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Michael J. McLane

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The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right

MICHAEL J. McLANE*
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INTRODUCTION

In recent years, the “right of publicity” has been recognized in a growing number of jurisdictions.¹ The growth of this right, which at this time derives primarily from state common law,² has recurrently been threatened by a number of fears, the most prominent of which involve how the right is created,³ whether it is assignable and devisable,⁴ whether the right is preempted under the Copyright Act,⁵ and most recently, whether it is eviscerated by first amendment interests.⁶

This Article will focus on all of these concerns, and will advocate recognition of the right of publicity, regardless of whether it is exploited while living;⁷ that the right should be fully assignable

* Senior Law Clerk, New Hampshire Superior Court. B.B.A., Siena College, 1980; J.D., Boston College Law School, 1983. Member, Massachusetts Bar. The author wishes to thank Massachusetts Superior Court Judge Hiller B. Zobel for his helpful comments on the original draft of the article.

1. *See, e.g.*, *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd per curiam*, 694 F.2d 674 (11th Cir. 1983); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (N.Y. App. Div. 1977); *see also* Comment, *The Right of Publicity vs. The First Amendment: Reconciling the Conflict Between a Proprietary Interest of the Plaintiff and the Constitutional Guarantee of Free Speech*, 27 VILL. L. REV. 1205, 1206 nn.5-6 (1981-82) [hereinafter cited as Comment, *Conflict*]; RESTATEMENT (SECOND) OF TORTS § 652C (1977). What has been lacking is a precise definition of the limits of “this right which does exist and has existed for a long time—much longer than the right of privacy.” Pilpel, *The Right of Publicity*, 27 BULL. COPYRIGHT SOC'Y OF U.S.A. 249, 263 (1980) [hereinafter cited as Pilpel, *Publicity*].

2. *But see* N.Y. (CIV. RIGHTS) LAW §§ 50-51 (McKinney Supp. 1982-83), protecting living persons from commercial exploitation of their names and likenesses without consent, in the form of a statutory right of privacy.

3. *See infra* § I.

4. *See infra* § II.

5. *See infra* § III.

6. *See infra* § IV.

7. *See infra* § I.

and devisable;⁸ that the right is not preempted by the Copyright Act;⁹ and that the protection afforded the media for use of a person's name, likeness or characteristics should only extend to newsworthy information.¹⁰

I. THE CREATION OF THE RIGHT OF PUBLICITY

Courts currently do not apply a uniform test to discern whether a person has acted adequately to create a right of publicity while living. The possible range of tests include: whether a person has created a business to market his name or likeness in areas other than the person's primary area of activity;¹¹ whether a person has exploited his name or likeness while living, without creating a business for this purpose in areas other than the person's primary area of activity;¹² whether a person has recognized the value of the right of publicity merely by entering into the person's primary area of activity;¹³ and recently, whether the person exploited the right of publicity while living was found to be totally unnecessary to creation of the right.¹⁴ These varying tests are mirrored in the widely divergent views of commentators.¹⁵

8. See *infra* § II.

9. See *infra* § III.

10. See *infra* § IV.

11. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

12. See *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1198-99 (S.D.N.Y. 1983); *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981).

13. This category includes cases where a person actually contracted concerning the use of a name or likeness in the person's primary area of activity, see *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429-30 (S.D.N.Y. 1978); and where no such contracts were ever entered into, see *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982) (applying California Law). But see *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 508 F. Supp. 854, 865 (N.D. Ga. 1981), *rev'd per curiam*, 694 F.2d 674 (11th Cir. 1983), where, although *Hicks* was cited as authority, Dr. King's accepting honoraria for the use of his name, likeness and literary compositions, as well as his sale of copyrights to several speeches, did not show a purpose to establish his personality as a commercial commodity.

14. See *Martin Luther King, Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 694 F.2d 674 (11th Cir. 1983) (*per curiam*), where the court relied on answers to certified questions to the Supreme Court of Georgia in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

15. "[I]t should not matter from the standpoint of the right of publicity whether the person is a public figure or not, nor should it matter if he is a public figure, he has exercised his right of publicity during his lifetime." Pilpel, *Publicity*, *supra* note 1, at 257. *Accord* Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1717 (1983). Compare *Sims, Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 479 (1981) [hereinafter cited as *Sims, Survivability*]: "A celebrity may perceive his fame as predicated in part on the projection of a public image that might be undermined by pro-

Another area of concern is whether the right of publicity should exist only in the names, likenesses and characteristics of celebrities. Although there appears to be less of a policy consideration¹⁶ in allowing creation of the right without exploitation to encourage creativity among noncelebrities who are as yet “undiscovered,” it is nonetheless unfair not to compensate even the “unknown” for the unauthorized use of his name, likeness or characteristics. Presumably, such use would not occur unless the name, likeness or characteristic had some value, which should be ascertained by the parties:

The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.¹⁷

Thus, it would be unfair to allow the celebrity to enjoy the benefits of the right of publicity, while denying these same benefits to the noncelebrity.

It is likewise arbitrary to require some type of overt exploitation by a living person in order to create a right of publicity, be it by incorporating a business to license property rights, by contracting to create commercial items, such as posters, utilizing publicity rights, or even by only requiring that a person show he or she knew of the right's existence by contracting to protect publicity rights in noncommercial items, such as the right to portray a particular character.¹⁸

moting commercial products.” *Id.* (footnote omitted); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 651-52 (1973): “A noncelebrity can establish the going rate for endorsements by other noncelebrities, or the going rate for models or actors who lend their personalities to commercial advertisements.” *Id.* (footnote omitted). *Accord* Comment, *The Right of Publicity as a Means of Protecting Performers’ Style*, 14 LOY. L.A.L. REV. 129, 132 n.22 (1980) [hereinafter cited as Comment, *Style*]. *But see* Rader, *The “Right of Publicity”—A New Dimension*, 61 J. PAT. OFF. SOC’Y 228, 233 (1979) [hereinafter cited as Rader, *New Dimension*] (stating that the right of publicity is only created by exploitation, and a private individual fails to create the right by associating his or her name or likeness with a product because these are usually without commercial value) and Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979) [hereinafter cited as Felcher & Rubin, *Portrayal*]: “Because the right of publicity rests on the idea of damage to property of demonstrated economic worth, it does not extend to the misappropriation of a person’s name or likeness when that person has not previously exploited these attributes in some commercial manner.” *Id.*

16. *See infra* notes 31-52 and accompanying text.

17. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

18. *See supra* notes 11-15 and accompanying text. This last test should inevitably result in a court finding a right of publicity. *See Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981), *rev’d*, 689 F.2d 317 (2d Cir. 1982):

The courts draw fine distinctions between what is and is not sufficient exploitation. In *Lugosi v. Universal Pictures*,¹⁹ the court acknowledged the assignability of the right of publicity, stating that “[a]ssignment of the right . . . by the ‘owner’ thereof is synonymous with its exercise.”²⁰ The fact that Lugosi had actually assigned the right to use his name and likeness to promote the film *Dracula* was not sufficient. The court would only protect those commercial situations actually affected by Lugosi’s assignment, which it found did not include the use of the character Dracula in a film made after his death.²¹ This type of burden on the right-holder, which requires foresight as to what future uses “pirates” may make of one’s name, likeness or characteristics, is unduly restrictive.²²

It is also possible for courts to confuse even the exploitation standards already in force. In *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,²³ (*King I*), the district court did not determine whether Georgia would recognize the devisability of the right of publicity, because the rule emerging from case law was that the right must have been exploited.²⁴ Although Dr. King accepted honoraria for the use of his name, likeness, and literary compositions, and sold copyrights to several speeches to Motown Records Corporation,²⁵ the court found that it was not Dr. King’s “purpose” to establish his personality as a commercial commodity.²⁶

The better view is found in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,²⁷ (*King II*), where the eleventh circuit relied on the Georgia Supreme Court’s ruling that “the appropriation of another’s name and likeness . . . is a tort in Georgia, whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public

“Every appearance, contract and advertisement involving the Marx Brothers signified recognition by the performers of the unique characters they portrayed.”

19. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

20. *Id.* at 823, 603 P.2d at 431, 160 Cal. Rptr. at 329.

21. *Id.*

22. If a test for exploitation should be required at all, the proper determination should be whether one’s name, likeness or characteristics have been exploited, not whether a particular commercial area has been exploited. *See Comment, Style, supra* note 15, at 135-36 n.36.

23. 508 F. Supp. 854 (N.D. Ga. 1981).

24. *Id.* at 864.

25. *See, e.g., King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963).

26. *King I* at 865.

27. 694 F.2d 674 (11th Cir. 1983) (per curiam), relying on answers to certified questions to the Supreme Court of Georgia in *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 250 Ga. 135, 296 S.E.2d 697 (1982).

figure who is not a public official.”²⁸ The court further found that the right of publicity need not be exploited while the person is alive:²⁹ “In our view, a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.”³⁰

The right of publicity should not be forfeited because a person while living avoids commercial exploitation. A person may fail to exploit his name, likeness or characteristics for a variety of reasons: as a means of maintaining a proper public image; for the purpose of letting the right of publicity appreciate in value, or, failing to assign the right may be due to a mere oversight. In addition, one whose right has not yet been exploited may suffer an untimely death. To avoid unjust enrichment, the right should exist in all persons; if it has in fact been infringed the question of value should be left to a proper determination of damages.

II. THE ASSIGNABILITY AND DEVISABILITY OF THE RIGHT

Ordinarily, once a court finds that the right of publicity was exploited sufficiently during life,³¹ it will deem the right devisable.³² Again, however, courts and commentators disagree.

28. *King II* at 680.

29. *Id.* at 682-83.

30. *Id.* at 683 (footnote omitted).

31. See *supra* notes 11-30 and accompanying text.

32. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *rev'd*, 652 F.2d 278 (2d Cir. 1981) (applying Tennessee law and deferring to the sixth circuit's interpretation of same in *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 694 F.2d 674 (11th Cir. 1983) (per curiam), relying on answers to certified questions to the Supreme Court of Georgia in 250 Ga. 135, 296 S.E.2d 697 (1982). *But see Memphis Dev.*, 616 F.2d at 958; *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979); *accord Guglielmi v. Spelling-Goldberg Prod.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (right not descendible). *But see Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983), where the court did not decide the exploitation question. The court relied upon *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977), for the proposition that the Ohio Supreme Court had “specifically rejected the notion that the right of publicity was a property right. Rather, it declared the right of publicity was more closely aligned with the right of privacy.” *Reeves*, 572 F. Supp. at 1235. The court placed too much emphasis on the Ohio Supreme Court's recognition that the right of publicity was originally a form of “invasion of the right of privacy by appropriation.” *Zacchini*, 47 Ohio St. 2d at 226, 351 N.E.2d at 456. The Ohio Supreme Court had actually been quite aware that “the ‘privacy’ which the performer seeks is personal control over commercial display and exploitation of his personality and the exercise of his talents.” *Id.* at 231, 351 N.E.2d at 459. The question of survivability was not before the Ohio Supreme Court in *Zacchini*. Whatever the ultimate decision on this issue by the Ohio court might be, the writer is convinced that the court recognized the difference between the right of publicity and the other

Three arguments exist which support the denial of the survivability of the right of publicity: 1) survivability of the right is not always deserved; 2) the survivability of the right is not warranted by policy considerations; and finally, 3) that the courts should maintain a hands-off posture regarding the development of the right.

That the survivability of the right is not always deserved was a spectre raised in *Memphis Development Foundation v. Factors Etc., Inc.*,³³ where the district court had enjoined further distribution of eight-inch pewter replicas of Elvis Presley by the Memphis Development Foundation, a nonprofit corporation.³⁴ The court of appeals concluded that “the right of publicity should not be given the status of a devisable right, even where as here a person exploits the right by contract during life.”³⁵ The court was concerned that fame “may be created by bad as well as good conduct.”³⁶

This argument can be countered by the fact that the financial benefits of such a right could ultimately inure to victims of the infamous person.³⁷ However, this answer is too narrow. Financial benefits may also inure to innocent family members or legatees of the right holder. Moreover, Anglo-American jurisprudence has for quite some time recognized that even the conviction of a felony has not meant that one’s property escheats to the sovereign.³⁸

That policy considerations do not support the survivability of the right, even when exploited during life, was another theory advanced in *Memphis Development*.³⁹ It “seem[ed] apparent” to the court “that making the right of publicity inheritable would not

branches of the right to privacy, as opposed to the district court’s conclusion in *Reeves* that the right of publicity is not descendible in Ohio, “[i]n light of the Ohio Supreme Court’s clear language linking the right of publicity more closely to the right of privacy than to a property right.” *Reeves*, 572 F. Supp. at 1235.

33. 616 F.2d 956 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

34. *Id.* at 957.

35. *Id.* at 958.

36. *Id.* at 959.

37. In the Memphis court’s final rationale that infamy could be the basis of a valuable right of publicity, the court ignored the fact that the financial benefits of such a right could ultimately inure to the benefit of the victims of the infamous acts or their survivors. For example, New York has enacted Section 632-a of the Executive Law [N.Y. Exec. Law § 632-a (1977)] which provides restitution to victims of crime from payments received by the perpetrators who exercise their rights of publicity.

Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987, 994 (1981) (footnote omitted) [hereinafter cited as Comment, *Premature Burial*].

38. See generally C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 21-22 (1979).

39. 616 F.2d at 958.

significantly inspire the creative endeavors of individuals in our society.”⁴⁰ This conclusion was reached despite the court’s recognition that Elvis Presley “worked to create the asset, with, perhaps, the hope of devising it.”⁴¹

It appears evident to this writer that, generally, “the protection provides an economic incentive for [performers] to make the investment required to produce a performance of interest to the public.”⁴² This incentive is bolstered by the fact that a right of publicity is survivable.⁴³ For various reasons previously discussed,⁴⁴ not all holders of the right will exercise it while living. For these people, the survivability of the right may be the most valuable aspect of it. To say that a person will not be further motivated to attain notoriety because a valuable asset will be added to the person’s estate runs counter to the notion that people accumulate personal property for their legatees or heirs as well as for themselves.⁴⁵

Another argument in opposition to the survivability of the right of publicity is that courts should be hesitant in defining the perimeters of the right. The reluctance of the courts to define the limits of the right is not surprising given the fact that commentators’ theories have ranged from permitting courts to set the outer limits of the right,⁴⁶ or advocating a fifty year period of survivability,⁴⁷ to the other end of the spectrum, calling for only a five to ten year period of survivability in legislation approved by Congress pursu-

40. *Id.* at 959.

41. *Id.* at 960.

42. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

43. Of course by noting such events as the aftermath of John Lennon’s death, the courts should recognize that the right of publicity has value in the marketplace even after death. The recognition of this value, then, should lead the courts to bestow the label of “property” on the right of publicity, even after the death of the artist.

Comment, *Premature Burial*, *supra* note 37, at 1000 (footnote omitted).

44. See *supra* notes 11-30 and accompanying text.

45. Compare Felcher & Rubin, *Portrayal*, *supra* note 15, at 1619:

Of course, the possibility of providing for one’s heirs may have a motivational effect during one’s life. But given the present state of the law, it is possible for a person to establish a bona fide contract to profit from his attributes during his life, and to leave the proceeds to his heirs. The fact that he did not do so indicates that he was not particularly concerned with using and devising this asset, and that such concerns were not a substantial motivation during his life.

The authors defend survivability in general in Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980).

46. See Comment, *Premature Burial*, *supra* note 37, at 1007.

47. Note, *The Right of Publicity Revisited: Reconciling Fame, Fortune, and Constitutional Rights*, 62 B.U.L. REV. 965, 1000 (1982) [hereinafter cited as Note, *Reconciling*].

ant to its Commerce Clause powers.⁴⁸

The life-plus-fifty-years period of survivability is the best choice. The United States Supreme Court has noted the similarities between copyright law and the right of publicity.⁴⁹ Additionally, Chief Justice Bird of the California Supreme Court adopted this time limit in her dissent in *Lugosi v. Universal Pictures*,⁵⁰ and it is proposed by the court in *Estate of Presley v. Russen*.⁵¹

The “parade of horrors” conjured up by the sixth circuit in *Memphis Development* should not retard the growth of the right of publicity;⁵² it is a property right, and should be survivable. The survivability of the right, similar to the survivability of copyright, ensures increased incentives and productivity within our society. As the right is originally a creature of common law, there is no reason why state courts as well as federal courts applying state law should not be free to define the perimeters of the right, and to limit it to a fifty year period after the death of the creator.

III. THE EFFECT OF THE COPYRIGHT ACT ON THE RIGHT OF PUBLICITY

Although various aspects of the right of publicity are similar to those found in copyright law,⁵³ the right of publicity is not pre-

48. Sims, *Survivability*, *supra* note 15, at 455, 498. See also Note, *Torts—Right of Publicity—Famous Persons Right of Publicity is Descendible—The Need for a Durational Limit on the Right of Publicity—Groucho Marx Productions, Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982), 14 SETON HALL L. REV. 190, 208-10 (1983); Aussen, *The Right of Publicity: A “Haystack in a Hurricane,”* 55 TEMP. L.Q. 977, 1025 (1982) [hereinafter cited as Aussen, *Haystack*].

49. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-77 (1977).

50. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Bird, C.J., dissenting): “A prominent person has a substantial economic interest in controlling commercial use of his name and likeness. This is entitled to protection under the common law and should be inheritable by an individual’s heirs and protected for 50 years after the individual’s death.” *Id.* at 828, 603 P.2d at 434, 160 Cal. Rptr. at 332.

51. 513 F. Supp. 1339, 1355 n.10 (D.N.J. 1981). The court suggested the New Jersey state legislature set a durational limit on the right of publicity, and proposed the Federal Copyright Act, 17 U.S.C. §§ 302, 305 as providing informative guidelines. *But see* Ropski, *Further Comments on the Development of the Right of Publicity—A Matter of Life, Death and Sometimes the First Amendment*, 73 TRADEMARK REP. 278, 283-84 (1983) (arguing that the right of publicity, like a trademark right, should be protectible as long as assignees or heirs assert or commercially exploit the right).

52. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 284 (2d Cir. 1981) (Mansfield, J., dissenting). Judge Mansfield, disagreeing that the sixth circuit’s promulgation of Tennessee law should be controlling, described the “parade of horrors” conjured up by the sixth circuit as “unreal.” *Id.* at 287. Judge Mansfield also approved of limiting the right of publicity’s duration by analogy to the copyright statute. *Id.* at 288. See also *Commerce Union Bank v. Coors of Cumberland, Inc.*, 7 Media L. Rep. (BNA) 2204 (Tenn. Ch. App. 1981).

53. For example, the “fair use” exception to copyright incorporated into 17 U.S.C. § 107 (1982) is comparable to the “incidental use” of one’s right of publicity. See Hoffman, *The Right of Publicity—Heirs’ Right, Advertisers’ Windfall, or Courts’*

empted by it. The Federal Copyright Act⁵⁴ protects artistic creations.⁵⁵ However, copyright protection is limited to works fixed by a tangible medium of expression.⁵⁶ One's persona, in all its varying aspects, is incapable of reduction to tangible form.⁵⁷ Arguments that one's persona may be captured in various tangible media and therefore may be protected by the Copyright Act reveal a fundamental misconception of the nature and extent of the Act's protection.⁵⁸

Nightmare?, 31 DE PAUL L. REV. 1 (1981) [hereinafter cited as Hoffman, *Courts' Nightmare*]; Ausness, *Haystack*, *supra* note 47, at 1048-53; RESTATEMENT (SECOND) OF TORTS § 652C Comment d (1977). In Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO L.J. 1567, 1576 n.79 (1983), the author states that:

Copyright . . . rewards only the individual's own work rather than giving that individual a right to share in the proceeds of all works that involve him. Thus, if a person wants to learn about Watergate, but feels that contributing to the Watergate conspirator's welfare is wrong, he can buy John Sirica's book rather than G. Gordon Liddy's.

The concern expressed in the Note, that unsavory characters will benefit by exerting the right of publicity where their names appear in a work, ignores the fact that adoption of the fair use exception would prevent the right of publicity from violating every copyrighted work.

54. 17 U.S.C. §§ 101-810 (1982).

55. *Id.* at § 102(a).

56. *Id.* See 1 M. NIMMER ON COPYRIGHT § 1.08(C) (2d ed. 1978) [hereinafter cited as NIMMER].

57. "The doctrines [of copyright and right of publicity] are not, however, identical. . . . The interest created under the right of publicity is the person's individual style—his persona—which need not become tangibly fixed in a medium of expression." Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 684 (1981) [hereinafter cited as Shipley, *Preemption*].

In Professor Shipley's article he states that "[i]t is uncertain whether copyright protection extends to characters. . . . If, however, federal copyright protection is available . . . , then concurrent state protection under the right of publicity might be preempted." *Id.* at 700. See also Ausness, *Haystack*, *supra* note 47, at 1022-23. But see Kulzick & Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A.L. REV. 57, 59 (1980) [hereinafter cited as Kulzick & Hogue, *Chilled Bird*] (law of copyright generally does not protect characters from infringement).

The case cited by Professor Shipley that found characters to be protected under copyright, *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), relied on a longstanding exception to the general rule, allowing protection for comic characters, which can be fixed in a pictorial medium. See also Ausness, *Haystack*, *supra* note 47, at 1022.

58. The Copyright Act only protects original artistic works from reproduction. See, e.g., *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914): "Of course when the first picture has been reproduced and copyrighted every other artist is entirely free to form his conception . . . and to avail of the same young woman's services in making it permanent, whether he works with pigments or a camera."

Although Professor Shipley is correct in stating that a film of Zacchini's human cannonball act, or a photograph of a baseball star in *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), would be an original work under 17 U.S.C. § 102(a)(5) (1982), he is incorrect in concluding: "[Plaintiff's right in *Haelen*] to control the use of these likenesses was susceptible to infringement either by reproduction of the photographs themselves, a copyright infringement, or by the distribution of completely different photographs." Shipley, *Preemption*, *supra* note 57, at 714. Cf. Ausness, *Haystack*, *supra* note 47, at 1021-22, where the author likewise con-

Another argument for preemption of the right of publicity is that the copyright holder will not be able to sell a copyrighted work which depicts an individual if the right of publicity allows an individual exclusive control over his name, likeness and characteristics.⁵⁹ However, free-wheeling use of a person's name or likeness for commercial purposes was denied long before the right of publicity was even recognized.⁶⁰ It would be anomalous to allow a person to circumvent the right of publicity merely by obtaining a copyright in a work containing a person's likeness. Such a use of the copyright laws would serve to eviscerate the right of publicity.⁶¹

The right of publicity, although analogous to copyright, differs in that one's persona cannot be placed in a fixed medium. Thus, the right is not protected under the Copyright Act, and is not preempted by the Act. As the right of publicity can be nullified by

fuses the reproduction of a copyright work and the reproduction of the non-copyrightable "likeness" of a person.

Professor Shipley lost sight of his own recognition that "[t]he copyrightable expression would be the recording or filming of the act, not the live act itself." *Id.* at 710 n.258 (quoting NIMMER, *supra* note 56, at § 1.08(C), at 1-51). Anyone would be free under the copyright law to make his or her own film of Zacchini's act or photograph of a person. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903), where Mr. Justice Holmes, for the Court, stated: "Others are free to copy the original. They are not free to copy the copy."

59. See Comment, *Style*, *supra* note 15, at 141, noting the preemption discussion in *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971):

Such a conclusion [that copyright preempts the right of publicity] clearly fails to recognize the simple fact that by according the protection requested, a licensee would in no way be prohibited from securing the rights to use the song, only from using the distinctive expression of it as created by someone else.

See also Rader, *New Dimension*, *supra* note 15, at 243.

60. N.Y. (CIV. RIGHTS) LAW §§ 50-51 (McKinney Supp. 1982-83); see also cases collected in *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105, 1107-08 (S.D.N.Y. 1980).

61. Consider for example the argument in *Ausness, Haystack*, *supra* note 47, at 1023, that a poster displaying a single frame from a copyrighted movie is a "derivative work" under 17 U.S.C. § 101 (1982). The author is incorrect in asserting that such a poster would be a work "based upon one or more preexisting works" under 17 U.S.C. § 101. A photograph is a protected original work under 17 U.S.C. § 102 (1982). See *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499, 511 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) (citing 17 U.S.C. § 5(j) (1947)). See also *Edison v. Lubin*, 122 F. 240, 241 (3d Cir. 1903), where an exact photographic reproduction was made of the copyrighted material.

The answer is clear as to who should prevail when a photograph is created from a copyright negative without permission. This does not mean, however, that the owner of a motion picture should be able to create posters from a copyrighted film without the permission of a person depicted in them under the guise that they are "derivative works" automatically protected. The work as a whole would be protected, as an original work, as between its creator and all others. The creator, however, would have to bargain with a person depicted, or filmmakers would be able to seriously dilute the value of a person's right to grant licenses to display posters.

strict enforcement of the Copyright Act, courts should give the right of publicity priority when a copyright holder attempts to circumvent the right by utilizing the federal system of registering copyrighted works.

IV. THE FIRST AMENDMENT AND THE RIGHT OF PUBLICITY

First amendment and right of publicity interests were balanced in *Zacchini v. Scripps-Howard Broadcasting, Inc.*,⁶² where an entertainer's "human cannonball" act was filmed in its entirety.⁶³ The Supreme Court of Ohio had decided that the newscasts of the act were privileged, unless the actual intent of the station was to appropriate the publicity for some private use, or unless the station intended to injure the individual.⁶⁴

The Supreme Court in *Zacchini* discussed *Time, Inc. v. Hill*,⁶⁵ where the plaintiffs sued for invasion of privacy.⁶⁶ The plaintiffs had been held hostage for nineteen hours in 1952, but were released unharmed.⁶⁷ Life magazine's story on a play written about the incident indicated that the play accurately represented acts of violence that never actually occurred.⁶⁸ Although the plaintiffs were portrayed as courageous, they sued under a New York statute⁶⁹ protecting even a "newsworthy person"⁷⁰ from a "fictitious"⁷¹ report. The Court applied the *New York Times Co. v. Sullivan*⁷² requirement that defendant publish the article with knowledge of its falsity or in reckless disregard of the truth to "false light" privacy cases.⁷³

Hill was distinguished in *Zacchini* as involving "an entirely different tort from the 'right of publicity' recognized by the Ohio Supreme Court."⁷⁴ The Court noted the importance of the differences between the two torts; first, that invasion of privacy protects injury to feelings, whereas the right of publicity protects a person's

62. 433 U.S. 562 (1977).

63. *Id.* at 564. See Quinn & Warren, *Professional Team Sports New Legal Arena: Television and the Players's Right of Publicity*, 16 IND. L. REV. 487 (1983) for a discussion of how *Zacchini* may apply to the rights of team sports athletes in television and cable television broadcasts.

64. 433 U.S. at 565 (citing 47 Ohio St. 2d 224, 352 N.E.2d 454, 455 (1976)).

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

66. *Id.* at 378.

67. *Id.*

68. *Id.* at 377-78.

69. N.Y. (CIV. RIGHTS) LAW §§ 50-51 (McKinney Supp. 1982-83).

70. 385 U.S. at 384.

71. *Id.*

72. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

73. *Hill*, 385 U.S. at 387-88.

74. *Zacchini*, 433 U.S. at 571.

proprietary interest in encouraging entertainment; and second, that the two torts markedly differ:

in the degree to which they intrude on dissemination of information to the public. In “false light” cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in “right of publicity” cases the only question is who gets to do the publishing. . . . Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.⁷⁵

It is rather striking that this distinction has not been noted by those postulating that the goals of the first amendment will be frustrated by right-of-publicity suits, because the public will be denied access to various forms of entertainment.⁷⁶ Nonetheless, the Court has clearly pointed out that the first factor to be considered in evaluating a potential conflict between the first amendment and the right of publicity is “that neither the public nor [the television station] will be deprived of the benefit of [Zacchini’s] performance as long as his commercial stake in his act is appropriately recognized.”⁷⁷

75. *Id.* at 573. Even in the face of *Zacchini*, some commentators insist upon applying the *New York Times* standard to publicity cases. See, e.g., Ausness, *Haystack*, *supra* note 47, at 1036-41. In *Haystack*, the case of *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated*, 387 U.S. 239 (1967), *aff’d on remand*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969), was termed a “false light privacy case.” Ausness, *Haystack*, *supra* note 47, at 1038. This writer, however, has been unable to locate the unfavorable element of the material invented about Warren Spahn. Nor is it true that there is “considerable social value in entertainment, but there is none in deception.” *Id.* at 1041 n.48. The court in *Spahn II* indicated that the “lively” method of portrayal used by the defendant author may well have been *more* entertaining to his youthful audience. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d at 128, 233 N.E.2d at 842-43, 286 N.Y.S.2d at 835. The case makes sense only in a right of publicity context, for, as J. Bergan noted in dissent, applying the *New York Times* standard was of little aid in a case involving more than the reckless disregard of truth. “Fiction is the conscious antithesis of truth.” *Id.* at 131, 233 N.E.2d at 845, 286 N.Y.S.2d at 838.

76. See, e.g., Felcher & Rubin, *Portrayal*, *supra* note 15, at 1595; Note, *Reconciling*, *supra* note 47, at 979, 992-93. But see Comment, *Conflict*, *supra* note 1, at 1223: “In sum, *Zacchini* represents an important milestone in the development of publicity law because it embodies Supreme Court recognition of a property-based right of publicity, and because it resulted in Supreme Court validation of a particular publicity claim in the face of a typically fatal first amendment challenge.”

77. *Zacchini*, 433 U.S. at 578. Commentators go to great lengths to attempt to minimize the force of *Zacchini*. One commentator suggests that *Zacchini* may be consistent with *Man v. Warner Bros.*, 317 F. Supp. 50 (S.D.N.Y. 1970), as *Zacchini* based his entire living on his act, which was broadcast in whole, whereas *Man* gave a “brief and spontaneous performance,” which the court characterized as *de minimis*. Ausness, *Haystack*, *supra* note 47, at 1036 (citing *Man*, 317 F. Supp. at 53). Even assuming *Man* suffered less damage than *Zacchini*, both performances were brief (if not spontaneous in *Zacchini*’s case), and the appropriation of *Man*’s entire performance, at forty-five seconds exactly three times the length of *Zacchini*’s, is no less offensive because it was small in proportion to the entirety of the motion picture “Woodstock”

It is unlikely that the continued vitality of the right of publicity will result in any more than a *de minimis* restriction on first amendment goals. The power of the market was duly noted in cases such as *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,⁷⁸ and *Zacchini*.⁷⁹ Individuals will, for the most part, be happy to be paid for their performances and portrayals. A live person already has the power to enjoin certain injurious publications.⁸⁰ Finally, the survivability of the right of publicity gives heirs, legatees and assignees the right for a limited time to monitor uses of a decedent's name, likeness and characteristics. In cases not involving a newsworthiness privilege,⁸¹ the media will have to be more circumspect than it is under current privacy law. At present, anything may be said about a decedent, and a privacy cause of action, which dies with the decedent, may not be brought by the next of kin.⁸²

Some courts that have considered the conflict between first amendment goals and the right of publicity have reached incorrect results.⁸³ Others have reached correct results, while not necessarily for the right reasons.⁸⁴ When examining these cases, one must realize that a liberal attitude toward the first amendment⁸⁵

than the appropriation in *Zacchini* was because his act was small in proportion to the full newscast.

78. "For it is common knowledge that many prominent persons . . . , 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, popularizing their countenances." *Haelen Laboratories, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

79. "[Zacchini] does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." *Zacchini*, 433 U.S. 562, 578.

80. W. PROSSER, LAW OF TORTS § 117, at 804 (4th ed. 1971).

81. See *infra* notes 141-61 and accompanying text.

82. See, e.g., *Young v. That Was The Week That Was*, 312 F. Supp. 1337, 1341 (N.D. Ohio 1969), *aff'd per curiam*, 423 F.2d 265 (6th Cir. 1970).

83. See *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Guglielmi v. Spelling-Goldberg Prod.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal Rptr. 352 (1979) (Bird, C.J., concurring).

84. See *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *rev'd*, 652 F.2d 278 (2d Cir. 1981); *Groucho Marx Prod., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981); *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd per curiam*, 694 F.2d 674 (11th Cir. 1983); and *Lerman v. Chuckleberry Publishing, Inc.*, 496 F. Supp. 1105 (S.D.N.Y. 1980).

85. The primary goal of the first amendment freedom of speech is to prevent the government from suppressing ideas it may disapprove of. Thus, Voltaire's legendary quote: "I disapprove of what you say, but I will defend to the death your right to say it," was cited with approval in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976).

The maintenance of the democratic process is furthered by a privilege for newsworthy information. See *Sims, Survivability, supra* note 15, at 1597. "The flow of

can coexist with the right of publicity.

Three categories of cases involving the right of publicity have been identified. They involve, respectively, newsworthy information, entertainment, and commercial products.⁸⁶ These categories are not mutually exclusive, however. Courts seeking to protect the right of publicity have often forced a case into the “commercial” category, because a “purely commercial” use of a person’s name, likeness or characteristics is generally not entitled to first amendment protection.⁸⁷

It is difficult, however, to find a case where the “purely commercial” use of a person’s name, likeness or characteristics does not contain a creative element sufficient to move the case into the entertainment category. In *King I*,⁸⁸ the defendant hired an artist to create the mold of a plastic bust of Dr. King.⁸⁹ Nevertheless, no first amendment claims were raised either in *King I* or on appeal.⁹⁰

In *Lerman v. Chuckleberry Publishing, Inc.*,⁹¹ the medium of expression was a magazine article containing “erotic and nude photographs of purportedly well-known actresses,”⁹² which might be found to be informative or entertaining by a certain portion of the community. Nonetheless, the court found that Chuckleberry’s misuse of plaintiff’s name was not protected as reporting an informational or newsworthy event.⁹³

In *Factors Etc., Inc. v. Pro Arts, Inc.*,⁹⁴ the defendant argued that its poster of the recently deceased Elvis Presley was a newsworthy event.⁹⁵ *Factors* cited *Paulsen v. Personality Posters, Inc.*,⁹⁶ where the court refused to enjoin the sale of a Pat Paulsen “FOR PRESIDENT” poster.⁹⁷ The court in *Paulsen* reasoned that the comedian’s choice of the political arena for satire made

information essential to a free society must be supported by a privilege of newsworthiness so that information sought by the public is freely available.” See also Kulzick & Hogue, *Chilled Bird*, *supra* note 57, at 58.

86. See generally Felcher & Rubin, *Portrayal*, *supra* note 15.

87. *Id.* at 1606; Rader, *New Dimension*, *supra* note 15, at 241.

88. 508 F. Supp. 854 (N.D. Ga. 1981), *rev’d per curiam*, 694 F.2d 674 (11th Cir. 1983).

89. *Id.* at 856.

90. “The defendants in the case now before us make no claim under [first amendment] freedoms and we find no violation thereof.” *King II*, 694 F.2d 674, 677 (11th Cir. 1983).

91. 496 F. Supp. 1105 (S.D.N.Y. 1980).

92. *Id.* at 1106.

93. *Id.* at 1108.

94. 579 F.2d 215 (2d Cir. 1978), *rev’d*, 652 F.2d 278 (2d Cir. 1981).

95. *Id.* at 222.

96. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968).

97. *Factors*, 579 F.2d at 222.

him “newsworthy.”⁹⁸ The second circuit’s reply in *Factors* was: “We cannot accept Pro Arts contention that the legend ‘IN MEMORY . . .’ placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate.”⁹⁹ However, it is hard to believe the court seriously thought Paulsen’s mock candidacy was somehow more newsworthy than Elvis Presley’s death.

The practice of forcing a case into the commercial category is perhaps best illustrated in *Groucho Marx Productions, Inc. v. Day & Night Co.*,¹⁰⁰ where the defendants’ production, “A Day in Hollywood/A Night in the Ukraine,” used the Marx Brothers characters only in the second half of the play.¹⁰¹ The court found the play constituted “entertainment that merely imitates,”¹⁰² which “even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment.”¹⁰³

The decisions which weigh the merit and creativity of differing works have led one commentator to recognize that “more constitutional interest in ‘mere’ commercial appropriations of the celebrity’s name and image exists than has been previously suggested.”¹⁰⁴ Indeed, the purchasers of commercial goods, the general public, are often exercising their protected rights of speech by exhibiting their heroes and villains in the form of commercial products.¹⁰⁵ Finally, in attempting to ascertain the motives of the person who is exploiting another’s right of publicity, it may be impossible to separate the speech from the commercial element.¹⁰⁶ Another commentator has gone so far as to suggest that *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁰⁷ involved a “purely commercial”¹⁰⁸ setting, although *Zacchini* involved the appropriation of a newsworthy event.

Given the alternative, the desire to categorize difficult cases as involving commercial appropriations is understandable. It is eas-

98. *Id.*

99. *Id.*

100. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev’d*, 689 F.2d 317 (2d Cir. 1982).

101. *Id.*, 523 F. Supp. at 486.

102. *Id.* at 492-93.

103. *Id.* at 493 (footnote omitted) (quoting *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981)). “The court reached an unjustifiable conclusion. An original play, with new music, lyrics and script must have enough original creativity to merit first amendment protection. By deciding otherwise, the court may have denied the public the opportunity to enjoy ‘A Day in Hollywood, A Night in the Ukraine.’” *Id.* Note, *Reconciling*, *supra* note 47, at 995.

104. Sims, *Survivability*, *supra* note 15, at 497.

105. *Id.* at 494-95.

106. See Note, *Reconciling*, *supra* note 47, at 989-90.

107. 433 U.S. 562 (1977).

108. Hoffman, *Courts’ Nightmare*, *supra* note 53, at 23.

ier to judge the merit of a work than to judge the merit of the first amendment itself, which is generally thought to come into play when the name, likeness or characteristics of an individual appear in an entertaining or informative work.¹⁰⁹

In *Hicks v. Casablanca Records*,¹¹⁰ the plaintiffs attempted to prevent the defendants from publishing a fictional account of Agatha Christie's mysterious eleven day disappearance in 1926.¹¹¹ The court found that the book was not protected as a biography.¹¹² Neither the book nor the movie were protected as news or history.¹¹³ The court noted that other courts had engaged in a balancing test between society's interest in the speech and those interests seeking to restrain it.¹¹⁴ The court cited *Miller v. California*,¹¹⁵ and *Near v. Minnesota*,¹¹⁶ and found that the right of publicity does not attach "where a fictionalized account of an event in the life of a public figure is depicted in a novel or movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."¹¹⁷

Citations to cases utilizing a balancing test, without recognizing the factual differences of those cases, are of little help in formulating a standard in right of publicity cases. Neither case is on point. In *Near*, the defendants had been convicted under a Minnesota statute which provided "for the abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.'"¹¹⁸ The Court found that although liberty of the press is not an absolute right, this statute was designed not to punish but to suppress the offending newspaper.¹¹⁹ *Near*, then, involved the government's suppression of undesirous speech in the

109. See *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Guglielmi v. Spelling-Goldberg Prod.*, 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (Bird, C.J., concurring).

110. 464 F. Supp. 426 (S.D.N.Y. 1978).

111. *Id.* at 429.

112. *Id.* at 430-31.

113. *Id.* at 431.

114. *Id.*

115. 413 U.S. 15 (1973).

116. 283 U.S. 697 (1931).

117. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978).

118. *Near*, 283 U.S. at 701-02.

119. *Id.* at 711. See also Justice Butler's dissenting opinion, at 732 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1880 (5th ed. 1891)):

That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen.

form of prior restraint upon publication by the press relating to the malfeasance of public officers—"the essence of censorship."¹²⁰ The Court found that the chief purpose of the guarantee of liberty of the press is to prevent prior restraints on publication.¹²¹

Miller v. California,¹²² on the other hand, involved the application of California's obscenity statute¹²³ to a situation where unwilling recipients had received sexually explicit materials.¹²⁴ The Court replaced the "utterly without redeeming social value" test¹²⁵ with an inquiry into "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹²⁶ *Miller* is inapposite, as obscene material is entirely unprotected by the first amendment.¹²⁷

Chief Justice Bird of the California Supreme Court also reached the first amendment issues in a concurring opinion in *Guglielmi v. Spelling-Goldberg Productions*,¹²⁸ involving an exhibition of the film *Legend of Valentino: A Romantic Fiction*.¹²⁹ The Chief Justice concluded that a film, whether exhibited on television or in theaters, is presumptively protected under the California and United States Constitutions,¹³⁰ and will forfeit that protection only if it falls within narrowly limited classes of cases.¹³¹

The Chief Justice relied on the primary goal of the first amendment, "to remove governmental restraints from the arena of public discussion,"¹³² to invalidate the right of publicity claim in a fictional work.¹³³ Chief Justice Bird also relied upon Justice

120. *Near*, 283 U.S. at 713.

121. *Id.*

122. 413 U.S. 15 (1973).

123. CAL. PENAL CODE §§ 311, 311.2 (West 1970).

124. *Miller*, 413 U.S. at 18.

125. *Id.* at 24. See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion) (utterly without redeeming social value).

126. *Miller*, 413 U.S. at 24.

127. *Id.* at 23.

128. 25 Cal. 3d 860, 865-72, 603 P.2d 454, 457-62, 160 Cal. Rptr. 352, 356-60 (1979) (Bird, C.J., concurring).

129. *Id.* at 862, 603 P.2d at 455, 160 Cal. Rptr. at 353.

130. U.S. CONST. amends. I & XIV; CAL. CONST. art. I, § 2.

131. *Guglielmi*, 25 Cal. 3d at 864-65, 603 P.2d at 457-58, 160 Cal. Rptr. at 355-56 (citing, *inter alia*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969), *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).

132. *Id.* at 866, 603 P.2d at 458, 160 Cal. Rptr. at 356 (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

133. *But see Sims, Survivability*, *supra* note 15, at 485 n.152: "Notably, state protection of publicity rights does not represent a suppression of ideas by government motivated by fear of their communicative impact on the listener—the type of regulation that the Court has voided"

Brandeis' concurring opinion in *Whitney v. California*,¹³⁴ and Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*,¹³⁵ for support.¹³⁶

Justice Brandeis' concurrence in *Whitney*, however, dealt with the California Criminal Syndicalism Act,¹³⁷ which punished an accused "not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely."¹³⁸ *Whitney* thus afforded another instance of a state attempting to regulate speech to ensure its own safety.¹³⁹ Once again, the primary goal of the first amendment was stressed, as is shown by this quote from Thomas Jefferson's First Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."¹⁴⁰

The only decision to date which balanced the right of publicity and the right of free speech and found that the right of publicity prevailed is *Estate of Presley v. Russen*.¹⁴¹ *Russen* involved the rights of the defendant to promote and present a theatrical production "designed to imitate or simulate a stage performance of Elvis Presley."¹⁴² The court explicitly noted that a distinction between the protection afforded to news as opposed to entertainment had been noted by commentators,¹⁴³ but did not indicate that it would afford fictional books or movies any less protection than news.¹⁴⁴

The court instead admitted that defendant's production did not entirely qualify as either purely commercial use or entertainment.¹⁴⁵ Although it contained "an informational and entertain-

134. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

135. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 949 (1968) [hereinafter cited as Nimmer, *Times*].

136. *Guglielmi*, 25 Cal. 3d at 866 n.7, 160 Cal. Rptr. at 356 n.7, 603 P.2d at 458 n.7.

137. 1919 Cal. Stats., c. 188, p. 281 (repealed by 1953 Cal. Stats., c. 32, p. 641; current version at CAL. PENAL §§ 11400-02 (West 1982)).

138. *Whitney*, 274 U.S. at 373 (Brandeis, J. concurring).

139. *Id.* at 376.

140. *Id.* at 375 n.2.

141. 513 F. Supp. 1339 (D.N.J. 1981).

142. *Id.* at 1344.

143. *Id.* at 1355-56, 1356 n.12 (citing Felcher & Rubin, *Portrayal*, *supra* note 15, at 1596-1601). The court ignored, however, Felcher & Rubin's statement that "[t]his tendency toward differential treatment is tempered, however, by the hesitation of courts to make fine distinctions in cases in which free speech issues are involved." Felcher & Rubin, *Portrayal*, *supra* note 15, at 1598.

144. *Estate of Presley*, 513 F. Supp. at 1357-58.

145. *Id.* at 1358-59.

ment element,"¹⁴⁶ the show primarily sought to commercially exploit Elvis Presley.¹⁴⁷ Although entertainment generally enjoys first amendment protection,¹⁴⁸ the court concluded that imitation "does not really have its own creative component and does not have a significant value as pure entertainment."¹⁴⁹

It is unfortunate that the court, after balancing the right of publicity and the goals of the first amendment, stopped short of saying that the right of publicity will prevail in a balancing test involving any type of nonnewsworthy, entertainment material, and instead relied on a facile distinction between "imitation" and "pure entertainment," an as yet undefined, and perhaps undefinable, concept.

There is support for the proposition that the balancing of the right of publicity and the first amendment should be more heavily weighted towards the first amendment when the primary goal of avoiding government suppression of undesirous speech is present. In *Young v. American Mini Theatres, Inc.*,¹⁵⁰ zoning ordinances adopted by the City of Detroit differentiated between motion picture theatres which exhibited sexually explicit movies and those which did not.¹⁵¹ A plurality of the Court¹⁵² found that the insidious element of selective government controls is "[t]he sovereign's agreement or disagreement with the content of what a speaker has to say."¹⁵³

The plurality concluded that availability of first amendment protection may depend on the speech's content.¹⁵⁴ Some speech receives no protection;¹⁵⁵ and even protected speech may require a different governmental response, if prompted by a difference in content.¹⁵⁶ The vital element is governmental neutrality:

Such a line may be drawn on the basis of content without

146. *Id.* at 1359.

147. *Id.*

148. *Id.* (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977); *Southeastern Prod., Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

149. *Estate of Presley*, 513 F. Supp. at 1359. The court also quoted *Zacchini* for the proposition that, to some degree, defendant had appropriated the very activity, a live stage show, by which Elvis Presley created his reputation. *Id.* at 1361. However, it is doubtful that the taking here approximated the taking in *Zacchini*. The only taking was by imitating Presley's past performances. Nonetheless, *Zacchini* left the courts to do the line drawing in cases involving appropriations of less than an entire act. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 574-75.

150. 427 U.S. 50 (1976).

151. *Id.* at 52. *But see Kulzick & Hogue, Chilled Bird, supra* note 57, at 61.

152. (Stevens, J., joined by Burger, C.J., White and Rehnquist, JJ.).

153. *Young*, 427 U.S. at 64.

154. *Id.* at 65-66.

155. *Id.*

156. *Id.* at 66 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.¹⁵⁷

A test which would allow a "newsworthiness" privilege in right of publicity cases, and deny any privilege in entertainment cases, would also be government-neutral. The right of publicity would be enforced in entertainment cases and not in cases involving privilege, whether or not the government liked the message the work attempted to convey. As stated earlier,¹⁵⁸ enforcement of the right of publicity will only impinge slightly on the first amendment, and certainly the right to protect one's property is at least as valid a state right as the right to protect one's feelings which is recognized in state libel law.¹⁵⁹ As opposed to the *New York Times*¹⁶⁰ standard, there would be no difference between violations of public and private figures' rights of publicity,¹⁶¹ and the protection afforded newsworthy information would be absolute.¹⁶²

CONCLUSION

The right of publicity should not be forfeited because a person while living does not commercially exploit the right. Nonforfeiture will promote the policy of preventing unjust enrichment.¹⁶³ Since the right to publicity is a property right, the right should be assignable and devisable, ensuring increased productivity. State and federal courts, where appropriate, should define the limits of the right, which should be limited to life plus fifty years.¹⁶⁴

157. *Id.* at 70. Justice Powell left the question for another day, stating it was possible that the decision was justified on the basis of the government's ability to tailor its reaction to different types of speech depending on the degree to which its rights are implicated. *Id.* at 82 n.6 (Powell, J., concurring).

158. *See supra* notes 78-80 and accompanying text.

159. *See Nimmer, Times, supra* note 135, at 949 n.46.

160. 376 U.S. 254 (1964).

161. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48, 351 (1974).

162. A publication involving newsworthy information, however, may pass into the realm of commercial exploitation of a person's right of publicity. *See, e.g., Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 640 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3089 (1983), where the court erroneously applied the *New York Times* standard. Cher had not alleged that the interview was false or defamatory. *Id.* at 637. The issue was simply whether Cher's name and likeness were used as an endorsement of *Forum* without her permission. Either Cher's permission was obtained or it was not, and if it was not obtained, it matters little whether *Forum's* advertising staff knew it did not have permission, or recklessly failed to ascertain whether it had such permission.

163. *See supra* notes 11-30 and accompanying text.

164. *See supra* notes 31-52 and accompanying text.

Although reasons for protecting the right are similar to those of copyright law, the right is not protected under the Copyright Act, hence it is not preempted. The right must not be circumvented by improper use of the Copyright Act.¹⁶⁵ Finally, the right should prevail over first amendment challenges in all areas other than the area of newsworthy information. Such enforcement by the states is government-neutral, and will only minimally affect the goals of the first amendment.¹⁶⁶

165. *See supra* notes 53-61 and accompanying text.

166. *See supra* notes 62-161 and accompanying text.