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# MONEY AS A THUMB ON THE CONSTITUTIONAL SCALE: WEIGHING SPEECH AGAINST PUBLICITY RIGHTS

DIANE LEENHEER ZIMMERMAN\*

**Abstract:** When courts in right of publicity cases deal with claims against defendants arising outside the context of commercial advertising but involving what judges nonetheless deem to be commercial uses, the typical approach is to “balance” a defendant’s right of free speech (that is, her right to use information legitimately in her possession) against a plaintiff’s exclusive right to control commercial uses of her persona. Considerable variation exists among the tests used to determine when a use is “commercial” rather than purely expressive, but if the defendant has crossed the line drawn by a given jurisdiction, then her constitutional liberty interest is quite likely to be treated as inferior to the property interest in her persona claimed by the plaintiff. This Article takes the position that balancing economic interests against constitutionally protected speech rights, while not always forbidden, is generally impermissible and cannot be justified, consistent with the Supreme Court’s free speech jurisprudence.

## INTRODUCTION

Over the past decade, an increasing number of academic commentators (and the occasional court) have turned their attention to the First Amendment implications of copyright, attempting to discern how and when free-speech principles should limit the expansive rights that copyright currently conveys.<sup>1</sup> Less attention has been paid to what is happening outside the boundaries of copyright, where a different set of intellectual property rights are increasingly relied on to “fill in the

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<sup>1</sup> See, e.g., *Eldred v. Ashcroft* 537 U.S. 186 (2003); *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

blanks” of copyright protection—often those very same “blanks” that copyright and free speech scholars have concluded are constitutionally required.

Think, for example, about the core fact/expression limitation on copyright. In the 1991 case *Feist Publications, Inc. v. Rural Telephone Service Co.*, the U.S. Supreme Court held that facts could not be protected by copyright.<sup>2</sup> Instead of ending all attempts to protect factual information, *Feist* resulted in advocates of protection searching for ways to use common law or statutory responses to fill that “unfortunate” gap in copyright’s coverage.<sup>3</sup> In their concern over limiting copyright, First Amendment scholars frequently fail to take into account the resilience of peri-copyright intellectual property law and its usefulness to those who remain convinced that all valuable resources, including information, ought to be owned.<sup>4</sup>

Peri-copyright protections for information are not uniformly problematic from a free speech perspective; some fit quite comfortably into the traditional First Amendment framework of analysis. Much of trade secrecy, for example, is consistent with a tradition that privileges the right not to speak. Similarly, unfair trade practices doctrine, which penalizes false indications of source and manufactured “endorsements,” fits with the general First Amendment notion that harmful and misleading speech is unprotected. But peri-copyright does not stop at protecting trade secrets or protecting against falsehoods. It often silences speech that is either creative or factually accurate and publicly known on the grounds that the plaintiff’s interest in controlling the use of the information “outweighs” the defendant’s speech rights.

The idea that free speech principles must accommodate intellectual property claims has credibility in copyright because both interests are protected by the Constitution. Unless one believes (and I am not an advocate of this position) that ratification of the First Amendment

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<sup>2</sup> 499 U.S. 340, 361–64 (1991).

<sup>3</sup> See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (attempting to use state misappropriation law to protect facts not covered by copyright); see also J. H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 *LAW & CONTEMP. PROBS.* 315 (2003) (discussing legal protections for scientific data and databases, in part inspired by the ruling in *Feist*).

<sup>4</sup> See Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age*, 4 *GREEN BAG 2D* 357, 363 (2001) (suggesting the need to resist the impulse to subordinate intellectual property protections in the face of free speech interests). See generally William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 *U. CHI. L. REV.* 471 (2003) (arguing for indefinite renewal of valuable copyrights).

wholly displaced the copyright clause, a middle ground between the sometimes conflicting goals of free speech and incentivizing authors must be identified. It is harder, however, to understand the justification for saying that speech principles must be balanced against forms of intellectual property protection that have no constitutional status. The existence of the First Amendment creates a presumption in favor of the speaker and her choice of what to say and how to say it. Admittedly, speech rights are not absolute and must give way in unusual cases where other compelling interests—protection of human life or safety or national security, for example—hang in the balance.<sup>5</sup> The countervailing interests in a typical non-copyright intellectual property cause of action, though, are not nearly so dramatic: they are instead the plaintiff's preference for privacy, image control, money, or all three. One might legitimately ask, therefore, whether any of these interests qualify as sufficiently compelling to allow them to climb onto the constitutional scale and potentially outweigh a defendant's freedom of speech.

This Article will illustrate this analytical puzzle by focusing on the right of publicity, an intellectual property right in the personal characteristics and other aspects of an individual's persona that identify him or her to the public. Names,<sup>6</sup> tag lines,<sup>7</sup> implicit references<sup>8</sup>—all these and more are elements that plaintiffs can claim to “own.” A defendant who appropriates any part of that property for purposes a court or legislature is willing to characterize as “commercial” can be required to pay damages and can be hit by an injunction against further use.<sup>9</sup> In short, within a sphere identified by courts or statutes as having more to do with money than with conveying information, publicity rights serve to allocate the potential value associated with an individual's persona in much the same way that copyright allocates value in expression captured in fixed works of authorship.

There is currently broad (although perhaps misguided<sup>10</sup>) agreement that this state of affairs is wholly unobjectionable as long as an owner of publicity rights asserts his claims against commercial advertis-

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<sup>5</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

<sup>6</sup> *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

<sup>7</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835–37 (6th Cir. 1983).

<sup>8</sup> *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397–99 (9th Cir. 1992).

<sup>9</sup> Notably, however, even the most avid defender of publicity rights acknowledges that this property interest cannot trump all unlicensed uses of such data, especially uses that convey news.

<sup>10</sup> See generally Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. 35 (1998) (criticizing developments in evolution of the right of publicity).

ers.<sup>11</sup> Because these cases are entangled with the complexities of the Supreme Court's commercial speech doctrine, I will not consider them here.<sup>12</sup> What I will focus on instead are publicity claims that seek to limit uses of the persona as an expressive component of an end product itself. Examples include the use of a celebrity's face on a tee shirt, on a poster, in an entertainment vehicle, or in a photograph offered for sale. Acceptance of the idea that these kinds of uses are commercial and, therefore, fall within the plaintiff's proper area of control is extremely widespread. Indeed, cautious would-be users routinely assume the need to clear publicity rights along with copyrights if, for example, they want to utilize shots from a photo archive for anything except news reportage.

### I. THREE APPROACHES TO "COMMERCIAL" USE AND FREE SPEECH

Plaintiffs in publicity cases, like owners of copyrights, make infringement claims for many reasons. Some are interested almost entirely in control: they want to decide whether to permit any uses of their personas at all, and, if so, which uses and users to accept. Others see their images in terms of dollar signs: they want to exploit the economic potential of their public images as fully as they can. Some want both.<sup>13</sup> Whatever the motives that drive plaintiffs to claim this property right, the legal hook is always money. The "bad thing" that virtually all unsuccessful defendants have done in publicity cases is to have tried to gain some "unjustified" financial benefit from using the plaintiff's persona.<sup>14</sup> According to publicity advocates, if that is the defendant's objective, granting damages and injunctive relief does not encroach on free speech values because the First Amendment does not entitle anyone to

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<sup>11</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995).

<sup>12</sup> For a discussion of this issue, see Zimmerman, *supra* note 10, at 67–74.

<sup>13</sup> For example, the legal successors of Martin Luther King, Jr. have used both publicity and copyright claims to exert control over the late civil rights leader's heritage. Sometimes the objection appears to be based on grounds of taste. See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982) (plaintiffs "seek to prevent the exploitation of [King's] likeness in a manner they consider unflattering and unfitting"). At other times, the objection is more about money. See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999) (asserting copyright claim to prevent defendant from using its footage of "I Have a Dream" speech without payment of copyright royalties). See generally Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345 (2009) (discussing whether dignity harms, as opposed to economic harms, should impact the analysis in right of publicity cases).

<sup>14</sup> Whether the defendants were successful or not in their attempts to profit from the persona is irrelevant.

divert potential profits from the pocket of the person who created the value in the first place.

Why this explanation is less than satisfactory can be illustrated vividly by the speech consequences of the recent *Tony Twist* litigation.<sup>15</sup> Former hockey player Anthony “Tony” Twist sued the publisher and creator of the famous comic book series, *Spawn*.<sup>16</sup> Twist, in real life, has been described as having once been the National Hockey League’s “preeminent ‘enforcer’” (that is to say, the guy who was officially given the assignment of beating up on other players).<sup>17</sup> In the *Spawn* comic book series, the name “Tony Twist” was used as the nickname for a fictional Mafia boss, Antonio Twistelli—also something of an enforcer.<sup>18</sup> The well-known comic book author Todd McFarlane was *Spawn*’s creator and the one who came up with the names for all the characters that populated the series.<sup>19</sup> In his search for names, he often used those of family members and friends, but McFarlane is also a hockey fan, and, to his undoubted regret, he sometimes used the names of professional hockey players for characters.<sup>20</sup> In the overall scheme of things, the Twist character was not a particularly important one, appearing in only 166 frames of a comic book series that ran to 31,000 panels.<sup>21</sup> But the real Tony Twist won a \$15 million publicity rights verdict for those few frames,<sup>22</sup> pushing the publisher, Todd McFarlane Productions, Inc., into bankruptcy.<sup>23</sup>

Everyone, including the Supreme Court of Missouri in its 2003 decision, *Doe v. TCI Cablevision*, agreed that the creation and distribution of comic books is an expressive activity protected by the First Amendment.<sup>24</sup> But the court also concluded that McFarlane appropriated the real Tony Twist’s name predominantly to obtain “a commercial advantage.”<sup>25</sup> The court apparently felt that such behavior was so hei-

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<sup>15</sup> See *Doe v. TCI Cablevision (TCI Cablevision II)*, 110 S.W.3d 363 (Mo. 2003); *Doe v. McFarlane*, 207 S.W.3d 52 (Mo. Ct. App. 2006); *Doe v. TCI Cablevision (TCI Cablevision I)*, No. ED 78785, 2002 WL 1610972 (Mo. Ct. App. July 23, 2002).

<sup>16</sup> *TCI Cablevision II*, 110 S.W.3d at 365.

<sup>17</sup> *Id.* at 366.

<sup>18</sup> See *id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *TCI Cablevision I*, 2002 WL 1610972, at \*2.

<sup>21</sup> See *id.* at \*2 n.3.

<sup>22</sup> *McFarlane*, 207 S.W.3d at 56, 76. The jury in the first trial awarded \$24.5 million. *Id.* at 56.

<sup>23</sup> *Lawsuit by Former Blues Player Spawns Bankruptcy Filing by Comic-Book Company*, KAN. CITY STAR, Dec. 21, 2004, at C2.

<sup>24</sup> See *TCI Cablevision II*, 110 S.W.3d at 372–74.

<sup>25</sup> *Id.* at 372.

nous that it justified stripping McFarlane of his free speech shelter, even at the risk of shutting down the *Spawn* series.<sup>26</sup> Why? Not, apparently, because McFarlane realized any actual financial benefit from its use of Twist's name. In truth, the *Spawn* comics were enormously successful, and there is every reason to believe that they would have been so had the Twist character never made an appearance.<sup>27</sup> Thus it is highly unlikely that McFarlane would have considered for a moment paying Twist twenty percent of his gross revenues—the amount Twist's expert claimed was fair compensation and the amount the jury awarded at the first trial—simply for the privilege of using his name.<sup>28</sup> In the court's view, however, "Twist was under no obligation to prove that [McFarlane] . . . actually derived a pecuniary benefit from the use of his name."<sup>29</sup> Twist needed to prove only that McFarlane appropriated his identity with an intent to derive such a benefit.<sup>30</sup> The court concluded that sufficient evidence of such intent was available to the jury because McFarlane tried to make *Spawn* more attractive to hockey fans by adopting hockey player names for various characters.<sup>31</sup> To further support the case for wrongful intent, the court pointed out that McFarlane once promoted the *Spawn* series at a minor league hockey game, including distributing products that featured the Twist character.<sup>32</sup> From the evidence, Twist's contribution to the financial success of *Spawn* could at most have been minuscule, but the fact that at least some readers would understand the name as a reference to the actual hockey player was enough to bring McFarlane down.

It might be tempting to explain away the result of the *Twist* litigation as a misnamed defamation action that was really about redress for reputational harm. The defamation, in this theory, would arise from

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<sup>26</sup> *See id.* at 374.

<sup>27</sup> Plaintiff Tony Twist's financial expert at the first trial estimated gross revenues from the *Spawn* series and related merchandising at more than \$122 million. *See TCI Cablevision I*, 2002 WL 1610972, at \*4.

<sup>28</sup> *See id.*

<sup>29</sup> *TCI Cablevision II*, 110 S.W.3d at 370.

<sup>30</sup> *Id.* at 370–71.

<sup>31</sup> *Id.* at 371–72. McFarlane revealed his naming practices in his responses to letters from *Spawn* fans and in an interview with a magazine editor. *Id.* at 366–67.

<sup>32</sup> *Id.* at 371. The most explicit publicity given to Twist, however, did not come directly from the defendant. Rather, an independently produced magazine feature, which focused on an interview with McFarlane, included a brief "bio" of Twist and a drawing of the character. *See id.* at 366–67. Also, the Twist character made an appearance in an animated HBO television series based on the *Spawn* comic books. *McFarlane*, 207 S.W.3d at 72–73. McFarlane did not write or produce the series, although he had a significant role in creating story lines and overseeing the production. *Id.* at 73.

the chance that at least some readers would believe that the portrait of fictional mob boss Antonio Twistelli was intended to cast aspersions on the actual behavior or personality of the real Tony Twist. Twist actually filed a defamation claim in his original action, but it was dismissed by the trial court on the ground that Twist could not meet the constitutional requirement of showing that the fictional characterization of Twistelli was “of and concerning” the plaintiff.<sup>33</sup> Although the Supreme Court of Missouri seemed to take some issue with that conclusion,<sup>34</sup> it nevertheless agreed that the appearance and behaviors of the real and the fictional Twists bore no similarities to one another.<sup>35</sup> In addition to imposing the “of and concerning” requirement, the Constitution also requires defamation to be believable before it can be actionable.<sup>36</sup> It strains credulity to imagine a reasonable comic book fan concluding that the real Twist, like the fictional one, was a Mafia don, a murderer, a frequenter of prostitutes, and an abductor of children.<sup>37</sup>

To the extent that any direct reference was intended, which McFarlane denied,<sup>38</sup> the use of Twist’s name for a fictional don could at most be seen as a parodic salute to the real Twist’s reputation as a tough “enforcer.” The possibility that there would be such a connection in readers’ minds may have led to some financial loss for Twist because at least one prospective endorsement contract apparently fell through as a result.<sup>39</sup> Although the company that decided not to use Twist to advertise its products could not reasonably have thought that the public would associate Twist with a life of crime, it may well have concluded that the unsavory aspects of Twist’s hockey career were still insufficiently forgotten and that, as a result, he would not be an acceptable symbol for a sports nutrition company.<sup>40</sup> If so, the real problem traces back to

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<sup>33</sup> See *TCI Cablevision I*, 2002 WL 1610972, at \*15.

<sup>34</sup> See *TCI Cablevision II*, 110 S.W.3d at 370 (noting the fact that at least some readers did make a connection between the cartoon character and the hockey player).

<sup>35</sup> *Id.* at 366.

<sup>36</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–22 (1990) (finding newspaper column implying that a wrestling coach lied under oath might reasonably be believed as a factual assertion); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (finding parody of nationally known minister engaging in drunken, incestuous relationship was not reasonably believable); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14–15 (1970) (finding that despite use of the word “blackmail” to describe contentious development, it was “simply impossible to believe” that readers would understand the word to mean the actual crime of blackmail).

<sup>37</sup> See *TCI Cablevision II*, 110 S.W.3d at 366.

<sup>38</sup> *Id.* at 367.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* Twist apparently had been working hard on improving his public image to put distance between himself and the sports figure once quoted in *Sports Illustrated* as say-



Twist's actual past, not to any tongue-in-cheek reference to it by McFarlane.

In short, this was solely a claim based on a "taking" of Twist's publicity rights, and the court used an extremely odd analysis to resolve the conflict between Twist's economic interests and McFarlane's speech interests. It agreed that the choice of a name for a comic book character would ordinarily be part of what the First Amendment protects, but it cautioned that McFarlane could rely on constitutional coverage only if, in exercising his choice of names, his goal was more expressive than commercial.<sup>41</sup> In other words, once commercial objectives intermingle with expressive ones, the ordinary presumption favoring a speaker's choice of what to say will no longer determine the outcome. Instead, the constitutional interest of the defendant and the property interest of the plaintiff must be weighed against one another. According to the court, if a jury were to conclude that McFarlane intended to enrich himself unjustly by choosing Tony Twist's name for a character, McFarlane's First Amendment defense would fail, and injunctive relief and damages (even crushing ones) could be justified.<sup>42</sup> The balancing theory in this case is so open-ended, and so tilted against situations where expressive and commercial motivations coexist, that it is hard to see why magazines and newspapers would not also be routinely liable for the common practice of using stories and pictures of celebrities to boost their circulation.

The Supreme Court of Missouri's approach to non-advertising publicity cases is extreme, but it is far from unique in permitting a balancing between speech rights and the economic interest of individuals in their identifying information. The more traditional formulation is set out in the *Restatement (Third) of Unfair Competition*.<sup>43</sup> The *Restatement* asserts that the use of elements of an individual's persona on merchandise is ordinarily commercial, non-expressive and unprotected by the First Amendment.<sup>44</sup> Hence, if a celebrity's face appears on a poster or a coffee mug without permission, the plaintiff automatically wins. By contrast, uses of another's persona in expressive works like news reports or

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ing, "I want to hurt [the players on the other team]. I want to end the fight as soon as possible and I want the guy to remember it." *See id.* at 366.

<sup>41</sup> *See id.* at 374.

<sup>42</sup> *See id.* at 374, 376.

<sup>43</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

<sup>44</sup> *Id.* § 47 cmt. b.

works of fiction are ordinarily fully protected by the First Amendment.<sup>45</sup>

The *Restatement's* protection of expressive works would seem to include comic books, and thus it might appear that states following the *Restatement* formulation would reach a different result from the Twist case. But the *Restatement* notes, "if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising."<sup>46</sup> Exactly where this formulation would leave the decision to nickname the fictional character Antonio Twistelli "Tony Twist" is uncertain. It is not too great a stretch, though, to imagine a court concluding that McFarlane used Twist's name in an "unrelated" context.

The most creative and influential attempt to negotiate the tricky terrain between publicity rights and free speech is the "transformative use" test articulated by the Supreme Court of California in the 2001 case *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>47</sup> Rather than draw a line between merchandise and expressive works the way the *Restatement* does, the *Comedy III* court took the position that right of publicity claims in non-advertising cases generally are valid if the value of the defendant's work is attributable primarily to the plaintiff's persona and if the defendant's use of that persona is "non-transformative."<sup>48</sup> Under this test, an artist's highly skilled representation of the Three Stooges that was subsequently reproduced on tee shirts and posters was held to violate the performers' publicity rights because the depiction of the trio was too realistic.<sup>49</sup>

By contrast, when musicians Johnny and Edgar Winter were evoked in a DC Comics series by two characters called Johnny and Edgar Autumn, the Supreme Court of California ruled that the use was constitutionally privileged.<sup>50</sup> In its 2003 decision, *Winter v. DC Comics*, the court agreed with the plaintiffs that some significant value of the cartoon characters resided in their reference to the plaintiffs.<sup>51</sup> But the court found that by presenting the plaintiffs as half-worm, half-human villains who are ultimately wiped out in a gun battle, the defendant's

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<sup>45</sup> *Id.* § 47 cmts. b & c.

<sup>46</sup> *Id.* § 47 cmt. c.

<sup>47</sup> 21 P.3d 797, 808–10 (Cal. 2001).

<sup>48</sup> *See id.* The transformative use test applies both to products and to expressive works. *See id.* at 811.

<sup>49</sup> *Id.* at 811.

<sup>50</sup> *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003).

<sup>51</sup> *See id.* at 479 (noting that the characters were "less-than-subtle evocations" of the musicians and implying that fans might be attracted to the comic books).

use was transformative, and his speech rights prevailed over the plaintiff's publicity rights.<sup>52</sup>

The Supreme Court of California's "transformative use" approach is certainly more speech-protective than the Supreme Court of Missouri's "predominant use" test, in part because California does not count a defendant's intent to gain a marketing advantage from the use against him if he contributes sufficient input of his own. Nevertheless, "transformative use" remains content-based and is nothing if not malleable. For example, in *Comedy III*, the Supreme Court of California suggested that its ruling would not put at risk Andy Warhol's use of celebrity images in his art.<sup>53</sup> Warhol's use, the court explained, was transformative—despite the literalness of the depictions involved—because of the way Warhol manipulated the "context" of what he borrowed.<sup>54</sup>

Each of these three approaches—transformative use, predominant use, and the Restatement—shares a common thread. All assume that because the identifying characteristics of people can have value, that value must be protected by a property right. And once a property right is identified, it is fully entitled to go head-to-head with, and will often defeat, a defendant's free speech claim. As the Supreme Court of California admitted in explaining its ruling in *Comedy III*, were it to decide that non-transformative representations "were protected by the First Amendment, [it could not] perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements."<sup>55</sup>

In recognizing the shaky ground occupied by publicity claims, the *Comedy III* court is not alone. The U.S. Court of Appeals for the Tenth Circuit, in its influential 1996 decision about parodic baseball cards, *Cardtoons, L.C. v. Major League Baseball Players Association*, ruled that products bearing likenesses and other information about celebrities were expressive works and that the defendant's free speech interests in producing and disseminating them outweighed the plaintiffs' economic interests in being able to control such uses.<sup>56</sup> Similarly, in 2007,

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<sup>52</sup> See *id.* at 479–80.

<sup>53</sup> See *Comedy III*, 21 P.3d at 811.

<sup>54</sup> See *id.* ("Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.")

<sup>55</sup> *Id.*

<sup>56</sup> See 95 F.3d 959, 972–76 (10th Cir. 1996) (applying a balancing test between the card maker's First Amendment rights and the baseball players' publicity rights). Baseball cards were also the subject of the first case to explicitly discuss the right of publicity. See *Haclan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

the U.S. Court of Appeals for the Eighth Circuit, while purporting to apply Missouri law, affirmed summary judgment for a defendant in a case involving the unlicensed use of baseball players' names and statistics in "fantasy baseball."<sup>57</sup> In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, the court noted that the defendants clearly intended to obtain a commercial advantage from using the names and statistics of real players, so it acknowledged the need, following Missouri law, to balance the publicity rights of the players against the free speech rights of the defendants.<sup>58</sup> The way the balancing was done, however, makes it hard to see how, in the Eighth Circuit, commercial value could ever win. The court concluded the information used by the defendants—names and statistics—was all in the public domain and involved matters of public interest.<sup>59</sup> How, then, could a defendant speaker be denied the right to use it? As if that were not enough, the court also added that, as long as the players were paid for participating in the sport and for endorsements and were not victims of misrepresentation or false endorsements, their remaining economic interests were of little concern in the constitutional scheme of things.<sup>60</sup>

## II. THE LEGITIMACY OF BALANCING FREE SPEECH AGAINST ECONOMIC INTERESTS

As the conflict in the courts demonstrates, the question has been joined: are economic interests really significant enough to defeat the normal presumption that speech is constitutionally protected or not? If so, what are the justifications for, the appropriate circumstances to bring, and the proper way to analyze such claims? The majority of non-advertising publicity cases have simply assumed that balancing is appropriate, and that the interests protected by publicity rights may, in many cases, outweigh any speech interests a party may raise. But is there a reasoned basis for this assumption? How do right of publicity protections fit within the general norms of First Amendment analysis?

Not easily. First, publicity rights restrict speech based on its content, which is generally something First Amendment jurisprudence re-

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<sup>57</sup> *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 825 (8th Cir. 2007). Participants in fantasy sports select actual players for fictional teams. These pretend teams then succeed or fail depending on how well the real athletes perform.

<sup>58</sup> *Id.* at 823.

<sup>59</sup> *Id.* at 823–24.

<sup>60</sup> *See id.* at 824.

jects.<sup>61</sup> Although the restrictions imposed by courts and legislatures to protect personae are not facially viewpoint-specific, they provide a mechanism through which plaintiffs can control speech of which they do not approve. The U.S. Supreme Court's current three-tier standard of review for speech regulation does not always classify restrictions in a predictable way,<sup>62</sup> but once a statute or a common law right is identified as one that restricts speech based on its subject matter, the normal way to test the legitimacy of the law is by applying strict scrutiny.<sup>63</sup> This is, of course, a form of balancing, but one that sets the bar for speech restrictions extremely high. A content-based regulation must be narrowly tailored and serve some compelling state interest.<sup>64</sup> The test is not one that can easily be met, and normally requires a clear showing of necessity for the protection of human life, public safety, or national security—not profit aggrandizement.<sup>65</sup>

How then can we understand why the prospect of profit in the publicity context gets the same treatment as protection of human life? Is there a second set of rules that might permit courts to favor economic interests this way? Arguably, support for a “second way” might be drawn from two subsets of Supreme Court rulings that might appear to favor property over speech. One possible source of a rule favoring publicity rights over speech might be drawn from cases involving dignitary and reputational harms. A second source resides in a small number of cases in which the Supreme Court has implicitly or expressly seemed to treat profits as a preferred interest over speech.<sup>66</sup> In the end, however,

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<sup>61</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 932 (3d ed. 2006) (“The Supreme Court frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content.”).

<sup>62</sup> See *id.* at 760–63; see also *Boos v. Barry*, 485 U.S. 312, 334–38 (1988) (Brennan, J., concurring) (discussing the difficulty of distinguishing categories of speech in case where the Court determined that a ban on picketing outside embassies was not content-neutral); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–49 (1986) (upholding a zoning ordinance prohibiting adult theaters in certain districts as “completely consistent with our definition of ‘content-neutral’ speech” because the restrictions were not aimed at specific speech, but rather at its “secondary effects”). See generally Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (providing a discussion of the line-drawing between “content neutral” and content-specific regulation).

<sup>63</sup> See Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 909–10 (1991).

<sup>64</sup> See CHEMERINSKY, *supra* note 61, at 541–42, 932–33.

<sup>65</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

<sup>66</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64, 578–79 (1977) (upholding state law damages remedy as permissible under the First Amendment when local television news station broadcast entire performance of entertainer's act without permission).

neither source provides support for open-ended balancing of publicity rights against speech claims in any but the most unusual situations.

Of the dignitary and reputational harm cases, only defamation offers a glimmer of hope for publicity rights claimants. Other causes of action, such as the right to control the publication of private embarrassing facts or intentional infliction of emotional distress, have either failed to succeed before the Supreme Court,<sup>67</sup> or have been pushed and squeezed to fit into a narrow aperture that depends entirely on the existence of intentional falsification.<sup>68</sup> Defamation, however, offers a clear example of permissible content-based regulation in the service of an interest that is obviously less pressing than life, safety, or national security. One could argue for an analogy between defamation's interest in reputation and the right of publicity's interests in control over a person's identifying characteristics based on several parallels between the two torts. Like publicity actions, defamation is intended to provide redress for injuries inflicted by private parties in the pursuit of private objectives. Both torts vindicate an individual's interest in controlling how she is perceived by others, and both are also rooted in a concern over the economic aftereffects of undesired or undesirable portrayals.

Historically, the injuries caused by defamation, like those from violations of publicity rights today, were conceived of in largely economic terms.<sup>69</sup> The law of defamation took particularly seriously untruths that

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<sup>67</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 530–41 (1989) (publication of the name of a rape victim not actionable); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101–06 (1979) (invalidating a statute protecting the privacy of juvenile offenders by barring publication of their names); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 837–46 (1978) (overturning criminal sanctions against newspaper for reporting on confidential judicial misconduct hearings).

<sup>68</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (public figures and officials may not recover for intentional infliction of emotional distress without showing that there was a false statement of fact made with “actual malice” or “knowledge that the statement was false or with reckless disregard” to the truth); *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (plaintiffs with statutory false light invasion of privacy claims must prove intentional falsehood or reckless disregard for the truth).

<sup>69</sup> In slander or spoken defamation, economic harm from false statements injurious to “holders of offices and members of professions and trades” was taken so seriously that actual damages did not need to be proved to prevail. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 463–64 (4th ed. 1948). This was in contrast to most other kinds of slander, including slanders imputing sexual misconduct to women. Recovery in those instances could be had, historically, only upon proof of loss of economic advantage (e.g., a marriage opportunity). See THOMAS ATKINS STREET, *FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW: VOL. 1: THEORY & PRINCIPLES OF TORT* 282–85 (1906). Written defamation at common law was actionable without special damages being proven. See *id.* at 294–95. In recent

injured plaintiffs in their professional or business interests, or in the case of women, in their economic prospects as they related to marriage.<sup>70</sup> For these reasons, one could argue that if the state has a compelling interest in protecting its citizens against defamation, the same reasons exist in favor of protecting publicity rights. Whether those parallels hold on further examination, however, is questionable. Although one could explain the survival of libel actions as an example of First Amendment balancing between private interests and speech interests, the story is actually more complex.

For a long time, the reason defamation actions were not seen as conflicting with the First Amendment was because defamatory content, like fighting words and obscenity, was not treated as protected speech for constitutional purposes.<sup>71</sup> Not until 1964, in *New York Times Co. v. Sullivan*, did the Supreme Court subject a defamation claim to First Amendment scrutiny.<sup>72</sup> Concerned about the possibility that large damage awards for libel would chill the willingness of citizens to engage in fully protected speech, the Court sharply limited (although it did not eliminate) the right of individuals to sue for reputational harm.<sup>73</sup> Although *Sullivan* remains an iconic decision, it was not actually very clear in setting out the theory under which defamation claims could legitimately be upheld.<sup>74</sup> It was possible, therefore, to suppose that the case and its immediate successors were applying an ad hoc balancing test under which at least some allegations of personal harm from otherwise protected speech could be compensated.<sup>75</sup>

If so, what is good for the goose of defamation may nevertheless not avail the gander of publicity rights. Although the alleged harms from defamation can be quite trivial, involving more insult and anger than actual injury, history is replete with examples where false and defamatory statements have in fact destroyed careers, broken friendships, and ruptured family relationships. The Supreme Court, for example, has frequently alluded to the devastating effects of harmful falsehoods promulgated by the Nazi regime in Germany and by Senator Joseph

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years, the Supreme Court has largely eliminated presumed damages, requiring instead that actual damages be shown. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

<sup>70</sup> See *supra* note 69 and accompanying text.

<sup>71</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (listing defamation, along with fighting words and obscene speech, as excluded categories).

<sup>72</sup> 376 U.S. 254, 256 (1964).

<sup>73</sup> See *id.* at 283 (requiring that public officials demonstrate “actual malice” in libel actions).

<sup>74</sup> See *id.* at 283–92.

<sup>75</sup> See *id.*

McCarthy in the United States in the 1950s.<sup>76</sup> Thus, some empirical foundation exists in defamation law for attributing substantial weight to reputational harm in a balancing test. The economic detriment from having one's name appear in a comic book or one's face on a tee shirt without permission or payment, however, does not in most cases come close to the potential harm from defamation, particularly where knowing lies are involved.<sup>77</sup> Further, as the *Twist* litigation demonstrates, it is also often doubtful that the plaintiff was actually deprived of any significant economic benefit because the value of the use, from the defendant's perspective, is often simply too insignificant to warrant voluntary payment of even a token sum.<sup>78</sup>

The real problem with attempting to compare balancing in publicity rights cases with that in defamation is that the premise for the comparison is itself faulty. The survival of defamation as a cause of action cannot be attributed to ad hoc balancing. Rather, it is a function of the history of the tort and of the particular kind of speech involved.

Defamation actions were well-established in Anglo-American law long before the ratification of the First Amendment, and libel cases were tried in state courts right up to the time of *Sullivan*.<sup>79</sup> An originalist could argue, therefore, that the Framers, to the extent that they intended to achieve any substantive result by creating the First Amendment, had their collective eyes solely on limiting claims of seditious (i.e., political) libel. Other kinds of libel remained triable in the state courts, suggesting that actions complaining of non-seditious but nevertheless libelous speech were never intended to be barred by the First Amendment. Prior to *Sullivan*, the Supreme Court dealt with the continuing viability of defamation by taking the consistent position that libelous statements were not "speech" for constitutional purposes, and hence libel actions did not violate the Constitution.<sup>80</sup> When the Court

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<sup>76</sup> See *Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) (Stewart, J., concurring) ("Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."); see also *Gertz*, 418 U.S. at 400 (White, J., dissenting) (quoting David Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1088 (1942) on the fascists' effective use of defamatory attacks on their opponents in Europe).

<sup>77</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

<sup>78</sup> See *supra* notes 21–28 and accompanying text.

<sup>79</sup> *Sullivan* itself was originally brought in Alabama state court. See *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

<sup>80</sup> See *Chaplinsky*, 315 U.S. at 571–72 (noting that libelous speech is unprotected by the Constitution).



decided *Sullivan*, it seems not to have changed its mind about the constitutional status of defamatory speech, but rather opted to privilege the utterance of injurious falsehoods so that fear of liability would not chill the willingness of citizens to exchange ideas, opinions and information that they could not prove were wholly accurate.<sup>81</sup>

The unprotected status of injurious falsehoods is reflected in other aspects of the Court's free speech jurisprudence as well, including its commercial speech doctrine (where false or misleading statements can freely be regulated) and its treatment of such speech torts as false light invasions of privacy and intentional infliction of emotional distress.<sup>82</sup> Clearly, where injurious falsehoods are the subject of a lawsuit, the Court gives the state much more latitude in regulation than it does where accurate speech or opinion is involved.<sup>83</sup> The Court's rationale is not that injurious falsehoods require special dispensation from speech protection. Rather, it is that the speech was never protectable in the first place.<sup>84</sup> Thus, publicity law can draw on the analogy to defamation to justify sanctioning liability for false endorsements but not for much else. It is not a template for justifying restrictions on the kind of creative expression produced by either Gary Saderup in *Comedy III* or Todd McFarlane in the *Twist* litigation.

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<sup>81</sup> See 376 U.S. at 282–83. This is similar to the Court's obscenity jurisprudence. Although obscene speech is unprotected by the Constitution, the Court has been careful to limit what can be deemed obscene so as to immunize sexually explicit but fully protected speech. See *Jenkins v. Georgia*, 418 U.S. 153, 157–61 (1974) (noting that the community standards test from *Miller v. California*, 413 U.S. 15 (1973), had to be applied with care to distinguish speech that was obscene from sexual content in a popular film like *Carnal Knowledge*).

<sup>82</sup> In the case of the latter speech torts, the Court has thus far been unwilling to permit liability unless the plaintiff can show that the speech in question was intentionally false. For example, in the 1988 case *Hustler Magazine, Inc. v. Falwell*, the Court expressed serious doubt that the alleged intentional infliction of emotional distress could rise to the level that would warrant limiting free speech rights, but said that in any event, minister Jerry Falwell, as a public figure, would at a minimum have to show knowing falsehood or reckless disregard for the truth to recover. See 485 U.S. at 52–56. The Court agreed that the cartoon depicting Falwell was not factually accurate (even intentionally so), but it also took note of the conclusion below that no one would understand the cartoon as conveying factual information. See *id.* at 57. In both the false light cases decided thus far by the Court, it also required a showing of knowing falsity or reckless disregard for the truth. See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 252–54 (1974); *Hill*, 385 U.S. at 390. See generally Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364 (1989) (providing a discussion of false light and the significance of the truth/falsity distinction).

<sup>83</sup> See *Gertz*, 418 U.S. at 347 (states are free to set the standard of liability in defamation cases brought by private persons involved in matters of public interest so long as a finding of fault is required).

<sup>84</sup> See *id.* at 339–40 (noting that there is no constitutional value in intentional or careless untruths).

The second source of Supreme Court precedent supplies a more relevant and convincing justification for publicity rights cases like those brought to protect the Three Stooges or Tony Twist. These are cases that permit exclusive rights in non-copyrightable content on the grounds that protecting such rights will incentivize innovation.<sup>85</sup> Under this line of reasoning, publicity rights must be protected for the same reasons we privilege commercial and creative interests through copyrights or trademarks. Pro-publicity advocates have gotten considerable mileage from the fact that the Supreme Court has drawn just this parallel in its seminal case dealing with publicity rights, *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>86</sup> Justice White, writing for the majority, noted that “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment” and that this interest “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 . . . .”<sup>87</sup>

The *Zacchini* case should not be read, however, as an endorsement by the Court for upholding traditional publicity claims in the face of all constitutional challenges. The issues in *Comedy III* and the *Twist* litigation, for example, bear little relation to the problem that existed in *Zacchini*. The plaintiff, Hugo Zacchini, was an entertainer who sued a television news station for broadcasting footage of his human cannonball act without his consent.<sup>88</sup> The complaint was not predicated merely on the fact that the defendant had used Zacchini’s name or his physical appearance without his permission; rather, Zacchini objected to the fact that the performance from which he earned a livelihood was aired in its entirety.<sup>89</sup> He argued that if people who might otherwise pay to witness his performance could see it for free on television and he was not compensated, he would lack any incentive to continue developing acts and offering them to the public.<sup>90</sup>

Although Justice White used the term “right of publicity” to describe Zacchini’s cause of action and used broad language to the effect that no one had a free speech right to interfere with another’s eco-

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<sup>85</sup> See *Zacchini*, 433 U.S. at 574–79 (justifying state law publicity rights on incentive grounds); *Goldstein v. California*, 412 U.S. 546, 569–71 (1973) (justifying state anti-music piracy statute on incentive grounds).

<sup>86</sup> See 433 U.S. at 562.

<sup>87</sup> *Id.* at 573.

<sup>88</sup> *Id.* at 563–64.

<sup>89</sup> See *id.* at 564, 575–76.

<sup>90</sup> See *id.*

conomic interests, he was nevertheless careful to emphasize the unusual facts of the case: that an entire performance was used.<sup>91</sup> “The broadcast of petitioner’s entire performance,” White wrote, “goes to the heart of petitioner’s ability to earn a living as an entertainer.”<sup>92</sup> According to White, this made Zacchini’s claim far stronger than claims regarding “the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press.”<sup>93</sup> White also pointed out that the injury to free speech done by permitting Zacchini’s claim to succeed was substantially mitigated by the fact that the performer was not claiming a right to enjoin anyone from using the footage of his act; all he wants, said White, “is to be paid.”<sup>94</sup>

The idea that some protection against misappropriation must exist to allow a plaintiff to reap whatever benefits might flow from his core work product resonates with other earlier Supreme Court decisions, even though they were not decided on free speech grounds. In 1918, in *International News Service v. Associated Press*, the Court upheld a misappropriation claim filed by the Associated Press (the “AP”) to protect the contents of its news wire stories.<sup>95</sup> The Court explained that its decision was intended to give the AP some space to benefit from its newsgathering activities before its competitor, International News Service, could take the information the AP had gathered and use it to compete against the AP in its own markets.<sup>96</sup> In *Goldstein v. California*, in 1973, the Court refused to preempt a state law prohibiting piracy of sound recordings at a time when such recordings were unprotected by copyright.<sup>97</sup> The Court’s decision was apparently driven by the concern that if copyists could duplicate and sell the sound recordings that someone else had invested in producing, the record industry might lose its incentive to continue producing records.<sup>98</sup>

If these cases can be said to have a common theme, it is that property rights can take priority over speech rights if and when it can be shown that without speech restrictions, total market failure will result. Freedom of speech is not nihilistic; *Zacchini* suggests that the right of free speech must be tempered when the consequence of not doing so is

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<sup>91</sup> See *id.* In this case, the entire performance consisted of a fifteen-second flight from the cannon. *Id.* at 564.

<sup>92</sup> *Zacchini*, 433 U.S. at 576.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 578.

<sup>95</sup> See 248 U.S. 215, 236–46 (1918).

<sup>96</sup> See *id.* at 239–41.

<sup>97</sup> See 412 U.S. at 570–71.

<sup>98</sup> See *id.* at 550–51, 555, 570–71.

to prevent future content from being produced at all.<sup>99</sup> The analytical framework within which such cases fit is uncertain, though. Is *Zacchini* an instance of the application of strict scrutiny or a discrete category unto itself? Whether or not one could characterize the prevention of market failure in speech production as a compelling state interest is a good subject for debate, but the result at least makes a kind of intuitive sense as long as the theory is reserved for those limited situations where the risk of market failure seems particularly convincing.<sup>100</sup>

The typical non-advertising publicity case, as Justice White intimated in *Zacchini*, falls far from meeting this standard. Market failure is not threatened. Although a plaintiff may argue that the public resonance of his persona has potential value and allowing others to use it for free and without permission is therefore a taking of property, it is typically not the sort of taking that will lead to a failure to produce public personas. A football player or a film star who never earns a cent from controlling how others present their images to the public will still have every incentive to burnish his public persona just to get ahead in his primary professional sphere.

As scholars have noted, fame is at a minimum a joint creation of the high-visibility individual and the public.<sup>101</sup> Thus, even in the rare case in which the cultivation of fame alone, without some accompanying talent or accomplishments, is the individual's claim to our attention, it is far from clear why the elements of the persona that attract public notice should be private property rather than part of the public domain. As the *Restatement (Third) of Unfair Competition* observes:

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<sup>99</sup> *Zacchini*, 433 U.S. at 576–78.

<sup>100</sup> For example, in the 1997 case *Nat'l Basketball Ass'n v. Motorola, Inc.*, the U.S. Court of Appeals for the Second Circuit held that use of “real-time” game scores and other tabulated information did not constitute misappropriation because it was not equivalent to the “hot news” that was deemed quasi-property in *Associated Press*. See 105 F.3d 841, 845 (2d Cir. 1997). The court held that misappropriation of information could be actionable only where:

- (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; (v) and the ability of other parties to free-ride would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

*Id.* The court also distinguished between cases in which plaintiff merely loses a “competitive edge” and cases “where the free-riding create[s] the danger of no . . . service being viable.” *Id.* at 854 n.9.

<sup>101</sup> See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 184–95 (1993).

The rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets. The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards. Any additional incentive attributable to the right of publicity may have only marginal significance. In other cases the commercial value acquired by a person's identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protection.<sup>102</sup>

Vague invocations of theories such as unjust enrichment to explain why publicity claims should trump free speech lack persuasive power unless one can establish what makes the accurate utilization of publicly known information for First-Amendment-protected activity "unjust." If information can be walled off from First Amendment protection simply because it has potential economic value to someone, then the content we are "free" to use will be greatly diminished indeed. Virtually any content that might interest anyone else can have some potential "value" if exclusive rights to it are awarded. As I have argued elsewhere, going very far down the road of propertizing such value would decimate both the concept of a free speech public domain and the First Amendment's social and liberty-protecting utility.<sup>103</sup>

In short, money is important, and we take seriously protecting people's ability to make it. Wealth-maximization and efficient exploitation of assets, though, are not the values that the Bill of Rights holds most dear. More than a hint of that fact can be found in an interesting, if somewhat obscure, opinion by the Supreme Court in the 1985 decision *Lowe v. SEC*.<sup>104</sup> *Lowe* had nothing to do with publicity rights, but the case provides an interesting insight into the Supreme Court's modern thinking on the relationship between economic and liberty interests. *Lowe* involved regulation of the securities markets, an area where speech concerns are seldom raised.<sup>105</sup> The defendant, Christopher Lowe, was convicted on a variety of charges including misappropriating a client's funds, and as a consequence was permanently barred from

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<sup>102</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

<sup>103</sup> See generally Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297 (2004).

<sup>104</sup> 472 U.S. 181, 181 (1985).

<sup>105</sup> See *id.* at 183–88.

engaging in investment advising.<sup>106</sup> When he subsequently turned to selling newsletters containing investment advice to subscribers, the Securities and Exchange Commission sought to enjoin their publication.<sup>107</sup> The U.S. District Court for the Southern District of New York refused to issue the injunction, holding that Lowe's newsletters were protected by the First Amendment.<sup>108</sup> The U.S. Court of Appeals for the Second Circuit reversed on the ground that it was constitutionally permissible to regulate speech in the interests of commerce, and held that Lowe could be barred from selling advice, even to willing subscribers.<sup>109</sup> The Supreme Court then reversed the Second Circuit.<sup>110</sup>

The Court acknowledged the strong state interest in preventing abuses in the securities industry, but strongly intimated that where speech was affected, there were limits on how far such regulation could go.<sup>111</sup> The majority followed its normal practice of avoiding, wherever possible, basing its decision on constitutionality, instead resting its holding on an interpretation of the Investment Advisers Act of 1940.<sup>112</sup> Although the Act did not distinguish between giving investment advice directly to clients and delivering it via a newspaper or journal,<sup>113</sup> the Court concluded that the intent of the statute was to treat the two differently.<sup>114</sup> As Justice Stevens, writing for the majority, understood the law through the lens of its legislative history:

Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate

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<sup>106</sup> *See id.* at 183–84.

<sup>107</sup> *See id.* at 184–85.

<sup>108</sup> *See id.* at 186.

<sup>109</sup> *See id.* at 187.

<sup>110</sup> *Lowe*, 472 U.S. at 211.

<sup>111</sup> *See id.* at 189–203.

<sup>112</sup> *See id.* at 190–211. Justice White and Chief Justice Rehnquist concurred in the result, but would have reached the constitutional question. *See id.* at 211 (White, J., concurring). Justice White wrote that the statute was, in fact, unambiguous in reaching both individualized investment advice and advice rendered through a publication. *See id.* at 227. Its application to publishers like Lowe, he argued, to further a general goal of ridding the market of “fraudulent, deceptive, or manipulative” advice was clearly unconstitutional. *See id.* at 234.

<sup>113</sup> *See id.* at 203–04 (majority opinion).

<sup>114</sup> *See id.* at 204.

the press through the licensing of nonpersonalized publishing activities.<sup>115</sup>

The Court agreed that the statute was justified in requiring an investment advisor to register with the government to advise clients in one-on-one fiduciary relationships, where experience had shown substantial risk of “fraud, deception, or overreaching” absent such regulation.<sup>116</sup> But where the communications are impersonal, and no showing can be made of wrongdoing, the Court held that an individual’s right to publish financial advice was protected and fell outside the Act.<sup>117</sup> Thus *Lowe*, like *Zacchini*, makes allowances for regulating speech in the interests of economic well-being, but only when the risks are significant, highly particularized, and non-speculative.<sup>118</sup>

#### CONCLUSION

Where does all this point? Arguably, to the end of the vast majority of publicity claims involving non-advertising uses. Except for special cases where misrepresentation occurs or where a plaintiff can demonstrate high risk of failure in the primary market for his talents, the argument for giving plaintiffs compensation for and control over their personas rests on no more than thin and speculative justifications. Awarding Tony Twist \$15 million to compensate him for the “value” of using his name in 166 frames of a comic book series, therefore, is totally puzzling—and seems entirely wrong-headed—as a matter of free speech theory. The trope of elevating the appearance of harm in publicity rights by classifying it as monetary rather than purely dignitary is a clever one because historically courts have tended to think that money occupies territory the Bill of Rights does not reach. It does not compute, though. Using information without permission is not like robbing a bank. Property rights in copyrighted speech are one thing; but reaching beyond copyright to commodify the value in personal information presents risks to the public domain that should be incurred rarely and only for good (dare I say compelling?) reasons. As a general matter, does a property right in public personas meet that standard? How many ways are there to spell “no”?

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<sup>115</sup> *Id.*

<sup>116</sup> *See Lowe*, 472 U.S. at 207–11.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*