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CASENOTES

DOUGLASS V. HUSTLER MAGAZINE, INC.:* ANATOMY OF PRIVACY FOR A PUBLIC “FIGURE” IN ILLINOIS

Ever since the inception of the common law tort of privacy,¹ much confusion has existed regarding the scope of the tort's protection. Part of the confusion exists because the tort has evolved from a single concept into four distinct torts.² The degree of

* 769 F.2d 1128 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3505 (U.S. Jan. 28, 1986).

1. Legal redress for a violation of one's right of privacy was first addressed in an 1890 law review article. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The now famous article was written in response to unfavorable newspaper reports of Mrs. Samuel Warren's Beacon Hill social events. The final provocation occurred when the local newspapers "had a field day" reporting Warren's daughter's wedding. Mr. Warren then contacted his former law partner, Louis D. Brandeis, and the two began a new chapter in the law. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-84 (1960).

2. Dean Prosser recognized that the right of privacy evolved from a single concept into four distinct torts: 1) unreasonable intrusion into seclusion; 2) public disclosure of a private fact; 3) false light in the public eye; and 4) appropriation of name or likeness. Prosser, *supra* note 1, at 389-407. He acknowledged that the four concepts had very little in common. *Id.* at 389. The one common thread running throughout, however, is that all four protect the plaintiff's right to be left alone. *Id.* See W. PROSSER & W. KEETON, *THE LAW OF TORTS* 117 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 652A (1977). See also Trubow, *Information Law Overview*, 18 J. MAR. L. REV. 815, 818 (1985) (commenting on common law privacy torts impact on communications technology).

Unreasonable intrusion into seclusion involves the objectionable intrusion into a person's solitude. Prosser, *supra* note 1, at 389-92. The intrusion must be objectionable to the reasonable person. *Id.* *Galella v. Onassis*, 487 F.2d 986 (2d. Cir. 1973) (photographer's constant harassment of a public figure held to be an intrusion). See, e.g., *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969) (tort is complete when information is obtained by improperly intrusive means); RESTATEMENT (SECOND) OF TORTS § 652B (1977); Note, *Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388 (1951) (noted before Prosser's article appeared that "peeping Toms" intrude on one's privacy).

According to Prosser, a public disclosure of a private fact involves three elements: 1) the disclosure must be public, not private; 2) the facts disclosed must be private; and 3) the matter made public must be highly objectionable to the reasonable person. Prosser, *supra* note 1 at 392-98. See W. PROSSER & W. KEETON, *THE LAW OF TORTS* 117 (5th ed. 1984). The Restatement of Torts added a fourth requirement, namely, that the general public must not have a legitimate interest in the information.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

The Restatement's definition of false light privacy is:

acceptance of the four privacy torts has not been uniform among the states.³ Illinois, for example, has historically recognized only the tort of appropriation.⁴ In *Douglass v. Hustler Magazine, Inc.*,⁵ the United States Court of Appeals for the Seventh Circuit for the first time explicitly recognized the existence of the false light tort in Illinois.⁶ Unfortunately, the *Douglass* court added to existing confusion about the appropriation tort by failing to distinguish it

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977). See *infra* notes 53-65 and accompanying text. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (false story causing the public to pity the plaintiffs held an invasion of privacy); *Time v. Hill*, 385 U.S. 374 (1967) (Supreme Court recognition of the false light tort); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 117 (5th ed. 1984) (comprehensive examination of false light privacy); Prosser, *supra* note 1, at 398-401 (written during the early development of the tort and notes similarities to the tort of defamation (see *infra* note 39)). But see Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 339-41 (1966) (criticism of false light privacy coexisting with the law of defamation).

The fourth privacy tort involves the appropriation of a plaintiff's name or likeness for the defendant's benefit or use. RESTATEMENT (SECOND) OF TORTS § 652C (1977). The interest protected is the individual's exclusive use of his own identity. *Id.* The unlawful appropriation of one's identity was the first privacy tort that the courts recognized. See, e.g., *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). See *infra* notes 72-80 and accompanying text. See also W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 117 (5th ed. 1984). See generally Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 331 (1966) (an article generally critical of privacy law, but nevertheless supportive of the appropriation tort).

3. The following are jurisdictions which have expressly adopted Prosser's four categories: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Dakota, Texas, Vermont, and the Virgin Islands. See generally 3 *LDRC* 50 — *STATE SURVEY* (H. Kaufman ed. 1984) (survey of defamation and related torts encompassing all fifty states and U.S. territories).

4. Comment, *Privacy in Illinois: Torts Without Remedies*, 17 *J. MAR. L. REV.* 799, 818 (1984) [hereinafter cited as *Privacy In Illinois*]. The privacy tort of appropriation was first recognized in Illinois in 1952. *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952). In *Eick*, Justice Schwartz was inspired by the Warren and Brandeis article and, therefore, recognized the right of privacy in Illinois. *Id.* at 295, 106 N.E.2d at 743. The defendant used a photograph of a blind girl to promote the sale of dog food. *Id.* at 294, 106 N.E.2d at 743. The court held that the defendant unlawfully appropriated the plaintiff's likeness and, therefore, violated her right of privacy. *Id.* at 306, 106 N.E.2d at 748. See also *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965) (acknowledged appropriation tort but denied plaintiff's recovery); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (limited the recovery in *Eick* by denying recovery for a mother who read a publication about her son); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958) (use of plaintiff's photograph in a story about her husband's murder held to be an invasion of privacy).

5. 769 F.2d 1128 (7th Cir. 1985).

6. *Id.* at 1133. See *infra* notes 51-67 and accompanying text.

from the right of publicity.⁷

In 1974, aspiring actress Robyn Douglass posed nude for freelance photographer Augustin Gregory.⁸ The photographs were to appear in upcoming issues of *Playboy Magazine*.⁹ In 1980, Gregory was hired as photography editor of *Hustler Magazine*.¹⁰ Gregory's portfolio included the nude photographs of Douglass.¹¹ Lacking Douglass' consent,¹² *Hustler* published the nude photographs in the January, 1981 issue of the magazine.¹³

7. *Id.* at 1138-39. See *infra* notes 68-98 and accompanying text.

8. *Douglass*, 769 F.2d at 1131. Gregory was a codefendant in the case. In 1974, Douglass posed for Gregory on two occasions. During the first session, Douglass posed nude with another woman. Those pictures were intended for *Playboy's* "Ripped-Off" pictorial. Douglass posed alone during the second session. Those pictures were intended for *Playboy's* "Water and Sex" pictorial. *Id.* at 1131-32.

9. *Douglass*, 769 F.2d at 1131-32. The "Ripped-Off" pictorial appeared in the March, 1975 issue of *Playboy*. *Playboy* never published the "Water and Sex" pictorial. Douglass appeared in *Playboy* eight times between 1974 and 1976. Brief for Appellant at 2, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

After all of the photo sessions, Douglass signed a release which gave *Playboy* sole rights to publish or distribute the photographs. *Douglass*, 769 F.2d at 1131. At the trial, Douglass contended that she went to the *Playboy* offices the day after each photo session, and signed a standard *Playboy Enterprises* model release. Gregory, however, testified that Douglass signed one of his own standard releases before leaving the studio. Brief for Appellant at 5, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

10. *Douglass*, 769 F.2d at 1131-32. Gregory's hiring was based, in part, on *Hustler's* desire to publish nude photographs of celebrities. *Id.* at 1132. Douglass had obtained celebrity status by various movie and television appearances. *Id.* In 1977, Douglass was cast as the female lead in the successful movie, "Breaking Away." In 1979, she appeared as a regular on the television series "Battlestar Gallactica." As a result of her film and television success, Douglass became a popular spokesperson for many national products. Her commercial contacts were through several Chicago-based advertising agencies. *Id.*

After *Hustler* hired Gregory, its management asked him for releases authorizing the publication of the photographs. *Id.* at 1132. At trial, Gregory said that he could not locate any releases at first, but eventually submitted two. *Id.* *Hustler* presented only copies of the releases at trial. *Id.* The parties stipulated that one of the releases was a forgery, while the quality of the other was too poor to authenticate. *Id.*

11. *Id.* See *supra* note 8 and accompanying text.

12. Prior to publication, Douglass discovered she was to be featured in the magazine. *Id.* The announcement of the "Robyn Douglass Nude" pictorial appeared in the December, 1980, issue of *Hustler*. *Id.* When Douglass learned she was to be featured, she contacted *Hustler* and informed them they had no authority to publish the photographs. *Id.* *Hustler* made no effort to recall the issue and it went on sale. *Id.*

13. See *supra* note 8. The pictorial was three pages long. The first page contained a photograph from the "Water and Sex" shoot, as well as a still photograph from "Battlestar Gallactica." The text made reference to Douglass' career and stated "Robyn has been trained to use her body as a tool of her trade." The second page included more photographs from the "Water and Sex" shoot, in addition to photographs from the "Ripped-Off" pictorial. The third page included a still from "Breaking Away," as well as two photographs from the "Ripped-Off" pictorial.

The text of the pictorial referred to the other woman in the "Ripped-Off" photographs as "a female friend." The text read in part, "[f]rom the looks of Robyn . . . , she's never had difficulty finding climactic moments." *Id.* at 1132-35.

Douglass brought suit in the United States District Court for the Northern District of Illinois¹⁴ alleging that Gregory and *Hustler* violated her right to privacy under Illinois law.¹⁵ Specifically, she claimed the publication placed her in a false light and unlawfully appropriated her name and likeness.¹⁶ The trial court entered judgment in Douglass' favor and awarded her \$600,000.¹⁷ The Seventh Circuit Court of Appeals reversed.¹⁸

The appellate court addressed whether Douglass stated a valid case of action for false light privacy.¹⁹ In addition, the court addressed whether *Hustler* had appropriated Douglass' name and likeness in violation of her right of publicity.²⁰ The court held that the false light branch of privacy and the right of publicity are recognized civil wrongs in Illinois,²¹ and that Douglass stated a valid claim for each, but reversed the judgment on other grounds.²²

In its analysis, the court first examined Illinois' treatment of the false light invasion of privacy.²³ Judge Posner, writing for a unanimous court, noted that no Illinois court had ever expressly found liability based on the tort.²⁴ He observed, however, that some Illinois courts had implied that the tort existed.²⁵ Judge Posner reasoned that the absence of any case in which liability for the tort

14. *Douglass v. Hustler Magazine, Inc.*, 607 F. Supp. 816 (N.D. Ill. 1984).

15. *Id.*

16. *Id.* Douglass' false light claim was based on two theories. First, she alleged that *Hustler* falsely portrayed her as a lesbian. *Douglass*, 769 F.2d at 1135. Douglass claimed that the "Ripped-Off" photographs, together with the text insinuated that she was a lesbian. *Id.* At trial, the author of the text testified that it was his intention to create the homosexual inferences. Brief for the Appellant at 15, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

Second, Douglass contended that *Hustler* falsely implied her voluntary association with the magazine. *Douglass*, 769 F.2d at 1135. Douglass argued that the manner of the pictorial suggests that she willingly posed for *Hustler*. *Id.* She cited as evidence a previous issue of *Hustler* in which Larry Flynt, the magazine's publisher, had announced that he does not publish photographs of women without their consent. *Id.* But see *infra* note 67 and accompanying text (*Hustler's* defense of this contention).

17. *Douglass v. Hustler Magazine, Inc.*, 607 F. Supp. 816 (N.D. Ill. 1984). Douglass was awarded \$500,000 in compensatory damages. She was also awarded \$1,500,000 in punitive damages which was remitted to \$100,000. *Id.* For a discussion of the appellate court's treatment of damages, see *infra* note 76 and accompanying text.

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

19. *Id.* at 1134-38. See *infra* notes 51-67 and accompanying text.

20. *Id.* at 1138-40. See *infra* notes 68-98 and accompanying text.

21. *Douglass*, 769 F.2d at 1133, 1139. Because there is no general federal common law, federal courts must apply the law as it believes the state courts would. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See also *Privacy in Illinois*, *supra* note 4, at 824-27 (federal court's interpretation of Illinois privacy law).

22. *Id.* at 1140. See *infra* note 44.

23. *Douglass*, 769 F.2d at 1133.

24. *Id.* at 1133. For a discussion of the existence of the false light branch of privacy see *infra* notes 51-63 and accompanying text.

25. *Douglass*, 769 F.2d at 1133.

was imposed was due only to the fact that no Illinois court had yet been presented with a valid false light claim.²⁶ Therefore, Judge Posner turned to whether Douglass stated a valid false light claim.

The court applied a two-step analysis to determine whether Douglass had a valid cause of action for false light privacy.²⁷ First, the court analyzed the negative implications of the pictorial.²⁸ After viewing the pictorial and accompanying text,²⁹ the court concluded that a reasonable jury could infer negative implications from the pictorial. The jury could believe that Douglass was a lesbian,³⁰ and a reasonable jury could also find that Douglass' association with *Hustler* in itself would be degrading.³¹ Second, the court analyzed the falsity of the negative implications.³² The evidence showed that

26. *Id.* at 1133. See *infra* notes 51-63 and accompanying text. The court recognized that the false light branch of privacy has been under criticism, chiefly because it overlaps with defamation. *Douglass*, 769 F.2d at 1133.

Prosser defines a defamatory statement as one "which tends to hold the plaintiff up to hatred, contempt, or ridicule, or to cause him to be shunned or avoided." W. PROSSER & W. KEETON, *THE LAW OF TORTS* 111 (5th ed. 1984). See, e.g., *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 186 N.E. 217 (1933) (publication alleging that plaintiff had been "courting" a married man held nondefamatory). But see *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581 (C.A. 1934) (false statement that a woman was raped was held to be defamatory).

A statement holding someone in a false light need not be defamatory, although it very often is. W. PROSSER & W. KEETON, *THE LAW OF TORTS* 117 (5th ed. 1984). An action for defamation is designed to protect a person's interest in a good reputation. *Id.* An action for false light invasion of privacy, however, is designed to protect a person's interest in being let alone. *Id.* This action is available when there has been publicity that is highly offensive. *Id.*

The Restatement acknowledges a major concern regarding the similarity of the two torts:

When the false publicity is also defamatory so that either action can be maintained by the plaintiff, it is arguable that limitations of long standing that have been found desirable for the action of defamation should not be successfully evaded by proceeding upon a different theory of later origin, in the development of which the attention of the courts has not been directed to the limitations.

RESTATEMENT (SECOND) OF TORTS § 652E comment e (1977). See also *Renwick v. News and Observer*, 310 N.C. 312, 320, 312 S.E.2d 405, 413 (1984) (court did not recognize false light in North Carolina because of the overlap with defamation); *Kalven*, *supra* note 2, at 339-41 (critical of false light because of the overlap); Prosser, *supra* note 1, at 400-01 (fears false light may eventually swallow up defamation).

The *Douglass* court acknowledged that in some instances proving a false light claim may be more difficult than proving a defamation claim. *Douglass*, 769 F.2d at 1133. For example, a plaintiff in a false light claim must prove that the materials have been widely publicized. *Id.* In defamation, however, the degree of publicity will not preclude a cause of action. *Id.*

27. *Douglass*, 769 F.2d at 1134.

28. *Id.*

29. See *supra* note 13.

30. *Douglass*, 769 F.2d at 1135.

31. To decide this issue, the court engaged in a section-by-section analysis of *Hustler*. The discussion ended with page 51 of a 136 page issue. The court concluded that voluntary association with *Hustler* "is unquestionably degrading to a normal person, . . ." *Id.* at 1136.

32. *Id.* at 1135.

Douglass was not a lesbian,³³ and that she did not voluntarily associate herself with *Hustler*.³⁴ The court held, therefore, that Douglass' claim that *Hustler* had placed her in a false light was valid.³⁵

The court next addressed whether *Hustler* had violated Douglass' rights under the appropriation branch of privacy.³⁶ In his analysis, Judge Posner used the terms "appropriation branch of privacy" and "right of publicity" synonymously.³⁷ He reasoned that the unauthorized publication exploited Douglass' talents by using her notoriety to sell magazines, and that she should be compensated for such exploitation.³⁸

The court then considered *Hustler's* affirmative defenses.³⁹ *Hustler* asserted that, under the Constitutional protections of the First Amendment, the plaintiff must establish actual malice⁴⁰ by clear and convincing evidence.⁴¹ Following the United States

33. All parties agreed that Douglass is not a lesbian. *Id.*

34. *Id.*

35. *Id.* See *infra* notes 64-67 and accompanying text.

36. *Douglass*, 769 F.2d at 1138.

37. *Id.* The court stated that, "*Hustler* also violated [Douglass'] right under the commercial appropriation branch of privacy — what is sometimes called the 'right of publicity.'" *Id.*

38. *Id.* at 1139.

39. *Id.* at 1139. For a discussion of the court's other reasons for reversal see *infra* note 46.

40. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court defined actual malice as a statement made with either actual knowledge of its falsity or a reckless disregard for the truth. *Id.* at 280. The Court developed the actual malice requirement to protect the first amendment rights of media defendants against libel actions brought by public officials. *Id.*

In *Sullivan*, a police commissioner from Montgomery, Alabama claimed that he had been defamed in an advertisement that appeared in *The New York Times*. *Id.* at 254. The Court denied recovery and held that a state cannot award damages to a public official for a defamatory falsehood relating to his official conduct unless he proves actual malice. *Id.*

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Court elaborated on its definition of actual malice. A plaintiff can prove actual malice by demonstrating that the defendant entertained serious doubts as to the truth or his publication. *Id.* at 731. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (reinforced proposition that actual malice does not mean ill will); *Rosenblatt v. Baer*, 380 U.S. 356 (1965) (held that public official standard applied to public employees who exercise substantial government power). S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS 1.18 (Sup. 1985) (concise history of the development of the actual malice concept); RESTATEMENT (SECOND) OF TORTS, § 580A (1977) (adopts the *Sullivan* definition).

41. *Douglass*, 769 F.2d at 1139. The *Sullivan* Court said that the U.S. Constitution demands that actual malice be proven with "convincing clarity." 376 U.S. at 285-86. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974) (approved of clear and convincing standard, but held it inapplicable because plaintiff was a private figure). But see *Bloomfield v. Retail Credit Co.*, 14 Ill. App.3d 158, 302 N.E.2d 88 (1973) (approves of a jury instruction which requires proof of actual malice by a preponderance of the evidence).

Supreme Court's holding in *Time v. Hill*,⁴² the court agreed actual malice operates as a first amendment defense to privacy claims.⁴³ Based on the trial evidence, the court concluded that the jury could have found that *Hustler* acted with actual malice.⁴⁴ The court held, however, that the trial court committed a reversible error⁴⁵ when it instructed the jury to apply merely a preponderance standard instead of a clear and convincing standard.⁴⁶

42. 385 U.S. 374 (1967). In *Hill*, the Court held that an action for invasion of privacy is subject to the same first amendment restrictions as defamation. *Id.* at 388. See *supra* note 40.

In 1952, three escaped convicts held James Hill and his family hostage in their home for nineteen hours. *Id.* at 388. The Hills were released unharmed. In order to avoid publicity of the matter, the Hills moved to another state. *Id.* In 1953, a novel entitled *The Desperate Hours* was published. *Id.* The story depicted a family being held hostage by escaped convicts. *Id.* In the novel, however, the family was brutally beaten and subjected to verbal sexual insults. *Id.* The novel was later made into a play. *Id.*

In 1955, *Life Magazine* did an article about the play which suggested *The Desperate Hours* faithfully depicted the Hill's experience. *Id.* at 377. The Hills contended that the article violated their right to privacy. *Id.* at 378. The trial court found for the Hills, based on New York's privacy statute (see *infra* note 84). *Id.* at 379. The Supreme Court reversed and remanded, ordering the lower court to apply the *Sullivan* standard to find liability. *Id.* at 396. See also *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (held that the first amendment mandates a constitutional privilege applicable to privacy torts where publicity is an element). *Cf. Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 256 (1974) (Court held that the *Sullivan* test applies to false light privacy cases, but did not disapprove of a preponderance jury instruction); *Braun v. Flynt*, 726 F.2d 245, 248-49 (5th Cir.), *cert. denied*, 105 S.Ct. 252 (1984) (in a privacy case, court correctly held that *Sullivan* test did not apply to private individual, but also did not disapprove of a preponderance jury instruction). See generally *Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976) (compares similarities between defamation and privacy and discusses relationship of each with the first amendment).

43. *Douglass*, 769 F.2d at 1140 (citing *Bichler v. Union Bank and Trust Co.*, 715 F.2d 1059, 1063 (6th Cir. 1983)).

44. *Douglass*, 769 F.2d at 1139. *Hustler* contended that the jury should not have found actual malice because the magazine actually believed they had valid releases from Douglass. *Id.* *Hustler* contended that Augustin Gregory defrauded them. *Id.* The court answered *Hustler's* contention in two ways. First, *Hustler* had been unable to produce the releases of Douglass' co-model in the "Ripped-Off" pictorial. *Id.* This tended to show that *Hustler* knew the Douglass releases were not authentic. *Id.* Second, if Gregory knew the releases were fraudulent, his knowledge would be imputed to *Hustler* through the doctrine of respondeat superior. *Id.* at 1139-40. Gregory was acting in the scope of his employment as photography editor, so that his knowledge of the falsity of the releases was imputed to the corporation. *Id.* The doctrine of respondeat superior is fully applicable to suits for defamation and privacy, notwithstanding the limitations of the first amendment. *Id.* See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974) (newspaper reporter's knowledge of false statements imputed to publisher); *Hunt v. Liberty Lobby*, 720 F.2d 631, 648-49 (11th Cir. 1983) (independent contractor's knowledge of falsity regarding the John F. Kennedy assassination is imputed to the publisher).

45. For a discussion of reversible error predicted on an incorrect burden of proof instruction, see *Meiners v. Moriority*, 563 F.2d 343, 350-51 (7th Cir. 1977).

46. *Douglass*, 769 F.2d at 1140. In addition, the court held that the introduction of 128 slides depicting *Hustler's* "vulgarity" was unfairly prejudicial. *Id.* at 1141-42. The court also decided that an undisclosed agreement not to execute judgment between Douglass and Gregory warranted reversal. *Id.* at 1142-43. The court agreed

The *Douglass* court's analysis of Ms. Douglass' claim helped to clarify one area of privacy law in Illinois, yet added confusion to another. The court was correct in holding that Illinois recognizes the false light theory of privacy and properly determined that Douglass had stated a valid claim.⁴⁷ The court was incorrect, however, in holding that *Hustler* violated Douglass' right of publicity. By erroneously equating a privacy right of appropriation with the right of publicity,⁴⁸ the court added to the confusion already existing in this area, because while the appropriation tort is recognized in Illinois, the publicity tort is not.⁴⁹ Additionally, the court's approval of a first amendment defense to a right of publicity cause of action is improper and inconsistent with a prior holding of the United States Supreme Court.⁵⁰

The *Douglass* court correctly reasoned that, although no plaintiff had yet been successful in litigating a false light claim, the tort nevertheless existed in Illinois.⁵¹ The history of privacy cases in Illinois supports this conclusion.⁵² For example, in *Leopold v. Levin*,⁵³ the Illinois Supreme Court considered whether a fictionalized novel of the famous Leopold-Loeb case violated Nathan Leopold's right to privacy.⁵⁴ Leopold claimed that the author "knowingly fictionalized accounts" of his life.⁵⁵ The court denied recovery because the accounts were of a public nature, and thus were not subject to any privacy protection.⁵⁶ The court nevertheless

with *Hustler's* claim that the agreement should have been disclosed so *Hustler* would be more aggressive in their cross-examination of Gregory. *Id.*

47. *Id.* at 1132-38. See *infra* notes 51-67 and accompanying text.

48. *Id.* at 138. See *supra* note 37.

49. See *infra* notes 88-89 and accompanying text. See also *Privacy in Illinois*, *supra* note 4, at 814-15, n. 102 (discussion of the right of publicity in Illinois).

50. See *infra* notes 99-107 and accompanying text.

51. *Douglass*, 769 F.2d at 1132-33.

52. See generally, *Privacy in Illinois*, *supra* note 4, (comprehensive analysis of the history of the privacy torts in Illinois).

53. 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

54. *Id.* In 1924, Richard Loeb and Nathan Leopold, Jr. pleaded guilty to the kidnapping and murder of a 14 year-old boy, Bobby Franks. *Id.* at 436, 259 N.E.2d at 252. Each defendant was sentenced to consecutive prison sentences of life and 99 years. *Id.* The trial attracted international notoriety. *Id.*

The novel *Compulsion* was published in 1956. *Id.* The author, Meyer Levin, was a fellow student of the defendants. *Id.* Although the novel was fiction, all parties agreed that it was factually based on the crime. *Id.* at 437, 259 N.E.2d at 252.

The *Leopold* case was the first opportunity the Illinois Supreme Court had to recognize the right to privacy. *Id.* at 439, 259 N.E.2d at 253. The court noted that the right of privacy had been recognized at the appellate level in *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952) (see *Eick* discussion *supra* note 4). The *Leopold* court also noted that the Illinois legislature had implicitly recognized the cause of action through enactment of a statute of limitations for privacy suits. *Leopold*, 45 Ill. 2d at 439, 259 N.E.2d at 253 (citing ILL. REV. STAT. ch. 83, § 14 (1967) (current version at ILL. REV. STAT. ch. 110, § 13-201 (1983))).

55. *Leopold*, 45 Ill. 2d at 439, 259 N.E.2d at 253.

56. *Id.* at 441, 259 N.E.2d at 254. The court observed that the right to privacy is

implied in dicta that the false light tort existed in Illinois.⁵⁷

A claim similar to Leopold's was raised in *Andreani v. Hansen*,⁵⁸ where a letter to the editor of a local newspaper falsely implied that the plaintiffs were ruthless businessmen.⁵⁹ The *Andreani* court held that the subject matter of a letter involved a legitimate public interest, and therefore, the plaintiff's case was barred.⁶⁰ Had the subject matter been different, however, the plaintiff might have prevailed. In *Midwest Glass Co. v. Stanford Development Co.*,⁶¹ the court of appeals, in dictum, implied that all four branches of common law privacy are recognized in Illinois.⁶² All three cases suggest the willingness of Illinois courts to recognize false light privacy. The *Douglass* court was correct, therefore, when

limited in areas of legitimate public interest. *Id.* at 440, 259 N.E.2d at 254 (citing *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952)). The *Leopold* court concluded that the Leopold-Loeb case was still of legitimate public interest. *Leopold*, 45 Ill. 2d at 441, 259 N.E.2d at 254.

57. See *Douglass*, 769 F.2d at 1133 (noting that the *Leopold* court raised several points that would be unnecessary unless false light existed in Illinois).

58. 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980).

59. *Id.* at 728, 400 N.E.2d at 681. In *Andreani*, the plaintiffs were builders and real estate developers who owned a tract of land that the local park district wished to buy. *Id.* at 727, 400 N.E.2d at 680. The two sides could not come to terms so the park district instituted condemnation proceedings. *Id.*

The plaintiffs alleged that the letter to the editor held them in a false light. *Id.* The *Andreani* court, while acknowledging the plaintiffs' claim, denied recovery. *Id.* at 730, 400 N.E.2d at 681.

60. *Id.* A plaintiff's right to privacy is weighed against the public's interest in the publication. See *Time Inc. v. Hill*, 385 U.S. 374 (1966) (opening of a new play linked to an actual incident is a matter of public interest); *Rozhon v. Triangle Productions, Inc.*, 230 F.2d 359 (7th Cir. 1956) (death from the use of narcotics considered legitimate public interest); *Buzinski v. Do-All Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961) (plaintiff's picture used in connection with a new mobile home is of public interest); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 2d 191, 175 N.E.2d 577 (1952) (no legitimate news interest in girl's picture on a box of dog food).

61. 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).

62. *Id.* at 133, 339 N.E.2d at 277. In *Midwest Glass*, the plaintiff sued the defendant for payment of a debt. *Id.* at 131, 339 N.E.2d at 275. The defendant filed counterclaim, alleging an invasion of privacy by public disclosure of private facts. *Id.* The court dismissed the counterclaim, holding that the defendant did not state a valid cause of action. *Id.* at 134, 339 N.E.2d at 277.

In addition, in *Cantrell v. American Broadcasting Co., Inc.*, 529 F. Supp. 746, the United States District Court for the Northern District of Illinois acknowledged the existence of the false light tort. In *Cantrell*, Judge Kocoras held that statements made during a television broadcast entitled "Arson for Profit" constituted a false light invasion of the plaintiff's privacy. *Id.* at 756-59. The court, citing *Midwest Glass*, stated that Illinois had recognized Prosser's four privacy torts. *Id.* at 756.

While granting the plaintiff's cause of action, the *Cantrell* court failed to note two earlier Illinois cases discussing the status of the four privacy torts. In *Bureau of Credit Control v. Scott*, Judge Simkins stated that it appeared that Illinois recognized a cause of action under invasion of privacy for unlawful appropriation only. 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976) (citing *Annerino v. Dell Publishing Co.*, 65 Ill. App. 2d 205, 149 N.E.2d 761 (1958), and *Eick v. Perk Dog Food Co.*, 347 Ill. App. 191, 175 N.E.2d 577 (1952)). In *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979), the court followed the holding in *Scott* and limited the right to privacy in Illinois to unlawful appropriation.

it decisively and explicitly recognized the tort's existence in Illinois.⁶³

The court was also correct in concluding that Douglass had stated a valid claim of false light. False light privacy protects a person who has been subjected to highly offensive and false publicity.⁶⁴ The court reasoned that while appearing nude in *Playboy* could be prestigious for an actress, appearing nude in *Hustler* could be degrading.⁶⁵ Other courts have concluded that *Hustler's* blend of sexually explicit photographs and racial and religious humor are offensive.⁶⁶ Thus, the court properly held that the false portrayal of a voluntary association with *Hustler* states a valid cause of action in false light privacy. The court also held that *Hustler's* untrue implications that Douglass was a lesbian constituted another valid claim of false light privacy.⁶⁷

63. *Douglass*, 769 F.2d at 1133.

64. *See supra* note 2.

65. *Douglass*, 769 F.2d at 1135-38. *Hustler* contends that the publication of "Robyn Douglass Nude" could not be degrading to one who had posed nude in *Playboy*. *Id.* at 1136. The court cited strong differences in content between the two magazines. *Id.* at 1137. The court said that in *Playboy*, unlike *Hustler*, the erotic theme is generally muted. *Id.* In addition to the magazines themselves, Douglass presented evidence that local advertising agencies were afraid of their clients' reactions to the *Hustler* pictorial. *Id.* The same agencies cared nothing about her appearances in *Playboy*. *Id.*

Hustler contends that there has been no falsity uttered at all. Brief for Appellant at 20, *Douglass v. Hustler Magazine, Inc.* 769 F.2d 1128 (7th Cir. 1985). They claim that merely disapproving of the magazine should not give rise to a valid cause of action for false light. *Id.* The first amendment would bar a cause of action for invasion of privacy for merely objecting to the magazine's content. *Id.* For example, a Ku Klux Klan member could not sue the NAACP merely because his picture appeared in their newsletter. *Id.* *See, e.g., Falwell v. Penthouse International, Ltd.*, 521 F. Supp. 1204, 1210 (W.D. Va. 1981) (plaintiff denied recovery when his only objection to a publication of an interview was the particular forum). *See also, Namath v. Sports Illustrated*, 48 A.D.2d 487, 363 N.Y.S.2d 276 (1976) (no recovery for unauthorized publication of photograph where nothing was degrading or untruthful about the representation).

Douglass, however, is not merely objecting to appearing in the magazine. *Douglass*, 769 F.2d at 1135. She contends that *Hustler* is highly objectionable to a reasonable person. *Id.* at 1132. *See generally Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984) (magazine placed plaintiff in false light by publishing nude photographs which were stolen).

66. *See, e.g., Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984) (nude photograph of plaintiff had been stolen and eventually appeared in magazine). *See generally Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984) (invasion of privacy arising from a photograph in *Chic* magazine, a Larry Flynt publication closely resembling *Hustler*).

67. *Douglass*, 769 F.2d at 1135. Although falsely suggesting that someone is a lesbian may be defamatory, it is also actionable as a false light invasion of privacy. *See Buck v. Savage*, 323 S.W.2d 363 (Tex. Civ. App. 1959) (statement that plaintiff was "queer" was defamatory); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 111 (5th ed. 1984) (examples of words which are considered defamatory). *See also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979) (holding that an accusation of homosexuality place plaintiff's deceased son in a false light; recovery denied on grounds that the right is personal and did not survive son's death).

While the court's recognition and application of false light privacy was correct and helped clarify the tort in Illinois, its treatment of Douglass' second claim added confusion to the appropriation branch of the tort. Douglass claimed that *Hustler* violated her right to privacy when it unlawfully appropriated her likeness.⁶⁸ The court, however, concluded that *Hustler* violated Douglass' *right of publicity*.⁶⁹ The court used the two terms synonymously, failing to acknowledge that they are separate and distinct torts.⁷⁰

The distinction between the torts is in the interest each is designed to protect. The tort of appropriation protects one's interest in being left alone.⁷¹ In contrast, one who claims a violation of his right of publicity does not need, *nor want*, privacy.⁷² Instead, that person is merely seeking compensation for the publication of his name or likeness for commercial purposes.⁷³

Douglass' claim is characteristic of the right of privacy⁷⁴ and not publicity. Douglass did not want the photographs to be shown in

68. *Douglass*, 769 F.2d at 1138.

69. *Id.* at 1138-39. The term "right of publicity" was coined by Judge Frank in *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

70. *See supra* note 37. *See also* *Gautier v. Pro-Football*, 304 N.Y. 354, 107 N.E.2d 485, 99 N.Y.S.2d 812 (1952) (a plaintiff claiming that his right of publicity has been violated does not want privacy); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 117 (5th ed. 1984) (compares a right of publicity to a trademark in person's likeness); Felcher and Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577 (1979) (recognizes that a privacy cause of action does not remedy portrayals that cause purely economic injury); Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 *N.W. U.L. REV.* 553 (1960) (acknowledges differences between injury to feelings and economic injury); Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203 (1954) (privacy is inadequate to address the claims of celebrities); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 *TEX. L. REV.* 637 (1973) (confusion exists because courts fail to recognize actual injury to plaintiff); Comment, *The Right of Publicity — Protection for Public Figures and Celebrities*, 42 *BROOKLYN L. REV.* 527 (1976) (right of publicity should be recognized outside the scope of privacy).

71. Prosser, *supra* note 1, at 389 (quoting Judge Cooley in *COOLEY*, *TORTS* 29 (2d. ed. 1888)).

72. *Gautier v. Pro-football*, 304 N.Y. 354, 361, 107 N.E.2d 485, 489, 99 N.Y.S.2d 812, 816 (1952).

73. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835-36, 603 P.2d 425, 438-39, 160 Cal. Rptr. 323, 337 (1979).

74. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 462, 573 (1977). Although Douglass was a celebrity, she did not necessarily waive her right to protect her privacy. *See Treece, Commercial Exploitation of Names, Likeness and Personal Histories*, 51 *TEX. L. REV.* 637 (1973) (*citing* *Continental Optical Co. v. Reed*, 119 Ind. App. 543, 650, 86 N.E.2d 306, 309 (1949); Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 *HASTING L. J.* 751, 756 (1978) (celebrity status does not preclude the possibility of hurt feelings). *See also* *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (actor Cary Grant claimed magazine unlawfully appropriated his likeness for a clothing advertisement; Grant sought no compensation for the ad, but wished to enjoy further use of his picture).

Hustler.⁷⁵ She did not approve of the publicity, nor did she wish to be compensated for it.⁷⁶ The court failed to recognize that Douglass was offended by the publication. Because of its failure to distinguish between the torts, the *Douglass* court added to the confusion existing in this branch of the privacy torts.

The right of publicity, which the *Douglass* court attempted to apply, was first recognized in *Haelen Laboratories v. Topps Chewing Gum*.⁷⁷ In *Haelen*, a chewing gum manufacturer contracted with a professional baseball player for the exclusive rights to use the athlete's picture on a baseball card.⁷⁸ The defendant was a competing manufacturer who used the player's picture on a baseball card.⁷⁹ The plaintiff claimed that, under section 51 of New York's Civil Rights Law,⁸⁰ he should be compensated for the defendant's

75. Brief for Appellee at 8, *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985). After *Douglass* discovered that *Hustler* was going to publish the photographs, she made several attempts to prevent the publishing. *Id.*

76. *Id.* In her complaint, *Douglass* claimed that she had suffered a pecuniary loss because local advertising agencies disapproved of the *Hustler* pictorial. *Douglass*, 769 F.2d at 1143. She also alleged that she had suffered severe emotional distress. *Id.*

Judge Posner held that the compensatory damage award was excessive for several reasons. First, he believed that the jury must have been prejudiced by the slide show. *Id.* Second, the economist who testified as to *Douglass*' lost earnings failed to take into account that the entertainment business is extremely risky, and that *Douglass*' career was only damaged in Chicago. *Id.* Her *persona non grata* status in Chicago actually created opportunities for *Douglass* in other markets. *Id.* at 1143-44. Finally, Judge Posner held that the \$300,000 award for emotional distress was "absurd" in light of the injury suffered. *Id.* at 1144. For a general discussion of damage awards in privacy cases see Lerman v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984). For a philosophical discussion of Judge Posner's analysis of damage awards see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 142-52 (2d ed. 1977). For insight on Judge Posner's economic theory of privacy, compare Posner, *John A. Sibley Lecture: The Right to Privacy*, 12 GA. L. REV. 393 (1978), with Fried, *Privacy: Economics and Ethics: A Comment on Posner*, 12 GA. L. REV. 423 (1978) (debate on economic impact of privacy law).

Under right of publicity, *Douglass* would only have been entitled to recover reasonable compensation for *Hustler*'s use of the photographs. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (a proper remedy for a right of publicity claim is the reasonable value of the publicity). *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 835-36, 603 F.2d 425, 438-39, 160 Cal. Rptr. 323, 337 (1979) (successful claim entitles plaintiff to reasonable compensation for use).

77. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

78. *Id.*

79. *Id.* at 867.

80. The New York Statute states:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained . . .

N.Y. CIVIL RIGHTS LAW § 51 (McKinney 1976). The New York State legislature enacted the statute in response to the New York court of Appeal's rejection of a right to privacy in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). Section 50 of the law makes it a misdemeanor to use the "name, portrait or

use of the athlete's name and likeness.⁸¹ The court held that "in addition to and independent of the right of privacy, . . . a man has a right to the publicity value of his photograph."⁸² Thus, the right of publicity was recognized as a separate tort, derivative of the right of privacy.

Since the right of publicity was first recognized, commentators have struggled with the nature of the right. Some have labelled it as a property right.⁸³ Inherent in the view of right of publicity as a property right is the ability to assign the right to others.⁸⁴ A few courts have held that the right of publicity is descendable.⁸⁵ A right of privacy, however, attaches to a person, and is neither assignable nor descendable.⁸⁶

picture" of a living person for "advertising purposes, or for the purpose of trade." N.Y. CIVIL RIGHTS LAW § 50 (McKinney 1976). For a general discussion of the development of New York's privacy statute see S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS, 2.57 (Supp. 1985).

81. *Haelan*, 202 F.2d at 868.

82. *Id.*

83. See, e.g., Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 569-71 (1960) (publicity is a restricted property right); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 209-10 (1954) (assignability of publicity makes it a property right); Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 839 (1983) (publicity rights should be labeled intangible property rights); Comment, *The Right of Publicity — Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976) (publicity should be labeled a property right in order to lessen confusion). *But see* W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984) ("It seems quite pointless to dispute over whether such a right is to be classified as 'property,' it is at least clearly proprietary in its nature.").

Many courts have adopted the view that the right to publicity is a property right. See, e.g. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979) (Elvis Presley assigned a property right in his name and likeness to plaintiff); *Haelan*, 202 F.2d at 866 (baseball player assigned property right of picture); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977) (identified right of publicity as a recognized property right); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (Laurel and Hardy had property right in their name and likeness); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (attempted to clarify confusion by labeling right of publicity as a property right). *But see* *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823-24, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979) (rejects need to label right to publicity as a property right).

84. See, e.g., *Haelan*, 202 F.2d at 869 (baseball player's likeness assignable to chewing gum company).

85. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (Elvis Presley's right of publicity is descendable); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (Agatha Christie's publicity rights descend to her family); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977) (right descends at death like any other intangible property right); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (actors right of publicity did not terminate at death). *But see* *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (right may be descendable, but only if exercised during life of deceased).

86. See, e.g., *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir. 1965) (see *infra* notes 94-96 and accompanying text).

The *Douglass* court implicitly adopted the view that the right of publicity is a property right.⁸⁷ The *Douglass* court has failed to recognize that assignability and descendability are unique to the right of publicity. As a result, the danger exists that Illinois courts will erroneously assume that the right to privacy and the right of publicity are identical torts.

In recognizing a right of publicity, the *Douglass* court failed to reconcile its holding with existing Illinois precedent. The court based its decision on analogous facts in *Zacchini v. Scripps-Howard Broadcasting Co.*⁸⁸ In *Zacchini*,⁸⁹ the United States Supreme Court, interpreting Ohio law, recognized that a right of publicity extends to non-advertising portions of publications or broadcasts.⁹⁰ The *Douglass* court claimed that there were no Illinois cases like *Zacchini*, but assumed that the courts would recognize a right of publicity based on analogous facts.⁹¹

Contrary to the *Douglass* court's assumption, Illinois courts have had the opportunity to recognize the right of publicity.⁹² The courts have consistently rejected claims of commercial appropriation

87. *Douglass*, 769 F.2d at 1139.

88. 433 U.S. 562 (1977).

89. Hugo Zacchini performed a "human cannonball" act in which he was shot from a cannon into a net 200 feet away. *Id.* at 563. The entire act would take approximately 15 seconds. *Id.* In 1972, Zacchini was hired to perform at a county fair in Ohio. *Id.* Shortly after the fair opened, a reporter from the defendant broadcasting company attended the performance carrying a movie camera. *Id.* at 563-64. Zacchini requested that the reporter not film the act. *Id.* at 564. The following day, the reporter returned and videotaped the entire act. *Id.* The film was shown that evening on the 11 o'clock news. *Id.*

Zacchini claimed that the defendant "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." *Id.* The Supreme Court was asked to decide whether the first and fourteenth amendments barred Zacchini's right of publicity claim. *Id.* at 565. The Court held that the states have an interest to encourage entertainment by protecting the proprietary interest of the individual. *Id.* at 573. The first and fourteenth amendments, therefore, do not protect the media when they broadcast a performer's entire act without consent. *Id.* at 575.

90. *Id.*

91. *Douglass*, 769 F.2d at 1139.

92. In *Bradley v. Cowles Magazine, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) the court held that a privacy action is not descendable. In *Bradley*, a mother claimed a story written about her son's murder violated her right to privacy. *Id.* at 332, 168 N.E.2d at 64. The mother was not permitted to recover because the right to privacy was purely personal, and "died" with her son. *Id.* at 336, 168 N.E.2d at 66.

There is no cause of action in Illinois for a right based on the appropriation of a likeness when the subject of the publication is deceased. *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965). In *Carlson*, the children of a woman who had been raped and murdered brought a right of privacy action against the publisher of an article concerning the crime. *Id.* at 210, 213 N.E.2d at 40. The court decided, therefore, that the right is not descendable. *Id.* at 213, 213 N.E.2d at 42.

In *Bradley* and *Carlson*, the courts firmly established that the tort of appropriation in Illinois is a personal right. Illinois courts have not taken a contrary position. See Comment, *Privacy in Illinois*, *supra* note 4, at 813-815.

based on property rather than privacy rights.⁹³ The Seventh Circuit Court of Appeals has itself rejected the existence of a right to publicity in *Mariote v. Desilu Productions, Inc.*⁹⁴ The *Mariote* court rejected the claim that the right to privacy embodies a descendable *property* right.⁹⁵ Judge Duffy's concurrence explicitly stated that Illinois courts do not recognize a cause of action for the appropriation of publicity values.

The *Douglass* court never mentioned these prior cases in its decision.⁹⁶ As a result of overlooking existing precedent, the *Douglass* court has created a right of publicity in Illinois, where it had not previously existed.⁹⁷ Although a federal court may interpret the law as it believes the state courts would,⁹⁸ Illinois courts have given no indication of a willingness to recognize a right of publicity. Therefore, the *Douglass* court erred in concluding that the right of publicity exists in Illinois.

Not only was the *Douglass* court's recognition of the right of publicity erroneous, its approval of *Hustler's* first amendment defense is inconsistent with the *Zacchini* decision, the very case relied upon by the *Douglass* court in recognizing the right. In *Zacchini*,⁹⁹ the United States Supreme Court held that first amendment defenses to common law privacy claims are not applicable to right of publicity claims.¹⁰⁰ However, while the *Douglass* court's first amendment analysis was misplaced, it was not unreasonable.¹⁰¹ While the *Zacchini* court expressly rejected a

93. See *supra* note 92.

94. 345 F.2d 418 (7th Cir. 1965).

95. *Id.* at 420. The widow and son of Al Capone claimed that their property rights in Capone's likeness had been violated. *Id.* at 418. The defendants were the producers of the television series, "The Untouchables." *Id.* at 420. The program, which was a fictionalized account of the Chicago gangster period, featured the Al Capone character. *Id.* at 421. The court, acknowledging that no such right exists in Illinois, dismissed the claim. *Id.* at 418.

96. *Id.* at 421.

97. In 1981, the United States District Court for the Northern District of Illinois erroneously recognized a claim of right of publicity. *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981). The *Winterland* court recognized a right of publicity which is assignable and transferable, despite the holdings of *Bradley* and *Carlson*. *Id.* See *supra* note 92.

98. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

99. *Zacchini*, 433 U.S. at 562.

100. *Id.* at 571-75. The Supreme Court noted that privacy and publicity are two different rights. The Court held that it was inappropriate to judge the two torts under the same standard. *Id.* See Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 868 (1983).

101. Other cases decided after *Zacchini* have applied a first amendment analysis to right of publicity claims. See, e.g., *Cher v. Forum Int'l., Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) ("The right of publicity has not been held to outweigh the value of free expression."); *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980) (freedom of speech and press

privacy analysis, it failed to institute a workable analysis to employ in publicity cases.¹⁰²

The *Douglass* court recognized that the *Zacchini* decision did not provide adequate guidance for the courts.¹⁰³ The *Douglass* court failed, however, to take the opportunity to create reasonable guidelines for an area of the law wrought with confusion. Although the *Douglass* court mentioned the possibility of employing a copyright analysis in right of publicity cases,¹⁰⁴ it failed to develop the analysis any further.

The copyright view, as referred to by the *Douglass* court, is employed when a defendant's appropriation of a person's name or likeness is fair and reasonable.¹⁰⁵ The fair use doctrine¹⁰⁶ grants a privilege to a person who uses the copyrighted material in a reasonable manner. This doctrine has proven reasonable in the copyright area and should be transferred here. Many commentators have urged the courts to adopt the copyright approach for right of publicity cases.¹⁰⁷ Growing support for the method warrants its

transcends the right of publicity).

102. The Court held that whenever a performer's "entire act" is appropriated, the first and fourteenth amendments are not a protection. *Zacchini*, 433 U.S. at 575. In his dissent, Justice Powell observed that the court's "formula" did not provide a clear standard for the resolution of future publicity cases. *Id.* at 579.

103. *Douglass*, 769 F.2d 1128.

104. The court recognized that *Douglass*' claim looked very much like a violation of common law copyright, but declined to apply the analysis, stating, "[f]ortunately we need not try to unravel this tangled skein." *Id.* at 1140.

105. See *Triangle Publications, Inc. v. Knight-Ridder Newspaper, Inc.*, 626 F.2d 1171 (5th Cir. 1980). The *Triangle* court stated four areas which must be evaluated in order to determine whether the use was fair or not. *Id.* at 1174-75. The factors are 1) the purpose and character of the use including whether such use is of a commercial nature or nonprofit; 2) the nature of the work; 3) the amount of the work used; and 4) the effect of the use among the potential market. *Id.* The four factors were codified in 17 U.S.C. 107 (1976).

106. The Fair Use doctrine is defined as:

"A privilege in one other than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."

Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966).

107. See Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983). The author makes her plea for employing a copyright analysis in right of publicity cases by illustrating the similarities between the two. *Id.* at 849. First, the enforcement of a copyright or a publicity right is aimed at compensating the owner for the time and effort spent to create the property right. *Id.* Second, both copyrights and publicity rights protect the interest holder from direct appropriations and substantially similar appropriations. *Id.* at 850. Third, both types of law are concerned not only with direct economic injury to the owner, but also the prevention of unjust enrichment. *Id.* Finally, the owner of either right should have the right to control when and in what matter he wishes to "go public" in order to reap the economic benefit of his efforts. *Id.* at 851; Comment, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CALIF. L. REV. 786 (1982) (urges standards set by Congress in the Copyright Act be employed in right of publicity cases).

Many courts have implied that a copyright analysis should be employed in right

implementation.

For the first time in Illinois, a court has expressly held that a defendant who subjects a person to false and offensive notoriety may be liable for his actions. The *Douglass* court's recognition of the false light tort is supported by existing Illinois case law.¹⁰⁸ The *Douglass* court, however, erred in its analysis of the appropriation claim. The court failed to draw the necessary distinction between the right to privacy and right of publicity.¹⁰⁹ The court concluded that *Douglass*' property rights had been violated when in fact her privacy right had been.¹¹⁰ The court's error adds to the current confusion in an area of the law desperately needing clarification. Moreover, the decision will have substantial impact since *Douglass* is the first case to recognize the right of publicity in Illinois.

The *Douglass* court's recognition of the right of publicity was inconsistent with precedent. Having recognized the tort, however, the court should have seized the opportunity to firmly establish the fair use doctrine as a defense in right of publicity cases.¹¹¹ The question remains whether Illinois courts will adopt the *Douglass* court's broad interpretation of the right of publicity. If they do, the privacy rights of celebrities may fade as quickly as the flash of a camera.

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of publicity cases. See *Zacchini*, 433 U.S. at 562 (noted similarity between right of publicity and copyright); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984) (employs copyright analysis where plaintiff's business cards are printed in *Hustler*); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (copyright analysis suggested in case that confuses right of privacy with right of publicity); *Martin Luther King, Jr., Center for Social Change, Inc., v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983) (suggests copyright analysis in case that establishes right of publicity in Georgia); *Factors Etc., Inc., v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) (Mansfield, J., dissenting, adopts copyright view); *Bi-Rite v. Button Master*, 578 F. Supp. 59 (S.D.N.Y. 1983) (approves of copyright analysis in right of publicity cases); *Presley's Estate v. Russen*, 513 F. Supp. 1339 (D.M.J. 1981) (copyright statute should be employed as a duration limit of the right of publicity).

108. See *supra* notes 51-63 and accompanying text.

109. See *supra* notes 68-91 and accompanying text.

110. See *supra* notes 68-86 and accompanying text.

111. See *supra* notes 106-20 and accompanying text.

