, the state high court held the concept inapplicable to plaintiff's act as it was "not a literary or artistic expression, nor [was] it a dramatic composition, nor [was] it original."<sup>127</sup> Logic that public performances would not constitute a publication terminating the right was dubbed "doubtful,"<sup>128</sup> as such logic would grant a perpetual right against copying. The court concluded with its opinion "that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such."<sup>129</sup> Unfortunately, the state supreme court, critical of the appellate court's handling of the conversion and copyright concepts, did not explore the substance of the lower court's reasoning—especially on the first amendment issue. The state appellate court perhaps botched the labels it applied to the substance of its holding; the state supreme court, however, botched the substance it placed behind its labels.

The state supreme court, having resolved that it was adjudicating a *privacy* case, proceeded to delineate the elements of the appropriation branch of privacy. The court noted that jurisdictions with a privacy statute, such as New York, commonly require the appropriation to be for commercial uses, while common law jurisdictions probably do not require that the appropriation be used for purposes of trade:<sup>130</sup> "The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise."<sup>131</sup> The court then noted the distinction that had led the lower court to digress into conversion and common law copyright—what the plaintiff was seeking to protect was not his right to be "let alone," but his right to be paid for his performances:

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases.<sup>132</sup>

Thus, the court expressly adopted a common law right of publicity. It had, in effect, reached the same conclusion as had the lower

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127. *Id.* at 228, 351 N.E.2d at 457.

128. *Id.*

129. *Id.* at 226, 351 N.E.2d at 456.

130. *Id.* at 229, 351 N.E.2d at 458.

131. *Id.*

132. *Id.* at 232, 351 N.E.2d at 460.

court—the plaintiff had a valuable proprietary interest protected by law. But where the lower state court ascribed this right to conversion or copyright theory, the state supreme court adopted a new slot, the right of publicity. And somewhere above this slot was still hanging the label “privacy.” While the lower court had avoided the confusion caused by the privacy-first amendment interface, the state supreme court was about to fall prey to some attractive, but shallow, reasoning.

After establishing the right of publicity, the court next asked whether invasion of that right by the defendant was privileged by the first amendment.<sup>133</sup> The court answered affirmatively. The court began with the premise that the right of publicity fell under the right of privacy. *Hill*, according to the court, established a privilege “to report matters of legitimate public interest even though such reports might intrude on matters otherwise private.”<sup>134</sup> It was “clear” to the court that a “public performance in a county fair is a matter of legitimate public interest.”<sup>135</sup> Therefore, the defendant’s use of the 15-second film clip of the plaintiff exploding from his cannon was privileged by the first amendment. The court stated:

No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the “breathing room” in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest . . . .<sup>136</sup>

But what of *Hill*’s restriction on its first amendment privilege that a publication cannot be made with knowing falsity or reckless disregard for truth or falsity? To its credit, the Ohio court did not write into its opinion a limitation that broadcasters cannot show “knowingly false” videotapes of human cannonballs. Rather, the court stated that the broadcast privilege would be lost “only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer.”<sup>137</sup>

Justice Celebrezze filed a dissenting opinion questioning the validity of the court’s reliance on *Hill* in view of both the exten-

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133. *Id.* at 233, 351 N.E.2d at 460.

134. *Id.* at 234, 351 N.E.2d at 461.

135. *Id.* at 235, 351 N.E.2d at 461.

136. *Id.*

137. *Id.*

sive alterations of the Supreme Court's views on defamation since *New York Times* and the questionable present stand of the court on the issue presented in *Hill*.<sup>138</sup>

The lockstep reasoning of the Ohio Supreme Court has not been without supporters. A student comment on the court's decision concluded that the proper result was reached.<sup>139</sup> But the Supreme Court in *Time, Inc. v. Firestone*,<sup>140</sup> another defamation case, warned against the hasty use of labels to reach legal results. The right of publicity *may* fit under the general broad heading of privacy, but that does not mean that the supposed first amendment privilege attached to false light privacy cases necessarily attaches to the right of publicity. "Whatever their general validity, use of such [generalized] subject matter classifications to determine the extent of constitutional protection afforded . . . may too often result in an improper balance between the competing interest . . . ." <sup>141</sup>

#### IV. THE SUPREME COURT'S APPROACH: BALANCING THE INTERESTS

##### A. *Settling the Confusion*

*Zacchini* gave the Court the opportunity to establish that Ohio's balance between free speech and proprietary interests in right of publicity cases is not mandated by the constitution. Following its own caveat from *Firestone*, the Court carefully examined the interests involved in the right of publicity before balancing that right against the first amendment.

First, the Court noted that the interests involved in the false light and right of publicity torts are different. The interest protected in false light cases is "clearly that of reputation, with the same overtones of mental distress as in defamation. By contrast, the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part

138. *Id.* at 236-40, 351 N.E.2d at 462-65 (Celebrezze, J., dissenting); see also note 84 *supra*.

139. Comment, *Tort Law: Appropriation of a Performer's Act By the News Media—Is It Privileged?*, 16 WASHBURN L.J. 786 (1977). The Comment concludes:

By articulating the "right of publicity" under which a public figure may control the commercial use of his name and likeness, the Ohio court lends new impetus to the growing body of legal writers who have acknowledged this branch of the "right of privacy." The court's recognition of the limitations placed on the rights of privacy and publicity by the factual reporting of matters of legitimate public interest adheres to an accepted principle of American law.

*Id.* at 791 (footnotes omitted).

140. 424 U.S. 448 (1976).

141. *Id.* at 456.



to encourage such entertainment."<sup>142</sup> The Court likened this latter goal to those of patent and copyright laws that assure the individual the fruits of his labors and have "little to do with protecting feelings or reputation."<sup>143</sup> Additionally, the two torts differ in the "degree to which they intrude on dissemination of information to the public."<sup>144</sup> In false light cases, a plaintiff is eager to minimize publication. In right of publicity cases, however, instead of arguing for limiting publication the plaintiff is merely litigating the question of "who gets to do the publishing."<sup>145</sup> The Court, therefore, held that *Hill* was inapplicable.<sup>146</sup> Other defamation cases with arguable impact on the case were also summarily dismissed:

These cases, like *New York Times*, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. *None of them involve an alleged appropriation by the press of a right of publicity existing under state law.*<sup>147</sup>

The Court, of course, did not discuss the propriety or necessity of establishing a common law right of publicity, but did give its answer to the question posed by the New York court in *Rosemont*: "[W]here does one draw the line between the right of the public to know and an act of appropriation?"<sup>148</sup>

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's *entire act* without his consent.<sup>149</sup>

On remand, Ohio may privilege the press in the circumstances of *Zacchini*, but the "First and Fourteenth Amendments do not require it to do so."<sup>150</sup>

Justice Powell, joined by Justices Brennan and Marshall,

142. 97 S. Ct. at 2856 (quoting Prosser, *supra* note 1, at 400) (footnote omitted).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 2855-56.

147. *Id.* at 2856 (emphasis added). The cases cited by the Court were *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

148. *Rosemont Enterprises, Inc. v. Urban Syss., Inc.*, 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973); see notes 105-07 and accompanying text *supra*.

149. 97 S. Ct. at 2856-57 (emphasis added).

150. *Id.* at 2858.

dissented. He argued that first amendment privileges should not be based upon appropriation of an "entire act," but on the use a television station makes of the act: "I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation."<sup>151</sup> Justice Stevens also dissented, arguing that Ohio's grounds for decision were so unclear as to warrant remand for clarification rather than for the Court to assume that the decision was based on first amendment and not independent state grounds.<sup>152</sup>

### B. Validity of the Court's Result

With a relatively brief opinion,<sup>153</sup> the Supreme Court managed in *Zacchini* to untangle several major confusions in privacy law. The performer's interest in his act or personality protected under the heading of the right of publicity was clearly analogized to copyright and patent law.<sup>154</sup> So classified, the right runs little risk of being "waived" when a celebrity loses his "privacy" or of encountering the other difficulties outlined earlier in this Comment.<sup>155</sup> Most importantly, the right of publicity branch of privacy law was firmly distinguished from a false light privacy tort and its concomitant first amendment privilege. While the Court left the right of publicity under the general privacy rubric,<sup>156</sup> possibility of confusion between false light and appropriation torts in the future should be remote—a false light case involves "an entirely different tort than the 'right of publicity' . . . ."<sup>157</sup>

The balance struck by the Court between first amendment concerns and the right of publicity was the result of careful weighing of competing proprietary and free speech interests. Inasmuch as the Court analogized the interests involved to patent and copyright laws,<sup>158</sup> an analysis of competing copyright and first amend-

151. *Id.* at 2860 (Powell, J., dissenting).

152. *Id.* at 2860-61 (Stevens, J., dissenting).

153. The opinion, as printed in the *Supreme Court Reporter*, is only 12 pages long. *Id.* at 2849 (1977).

154. *Id.* at 2856-57.

155. See notes 47-55 and accompanying text *supra*.

156. 97 S. Ct. at 2855.

157. *Id.* Completely severing the right of publicity from the privacy rubric would substantially alleviate any remaining confusion in this area. As the right of publicity does not involve the right to be "let alone," it unnecessarily complicates privacy law by its inclusion. See notes 59-69 and accompanying text *supra*.

158. *Id.* at 2856-57.

ment interests will be useful in evaluating the balance struck by the Court between the right of publicity and free speech in *Zacchini*.

Free speech interests in the copyright area are perhaps most succinctly summarized in the copyright clause of the Constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>159</sup> These interests, as has been noted by Professor Nimmer,<sup>160</sup> may clash with the interests protected by the first amendment. Some of these possibly conflicting first amendment interests were summarized by Justice Brandeis in his classic concurrence in *Whitney v. California*.<sup>161</sup> According to Brandeis, free speech is: first, a necessary component of a self-governing or democratic society—democracy cannot long survive without informed electors; second, an end in itself—man realizes self-fulfillment only if free to express himself; and finally, a safety valve—it is hazardous to discourage thought as men are less prone to violence if they can express themselves nonviolently.<sup>162</sup> The balance struck in the copyright area between these competing interests is that copyright laws protect *expression*, while the first amendment privileges *ideas*.<sup>163</sup> Thus, according to Professor Nimmer, both copyright and free speech interests are optimally served.<sup>164</sup> Unshackling the use of ideas does not hurt creators, as it is often necessary for them to borrow liberally from each other anyway. Protecting expression—*i.e.*, the form in which, for example, a book is set down by an author—protects the author's proprietary interest in his labor, but does not prohibit free discussion of the ideas contained in the book.<sup>165</sup> Moreover, Brandeis' three free speech interests are vindicated. As ideas are not protected by copyright law, they can be freely disseminated among a well-informed electorate. Self-expression, the second Brandeis category, is not harmed as it

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159. U.S. CONST. art. I, § 8, cl. 8.

160. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1181 (1970).

161. 274 U.S. 357 (1927).

162. *Id.* at 372-80 (Brandeis, J., concurring).

163. *Cf. Goldstein v. California*, 412 U.S. 546, 571 (1973) (record piracy statute valid as it does not restrict use of ideas); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972) (unauthorized use of substantially the entire rock opera "Jesus Christ Superstar" not privileged by first amendment); *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972) (unauthorized use of Disney cartoon characters not privileged by first amendment).

164. Nimmer, *supra* note 160, at 1202.

165. *Id.*

would not be served by allowing wholesale plagiarism—plagiarism cannot be said to be “self-expression” in the first place. Finally, men will not be prone to riot because they cannot copy and claim as their own the work of another.<sup>166</sup>

The Supreme Court in *Zacchini* struck a similar balance between the first amendment and the right of publicity when it declared that appropriation of an “entire act” was not constitutionally privileged. Thus, while the “idea” of a human cannonball’s act is not protected, *Zacchini*’s actual performance is. Anyone with the requisite daring (or foolhardiness) can learn the skills of a human cannonball, and *Zacchini* could not complain.<sup>167</sup> The television station could express the “idea” that a human cannonball was performing at the fair, and again *Zacchini* would have no complaint. As the Court wrote, “It is evident, and there is no claim to the contrary, that petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act.”<sup>168</sup> Filming and televising *Zacchini*’s stunt, however, was more than appropriation of a mere “idea;” it was, to adapt language from Professor Nimmer, appropriating “the particular selection and arrangement of ideas, as well as . . . specificity in the form of their expression which warrants protection under the [right of publicity].”<sup>169</sup>

The balance struck by the court between free speech and right of publicity interests appears to be valid and reasonable. Democratic dialogue will not appreciably suffer because viewers of the late evening news will be limited to a photograph and verbal description of the human cannonball’s thrilling act instead of a videotape of the entire event. The essential free speech content of the event will have been broadcast, and Mr. *Zacchini*’s proprietary interest in his act will have been protected. (How many of the viewers would bother to travel to the fair and perhaps pay an admission fee to see something they had observed on color television the night before?) A television station seeking self-fulfillment perhaps would prefer to broadcast its station manager being shot out of a cannon rather than *Zacchini*, and it is doubtful that being told about rather than seeing a human cannonball will

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166. *Id.* at 1191-93.

167. The Court stated in a footnote, “Of course this case does not involve a claim that respondents would be prevented by petitioner’s ‘right of publicity’ from staging or filming its own ‘human cannonball’ act.” 97 S. Ct. at 2858 n.13.

168. *Id.* at 2856.

169. Nimmer, *supra* note 160, at 1190.

provoke many television viewers to violence.<sup>170</sup> And besides protecting Zacchini's interest in his act, prohibiting a broadcast of the event could have long-term benefits for the public—"the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public."<sup>171</sup>

Obviously, the "entire act" test is uniquely adapted to the context of television news reports of performers' acts. The test does not translate easily into other right of publicity cases involving differing factual settings—such as appropriation of a celebrity's picture as in *Paulsen* or appropriation of a celebrity's interest in his life story as in *Rosemont*. But, nevertheless, the holding in *Zacchini* will be a significant roadmark in these cases as well. *Zacchini* firmly establishes that the right of publicity protects rights analogous to copyright and patent interests. Just as the Supreme Court examined those interests in the specific context of the *Zacchini* facts, other courts faced with factually dissimilar right of publicity cases can look to the general area of copyright and first amendment law for guidance. For example, the doctrine of "fair use" in the copyright area, especially as outlined in the new federal copyright statute,<sup>172</sup> should provide a touchstone for resolution of cases similar to *Rosemont* and *Paulsen*.

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170. Indeed, it is questionable whether viewing the human cannonball act would have any impact on the television audience. The mere spectacle of a man being blown from a cannon is probably pale when compared to the videoaction crammed into one hour of the life of, for example, a television supercop.

171. 97 S. Ct. at 2857.

172. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (to be codified at 17 U.S.C.). The new copyright statute, effective Jan. 1, 1978, explicitly outlines the criteria to be used in determining whether use of copyright material is privileged as a "fair use:"

[T]he fair use of copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market nor or value of the copyrighted work.

*Id.* § 107.

It is possible that the Supreme Court reached its decision in *Zacchini* after weighing the factors involved in the case in a manner similar to that outlined in the above statute. While the use was for news or arguably "educational" purposes, substantially all of the human cannonball's act was appropriated; the Court expressed concern over the possible ill effects this appropriation could have on the future value of the act. 97 S. Ct. at 2857.

C. *Media Impact, Damages, and Consent*

The balance struck by the Court between first amendment and right of publicity interests in the area of media news reports is certain to be unpopular in some quarters. Broadcasters, for example, would almost assuredly prefer the approach taken by the dissent, which would have privileged all uses of film footage on news programs absent a showing of use for commercial exploitation.<sup>173</sup> But the effect of *Zacchini* on television news will probably not be great in any event. There are few "entire acts" short enough to be broadcast in news programs; most such programs use short film clips or videotape cuts lasting less than a few minutes. Thus, the "chilling" effect on the media decried by the dissent<sup>174</sup> will probably be minimal. The Court in *Zacchini* employed what scholars have termed "definitional balancing"<sup>175</sup> in announcing its result. Instead of leaving to trial courts the duty to ascertain and balance on an ad hoc level the competing free speech and proprietary interests in each right of publicity case involving appropriation of an act (as, for example, the New York court in *Rosemont* did), the courts and the media have been left a rule—appropriation of "entire acts" is not privileged by the first amendment. Although the "entire act" test may not be the Court's final word on the subject<sup>176</sup> and the term is burdened with the usual semantic uncertainties of all new legal tests, it will be rare that a television news editor will not be able to resolve most doubts about liability by editing the clip so as to emphasize the

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173. *Id.* at 2860 (Powell, J., dissenting).

174. *Id.* at 2859-60.

175. Nimmer, *supra* note 75, at 942. The term "definitional balancing" was coined to differentiate this practice from "ad hoc balancing." With ad hoc balancing, the trial court discerns the conflicting free speech and proprietary interests at stake in each case and makes a judgment as to which, in the discrete context of the case, is weightier and deserves to prevail. While ad hoc balancing appears to present the opportunity for perhaps a more just resolution of a given case, it has one major drawback—the process leaves no rule for the public and the courts to rely on. And often, absence of a rule tends to "chill" exercise of first amendment rights. Not knowing what speech is protected, only the courageous speak. *Id.* at 939-42. The definitional approach has the major advantage of leaving a rule behind which can guide the outcome of future cases. "[T]he court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment." *Id.* at 942.

176. The Court wrote, "*Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.*" 97 S. Ct. at 2856-57 (emphasis added). This holding, obviously, leaves open the possibility that something less than an "entire act" may be protected by the right of publicity without any first amendment difficulty.

"newsworthy facts" of an act rather than show it in its entirety.<sup>177</sup>

Moreover, in states such as New York with a privacy statute, the impact of *Zacchini* upon the media may well be nil. Ohio, a common law privacy jurisdiction, does not require that the appropriation be for advertising purposes or for uses of trade. Privacy statutes uniformly require such a use.<sup>178</sup> Prosser's text on torts, cited by the Supreme Court,<sup>179</sup> states that while newspapers are published for a profit, not everything printed in the newspaper meets the statutory definition of "for trade purposes."<sup>180</sup> Therefore, in statutory privacy jurisdictions, a television news program using film clips even of "entire acts" may escape liability if such use is not "for trade purposes."

If found liable, the media will obviously be concerned about possible damage awards in right of publicity suits. The majority opinion in *Zacchini* states that one of the major rationales for the right of publicity is to prevent unjust enrichment: "No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay."<sup>181</sup> Thus, it appears that the measure of damages in these appropriation cases could be the profit the defendant realizes by his wrongful appropriation. In a footnote, however, the Court talks as though the measure of damages would be the injury to the plaintiff's income caused by decreased public interest in seeing the act live after viewing it on television.<sup>182</sup> Inasmuch as the Court analogized the right of publicity to copyright law, presumably recovery of damages would be similar to recovery of damages under copyright law. Under common law copyright damages rules, a plaintiff may recover the change in market value of his proprietary interest or, alternatively, the profits derived by the defendant from the infringement.<sup>183</sup> Since the common law allows both measures of recovery, ambivalence

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177. *Id*<sup>9</sup>

178. Typical is the New York statute, which requires that the use be for "the purpose of advertising" or "for trade purposes." N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976). See note 30 and accompanying text *supra*.

179. 97 S. Ct. at 2856-57 n.11.

180. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 806-07 (4th ed. 1971).

181. 97 S. Ct. at 2857 (citing Kalven, *supra* note 27, at 331).

182. *Id.* n.12: "It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover."

The dissent, with some disapproval, noted this seeming ambivalence on damages. *Id.* at 2859 n.2 (Powell, J., dissenting).

183. M. NIMMER, NIMMER ON COPYRIGHT § 150 (1963).

on the damage question in the majority's opinion is likely not a product of court oversight.

Damages, it should be further noted, will be a difficult part of the plaintiff's case. Proving decreased income as a direct result of a television broadcast—or unjust enrichment of the broadcaster—may be impossible in some cases. Thus, the damage element of right of publicity cases alone may be sufficient to shield the media from any barrage of unfounded *Zacchini*-type lawsuits.

Another possible escape for the media lies in the consent requirement of the *Zacchini* holding. If use of the "entire act" is with the performer's consent, no liability arises.<sup>184</sup> The factual circumstances of *Zacchini* were rather unusual, in that plaintiff expressly objected to the filming and broadcasting, yet that objection was disregarded.<sup>185</sup> Most performers will be aware of the presence of news cameras during their acts because of the necessary lights and often bulky equipment. There are several old cases holding that consent, if not express, will at least be implied from long acquiescence with knowledge of infringement.<sup>186</sup> Presence of a television news camera at his act should certainly inform a performer that his interest in his act is about to be "infringed." He must also realize that in these days of electronic journalism he cannot "acquiesce" for longer than a few hours or any film of his act will have been broadcast. Thus, it may be reasonable to argue that the performer impliedly consents if he allows the filming and does not object before broadcasting.<sup>187</sup> This implication, however, places a heavy burden on the performer and is a rather extreme extension of the older consent cases—in those instances plaintiffs had been aware of the infringing use for a period of some years.<sup>188</sup>

## V. CONCLUSION

The right of privacy, envisioned by Warren and Brandeis as

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184. 97 S. Ct. at 2856-57.

185. *Id.* at 2851.

186. *Edwin L. Wiegand Co. v. Harold E. Trent Co.*, 122 F.2d 920 (3d Cir.), *cert. denied*, 316 U.S. 667 (1941); *H.M. Chandler Co. v. Penn Paper Prods.*, 88 F. Supp. 753 (S.D.N.Y. 1950).

187. This implication, of course, could not be made where live cameras were used to broadcast the act simultaneously with its performance and the performer had no form of advance warning.

188. For example, the plaintiff in *Edwin L. Wiegand Co. v. Harold E. Trent Co.*, 122 F.2d 920 (3d Cir. 1941), *cert. denied*, 316 U.S. 667 (1942), waited over three years to bring suit after he first knew of the defendant's infringement.



the right to be "let alone,"<sup>189</sup> has grown to encompass various interests—often having little in common. Recently, courts have recognized that the proprietary interests protected by the right of publicity are separate and distinct from those of other privacy torts—specifically invasions of privacy through placing a person in a false light. But in spite of these basic differences, constitutional free speech provisions applicable to false light cases have sometimes been applied across the board to all privacy cases, including appropriation and right of publicity cases, with little thought as to the underlying issues involved.

The Supreme Court in *Zacchini* was faced with an instance of just such reasoning. The Ohio Supreme Court had reasoned that the right of publicity is a branch of privacy theory, that matters otherwise protected by privacy theory are privileged by the first amendment if they are of public interest, and that therefore an appropriation is privileged if the matter appropriated is of public interest. Though states may reach such a result on the basis of state law, the Supreme Court held that the first amendment does not mandate such a result. The underlying interests protected by the false light privacy tort and the right of publicity tort are diverse and demand different first amendment analyses. While the false light tort is concerned with reputation, the publicity tort protects a person's valuable interest in his name and personality. Tension between the first amendment and the publicity tort resembles that between the first amendment and the copyright laws. Just as copyright laws protect the discrete expression of literary property while the first amendment defends the free exchange of ideas, so the right of publicity protects the expression of a performer's act while the first amendment privileges the "idea" of the act. It is now settled that the first amendment does not protect appropriation of a performer's entire act. Further analogies from copyright and first amendment law will be useful in other factual settings involving the right of publicity.

While the resolution of the competing interests in *Zacchini* is not expected to be popular with the media, it appears to provide a proper balance of the rights involved. Though the public should be informed of the performance of a human cannonball at the fair if a television station elects to broadcast such information, the television station has no right to obtain and exploit an interest in the performance for which others would normally have to pay. This assures the performer the fruits of his labor and may

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189. Warren & Brandeis, *supra* note 21, at 195.

in the end benefit the public, as the performer will have the incentive to continually produce an act interesting to the public.

When Hugo Zacchini was fired from his cannon that day in August 1972, he probably had no intention to make legal history—he undoubtedly only wanted to make his net 200 feet away. And when he brought his suit for appropriation of professional property, he probably had no intention to clarify the first amendment's role in right of publicity cases—he wanted his money.

As of June 1977 he has achieved all these things—except, as far as can be ascertained, his goal of money.<sup>190</sup>

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190. The case was reversed. 97 S. Ct. at 2859. Negotiations between counsel or further judicial proceedings will be necessary before the human cannonball reaches his target of hard cash.