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The Court and the Cannonball: An Inside Look

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The Court and the Cannonball: An Inside Look

ESSAY

THE COURT AND THE CANNONBALL: AN INSIDE LOOK

LEE LEVINE* AND STEPHEN WERMIEL**

As lawsuits over the right of publicity proliferate among athletes and other celebrities, there is renewed interest, by litigants and judges alike, in the one decision by the U.S. Supreme Court that addresses a tort action arising from a “publicity” related claim, Zacchini v. Scripps-Howard Broadcasting Co. Although the 1977 ruling is often cited as holding that the right of publicity tort survives constitutional scrutiny under the First Amendment, an examination of the case and of the Supreme Court Justices’ available papers shows that the Court did not view the case as presenting the type of claim that has become prevalent today.

The Zacchini case involved a human cannonball act in which a television station filmed and broadcast the entire fifteen-second performance of Hugo Zacchini being shot from a cannon to a landing pad. The Supreme Court rejected the television station’s First Amendment defense that it had a right to broadcast the act on a newscast because the performance itself constituted a matter of public interest.

For the Supreme Court, the internal papers indicate the case was about the right of a performer/producer to control the display of his entire act. The Court was not focused on the more contemporary claim that athletes, celebrities, and

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others have a right to control the use by anyone else, especially for commercial purposes, of their name or their visual image. Nor did the Court's ruling address the First Amendment issue raised in contemporary cases when a name or likeness is used in a creative work or other public communication.

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INTRODUCTION

The Supreme Court decided *Zacchini v. Scripps-Howard Broadcasting Co.*¹ on June 28, 1977. In the years since, it has become the linchpin of an escalating controversy concerning the extent to which the First Amendment restricts the ability of common law courts and legislatures to afford a remedy for violations of a person's "right of publicity," generally described as a right—typically inhering in people who have achieved a measure of fame—to control the use of their own name, likeness, or performance.² On the one hand, advocates of

1. 433 U.S. 562 (1977).

2. See generally, e.g., *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013) (evaluating video games that use avatars of college football players and the potential violation of their right of publicity); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (same); *Marshall v. ESPN Inc.*, No. 3:14-01945, 2015 WL 3606645 (M.D. Tenn. June 8, 2015) (addressing whether college athletes have an enforceable right of publicity in their likeness, name, and image); *Dryer v. NFL*, 55 F. Supp. 3d 1181 (D. Minn. 2014) (evaluating the use of professional football players' likeness and image in NFL Films productions); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014) (discussing the use of avatars

such a right assert that *Zacchini* has effectively settled the question in their favor by rejecting the First Amendment defense raised in that case. On the other, an assortment of defendants—from video game creators to television networks, motion picture producers, and sports leagues—have contended that *Zacchini* stands at most for the proposition that the First Amendment does not preclude the “owner” or “producer” of a live event or performance from prohibiting the unauthorized reproduction of it in its entirety. In other words, to a significant extent, the ongoing controversy centers on what the U.S. Supreme Court *meant* in *Zacchini*.

The existence of this increasingly high-stakes dispute caused us to wonder whether further insight about its appropriate resolution might be gleaned from a review of the publicly available papers about the *Zacchini* case compiled by the Supreme Court justices who decided it. Unfortunately, three of those Justices’ papers—Chief Justice Burger, Justice Rehnquist, both of whom joined Justice White’s majority opinion, and Justice Stevens, who dissented on jurisdictional grounds—are not publicly available. The papers of two others—Justice Powell, who also authored a dissent, and Justice Blackmun, who joined the Court’s majority opinion—are extensive and include both their own handwritten notes made during the course of the Court’s deliberations and at least some communications with their law clerks about the case. The papers of the remaining Justices—Justice White, who wrote the Court’s majority opinion; Justice Stewart, who joined it; and Justices Brennan and Marshall, both of whom joined Justice Powell’s dissent—are less revealing because they are largely limited to drafts of the various opinions and formal correspondence between the Justices. In addition, Justice Brennan, who collaborated with his law clerks on extensive term histories chronicling the Court’s internal deliberations in what he deemed to be the most significant cases decided each year of his tenure, did not include *Zacchini* in his account of the October 1976 Term.³ As a result, the insights that the body of the Justices’ publicly available papers provide with respect to the Court’s consideration of *Zacchini* are necessarily incomplete.

Nevertheless, those papers do contain some useful information, both about the Court’s deliberations and the substantive analyses of the issues by some of the Justices and their clerks (all of whom have

representing college athletes on television and in video games).

3. See generally Opinions of William J. Brennan, Jr., October Term, 1976 (on file with the Brennan Papers, Library of Congress Manuscript Division).

gone on to distinguished careers in their own right). Following a brief introduction, in which we describe the state of the relevant law at the time the case was decided and recap its litigation history prior to its arrival at the Supreme Court, we set out what appear to be the most noteworthy aspects of the papers to which we were able to secure access.

I. THE HUMAN CANNONBALL

For much of the twentieth century, the Zacchini name was synonymous with performing the “human cannonball” act at circuses, fairs, carnivals, sporting events, world’s fairs, and other events.⁴ While there were at one time almost half a dozen members of the Zacchini family performing the act, the most famous was Hugo Zacchini⁵—in fact, two Hugo Zacchinis.

The patriarch of the family, Ildebrando Zacchini, fathered seven sons and two daughters and founded a circus in Italy in the early 1900s.⁶ One of his sons, Edmondo, is credited with inventing a cannon that used compressed air to catapult a person as far as 200 feet to a waiting net or foam landing pad.⁷ Although it now appears that the Zacchini family did not actually introduce the idea of human projectiles,⁸ its members did bring the form of entertainment to the United States. John Ringling, the circus impresario, discovered the Zacchinis’ act in 1929⁹ and brought it to New York where Hugo performed it as a feature of what was then called the Ringling-Barnum & Bailey Circus.¹⁰

For some thirty years thereafter, multiple members of the Zacchini family performed the human cannonball act, but it was Hugo who

4. See Matt Blitz, *The History of the Human Cannonball*, GIZMODO (Jan. 17, 2014, 7:29 AM), <http://gizmodo.com/the-history-of-the-human-cannonball-1503318972>.

5. See *id.*

6. See Glenn Collins, *Mario Zacchini, Sensational Human Cannonball, Dies at 87*, N.Y. TIMES (Feb. 3, 1999), <http://www.nytimes.com/1999/02/03/arts/mario-zacchini-sensational-human-cannonball-dies-at-87.html>.

7. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977) (describing Hugo Zacchini’s performance on August 30, 1972, where he was shot from a cannon into a net approximately 200 feet away); see also *Zacchini Fired Self Out of a Cannon*, PLAIN DEALER, Oct. 7, 1981, at 3-D (noting that Edmondo Zacchini first invented a spring-powered cannon, which propelled him twenty feet, and later developed a compressed air cannon).

8. Blitz, *supra* note 4.

9. Collins, *supra* note 6.

10. See *‘Human Projectile’ Is Shot for Cameras: Hugo Zacchini Does His Circus Act in Bronx Field for 150 Photographers*, N.Y. TIMES, Mar. 27, 1929, at 32 (describing an exhibition performed by Hugo Zacchini on a soccer field at 177th Street and Bronx River Road in New York City).

gathered the most headlines.¹¹ He often appeared by himself, but also performed tandem cannonball shots with one or more of his brothers.¹² In 1961, Hugo Zacchini retired, but by then several members of the Zacchini family's next generation were fully engaged in the family business.¹³

Foremost among that generation of performers was another Hugo Zacchini, the son of Edmondo and nephew of the first Hugo.¹⁴ The younger Hugo carried on the family act for more than thirty years, retiring in 1991.¹⁵ While he had cousins who were also performing, the younger Hugo took on the mantle of the human cannonball, for a time restoring the act to the circus but also appearing at sports teams' opening days and special occasions, county fairs, carnivals, and other events.¹⁶

It was the younger Hugo, not his retired uncle,¹⁷ who appeared in the summer of 1972 at the Geauga County Fair in Burton, Ohio, about thirty miles east of Cleveland. On August 30, 1972, as he was getting ready to perform, Hugo Zacchini noticed a television photographer, George Masur, in the audience. According to the record in the litigation that followed, Zacchini asked Masur not to photograph his act, which consumed some fifteen seconds as he was launched from the cannon and landed in a net 200 feet away.¹⁸ The next day, however, the photographer returned and filmed the act for a news broadcast on WEWS Channel 5, a television station owned by the Scripps-Howard Broadcasting Company.¹⁹ That night, the station's newscast featured a film clip showing Zacchini being shot from the cannon and landing in the net.²⁰ As anchor David Patterson reported to the station's viewers:

11. See John T. McQuiston, *Hugo Zacchini, 77, Dies; First Human Cannonball*, N.Y. TIMES, Oct. 21, 1975, at 40.

12. See Collins, *supra* note 6.

13. See McQuiston, *supra* note 11, at 40.

14. See Collins, *supra* note 6.

15. See *id.*

16. See, e.g., *Opening Day to Be a Blast for Zacchini*, PLAIN DEALER, Mar. 31, 1974, at 2-C.

17. For one of numerous accounts erroneously suggesting that it was the elder Hugo Zacchini who was the plaintiff in the case that is the subject of this Essay, see *Hugo Zacchini*, TUMBLR (Nov. 29, 2009, 5:24 AM), <http://devilduck.tumblr.com/post/261643691/hugo-zacchini-1898-1975-was-the-first-human> (last visited Mar. 27, 2016). That it was in fact the younger Hugo was verified in a phone conversation between his family and the authors on August 19, 2015.

18. Brief for Petitioner, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (No. 76-577), 1977 WL 189127, at *3-4.

19. *Id.* at *4.

20. *Id.* at *3-4.

This . . . now . . . is the story of a *true spectator* sport . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it²¹

Zacchini filed his lawsuit against the television station's parent company on July 2, 1973 in the Ohio Court of Common Pleas. The complaint alleged that the television station had infringed upon Zacchini's right to privacy by unlawfully appropriating his property in showing what it described as his entire act on the news broadcast.²² Zacchini asked for \$25,000 in damages.²³

On March 11, 1974, the station moved for summary judgment, relying on the undisputed facts that the human cannonball act was performed in front of an open grandstand inside the fair with no separate admission fee other than the entrance charge to attend the fair itself and that the fair's promoters had invited reporters to attend for free to encourage news coverage.²⁴ In its motion, the station argued that it had a First Amendment right to broadcast the story as it did.²⁵ On April 29, 1974, the Ohio trial court granted the motion but issued no opinion to support or explain its ruling.²⁶

Zacchini, however, was not about to give up. Indeed, he felt strongly enough about the issue that, just days before the Ohio trial court ruled against him, he threatened another lawsuit in a similar dispute.²⁷ The Cleveland Indians had invited Zacchini to perform his act on the American League's opening day on April 9, 1974.²⁸ He was having quite a high-profile spring; he had already performed on April 6, 1974 at the National League season opener in Philadelphia between the Phillies and the New York Mets.²⁹ In Cleveland, Zacchini's agreement with the Indians provided that there would be

21. Brief for Respondent, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (No. 76-577), 1977 WL 189128, at *3 (quoting broadcast script).

22. Brief for Petitioner, *supra* note 18, at *3.

23. Mary Strassmeyer, *Inflation Hits the Courts*, PLAIN DEALER, Aug. 23, 1979, at 3-A.

24. Brief for Respondent, *supra* note 21, at *2.

25. See Brief for Petitioner, *supra* note 18, at *3.

26. *Id.* at *4.

27. See Russell Schneider, *Schneider Around*, PLAIN DEALER, Apr. 15, 1974, at 2-F (reporting that Zacchini planned to sue WKYC, another TV station, for broadcasting his performance despite an agreement forbidding television coverage).

28. *Opening Day to Be a Blast for Zacchini*, PLAIN DEALER, Mar. 31, 1974, at 2-C.

29. See Steve Cady, *Phils Top Mets, 5-4, on Homer in 9th*, N.Y. TIMES, Apr. 7, 1974, at 1, 4 (describing Hugo Zacchini's cannonball act at Veterans Stadium in Philadelphia).

no broadcast coverage of his opening act, and he apparently had the team post a bond to guarantee its performance of that contractual provision.³⁰ According to news reports, however, Cleveland station WKYC Channel 3 filmed and broadcast the act anyway, which led Zacchini not only to retain the undisclosed amount of the bond, but also to threaten to sue that television station as well.³¹

II. THE OHIO APPEALS AND THE RIGHT OF PUBLICITY

In the litigation arising from his appearance at the county fair, Zacchini appealed the grant of summary judgment to the Ohio Court of Appeals, which reversed and remanded the case for trial.³² The station then took the case to the Ohio Supreme Court, which reversed again and reinstated the summary judgment dismissing Zacchini's claim.³³ Before exploring the contrasting rulings of these two Ohio appellate courts, it is helpful to set out briefly the genesis and evolution of the tort cause of action for which the case has become known.

Judicial recognition of a right of publicity in U.S. law generally is attributed to the work of Judge Jerome Frank in his 1953 decision for a panel of the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*³⁴ The right emerged in the midst of, and related to, the development in American jurisprudence of a tort claim for invasion of privacy.³⁵

30. Schneider, *supra* note 27, at 2-F.

31. *Id.*

32. See Zacchini v. Scripps-Howard Broad. Co., No. 33713, 1975 WL 182619, at *2, *6 (Ohio Ct. App. July 10, 1975) (explaining that the First Amendment was not a proper defense to "the taking of private property against the owner's explicit denial of permission"), *rev'd*, 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

33. See Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 462 (Ohio 1976) (finding that the TV station could report the facts of the performance because it was a "matter of legitimate public interest"), *rev'd*, 433 U.S. 562 (1977).

34. 202 F.2d 866, 868 (2d Cir. 1953) ("[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 . . .").

35. Initial recognition of the tort of invasion of privacy, at least denominated as such, is widely attributed to a law review article, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing the limitations and potential remedies for invasion of privacy under common law tort claims), and to a subsequent Georgia Supreme Court decision, see generally Pavesich v. New England Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905) (recognizing that the invasion of privacy is a tort).

According to the seminal summary of then-current law in 1960 by Dean William Prosser,³⁶ the law had by that time evolved to protect four distinct interests or causes of action under the general rubric of "invasion of privacy": (1) intrusion upon the solitude of an individual; (2) public disclosure of embarrassing private facts; (3) publicity depicting an individual in a false light; and (4) appropriation of a person's name or likeness for the defendant's benefit.³⁷ By the time of Prosser's article, all but a handful of states had recognized some aspect of this multi-faceted privacy right.³⁸

The right of publicity developed in a way most closely related to the fourth category Prosser recognized: appropriation.³⁹ But as another scholar, Melville Nimmer, had observed, appropriation and the right of publicity appear to serve two different purposes. The appropriation cause of action, Nimmer explained, developed as a branch of the privacy tort because it provided redress for the harm caused to people who wanted to maintain their privacy and not have their name or likeness used by anyone else for any purpose.⁴⁰ The right of publicity, in contrast, inhered in celebrities or other prominent people who generally benefited from being in the public eye but wished to control the use and exploitation of their image or name.⁴¹ As Nimmer recognized, "Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy."⁴² As it developed, therefore, the focus of the right of publicity was not so much protecting privacy as it was controlling public exposure, including who profits from that exposure.

Although state courts and legislatures were busily embracing causes of action for invasion of privacy in the period during which Judge Frank wrote his opinion in *Haelan*, before that decision there otherwise appeared to be no great rush in state courts and legislatures to recognize a right of publicity, at least not of the kind Nimmer described. Thus, some twenty-three years later when the Ohio Supreme Court ruled in the *Zacchini* case in 1976, the majority cited no cases purporting to recognize such a right, although there

36. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

37. *Id.* at 389.

38. *Id.* at 386-87.

39. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203-05 (1954) (explaining that, because the right to privacy is inadequate to protect publicity, courts began to recognize the "publicity value" of a person's name or likeness as a legally cognizable right).

40. *Id.* at 203, 206-07.

41. *Id.* at 204.

42. *Id.*

were some available which had in fact been cited in a concurring opinion in the Ohio Court of Appeals.⁴³ Still, when that Ohio intermediate appellate court issued its ruling in *Zacchini* on July 10, 1975, the judges that decided it were, to a significant extent, swimming in uncharted waters.

In its decision, the three-judge panel of the Ohio Court of Appeals unanimously decided that *Zacchini* had a legal claim that should be reinstated, although it was divided as to exactly what that claim was.⁴⁴ The majority opinion, written by Judge Jack Day and joined by Judge Thomas Parrino, noted that there was no statute governing “privacy” rights in Ohio at the time, but concluded that “privacy” was not the real basis of *Zacchini*’s claim in any event.⁴⁵ Instead, the majority held, *Zacchini*’s cause of action was properly deemed to be one of conversion, a claim typically asserted in real property cases.⁴⁶ As Judge Day explained, “the full performance is artistic property which cannot be taken from the artist or performer without giving rise to a cause of action. If the appropriating action needs a title in tort, conversion will do.”⁴⁷ The majority further held that *Zacchini* had a viable cause of action for infringement of a common law copyright because he had performed the act for the specific, limited purpose of entertainment and that purpose could not be overcome by another’s interest in disseminating it.⁴⁸ The proper remedy for both causes of action, the court concluded, would be money damages, ordering the case remanded for a trial on the merits.⁴⁹

43. See *Zacchini v. Scripps-Howard Broad. Co.*, No. 33713, 1975 WL 182619, at *7 (Ohio Ct. App. July 10, 1975) (Manos, J., concurring) (citing the following cases that recognized a right of publicity: *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 826 n.15 (9th Cir. 1974); *Haelan Labs. Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), *abrogated by Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181 (D. Minn. 2014); *Cepeda v. Swift*, 291 F. Supp. 242, 245 (E.D. Mo. 1968), *aff’d*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Sharman v. C. Schmidt & Sons Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963); *Canessa v. Kislak, Inc.*, 235 A.2d 62, 71 (N.J. Super. Ct. 1967); *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966); *Hogan v. A.S. Barnes & Co.*, No. 8645, 1957 WL 7316 (Pa. Ct. Com. Pl. June 19, 1957)).

44. *Zacchini*, 1975 WL 182619, at *7 (Manos, J., concurring) (disagreeing with the majority’s conclusion that *Zacchini*’s claim was based on conversion or common law copyright, and instead concluding that the claim was based on appropriation of *Zacchini*’s common law right of publicity).

45. *Id.* at *3 (majority opinion).

46. *Id.* at *3–4.

47. *Id.* at *3.

48. *Id.* at *4–5.

49. *Id.* at *6–7 (finding that damages are appropriate if they are proved in cases of conversion and common law copyright).

The appeals court also rejected the First Amendment defense raised by the station—specifically, its contention that the performance itself was news that it was privileged to broadcast. According to Judge Day:

The mere fact that the taking and conversion and copyright violations were done by a news medium does not quicken First Amendment rights. The entertainer's performance is his property. 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.⁵⁰

Judge John Manos, who soon after *Zacchini* would begin a thirty-year tenure as a U.S. district court judge in Cleveland, wrote an opinion concurring only in the judgment. He rejected the majority's contention that *Zacchini* had asserted claims for conversion and copyright.⁵¹ In his view, the case should instead proceed to trial on a cause of action based in appropriation or "right of publicity."⁵² Nevertheless, Judge Manos too rejected the station's First Amendment defense:

Mr. *Zacchini*'s performance constituted neither pressing public business, nor a critical public event about which the public had a particularly compelling need to know. Consequently the defendant's [sic] conduct in this case does not constitute the collection and broadcast of news. Rather it constitutes a seizure of the plaintiff's proprietary interest in the publicity value of his likeness.⁵³

The station, thereafter, appealed to the Ohio Supreme Court. Whether by happenstance or design, the appeal was argued in a special Law Day session of the court, convened before an audience in the Cleveland City Council chambers on May 5, 1976.⁵⁴ After that, it took the state's highest court little more than two months to decide, by a vote of six-to-one, in favor of the station.⁵⁵ The majority opinion was written by Justice Leonard Stern,⁵⁶ who would leave the bench six months later because of a state imposed age limit.⁵⁷ Chief Justice C.

50. *Id.* at *6.

51. *Id.* at *7 (Manos, J., concurring).

52. *Id.* at *7, *9.

53. *Id.* at *9.

54. W. James Van Vliet, *Cannonball Gives High Court a Weighty Matter*, *PLAIN DEALER*, May 6, 1976, at 7-A.

55. *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 462 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

56. *Id.* at 454.

57. *Leonard J. Stern*, *THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM*, www.supremecourt.ohio.gov/sco/formerjustices/bios/stern.asp.

William O'Neill and Justices Thomas Herbert, J.J.P. Corrigan, William B. Brown, and Paul W. Brown joined Justice Stern's opinion.⁵⁸ Justice Frank Celebrezze, who later served eight years as the court's chief justice, wrote the lone dissent.⁵⁹

The majority rejected the Court of Appeals's conclusion that conversion of property and common law copyright were the appropriate theories of liability on which to premise Zacchini's claim. Rather, the state supreme court determined that Zacchini had asserted a cause of action for invasion of privacy by appropriation—which it described as a right in the publicity value of his performance—and that the question before it was, therefore, whether the reach of such a claim should be cabined to afford the press latitude to inform the public about newsworthy matters.⁶⁰ Despite Zacchini's argument that the station infringed upon his rights by filming and broadcasting his performance, Justice Stern's opinion for the court concluded that such rights must be subordinated to the overarching interest in promoting a free press. As Justice Stern explained, "The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation."⁶¹ Concluding that the broad right for which Zacchini advocated would "unduly restrict the 'breathing room'"⁶² that a free press requires, Justice Stern determined that there could be no liability if "the matters reported

58. *Zacchini*, 351 N.E.2d at 456.

59. *Id.* at 462.

60. *Id.* at 456, 459, 461. Whether the Ohio Supreme Court's resolution of that issue was grounded in state law or the First Amendment became a threshold question in the U.S. Supreme Court, where all of the Justices, except for Justice Stevens, ultimately concluded, over contrary arguments advanced by the station, that the state court had relied on the First Amendment to limit the reach of the cause of action it had otherwise recognized. *Compare* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566, 568 (1977) (explaining that, because the Ohio Supreme Court's opinion failed to reference the Ohio constitution, treated First Amendment cases decided by the U.S. Supreme Court as controlling, and applied state law in a way primarily informed by the First Amendment, the state court's opinion rested on federal grounds and therefore gave the Supreme Court jurisdiction), *with id.* at 582–83 (Stevens, J., dissenting) (concluding that, although the majority's view that the state court's opinion rested solely on federal grounds was plausible, the actual basis of the Ohio Supreme Court's decision was ultimately "doubtful" enough that it should be remanded for clarification of the holding before the U.S. Supreme Court decided whether it had jurisdiction).

61. *Zacchini*, 351 N.E.2d at 461.

62. *Id.*

were of public interest"⁶³ and the press's actual intent was "to report the performance" and not "to appropriate [it] for some other private use, or . . . to injure the performer."⁶⁴ In the absence of any such evidence in the case before it, the court concluded that the station enjoyed a privilege to report the Zacchini cannonball show and ordered the summary judgment that the station had secured in the trial court reinstated.⁶⁵

In dissent, Justice Celebrezze agreed with the majority's rejection of the Court of Appeals's reliance on theories of conversion and common law copyright to support Zacchini's claim. Nevertheless, he argued that the majority was too heavily influenced by the U.S. Supreme Court decisions it cited, especially *New York Times Co. v. Sullivan*⁶⁶ and *Time, Inc. v. Hill*.⁶⁷ He looked instead to the Court's more recent decision in *Gertz v. Robert Welch, Inc.*,⁶⁸ which he said had narrowed the scope of the First Amendment protections afforded the news media.⁶⁹ In the wake of *Gertz*, Justice Celebrezze wrote, his colleagues' reliance on cases like *Sullivan* and *Hill* was "questionable, at best, and . . . clearly erroneous, at worst."⁷⁰

In the section that follows, this Essay chronicles the fate of the Ohio Supreme Court's analysis in the U.S. Supreme Court. It is worth noting, however, that the case would eventually find its way back to the Ohio courts following the U.S. Supreme Court's disposition of it. Specifically, on August 22, 1979, *Zacchini v. Scripps-Howard Broadcasting Co.* went to trial, more than seven years after the original performance. By that time, Zacchini had increased the amount of the damage award he requested from \$25,000 to \$250,000.⁷¹ On the second day of trial, Zacchini and the station settled the case for an undisclosed amount; a news account suggested that it was more than \$10,000 and less than \$25,000.⁷²

63. *Id.*

64. *Id.*

65. *Id.* at 462.

66. 376 U.S. 254, 271-72 (1964) (stating that innocently or erroneous statements about public officials are inevitable and must be protected to allow the freedom of expression to survive, unless made with actual malice).

67. 385 U.S. 374, 387-88 (1967) (extending the actual malice standard to claims for false-light invasion of privacy).

68. 418 U.S. 323 (1974).

69. *Zacchini*, 351 N.E.2d at 463 (Celebrezze, J., dissenting).

70. *Id.* at 462.

71. See Strassmeyer, *supra* note 23, at 3-A.

72. *Human Cannonball, WEWS Settle Suit in Out-of-Court Pact*, PLAIN DEALER, Aug. 24, 1979, at 2-B.

III. THE U.S. SUPREME COURT

A. *How the Court Came to Take the Case*

Zacchini filed his petition for a writ of certiorari on October 23, 1976. At the time, five Justices—Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist—participated in a “cert. pool,” through which a single law clerk screened new petitions and wrote a memo describing the case to the participating Justices. W. Wayne Drinkwater, then one of Chief Justice Burger’s clerks and now a distinguished practitioner in Mississippi, wrote the cert. pool memo in *Zacchini*.⁷³ In his memo dated December 7, 1976, Drinkwater described the case as presenting “a conflict between the tort of ‘appropriation’ or ‘right of publicity’ privacy and the First Amendment rights of broadcasters.”⁷⁴ Drinkwater struggled to bring Zacchini’s petition within the Court’s “relevant precedents” because, as his memo explained, “the privacy interest he is asserting has not yet been addressed by this Court in the First Amendment context.”⁷⁵ As Drinkwater analyzed it, the case was not controlled by *Cox Broadcasting Corp. v. Cohn*,⁷⁶ which he considered the closest precedent, because it did not involve “a report or comment on [Zacchini’s] performance; it is an appropriation, for whatever purpose, of the entire act itself.”⁷⁷ Moreover, he noted that, in *Cohn*, the Court had itself emphasized that “‘right of publicity’ actions may call into play a wholly different analysis” when it indicated that “‘we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one’s name or photograph.’”⁷⁸ Drinkwater suggested that, in this different context, “[s]ome of the key variables would appear to be whether [Zacchini] has contracted away his right with respect to this performance, and whether [the television station’s] conduct constitutes an appropriation harmful to [Zacchini’s] commercial interests.”⁷⁹

73. See Preliminary Memorandum from W. Wayne Drinkwater, Clerk, Chief Justice Burger, to Chief Justice Burger and Associate Justices White, Blackmun, Powell, and Rehnquist, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-577) (Dec. 7, 1976) (on file with the Powell Archives, Washington and Lee Law Library).

74. *Id.* at 1.

75. *Id.* at 4.

76. 420 U.S. 469 (1975) (finding Georgia’s statutory and common law rules forbidding publication of rape victims’ names unconstitutional because the press has the right to report accurately government proceedings from publicly available records).

77. Drinkwater, *supra* note 73, at 5.

78. *Id.* (quoting *Cox Broad. Corp.*, 420 U.S. at 489).

79. *Id.* at 6.

Ultimately, however, he concluded both that the “record [was] probably inadequate on both counts” and that it was “unclear” that the case “present[ed] a recurring problem, or that [Zacchini] ha[d] any damages,”⁸⁰ strongly suggesting that, for these reasons, the Court should not take it on.

In Justice Blackmun’s chambers, Zacchini’s petition was assigned to his law clerk, Richard A. Meserve, who would go on to serve as President of the Carnegie Institute for Science and as Chairman of the Nuclear Regulatory Commission. Meserve wrote to Blackmun that the “underlying tort cause of action” asserted by Zacchini “is one in the process of evolution.”⁸¹ Although he surmised that Prosser would likely “label the tort as an ‘appropriation’ tort,” he concluded that Zacchini’s claim did not fit neatly within that rubric.⁸² As Meserve explained it:

the seminal example of such a tort—the unconsented use of a woman’s photograph on a flour bag—seems somewhat far from the instant case. Here [Zacchini] had “projected” himself (sorry) into the public eye in the same fashion as the “exploitation,” and the use of the film in the news broadcast is not the same type of commercial exploitation as a use of a name or photograph in advertising.⁸³

In Meserve’s view, given the “unsettled and somewhat undefined nature of the tort cause of action, it would seem somewhat premature to define the [F]irst [A]mendment defense to it.”⁸⁴ Moreover, he wrote to Justice Blackmun, “the fact that the tort is unsettled would suggest that the problem is not recurring.”⁸⁵ Thus, although he conceded that “the [F]irst [A]mendment issue is fascinating,” he cautiously recommended which way the Justice should vote, writing “Deny?” at the end of his note.⁸⁶

On his copy of Drinkwater’s memo, Justice Powell also initially wrote “deny” in the upper margin of the first page, a notation—as will

80. *Id.*

81. Preliminary Memorandum from W. Wayne Drinkwater, Clerk, Chief Justice Burger, to Chief Justice Burger and Associate Justices White, Blackmun, Powell, and Rehnquist, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-577), at 6 (Dec. 7, 1976) (with handwritten notes from Richard A. Meserve dated Dec. 15, 1976) (on file with the Blackmun Papers, Library of Congress, Manuscript Division) [hereinafter Meserve Notes].

82. *Id.* See generally Prosser, *supra* note 36, at 401–07 (providing a description of the tort of appropriation).

83. Meserve Notes, *supra* note 81, at 6.

84. *Id.*

85. *Id.*

86. *Id.*

be explained further below—he subsequently changed to “grant.”⁸⁷ In his own hand, Justice Powell at first reasoned that “[t]his is neither a defamation (no falsehood) nor a ‘false-light’ case ([petitioner’s] act was faithfully portrayed),” signifying to him that none of the cases on which the Ohio Supreme Court had ostensibly relied—*Gertz, Sullivan*, or *Hill*—were “applicable.”⁸⁸ Still, Justice Powell appeared puzzled by Zacchini’s claim, noting that the human cannonball’s assertion that “his ‘privacy’ was invaded . . . makes no sense . . . altho [sic] [Zacchini’s] act was appropriated [and] used commercially.”⁸⁹ Justice Powell, therefore, pronounced this a “Difficult area” and concluded, albeit preliminarily, that the Court should “Let it develop[.]”⁹⁰

Justice Powell’s clerk, Tyler Baker, apparently shared this view. In the margins of Drinkwater’s memo, he wrote to Justice Powell that the case presented “[a]n interesting question, but not a burning one.”⁹¹ On the eve of the Court’s conference to consider whether to take the case, however, Baker, who went on to become a respected practitioner in Northern California, wrote to Justice Powell that, “[i]n thinking more about this case, I think it would be a lot of fun. It does involve a number of issues unresolved in other decisions. If the vote is close, I would cast a ‘fun-to-work-on’ vote to grant?”⁹² In his own hand, Justice Powell underscored the words “lot of fun” and drew an arrow from the word “fun” to his own handwritten “yes.”⁹³

By the time the Court met in conference on January 7, 1977, Justice Powell had concluded that he would indeed cast the fourth and final vote necessary to grant Zacchini’s petition. In notes taken at the conference, he recorded that Justices Rehnquist, Blackmun, and Stewart had all voted to grant and that he had joined them, explaining in his own hand that “I think this will be [an] interesting case.”⁹⁴ Justice White’s conference notes confirm that there were

87. Drinkwater, *supra* note 73, at 1 (with handwritten notes from Justice Powell). Justice Powell’s notes include the phrase “changed to grant” at the top of the first page of the memorandum. *Id.*

88. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

89. *Id.*

90. *Id.*

91. *Id.* (with handwritten notes from Tyler Baker).

92. *Id.* at 6 (reverse side of page 6).

93. *Id.*

94. Justice Powell, Conference Notes, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-577) (Jan. 7, 1977) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter Justice Powell, January 7, 1977 Conference Notes].

four votes to grant Zacchini's petition—Justices Rehnquist, Powell, Blackmun, and Stewart.⁹⁵

B. *The Absence of Amici*

No briefs amicus curiae were filed in *Zacchini*, either before or after the Court granted review. That fact did not escape the attention of the Justices or their clerks. At the conclusion of his pre-argument memorandum to Justice Blackmun, for example, Meserve noted that “[u]nfortunately, no amicus briefs were filed in this case” and lamented that the “briefs of the parties do not provide much enlightenment.”⁹⁶ This view was shared in Justice Powell's chambers, where the bench memorandum prepared by his clerk, Gene Comey, who later became an accomplished practitioner in Washington, D.C., similarly asserted that he was “quite surprised to find the Court in the posture of deciding what could be a very important First Amendment case without the aid of interested amici such as broadcasters and newspapers. For some reason, the news media apparently does not realize that this case has the potential of being a major First Amendment decision.”⁹⁷ In response to the first observation—about the absence of amicus briefs—Justice Powell wrote by hand in the margin of the memorandum the word “true” and, in response to the second, he underscored, in his own hand, Comey's suggestion that the case had “the potential of being a major First Amendment decision.”⁹⁸

C. *Blackmun and Powell Reject Their Clerks' Recommendations*

The case was set for argument on April 25, 1977. In preparation for it, both Justices Blackmun and Powell received detailed bench memoranda from their law clerks. As it turned out, both Justices ultimately rejected their clerks' recommendations. Nevertheless, the detailed analyses by the two clerks, as well as the Justices' reaction to

95. See Justice White, Conference Notes, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-577) (Jan. 7, 1977) (on file with the White Papers, Library of Congress Manuscript Division).

96. Bench Memorandum from Richard A. Meserve, Clerk, Justice Blackmun, to Justice Blackmun, Associate Justice, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-557), at 10 (Apr. 23, 1977) (on file with the Blackmun Papers, Library of Congress Manuscript Division) [hereinafter Meserve, Bench Memo].

97. Bobtail Bench Memorandum from Gene Comey, Clerk, Justice Powell, to Justice Powell, Associate Justice, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-557), at 3 (Apr. 25, 1977) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter Comey, Bobtail Bench Memo].

98. *Id.* (with handwritten notes from Justice Powell).

them, provide some insight concerning both what the Court thought it was deciding in *Zacchini* and why it did so.

1. *Justice Blackmun*

For Justice Blackmun, Meserve noted at the outset of his memorandum that the “case may be very significant” because it could “demand that the Court define the limits, if any, on the right of the press to report truthful information.”⁹⁹ Accordingly, he proceeded to distinguish the Court’s precedents on which the parties themselves had relied, concluding—like Drinkwater—that, although *Cohn* had raised a roughly analogous issue, it was “carefully limited in its holding to the right to disseminate accurate information in the public record” and, moreover, that “the privilege associated with the appropriation tort may differ from the rule governing disclosure of private facts because of the different weight given the interests that the tort causes of action seek to protect.”¹⁰⁰

Meserve then assessed the competing interests at issue in *Zacchini*. On the one hand, he appeared skeptical of the right *Zacchini* asserted, which, he noted, had variously been described by the lower courts and in the parties’ briefs as “a right of privacy,” “a right of publicity,” and a “right to the publicity value of his performance”:

It might be argued that the news story about him provides him with free publicity for his act; he may have benefited rather than been harmed by the story. However, the publicity provided by the news station was not evidently of a kind that *Zacchini* desired. He apparently fears that if people have seen his act on film, they will not come to see it in person. Thus[,] the interest that *Zacchini* seeks to protect is his interest in personal control over the publicity for his act. On reflection, his interest may not seem particularly substantial. He no doubt desires to place himself in the public eye with regard to his act and his concern is that the newstation [sic] did not publicize him in a manner he considers optimal. His interest is purely commercial, and his sense that he was harmed by the news story is purely speculative. (In fact, the owner of the fair wanted newsmen to come in order in [sic] enhance the fair’s publicity.)¹⁰¹

Justice Blackmun, however, appeared less than convinced. The Justice underscored the portion of the memorandum in which Meserve had repeated *Zacchini*’s claim that, “if people have seen his

99. Meserve, Bench Memo, *supra* note 96, at i.

100. *Id.* at 3–4.

101. *Id.* at 4.

act on film, they will not come to see it in person."¹⁰² Where Meserve opined that Zacchini's "interest may not seem particularly substantial," Justice Blackmun wrote in the margin "a full dramatic performance?"¹⁰³

The Justice appeared equally skeptical of his clerk's assessment of the strength of what his memorandum characterized as "the public interest." In Meserve's view, that interest was "substantial: it is nothing less than the right to report on newsworthy individuals."¹⁰⁴ Thus, he asserted that, on balance, "the press has an overwhelming argument for an expansive privilege."¹⁰⁵ On his copy of the memorandum, however, Justice Blackmun added a question mark in the margin adjacent to the word "substantial."¹⁰⁶

Although he cautiously suggested to Justice Blackmun that it might make sense to extend to the press "an absolute privilege as a defense to the appropriation tort for the broadcasting of newsworthy information," Meserve nevertheless worried about the "extreme vagueness" of such a standard.¹⁰⁷ Ultimately, therefore, he recommended that "[it] may be possible, and probably very wise, to reach an extremely narrow holding in the case," much the same way he said the Court had in *Cohn*, "by claiming that the performance was a public one. Once the press was through the gates to the fair . . . they were entitled to join the public and see Zacchini's act without any restriction by the operator of the fair."¹⁰⁸ As Meserve explained it:

If Zacchini had performed his act in a public square, I would think the press could film it as a public event even without his consent. If he didn't want the press to report on his act, he could either not perform, exclude the press, or perhaps extract a promise from them not to film. He exercised none of these options here.¹⁰⁹

Justice Blackmun, however, was unconvinced on this score as well. Where Meserve suggested that Zacchini could have "extract[ed] a promise" from the press not to film his performance, the Justice underscored those words and wrote in the margin "he did!"¹¹⁰ In separate handwritten notes prepared prior to the argument, Justice Blackmun noted that the Court had not previously addressed the issues presented "to any degree," and described the interest asserted

102. *Id.* (with handwritten notes from Justice Blackmun).

103. *Id.*

104. *Id.*

105. *Id.* at 5.

106. *Id.* at 4 (with handwritten notes from Justice Blackmun).

107. *Id.* at 8.

108. *Id.* (discussing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)).

109. *Id.* at 8-9.

110. *Id.* at 9 (with handwritten notes from Justice Blackmun).

by Zacchini as a right to “make a living,” which he characterized—Meserve’s assessment notwithstanding—as “pretty imp[ortan]t.”¹¹¹ Working through Meserve’s suggestion for a “narrow” holding, the Justice appeared to wrestle with the consequences for Zacchini of the “exhibitor[’s]” apparent decision to allow the press to attend his performance apparently without imposing any restrictions on the use of recording equipment.¹¹²

As Justice Blackmun assessed it, there “must be” a performer’s right in his own performance that “one can sell,” and that right “can be called a r[igh]t of publicity.”¹¹³ Although the Justice acknowledged to himself that the right could be waived, the question in his mind was whether Zacchini could be deemed to have done so in a circumstance in which he “hired [himself] out” to perform at the fair, but nevertheless “requested” that his act not be filmed.¹¹⁴ For Justice Blackmun, therefore, the dispositive issue going into the argument apparently boiled down to whether Zacchini’s “deal wi[th] his promoter” served to “absolve” the press from liability for filming his act.¹¹⁵

Accordingly, at the argument itself, Justice Blackmun came prepared with a series of typewritten questions, some of which he posed to counsel and all of which reflected, at least in part, the issues raised for him by Meserve’s bench memorandum.¹¹⁶ Among other things, Justice Blackmun asked Zacchini’s counsel, John Lancione, whether the showing of a still photograph of his client “being shot from his cannon [would] be privileged,” to which, as the Justice noted in his handwriting adjacent to his typed-out questions, counsel “says no.”¹¹⁷ At the argument itself, Lancione expanded on his answer:

I think that the news media has a right to publicize in an entertainment section[:] for example, they can advertise to the public that there is an entertainment section on their 11 o’clock news show, and they can tell about everyone of import or of little

111. Justice Blackmun, Handwritten Notes, *Zacchini v. Scripps-Howard Broad. Co.*, No. 76-557 (Apr. 24, 1977) (on file with the Blackmun Papers, Library of Congress Manuscript Division).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. See Justice Blackmun, Questions, *Zacchini v. Scripps-Howard Broad. Co.* [hereinafter Justice Blackmun, Questions] (on file with the Blackmun Papers, Library of Congress Manuscript Division).

117. *Id.* (with handwritten notes from Justice Blackmun); see also Transcript of Oral Argument at 9, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (No. 76-577) [hereinafter Transcript].

import who is performing in and about the area where their readers and listeners are concerned about. But what we have here is the taking of an entire total performance.¹¹⁸

Justice Blackmun was also interested in learning whether Zacchini himself advertised his performance (at argument, Lancione said that he did)¹¹⁹ and whether “the interest in seeing Zacchini perform increase[d] or decrease[d] as a result of the news broadcast,” though he did not actually pose this question at argument.¹²⁰ In addition, Justice Blackmun asked Lancione a version of the following series of typewritten questions: “If Zacchini performed his act in a public square, could the press film it in its entirety and show it on the news? Even if Zacchini told them not to? If so, how does this case differ?”¹²¹ As the Justice’s own notes of the colloquy reflect, at argument, Lancione responded by asserting that such a performance would be equally protected by the right of publicity that Zacchini claimed.¹²² According to Lancione, Zacchini’s “act in its entirety becomes his peculiar property,” and under no “circumstances, unless there is a waiver, which the Supreme Court of Ohio declared there was not, [can] the news media . . . come in and say we call it news and therefore we can do whatever we want to.”¹²³

By the time the Court convened in conference two days later, Justice Blackmun had concluded, according to Justice Powell’s handwritten notes, that Zacchini possessed a state-created “prop[erty] right” in his performance.¹²⁴ Speaking in order of seniority, Justice Blackmun (as Justice Powell recounted it) endorsed the views previously expressed by Justices Stewart and White.¹²⁵ According to

118. Transcript, *supra* note 117, at 9.

119. *Id.* at 8.

120. *Id.*; Justice Blackmun, Questions, *supra* note 116.

121. Justice Blackmun, Questions, *supra* note 116; see Transcript, *supra* note 117, at 9.

122. Justice Blackmun, Questions, *supra* note 116.

123. Transcript, *supra* note 117, at 9–10.

124. Justice Powell, Conference Notes, 433 U.S. 562 (1977) (Apr. 27, 1977) (on file with the Powell Archives, Washington and Lee Law Library) [hereinafter Justice Powell, April 27, 1977 Conference Notes]. The handwritten notes taken at conference by three Justices—Powell, Blackmun, and Brennan—are publicly available. See Justice Blackmun, Conference Notes, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (Apr. 27, 1977) (on file with the Blackmun Papers, Library of Congress Manuscript Division); Justice Powell, April 27, 1977 Conference Notes, *supra*; Justice Brennan, Conference Notes, *Zacchini v. Scripps-Howard Broad. Co.*, No. 76-577, at 2 (Apr. 27, 1977) (on file with the Brennan Papers, Library of Congress Manuscript Division).

125. Justice Powell, April 27, 1977 Conference Notes, *supra* note 124, at 2 (with handwritten notes from Justice Powell).

Justice Powell's notes, Justice Stewart said he had concluded "there is now a prop[erty] right of some sort of privacy under Ohio law."¹²⁶ Moreover, Justice Stewart asserted that the "[Fir]st Amend[ment] has little to do with this. A prop[erty] right was appropriated. It can't be taken."¹²⁷ Similarly, Justice Brennan's notes record Justice Stewart as saying he thought the Ohio Supreme Court was "wrong on [the] First Am[endment and] that Judge Day [in the Ohio Court of Appeals] was right in holding it was an appropriation of a property right not protected by [the First] Am[endment]."¹²⁸

Before Justice Blackmun spoke, Justice White had agreed with Justice Stewart, explaining, according to Justice Brennan's notes, that the Ohio Supreme Court's "holding of First Am[endment] privilege for [the] press to do this was [an] error," especially since Zacchini "was a commercial performer and his property can't be seized."¹²⁹ Similarly, Justice Powell's notes recount that Justice White emphasized that "there was no consent" by Zacchini and that the "privilege to publish does not go this far."¹³⁰

On June 6, 1977, shortly after Justice White circulated the initial draft of his opinion for the Court to the other Justices, Meserve provided Justice Blackmun with his assessment of the then-putative majority opinion. Specifically, Meserve told Justice Blackmun that he saw "no reason for [him] not to join Justice White's opinion in this case. The opinion is quite narrow, and although I was originally in favor of a contrary disposition, I now think the result reached by the Court is correct."¹³¹ That same day, Justice Blackmun wrote to Justice White to say, "I am with you," proposing no changes to Justice White's opinion.¹³²

2. *Justice Powell*

The bench memorandum that Comey prepared for Justice Powell deemed the case "interesting and important," but also "quite difficult," an assessment with which Justice Powell expressed his

126. *Id.* at 2.

127. *Id.* at 1.

128. Justice Brennan, Conference Notes, *supra* note 124, at 2.

129. *Id.*

130. Justice Powell, April 27, 1977 Conference Notes, *supra* note 124, at 2.

131. Memorandum from Richard A. Meserve, Clerk, Justice Blackmun, to Justice Blackmun, Associate Justice, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.* (No. 76-577) (June 6, 1977) (on file with the Blackmun Papers, Library of Congress Manuscript Division).

132. Correspondence from Justice Blackmun, Associate Justice, U.S. Supreme Court, to Justice White, Associate Justice, U.S. Supreme Court, No. 76-577 (June 6, 1977) (on file with the Blackmun Papers, Library of Congress Manuscript Division).

handwritten agreement in the margins of the memorandum.¹³³ The difficulty, Comey suggested, arose in part from the confusion surrounding whether the Court was dealing with a right of privacy or publicity.¹³⁴ Unlike Nimmer, however, Comey viewed the two rights as “two sides of the same coin,” each of which reflects a “state defined and protected ‘area of privacy free from *unwanted* publicity.’”¹³⁵ “Some people,” he continued, “consider a part of their lives ‘private’ and seek to avoid publicity as to that part of their lives because of a preference for privacy. In that context, it seems appropriate to talk about a right to privacy.”¹³⁶

In other contexts, Comey explained, “an individual plans to make a part of his life ‘open’ to the public, but, perhaps for reasons of commercial profit, the individual wants to control access to what he intends to expose. In that context, it seems appropriate to talk of a ‘right of publicity.’”¹³⁷ In this case, Comey continued, “we are not confronted . . . with appropriation for the purpose of commercial advertising or the use of aspects of the performance to promote the sale of goods,” as in the classic formulation of the appropriation tort by Prosser, but rather with a “narrow state-created area of privacy” of a magnitude “that may not be present in other contexts.”¹³⁸ Moreover, Comey concluded:

The state interest is analogous to the interest [that] underlies our federal copyright and patent protections. We want people to invent and perform entertaining acts. Many will do it only if they are assured that their financial rewards will not be drained off by others. So we want to give to the performer the right to decide whether and how much publicity he needs by giving him the right to control publicity.¹³⁹

Accordingly, Comey asserted, “in this limited area the state interest which is analogous to the interest that underlies our copyright laws seems to me sufficient to justify this infringement of First Amendment freedoms.”¹⁴⁰ For his part, Justice Powell underscored

133. Comey, Bobtail Bench Memo, *supra* note 97, at 3 (with handwritten notes from Justice Powell).

134. *Id.* at 3–4.

135. *Id.* at 3.

136. *Id.* at 3–4.

137. *Id.*

138. *Id.* at 5–6. See generally Prosser, *supra* note 36, at 401–07.

139. Comey, Bobtail Bench Memo, *supra* note 97, at 6.

140. *Id.* at 10.

Comey's assertion that "these are relevant considerations" and wrote "yes" in the margin of his clerk's memo.¹⁴¹

Following argument, in his own handwritten notes, Justice Powell attempted to distill the positions of the advocates. Lancione, he wrote, conceded that the "media had [the] right to report the act [and] to show a 'still shot,'" but asserted that it had "no right to reproduce an *entire* act."¹⁴² Ezra Bryan, the television station's counsel, "distinguished bet[ween a fifteen] second show [and] a [thirty] min[ute] symphony," asserting that, if "there is a 'legitimate news interest,' and no copyright or contract int[erest], the media is privileged."¹⁴³

Justice Powell appeared to be persuaded by Bryan's analysis. At conference, as Justice Brennan recounted in his handwritten notes, Justice Powell said he would vote to affirm "on [the] theory that [the] media has [a First Amendment] right to report [a] public event as news[,] and that's what this is."¹⁴⁴ As Justice Powell saw it, the "performance here was only [fifteen] seconds—if [it] had been a [half] hour, I'd say that [is] not protected."¹⁴⁵ Justice Blackmun's conference notes indicate that, to support his position, Justice Powell pointed not only to the fact that the performance was "[fifteen] seconds!" but also to Lancione's concession to Justice Blackmun at argument that the taking of "a still photo" would be "ok."¹⁴⁶ In undated, handwritten notes—apparently created at approximately the same time—Justice Powell considered his own opinion for the Court three years earlier in *Gertz*, noting that, in that case, the Court determined that the First Amendment must "protect some falsehood to protect speech that matters," whereas in *Zacchini*, it should be read to "protect some overlong appropriation in order to protect news that matters."¹⁴⁷

141. *Id.* at 6 (with handwritten notes from Justice Powell).

142. Justice Powell, Argument Notes, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (undated) (on file with the Powell Archives, Washington and Lee Law Library).

143. *Id.*

144. Justice Brennan, Conference Notes, *supra* note 124, at 2.

145. *Id.*

146. Justice Blackmun, Conference Notes, *supra* note 124, at 2.

147. Justice Powell, Handwritten Notes, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (undated) (on file with the Powell Archives, Washington and Lee Law Library) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). Justices Brennan and Marshall similarly voted to affirm, albeit apparently without providing detailed explanations of their views at Conference. See Justice Blackmun, Conference Notes, *supra* note 124, at 1–2; Justice Brennan, Conference Notes, *supra* note 124, at 1–2; Justice Powell, April 27, 1977 Conference Notes, *supra* note 124, at 1–2. As reflected in the Court's published opinions, Justices Brennan and Marshall ultimately joined the dissenting opinion written by Justice Powell. *Zacchini v.*

After receiving Justice White's initial draft of his opinion for the Court, Justice Powell wrote to him on June 1, 1977, indicating his intention to circulate a dissent.¹⁴⁸ As we know, he ultimately did publish a dissenting opinion, which was joined by Justices Brennan and Marshall.¹⁴⁹ That opinion, as published in the U.S. Reports, changed little from the initial typewritten draft prepared in Justice Powell's chambers and edited by him on June 14.¹⁵⁰ In his initial draft, Justice Powell asserted that, "[i]n an 'appropriation' or 'right of publicity' suit like the one before us, the plaintiff does not complain about the fact of publication, but rather about its timing or manner. He seeks to retain control over these aspects in order to keep the monetary benefits that flow from such publication."¹⁵¹ By June 18, in a second internal draft, he had sharpened his description of the right at issue, revising the language to assert that, "[i]n a suit like the one before us, however, the plaintiff does not complain about the fact of *exposure to the public*, but rather about its timing or manner."¹⁵² By the time he circulated a draft to the other Justices on June 20, he had revised the passage to read, in its entirety:

In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He welcomes some publicity, but seeks to retain control *over means and manner* as a way to maximize for himself the monetary benefits that flow from such publication.¹⁵³

Scripps-Howard Broad. Co., 433 U.S. 562, 579 (1977) (Powell, J., dissenting). Justice Stevens determined that no federal question was at issue in the case and that the petition should, therefore, be dismissed, a view he explained in his separate dissenting opinion. See *id.* at 583 (Stevens, J., dissenting) (interpreting the Ohio Supreme Court's opinion as defining a common law tort as opposed to placing a federal constitutional limit on the reach of that tort).

148. Correspondence from Justice Powell, Associate Justice, U.S. Supreme Court, to Justice White, Associate Justice, U.S. Supreme Court, No. 76-577, *Zacchini v. Scripps-Howard Broad. Co.* (June 1, 1977) (on file with the Powell Archives, Washington and Lee Law Library).

149. See *Zacchini*, 433 U.S. at 579 (Powell, J., dissenting) (showing that Justices Marshall and Brennan joined Justice Powell's dissent).

150. Compare Justice Powell, First Draft, No. 76-577 *Zacchini v. Scripps-Howard Broad. Co.* (June 14, 1977) (on file with the Powell Archives, Washington and Lee Law Library) (containing handwritten revisions by Justice Powell), with *Zacchini*, 433 U.S. at 579 (Powell, J., dissenting) (incorporating technical revisions from Justice Powell's first draft).

151. Justice Powell, First Draft, *supra* note 150, at N-2-N-3 n.4.

152. Justice Powell, Second Draft, No. 76-577 *Zacchini v. Scripps-Howard Broad. Co.*, at 5 (June 18, 1977) (on file with the Powell Archives, Washington and Lee Law Library) (emphasis added).

153. Justice Powell, First Circulated Draft, No. 76-577 *Zacchini v. Scripps-Howard*

Moreover, in his initial internal draft, Justice Powell began the first footnote by confessing that he had “never witnessed a human cannonball performance,” but that he assumed the event would encompass more than the simple act of firing the petitioner from the cannon and “ending with the landing in a net a few seconds later.”¹⁵⁴ The footnote went on to highlight Justice White’s emphasis on the alleged taking of Zacchini’s “entire act”¹⁵⁵ and to contend that if, on remand, the court determined that Zacchini’s performance in fact entailed more than shown in the television station’s “[fifteen]-second newsclip,” then it “could not be said to have appropriated the ‘entire act’” and that “the Court’s opinion then would afford no guidance whatever for resolution of the case.”¹⁵⁶ Following that observation, in his second internal draft, Justice Powell added two additional sentences by hand: “Is the majority saying that a First Amendment privilege springs into being whenever the news cameras fail to capture the entire performance? We are not told.”¹⁵⁷ These sentences, however, are omitted from the versions that Justice Powell circulated to his colleagues and ultimately published, which begin with the more truncated assertion that “[a]lthough the record is not explicit, it is unlikely that the ‘act’ commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later.”¹⁵⁸

D. *The Chief Justice Forms the Court’s Majority*

At conference, the views expressed by Justices Blackmun, Stewart, and White were joined by Justice Rehnquist, who, according to Justice Brennan’s notes, asserted that “Ohio law confers proprietary rights like copyright under federal law [and it] certainly can do that for [a] professional performance.”¹⁵⁹ Justice Blackmun similarly recorded

Broad. Co., at 4 (June 20, 1977) (on file with the Powell Archives, Washington and Lee Law Library) (emphasis added); *accord Zacchini*, 433 U.S. at 582 (Powell, J., dissenting) (using the same quoted language).

154. Justice Powell, First Draft, *supra* note 150, at N-1 n.1.

155. *Id.*; see Justice White, First Draft, No. 76-577 *Zacchini v. Scripps-Howard Broad. Co.*, at 8, 11, 12, 6 n.10 (May 31, 1977) (with handwritten notes from Justice Powell) (on file with the Powell Archives, Washington and Lee Law Library) (identifying six separate references to Zacchini’s “entire act,” which Justice Powell underscored in his copy of Justice White’s draft opinion).

156. Justice Powell, First Draft, *supra* note 150, at N-1 n.1.

157. Justice Powell, Second Draft, *supra* note 152, at N-1 n.1.

158. *Zacchini*, 433 U.S. at 579 n.1 (Powell, J., dissenting); Justice Powell, First Circulated Draft, *supra* note 153, at N-1 n.1.

159. Justice Brennan, Conference Notes, *supra* note 124, at 2.

Justice Rehnquist as “draw[ing] t[he] line at a [commercial performance]” and concluding that “Ohio can gi[ve] new [rights] up to th[at] point.”¹⁶⁰ The fifth vote for what became the Court’s majority was provided by the Chief Justice who, Justice Powell’s notes suggest, initially passed but ultimately supported a decision to “reverse and remand for trial.”¹⁶¹ The notes taken by Justices Powell, Blackmun, and Brennan all indicate several apparently contradictory threads in Chief Justice Burger’s comments at conference, which he apparently made before he cast the deciding vote. Those comments ranged from an assertion that “the record is woefully inadequate to decide [the] important questions presented here”¹⁶² and that the “record and opinion below [are] inadequate for a decision by this Court,”¹⁶³ to the substantive contentions that, on the one hand, “almost [the] entire ‘show’ would be revealed by a still picture”¹⁶⁴ and, on the other, that “res[pondent] approp[riated] how [Zacchini] makes his living.”¹⁶⁵

E. *The Opinion of the Court*

Unfortunately, Justice White, the author of the Court’s majority opinion, has made available to the public only the portion of his file in *Zacchini* that contains the various drafts of his opinion (and those of Justices Powell and Stevens) as well as the formal correspondence between the Justices announcing their intention to join one or another of those opinions. Unlike Justices Powell and Blackmun, Justice White left no handwritten notes, intra-chambers memoranda, or other indicia of his thought process, beyond the draft opinions themselves. In all, Justice White prepared three drafts of his opinion: one typed and two printed.¹⁶⁶ Except for correcting typographical and typesetting errors and the occasional change of wording for stylistic reasons, the opinion did not change at all throughout this drafting process.

Indeed, the only change of any kind proposed to Justice White came from the Chief Justice, who inserted in a handwritten note in

160. Justice Blackmun, Conference Notes, *supra* note 124, at 2.

161. Justice Powell, April 27, 1977 Conference Notes, *supra* note 124, at 1.

162. Justice Brennan, Conference Notes, *supra* note 124, at 2.

163. Justice Powell, April 27, 1977 Conference Notes, *supra* note 124, at 1.

164. *Id.*

165. Justice Blackmun, Conference Notes, *supra* note 124, at 1.

166. Justice White, First Draft, *supra* note 155; Justice White, First Printed Draft, *Zacchini v. Scripps-Howard Broad. Co.*, No. 76-577 (June 7, 1977) (on file with the Powell Archives, Washington and Lee Law Library); Justice White, Second Draft, *Zacchini v. Scripps-Howard Broad. Co.*, No. 76-577 (June 23, 1977) (on file with the Brennan Papers, Library of Congress Manuscript Division).

Justice White's draft, in which Justice White recounted that Zacchini's "complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy," the phrase "in common with those who paid admission to see the 'original' performance at the State Fair."¹⁶⁷ In his cover letter accompanying the single page from Justice White's draft containing this sentence and Chief Justice Burger's handwritten addition to it, the Chief Justice both communicated his decision to join Justice White's opinion and added that, "[i]f the longhand note on the attached copy of page [seven] interests you, I grant you the right to copy my entire 'performance' sans royalties."¹⁶⁸ Justice White did not make the suggested revision.

In its published form, Justice White's opinion reflected many of the themes that he and his concurring colleagues articulated at conference. As Justice Powell had observed in his own handwritten underscoring of Justice White's draft, the opinion repeatedly emphasized that the television station had appropriated Zacchini's "entire act."¹⁶⁹ By the same token, Justice White attempted to unravel and arguably narrow the confusion surrounding the nature of the right Zacchini had asserted and the Ohio Supreme Court had recognized.¹⁷⁰ Justice White both explained that Zacchini's

167. Correspondence from Justice Burger, Chief Justice, U.S. Supreme Court, to Justice White, Associate Justice, U.S. Supreme Court, *Zacchini v. Scripps-Howard Broad. Co.*, at 2 (June 17, 1977) (with handwritten notes from Chief Justice Burger) (on file with the Brennan Papers, Library of Congress Manuscript Division).

168. *Id.* at 1.

169. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569–70, 574–75 (1977).

170. At argument, Lancione had characterized the tort theory under which Zacchini sued as "a right of publicity that inheres in a professional entertainer's act, that he has a property right to govern how, when and where his performance is published." Transcript, *supra* note 117, at 4. He ultimately conceded, however, that the Ohio Supreme Court had been less than clear on this point, referring as it did in the first portion of its syllabus "to the benefit of the name and likeness of another being subject to liability to the other for invasion of his privacy" and then "to this right of the publicity value in his performance." *Id.* In any event, Lancione urged, the Ohio Supreme Court had recognized a "proprietary interest"—a "right of publicity [that] inheres in his performance." *Id.* at 4–5. This led to a lengthy exchange with Justice Brennan, in which the Justice noted that, although the Ohio Court of Appeals had held that a "performer's 'act' . . . is property entitled to the same protection under the common law as any other property right," the Ohio Supreme Court had not expressly characterized the "right of publicity" it recognized as a "property right." *Id.* at 6–7. Lancione, however, did not attach any significance to that omission, responding to Justice Brennan that the Ohio courts had "created a substantive right, a tort remedy, the invasion of the right of publicity. To state it in terms of property, personalty or realty, I don't think is the intent of using the word

complaint had itself articulated a claim for the “unlawful appropriation’ of [his] ‘professional property’”¹⁷¹ and that, for its part, the Ohio Supreme Court had “rested petitioner’s cause of action under state law on his ‘right to the publicity value of his performance,’” which, as noted, Justice White described as a “complaint . . . that respondent filmed his entire act and displayed that film on television for the public to see and enjoy.”¹⁷² And, although his opinion acknowledged that the Ohio Supreme Court had at one juncture defined the “right of publicity” it recognized as one of “personal control over commercial display and exploitation of his personality and the exercise of his talents,” Justice White nevertheless proceeded to characterize it, as the Ohio Supreme Court had elsewhere in its own opinion, as a “right of ‘exclusive control over the publicity given to his performances.’”¹⁷³ This right, Justice White continued, was so “‘valuable’ . . . that it was entitled to legal protection.”¹⁷⁴ Thus, Justice White determined that “the State’s interest in permitting a ‘right of publicity,’” the strength of which his opinion proceeded to assess against the television station’s First Amendment defense, was grounded “in protecting the proprietary interest of the individual in his act.”¹⁷⁵

‘property’ or proprietary interest.” *Id.* at 7. As Lancione explained it, Zacchini “is a professional entertainer and that is to whom the right applies, the right of publicity applies to an entertainer or to a professional athlete or to anyone who has developed some commercial value in the use of their name and their image and their success.” *Id.* at 19–20. Although his contention in this regard was at least implicitly rejected by the Supreme Court, it is worth noting that, at argument, Bryan, the television station’s counsel, vigorously challenged the notion that the “right of publicity” recognized in Ohio constituted a property right at all, contending that the Ohio Supreme Court did not “look[] at this in any sense as a property right,” as evidenced by that court’s rejection of the Ohio Court of Appeals’s conclusion that he had been the victim of an actionable conversion. *Id.* at 30–31. “I think they refer in their opinion to the fact that you can’t have conversion because there is no property right here,” Bryan explained, adding that the Ohio Supreme Court “refer[red] to it specifically as being . . . part of our right of privacy.” *Id.* at 31. In his own questioning of Bryan, Justice Stewart lamented that the Ohio Supreme Court “has said there is in Ohio a common law right of publicity. It would have been a little more understandable to me if they had said there was a property right of a performer in his performance . . . but they said there was a publicity right.” *Id.* at 32.

171. *Zacchini*, 433 U.S. at 564.

172. *Id.* at 565, 569.

173. *Id.* at 569 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 460 (Ohio 1976)).

174. *Id.*

175. *Id.* at 573.

Moreover, borrowing from Justice Rehnquist's observations at conference, Justice White's opinion explained that such an interest is premised, at least "in part," on the salutary goal of "encourag[ing] such entertainment," an interest that is "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."¹⁷⁶ Later in the opinion, Justice White reiterated this point:

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. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight¹⁷⁷ or a baseball game where the promoters or the participants had other plans for publicizing the event.¹⁷⁸

And, he added, "Ohio's decision to protect petitioner's right of publicity" goes beyond "compensat[ing] the performer" for the "invest[ment] in [the] act" because it "provides an economic incentive . . . to make the investment required to produce a performance of

176. *Id.*

177. This reference to a "prize fight" likely derived from a hypothetical question the Chief Justice posed to Lancione at argument, drawn from his understanding that "[w]hen Mohammed Ali engages in one of his professional exhibitions of prize fighting . . . the TV rights are many, many times the income he receives from the persons who are present in the arena." Transcript, *supra* note 117, at 15. Although Lancione confessed he was unaware whether his client had retained or secured "TV rights" to his performance at the fair, he told Chief Justice Burger that he did "analogize" Zacchini's situation to the Chief Justice's hypothetical. *Id.* Indeed, Lancione later asserted that, "as a legal proposition," Ali would hold such rights and, although he did not say so explicitly, so would his client. *Id.* at 16. During his own argument, Bryan returned to the Chief Justice's hypothetical and asserted that "there isn't any possibility" the unauthorized recording of one of Ali's fights "would get by the State of Ohio." *Id.* at 26. Ohio, he contended, "is not saying you can go in and steal things and break contracts." *Id.* In response, the Justices joked that "some of Mohammed Ali's performances last only about fifteen seconds" and asked whether "that mean[s] that the performance would be open to any surreptitious coverage by a television camera." *Id.* After protesting that his client's filming was not "surreptitious," as the question had assumed, Bryan's response focused on the fact that Zacchini had "contracted to put on a performance for some promoters who did invite" his client to attend the fair and that he "did not have an agreement with them that would prevent the taking of pictures." *Id.* at 26-27.

178. *Zacchini*, 433 U.S. at 574-75 (citations omitted).

interest to the public," which, he emphasized, is the "same consideration [that] underlies the patent and copyright laws."¹⁷⁹

Justice White expanded on this analogy to laws protecting intellectual property when he described the "rationale" for recognizing a right of publicity as the "straightforward one of preventing unjust enrichment by the theft of good will."¹⁸⁰ As Justice White explained it, "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."¹⁸¹ Moreover, at this juncture in his opinion, Justice White expressly distinguished between the species of the publicity right asserted by *Zacchini* and its more traditional formulation as recognized by Prosser:

the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.¹⁸²

In this same vein, Justice White emphasized the "limited" nature of the right on which *Zacchini* had based his claim, explaining that it differed from "the broad category of lawsuits that may arise under the heading of 'appropriation.'"¹⁸³ *Zacchini*, Justice White wrote, "does not merely assert that some general use, such as advertising, was made of his name or likeness."¹⁸⁴ Rather, "he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform."¹⁸⁵

IV. THE SCOPE OF *ZACCHINI* AS FIRST AMENDMENT PRECEDENT

In the years since *Zacchini*, the case has become the focal point of extensive litigation concerning whether, or the extent to which, the First Amendment places limitations on the reach of the right of

179. *Id.* at 576.

180. *Id.*

181. *Id.*

182. *Id.* See generally Prosser, *supra* note 36, at 401-07 (discussing the tort of appropriation).

183. *Zacchini*, 433 U.S. at 573 n.10.

184. *Id.*

185. *Id.*

publicity in a variety of contexts. Prominently, professional and amateur athletes have claimed in a series of cases that companies that use their likenesses in video games and in telecasts of the games in which they play have violated their right of publicity.¹⁸⁶ In these cases, several courts have divined from *Zacchini* the notion that such a right can peacefully coexist with the First Amendment through application of a case-by-case balancing test of one kind or another. In *Keller v. Electronic Arts, Inc.*,¹⁸⁷ for example, a case involving the use of avatars of college athletes in football game simulations, the U.S. Court of Appeals for the Ninth Circuit began its analysis with the almost off-hand observation, derived from a citation to *Zacchini*, that First Amendment rights in this context are “not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.”¹⁸⁸ From this premise, the court concluded that it was obliged to “balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.”¹⁸⁹

Following *Keller*, the Ninth Circuit similarly concluded, in *Davis v. Electronic Arts, Inc.*,¹⁹⁰ that the maker of the *Madden NFL* series of video games is not entitled to First Amendment protection from right of publicity claims brought by former professional football players who were depicted in the games as avatars.¹⁹¹ As the court explained in *Davis*, “We are called upon to balance the right of publicity of former professional football players against Electronic Arts’ (EA) First Amendment right to use their likenesses”¹⁹² In *Hart v. Electronic Arts, Inc.*,¹⁹³ the U.S. Court of Appeals for the Third Circuit embraced the same analysis in an analogous right of publicity claim brought by other college football players, citing *Zacchini* as supporting the proposition that “we must balance the interests underlying the right to free expression against the interests in protecting the right of publicity.”¹⁹⁴

Such reliance on *Zacchini* appears to be misplaced. On its face, the Supreme Court’s opinion in that case contains no language that

186. See, e.g., *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015), *cert. denied*, 2016 WL 1078936 (U.S. Mar. 21, 2016); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013).

187. 724 F.3d 1268.

188. *Id.* at 1271.

189. *Id.*

190. 775 F.3d 1172.

191. *Id.* at 1181.

192. *Id.* at 1175.

193. 717 F.3d 141 (3d Cir. 2013).

194. *Id.* at 149.

purports to require a case-by-case balance of the sort engaged in in *Keller, Davis and Hart*. Moreover, although the Court used the shorthand phrase “right of publicity” to describe the cause of action before it (a claim the Ohio Supreme Court had characterized as Zacchini’s right in “the publicity value of his performance”), the Justices’ focus—at argument, during their internal deliberations, and in their published opinions—on the fact that the station had copied and disseminated his “entire act” strongly suggests that the right they believed they were confronting was in the nature of a common law copyright (as the Ohio Court of Appeals had indeed characterized it) and had little to do with the right to control the use of one’s image in an otherwise distinct creative work of the kind at issue in cases like *Keller, Davis and Hart*. Indeed, at the time the case was decided, state law claims for common law copyright had not yet been preempted by federal law, and, not surprisingly, the Court’s opinion drew heavily on analogies to the law of copyright, which can coexist with the First Amendment because of its place in the U.S. Constitution itself—a place which is, in turn, based on the need to encourage the creation and dissemination of performances like Zacchini’s in the first place. There is no such governmental interest undergirding the very different species of “right of publicity” claims asserted by the athlete-plaintiffs in cases like *Keller, Davis and Hart*.

Some courts have appeared to recognize this. The Seventh Circuit, for example, has acknowledged that, *Zacchini* notwithstanding, “[t]he Supreme Court has *not* addressed the question, and decisions from the lower courts are a conflicting mix of balancing tests and frameworks borrowed from other areas of free-speech doctrine.”¹⁹⁵ In *Marshall v. ESPN, Inc.*,¹⁹⁶ a federal district court recently dismissed a claim by college athletes against the conferences and television networks that produce the games in which they participate that their names and likenesses had been unlawfully appropriated for use in those televised productions.¹⁹⁷ Significantly, the court not only rejected the athletes’ reliance on *Zacchini* for the proposition that their “right of publicity”-based claims did not violate the First Amendment, but it also concluded that *Zacchini* in fact supported the defendants:

Unlike the situation here, Mr. Zacchini was not only a performer, he was also the producer of his one-man show and, as a consequence, “Ohio’s decision to protect [his] right of publicity

195. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 (7th Cir. 2014) (emphasis added).

196. No. 3:14-01945, 2015 WL 3606645 (M.D. Tenn. June 8, 2015).

197. *Id.* at *8.

here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.” The Supreme Court went on to observe that “[t]his same consideration underlies the patent and copyright laws long enforced by this Court,” laws that “were ‘intended definitely to grant valuable, enforceable rights’ in order to afford greater encouragement to the production of works of benefit to the public.” It is a mistake, the Court believes, to read *Zacchini* as supporting a right of publicity by anyone who performs in an event produced by someone else.¹⁹⁸

The court’s analysis in *Marshall* appears accurately to reflect not only the quoted language from the Supreme Court’s decision in *Zacchini*, but also the rationale for rejecting the First Amendment challenge in that case that motivated the Justices during their internal deliberations. Those deliberations appear to reveal a Court concerned largely with validating, against constitutional attack, a common law cause of action focused narrowly on a state interest akin to that protected by the federal copyright law, itself a body of law the enforcement of which typically raises no First Amendment issues. By the same token, the Court’s internal deliberations in *Zacchini* do not appear to have been directed to the very different species of “right of publicity” claim asserted by the plaintiffs in contemporary cases such as *Marshall*. As a result, it is difficult to glean from those deliberations any support for the notion that the Court in *Zacchini* endorsed or even contemplated a balancing of the qualitatively different state interests undergirding that right against the First Amendment.

CONCLUSION

In *Zacchini*, the Supreme Court’s focus—both during its internal deliberations and in its published opinion—on the television station’s appropriation of *Zacchini*’s “entire act,” coupled with its characterization of the right of publicity he asserted as a “proprietary” interest analogous to the one that supports the laws governing intellectual property, appears to bolster the proposition, embraced most recently by the court in *Marshall*, that the First Amendment claim rejected in *Zacchini* was limited to its viability as a defense against a “right of publicity” asserted by the person or entity that owns the proprietary rights in the event itself, which, in the case before it, the Justices simply assumed was *Zacchini*. If nothing else,

198. *Id.* (citations omitted).

the record of the Court's deliberations in *Zacchini* appears to support the view that that decision does not purport to speak to the viability of a First Amendment-based defense to the kind of "right of publicity" claims asserted by contemporary plaintiffs seeking compensation for the use of their name, likeness, or even their performance, in the context of a video game, sporting event, news report or other creative work produced by someone else. To the contrary, the Court's deliberations in *Zacchini* suggest that, at least in contexts where the asserted "right of publicity" is not akin to a claim for common law copyright, there is no basis to depart from traditional modes of First Amendment analysis and engage instead in the kind of ad-hoc balancing of state-created and constitutional rights embraced by the courts in cases like *Keller*, *Davis*, and *Hart*.