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# TOWARD A MODIFIED FAIR USE DEFENSE IN RIGHT OF PUBLICITY CASES

RANDALL T.E. COYNE\*

## I. INTRODUCTION

In recent years, courts have entertained an increasing number of claims contesting the appropriation of names, likenesses and personalities.<sup>1</sup> Initially, a strong judicial impulse favored recognizing the pecuniary value of names and personal features as protectable interests under the right of privacy.<sup>2</sup> Although most claimants in fact alleged invasion of the right of privacy, various other theories of recovery have been advanced, including misappropriation,<sup>3</sup> unfair competition,<sup>4</sup> and contract.<sup>5</sup> The stark dissimilarities among

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1. See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (plaintiff relied on the common law right of publicity and the right of privacy to bring suit against defendant for falsely identifying her in nude photographs); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983) (right of publicity suit brought against defendant for its use of plaintiff's deceased husband's name in connection with its business); *Cher v. Forum Int'l Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) (court found that defendant violated plaintiff's right of publicity by falsely indicating that she endorsed the magazine); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (plaintiff sued defendant for use of look-alike in advertisement); *Onassis v. Christian Dior—New York*, 122 Misc. 2d 603, 472 N.Y.S.2d 254 (1984), *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1985) (mem.); J.T. McCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1987); Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C.L. REV. 603 (1984); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983).

2. See Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553 (1960).

3. E.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

4. E.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

5. E.g., *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C.D. Mass. 1894). See Nimmer, *supra* note 1, at 214. For a thorough evaluation of the inadequacies of these theories, see generally Nimmer, *supra* note 1, at 204-15.

these causes of action contributed to judicial confusion and ultimately led to inconsistent decisions.<sup>6</sup>

Gradually, courts began deciding cases involving the commercial exploitation of names and likenesses under the evolving common law right of publicity. Of relatively recent origin,<sup>7</sup> the right of publicity injected into the law a uniformity that has been more apparent than real. Although the publicity right has won increased judicial acceptance during the past twenty years, courts have struggled to find suitable legal analogies on which to base their decisions. Whether a court views the right of publicity as a privacy right, property right, or a species of copyright, therefore, has consequences that are outcome determinative.

This Article identifies four different types of claims that are actionable under the right of publicity and argues that first amendment conflicts vary depending on the specific type of claim asserted. The Article suggests that the copyright law provides a suitable model for right of publicity decisions. By applying a modified fair use doctrine to certain right of publicity cases, courts can more effectively balance first amendment free speech interests and the twin policies underlying the right of publicity: promoting creativity and preventing unjust enrichment.

## II. ORIGIN AND DEVELOPMENT OF THE RIGHT OF PUBLICITY

Broadly defined, the right of publicity is the right to own, protect, and profit from the commercial value of an individual's name, likeness, activities, or identity.<sup>8</sup> Neither enshrined in the Constitution nor enumerated in the Bill of Rights, the right of publicity has its antecedents in the right of privacy.

In an 1890 law review article, Samuel Warren and Louis Brandeis identified a common law right of privacy and described the

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6. See Gordon, *supra* note 2, at 554; see also *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 282-83 (S.D.N.Y. 1977) (acknowledging that many courts address the right of publicity under the guise of a right of privacy).

7. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (recognizing a common law right of publicity in photographs of famous baseball players).

8. See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

injury involved as a violation of a person's right "to be let alone."<sup>9</sup> Warren and Brandeis asserted, however, that people lose their rights to privacy in things they make public.<sup>10</sup> Under the original formulation of the right of privacy, therefore, performers could have no privacy interest in their names and likenesses. Thus, any privacy justification for a right of publicity is likely to be considered weak.

Eventually, Dean Prosser suggested a more detailed definition of exactly what the right of privacy includes. In his noted treatise on tort law, Prosser stated that "the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'"<sup>11</sup> Specifically, Prosser's four invasions are: the intrusion upon physical solitude, the public disclosure of private facts, publicity that places someone in a false light, and the appropriation of one's name or likeness for another's benefit.<sup>12</sup>

In recent years, Prosser's fourth invasion, appropriation of plaintiff's name or likeness for defendant's benefit, has acquired the label "right of publicity."<sup>13</sup> Courts and commentators have supported recognition of a right of publicity independent of Prosser's fourth category, however, to avoid the inherent contradiction of classifying a commercial right under the heading of "privacy."<sup>14</sup> This appears to make perfect sense when one carefully considers Prosser's four categories. With respect to the first three invasions, the injured party attempts to protect his interest by minimizing the intrusion or publication of the damaging matter. In contrast, the right of publicity plaintiff does not necessarily object to the

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9. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). For an argument that in the process of searching for the right of privacy in the common law, Warren and Brandeis actually invented the right, see Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1581 (1979).

10. Warren & Brandeis, *supra* note 9, at 215.

11. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 804 (4th ed. 1971).

12. *Id.* at 804-14.

13. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

14. See Felcher & Rubin, *supra* note 9, at 1588-89. This contradiction was also apparent to Warren and Brandeis. See *supra* note 10 and accompanying text.

commercial exploitation, provided the exploitation is at his behest and the profits accrue to his benefit.<sup>15</sup>

In 1953, the right of publicity first received judicial recognition as a right distinct from the right of privacy.<sup>16</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>17</sup> the United States Court of Appeals for the Second Circuit expressly recognized the right of publicity as an independent, enforceable property right.<sup>18</sup> Because *Haelan Laboratories* remains the seminal case in the development of the right of publicity, it is useful to examine the decision in some detail. *Haelan Laboratories* involved a baseball player who executed a contract granting to plaintiff the exclusive right to use the player's name and photograph in promoting sales of plaintiff's chewing gum. The defendant, a competitor, secured the same player's authorization to use his name and photograph to advertise and sell its own gum. The court stated that such behavior, if deliberate, would be tortious.<sup>19</sup> The defendant contended that an individual had no legal right to control the publication of his name and picture apart from his right of privacy. According to the defendant, the contract between the plaintiff and the player was merely a release from potential liability for invasion of privacy rather than a transfer of exclusive rights.<sup>20</sup>

Although Judge Frank agreed that under the existing right of privacy doctrine, the exclusive-use contract released the plaintiff but did not constitute an assignment,<sup>21</sup> his analysis did not end there. Instead, the opinion proceeded to recognize a separate right, using the following widely quoted language:

We think that, *in addition to and independent of* [the] right of privacy . . . a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the *exclusive* privilege of publishing his picture, and that such a grant may validly be made "in gross," *i.e.*, without an accompanying transfer . . . of anything else. Whether it be labelled a "property" right is im-

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15. See *Factors Etc., Inc.*, 579 F.2d at 220.

16. See Nimmer, *supra* note 1, at 221-22.

17. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

18. *Id.* at 868.

19. *Id.* at 867-68.

20. *Id.* at 867.

21. *Id.*

material; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "right of publicity." . . . This right of publicity would usually yield . . . no money unless it could be made the subject of an exclusive grant. . . .<sup>22</sup>

The court implicitly distinguished the right of privacy when it proclaimed that "it is common knowledge that many prominent persons . . ., far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."<sup>23</sup>

If, as Roscoe Pound claimed, the Brandeis-Warren law review article did "nothing less than add a chapter to our law,"<sup>24</sup> subsequent scholarship by Professor Nimmer should be credited with adding an additional paragraph or two. In his 1954 piece entitled *The Right of Publicity*, Professor Nimmer reaffirmed the Second Circuit's conclusion that the right of publicity exists independent of the right of privacy.<sup>25</sup> Nimmer demonstrated that alternative theories such as pure privacy, unfair competition, contract and defamation were inadequate to protect the interest in name and likeness.<sup>26</sup> Further, he identified four basic theoretical differences between the right of publicity and its antecedents in the right of privacy.

First, Nimmer argued that the right of publicity should be conceptualized as a proprietary and not a personal interest. Second, he contended that damages should not be measured by injury sustained to plaintiff's psyche, but rather should be evaluated according to the value of the publicity. Third, although inanimate objects, animals, and institutions enjoy no right of privacy, Nimmer suggested that their human owners should have a right of publicity in such property. Finally, Nimmer maintained that unlike pure

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22. *Id.* at 868 (emphasis added).

23. *Id.*

24. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 70 (1946) (quoting Dean Roscoe Pound's communication to William Chilton, 1916).

25. Nimmer, *supra* note 1, at 223.

26. *Id.* at 204-15.

privacy actions, right of publicity actions should not include the defense of waiver against celebrity plaintiffs because of their fame, because that fame is the very factor that triggers a substantial publicity value.<sup>27</sup>

Following the appearance of Professor Nimmer's article, claimants attempted to secure protection for personality elements other than name and likeness. Attributes sought to be protected included a particular routine or act,<sup>28</sup> unique style,<sup>29</sup> characters created by the celebrity,<sup>30</sup> characters made famous by the celebrity,<sup>31</sup> and biographical information.<sup>32</sup> Although these efforts met with varying degrees of success, the courts' approaches, at least, have been uniform. In deciding whether the right of publicity applies to a particular attribute, courts consider the policies underlying the right of publicity.<sup>33</sup>

Courts consistently have identified two goals served by the recognition of a right of publicity: the promotion of creative endeavor, and the prevention of unjust enrichment.<sup>34</sup> Moreover, courts determine the scope of publicity rights by balancing these policies against countervailing first amendment and free trade interests.<sup>35</sup>

Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances that appeal to the public. The underlying assumption is that the greater the possibility for personal profit, the more likely people are to pursue creative activities. As one court delicately put it:

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27. *Id.* at 216.

28. *E.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (human cannonball act).

29. *E.g.*, *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (imitation of Bert Lahr's voice and comic delivery style).

30. *E.g.*, *Price v. Hal Roach Studios*, 400 F. Supp. 836 (S.D.N.Y. 1975) (comic characters developed by Stan Laurel and Oliver Hardy).

31. *E.g.*, *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (Bela Lugosi's portrayal of Count Dracula).

32. *E.g.*, *Rosemont Enter. v. Urban Sys.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. 1973) (biographical facts about Howard Hughes).

33. *E.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-77 (1977).

34. A third goal, protecting privacy interests of celebrities, has been discredited, largely under a waiver rationale. *See supra* note 10 and accompanying text.

35. *See infra* pt. III.

Although fame and stardom may be ends in themselves, they are normally by-products of one's activities and personal attributes, as well as luck and promotion. The basic motivations are the desire to achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement.<sup>36</sup>

Further, the United States Supreme Court has recognized that rewarding successful entertainers for their efforts and thereby encouraging artists to devote their lives to creative endeavor is in the public interest.<sup>37</sup> Obviously, granting a celebrity a right of publicity in any aspect of his personality increases the value of stardom, thus making creative endeavors more attractive. As the value of fame increases, however, misappropriation becomes more lucrative and the need to protect against unjust enrichment becomes more important.

*Zacchini v. Scripps-Howard Broadcasting Co.*<sup>38</sup> is the only right of publicity case decided by the Supreme Court to date. Hugo Zacchini, a human cannonball, brought suit against Scripps-Howard for unlawfully appropriating his professional property.<sup>39</sup> Without Zacchini's permission, Scripps-Howard had filmed his performance at an Ohio county fair and broadcast fifteen seconds of the film on its evening news program.<sup>40</sup> The Court's analysis began with a review of cases granting performers the right to sue for misappropriation of their performances.<sup>41</sup> The issues in *Zacchini* were drawn clearly. If Scripps-Howard was permitted to film and broadcast the cannonball act without compensating Zacchini, it would benefit from the act at no cost beyond its relatively insignificant production expenses. Conversely, granting Zacchini a right to control the dissemination of his performance not only would enable him to secure compensation for the benefit his performance bestowed on others, but also would operate to prevent others from

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36. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir. 1980).

37. *Zacchini*, 433 U.S. at 576-77.

38. 433 U.S. 562 (1977).

39. *Id.* at 563-64.

40. *Id.*

41. *Id.* at 572 n.9.



benefiting from unjust enrichment.<sup>42</sup> Because celebrities often invest substantial time and money to achieve uncertain success, fairness would seem to dictate that they be entitled to whatever value derives from their efforts.

Although promoting creative endeavor and preventing unjust enrichment often operate as powerful incentives toward recognition of the right of publicity, they nonetheless must be considered in conjunction with the countervailing first amendment policies favoring free speech and free trade. In the next section, this Article examines potential conflicts between the right of publicity and the first amendment.

### III. ACCOMMODATING COMPETING PUBLICITY RIGHTS AND FIRST AMENDMENT INTERESTS

Before exploring the tension between the right of publicity and the first amendment, certain broad and potentially conflicting principles of general application should be noted. The first amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>43</sup> In a 1969 decision involving important first amendment issues, the Supreme Court embraced "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."<sup>44</sup> Consequently, freedom of speech embraces two complementary and correlative components: a right to communicate information and a right to receive communications.

The Supreme Court has held that entertainment, as well as news, enjoys first amendment protection.<sup>45</sup> Entertainment, however, frequently is a commercial enterprise conducted for personal profit. If entertainment is properly regarded as a form of commercial speech, it will receive only minimal first amendment protection.<sup>46</sup> In addition, to the extent that entertainers are classifiable as public figures, their privacy interests may merit less first

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42. The Court appeared to allude to the unjust enrichment rationale. *See id.* at 576.

43. U.S. CONST. amend. I.

44. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

45. *Zacchini*, 433 U.S. at 578.

46. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (holding that commercial speech will receive minimal first amendment protection because it is not entirely outside the protection of the first amendment).

amendment protection than the privacy interests of private citizens.<sup>47</sup>

A celebrity's attributes can be exploited in several ways. His picture can be placed on commercial products,<sup>48</sup> his name or likeness can be included in a product or service advertisement,<sup>49</sup> books and movies can be created based on the celebrity's life or experiences,<sup>50</sup> or the celebrity's act can become the subject of a news broadcast.<sup>51</sup> In general, the more the exploitation involves purely commercial appropriation, the greater the likelihood of actionability. However, some exploitative uses implicate important first amendment interests that may defeat an otherwise legitimate claim of infringement.

In *Zacchini*, the Supreme Court examined the first amendment limits on the right of entertainers to control public dissemination of their performances.<sup>52</sup> In a 5-4 decision, the Court ruled in favor of Zacchini and held that the first amendment did not give Scripps-Howard the right to appropriate Zacchini's "entire act."<sup>53</sup> The Court overturned the Ohio Supreme Court's ruling that although Zacchini might have an action against ordinary infringers for appropriation of his "likeness and identity," the press had a first amendment privilege to make such an appropriation.<sup>54</sup>

Writing for the majority, Justice White noted that state-created rights of performance were a valid and desirable means of providing entertainers with an economic incentive to continue performing.<sup>55</sup> Although he acknowledged that entertainment could be legitimate news to which the public had a first amendment right of

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47. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (public figures are persons who, because of the notoriety of their accomplishments or their ability to gain the attention of the public, have become prominent in society).

48. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (Elvis Presley posters), *cert. denied*, 440 U.S. 908 (1979).

49. *Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082 (8th Cir. 1974) (Carson's name used to promote Las Vegas trip).

50. *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (fictionalization of event in the life of Agatha Christie).

51. *Zacchini*, 433 U.S. 562 (human cannonball act filmed and broadcast on evening news).

52. *Id.* at 565. For a discussion of the facts of *Zacchini*, see *supra* notes 40-42 and accompanying text.

53. *Zacchini*, 433 U.S. at 574-75.

54. 47 Ohio St. 2d 224, 231, 234-36, 351 N.E.2d 454, 459, 461-62 (1976), *rev'd*, 433 U.S. 562 (1977).

55. 433 U.S. at 576.

access, Justice White insisted that state rights of performance did not prevent the press from reporting to the public such newsworthy information.<sup>56</sup>

The conflict confronting the Court in *Zacchini* should be apparent. On one hand, Zacchini's human cannonball act was an attribute clearly protected by the right of publicity. On the other hand, the exploitative use of Zacchini's act, dissemination via an evening news broadcast, warranted first amendment consideration.<sup>57</sup> Ultimately, the Court concluded that the news broadcast exceeded the bounds of the first amendment because it appropriated Zacchini's "entire act."<sup>58</sup>

Crucial to the Court's decision was the fact that by appropriating Zacchini's entire act, the defendant had jeopardized the celebrity's ability to earn a living.<sup>59</sup> Moreover, both policy rationales favoring the right of publicity operated strongly in Zacchini's favor. First, by denying the press the right to rebroadcast Zacchini's entire act, the Court protected Zacchini's "drawing power" and thus nurtured his incentive to perform. Second, the decision effectively prevented Scripps-Howard from reaping the fruits of Zacchini's labors. Implicit in the Court's decision is the suggestion that to the extent the right of publicity does not withhold the material in question from the public, but only determines who will benefit from its dissemination, potential conflict with the first amendment is minimized.

More recently, two federal district courts have addressed the conflict between the right of publicity and the first amendment. *Estate of Presley v. Russen*<sup>60</sup> involved "The Big El Show," a stage production patterned after an Elvis Presley concert. A Presley imitator mimicked Presley's voice, appearance, and unique singing style. Presley's estate sought to restrain all use of the name "The Big El Show," "the image or likeness or persona of Elvis Presley," and any of the various names by which Presley is popularly known, "on any goods, in any promotional materials, in any advertising or in connection with the offering or rendering of any musical ser-

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56. *Id.* at 574.

57. *Id.* at 578.

58. *Id.* at 575.

59. *Id.* at 575-76.

60. 513 F. Supp. 1339, 1348 (D.N.J. 1981).

vices.”<sup>61</sup> The case presented a novel issue; namely, how the right of publicity applied to a stage production that imitated a deceased celebrity’s performance.<sup>62</sup> The United States District Court for the District of New Jersey examined three distinct right of publicity issues: whether New Jersey recognized the common law right of publicity, whether the right descended to the estate upon the death of the individual, and whether “The Big El Show” infringed on plaintiff’s publicity rights.<sup>63</sup>

The court first found that New Jersey recognized the right of publicity.<sup>64</sup> Because the court considered the publicity right to be a property interest, it held that the right descended upon the death of its creator.<sup>65</sup> Finally, the court addressed whether first amendment considerations would defeat plaintiff’s infringement claim.

The court’s first amendment analysis focused on whether “The Big El Show” “serve[d] a social function valued by the protection of free speech.”<sup>66</sup> Typically, a defendant’s exploitative use of a celebrity’s personality will inform, entertain, or sell a product. When an exploitative use disseminates information or “contributes to society’s cultural enrichment,” however, it is worthy of first amendment protection sufficient to defeat a plaintiff’s infringement claim.<sup>67</sup> Conversely, if an exploitive use is purely commercial, first amendment considerations are less significant and the plaintiff’s infringement claim probably will succeed.<sup>68</sup> Within this framework, the court attempted to characterize the purpose of “The Big El Show.”

Although the court found that “The Big El Show” contained both informational and entertainment elements, it determined that the show’s predominant design was to “commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.”<sup>69</sup> The court distinguished cases granting first

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61. *Id.* at 1344.

62. *Id.*

63. *Id.* at 1353-54.

64. *Id.* at 1354.

65. *Id.* at 1355.

66. *Id.* at 1356.

67. *Id.*

68. *Id.*

69. *Id.* at 1359.

amendment protection to entertainment because "The Big El Show" lacked its "own creative component" and therefore did not have a "significant value as pure entertainment."<sup>70</sup> The court also took pains to note the production's limited informational value, particularly when compared to a biographical work about Presley or a discourse on Presley's contribution to popular music.<sup>71</sup> Finally, the court was struck by the similarity between the wholesale appropriation of a complete Presley concert—the very activity by which Presley initially acquired his reputation—and the news broadcast of Zacchini's entire act.<sup>72</sup> The court therefore held that "The Big El Show" did not merit sufficient first amendment protection to defeat plaintiff's publicity infringement claim.<sup>73</sup>

Similarly, *Groucho Marx Productions, Inc. v. Day & Night Co.*<sup>74</sup> raised first amendment issues in the right of publicity context. *Groucho Marx Productions* involved a Broadway musical during which performers imitated the unique appearance, style, and mannerisms of the Marx brothers. Plaintiffs alleged that the performance infringed publicity rights created by the deceased comedians.<sup>75</sup> As in *Russen*, the issues facing the United States District Court for the Southern District of New York included the existence and devisability of the right, in addition to first amendment concerns.<sup>76</sup> As a preliminary matter, the court held that New York recognized publicity rights in the commercial value in a name and likeness.<sup>77</sup> The devisability question turned on whether the brothers had exploited their respective publicity rights during their lives, and the court found that all brothers had preserved their rights through lifetime exercise.<sup>78</sup>

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70. *Id.* The court was also careful to distinguish parody and satire, both of which would be protected speech, from the blatant parroting at issue in *Russen*. *Id.* at 1359 n.21.

71. *Id.* at 1360.

72. *Id.* at 1360-61.

73. *Id.* at 1361. Nonetheless, apparently influenced by first amendment concerns, the court refused to enjoin production of the show, primarily because plaintiff failed to demonstrate irreparable harm. *Id.* at 1378-79.

74. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

75. *Id.* at 486.

76. *Id.* at 487.

77. *Id.* at 489.

78. *Id.* at 489-92.

Having thus disposed of the two preliminary issues, the court turned its attention to whether the first amendment protected defendant's appropriation. The court began its analysis by noting that the first amendment protected entertainment.<sup>79</sup> The court stressed, however, that "the purpose or function of such entertainment must be scrutinized in determining the scope of the right of publicity."<sup>80</sup> Further, the court held that commercial uses of a celebrity's persona were actionable, but that informative or entertaining uses were protected by the first amendment.<sup>81</sup> The court acknowledged that "parody, burlesque, satire and critical review might be immune from the right of publicity because of their contribution as entertainment and as a form of literary criticism."<sup>82</sup>

At the parties' request, the judge reviewed the play. According to the opinion, any literary or entertainment value of the production was "substantially overshadowed . . . by the wholesale appropriation of the Marx Brothers characters."<sup>83</sup> Thus, the court held that the particular production before it was not entitled to first amendment protection because it lacked any creative component that would give it societal value.<sup>84</sup> As support for denying the first amendment defense to plaintiffs' publicity right infringement claim, the court relied on *Russen* and *Zacchini*.<sup>85</sup>

The first amendment defense is most powerful when asserted in cases involving news and newsworthy figures. At a minimum, the first amendment guarantees "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."<sup>86</sup> This guarantee is furthered by protecting publication of newsworthy items from undue restraint. Obviously, a right of publicity that permits a celebrity to either prevent or punish the dissemination of news violates both the letter and the spirit of the first amendment.

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79. *Id.* at 492.

80. *Id.*

81. *Id.*

82. *Id.* at 493.

83. *Id.*

84. *Id.*

85. *Id.* at 493-94.

86. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

At times, the judicial resolution of first amendment issues has produced inconsistent holdings. For example, *Paulsen v. Personality Posters, Inc.*<sup>87</sup> illustrates the extent to which a court will strive to protect the publication and distribution of what it deems to be newsworthy matters. Paulsen, a well-known comedian, sued to prevent the defendant from distributing a poster with his picture captioned "For President."<sup>88</sup> Although the poster allegedly commemorated Paulsen's candidacy in the 1968 presidential election, he contended that the poster was an unauthorized appropriation of his name and likeness. In addition, Paulsen argued that the poster was commercial speech and therefore was unprotected by the first amendment.<sup>89</sup> The Supreme Court of New York County disagreed, holding that "[w]hen a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. . . [and] it is sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected and 'deserving of substantial freedom.'"<sup>90</sup> Further, even though the poster was more entertaining than informative, this did not alter its protected status. In the court's view, the right of publicity was limited to advertising uses and had no application to matters of public interest.<sup>91</sup>

Conversely, the court in *Factors Etc., Inc. v. Pro Arts, Inc.*<sup>92</sup> evidenced far less deference toward the first amendment. Two days after the sudden death of Elvis Presley, his estate granted plaintiff the exclusive license to exploit Presley's name and likeness commercially. The following day, the defendant published and began to market a poster bearing Presley's photograph and the caption "In Memory."<sup>93</sup> When plaintiff succeeded in obtaining a preliminary injunction restraining defendant from infringing plaintiff's exclusive license, defendant appealed.<sup>94</sup>

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87. 59 Misc. 2d 444, 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968).

88. *Id.* at 445, 299 N.Y.S.2d at 503.

89. *Id.* at 447, 299 N.Y.S.2d at 505.

90. *Id.* at 449-50, 299 N.Y.S.2d at 507-08 (quoting *Berlin v. E.C. Publications*, 329 F.2d 541, 545, *cert. denied*, 379 U.S. 822 (1964)).

91. *Id.* at 450-51, 299 N.Y.S.2d at 507-08.

92. 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

93. *Id.* at 217.

94. *Id.* at 215.

As a threshold matter, the United States Court of Appeals for the Second Circuit considered whether Presley's right of publicity survived his death.<sup>95</sup> Because the court found that the exclusive license constituted a valid, transferable property right, it concluded that the right survived Presley's death.<sup>96</sup> Next, the court turned to defendant's contention that it enjoyed a privilege to print and distribute its memorial poster of Presley because the poster celebrated a newsworthy event.<sup>97</sup> The court noted that defendant's reliance on *Paulsen* was misplaced because, in that case, "Paulsen's choice of the political arena for satire made him 'newsworthy' in the First Amendment sense."<sup>98</sup> Ultimately the court refused to place the Presley memorial poster "in the same category as one picturing a presidential candidate, albeit a mock candidate."<sup>99</sup> The court therefore held that defendant's poster was not privileged as celebrating a newsworthy event.<sup>100</sup>

At first blush, the inconsistent holdings in *Paulsen* and *Factors Etc.* appear to be reconcilable on content grounds. Simply stated, political speech has always occupied a position of priority in the spectrum of first amendment protection.<sup>101</sup> Because the allegedly infringing article in *Paulsen*—a poster of a mock presidential candidate—arguably qualified as political speech, first amendment interests were especially strong. In contrast, the memorial poster in *Factors Etc.* had no political significance whatsoever, and first amendment concerns therefore were properly subordinated to Presley's right of publicity. However, before one embraces the generalization that publicity rights necessarily wilt in the face of first amendment protections surrounding political speech, a recent decision involving the publicity rights of the late Dr. Martin Luther King merits examination.

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95. *Id.* at 221.

96. *Id.*

97. *Id.* at 222.

98. *Id.*

99. *Id.*

100. *Id.*

101. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964).



In *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,<sup>102</sup> the United States District Court for the Northern District of Georgia extended the scope of publicity rights to include attributes of political figures. Several years after the assassination of Dr. Martin Luther King, Jr., defendant began manufacturing and peddling plastic busts of the slain civil rights leader.<sup>103</sup> Dr. King's heirs, seeking to enjoin the manufacture and sale of what they considered to be crass memorabilia, brought suit alleging infringement of King's right of publicity.<sup>104</sup> Although Georgia law clearly recognized the right of publicity, the extent of its application to political figures had never been squarely resolved. The first issue facing the court was whether King, a political figure, could properly assert a right of publicity.<sup>105</sup>

The court rejected defendant's contention that by virtue of his status as a popular figure, King somehow had waived his right of publicity.<sup>106</sup> Although the court acknowledged that as a general matter, persons who seek public office relinquish some of the protection afforded by privacy and defamation law, the court distinguished publicity rights and refused to adopt defendant's waiver theory. According to the court, "[a]ny waiver that may be implied when a person seeks public acclaim applies essentially only to newsworthy public comment or disclosures of legitimate public interest."<sup>107</sup> Consequently, without explicitly addressing any first amendment issues, the court held that King enjoyed a right of publicity during his lifetime.<sup>108</sup>

Having decided that notwithstanding their status as popular figures, political figures could assert publicity rights, the court addressed the question of the descendibility of publicity rights. Even though King was deemed to have enjoyed the right of publicity during his lifetime, whether the right survived King's death was an

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102. 508 F. Supp. 854 (N.D. Ga. 1981), *rev'd and remanded*, 694 F.2d 674 (11th Cir. 1983).

103. *Id.* at 856.

104. *Id.* at 859-62.

105. *Id.* at 862-63.

106. *Id.*

107. *Id.* at 863.

108. *Id.*

issue of first impression facing the court.<sup>109</sup> The court noted that the majority of states recognizing the descendibility of publicity rights did so only when the rights were actively exploited during the lifetime of their creator.<sup>110</sup> Because plaintiffs failed to demonstrate that King had intended "to capitalize on the commercial value of his name and likeness,"<sup>111</sup> they did not meet the requirement of exploitation during life, and the court concluded that King's right of publicity did not descend to plaintiffs.<sup>112</sup> On appeal, the United States Court of Appeals for the Eleventh Circuit reversed this holding, stating that "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."<sup>113</sup>

#### IV. FOUR POTENTIAL INFRINGEMENTS OF THE RIGHT OF PUBLICITY

As noted above, the right of publicity embraces the right to own, protect, and profit from the commercial value of an individual's name, likeness, activities and identity.<sup>114</sup> The cases examined thus far demonstrate that the publicity right may be infringed in a variety of ways. Review of the relevant case law suggests that right of publicity actions generally involve at least one of four distinct infringements: appropriation of plaintiff's name or likeness for advertising or endorsement purposes, appropriation of plaintiff's name or likeness to promote the sale of memorabilia, appropriation of plaintiff's unique style or characters which plaintiff has created or made famous, or appropriation of plaintiff's performance. Although certain publicity right decisions resist being pigeonholed neatly into one specific category of infringement, this classification system provides a useful analytical framework for evaluating judicial decisions that purport to balance publicity rights against first amendment concerns. As demonstrated below, this analysis underscores the existence of a sliding scale of first amendment protec-

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109. *Id.*

110. *Id.* at 864.

111. *Id.* at 865.

112. *Id.*

113. 694 F.2d 674, 683 (11th Cir. 1983).

114. See *supra* note 8 and accompanying text.

tions in right of publicity actions. In particular, the nature of the specific infringement alleged will significantly impact the weight the court will ascribe to countervailing first amendment rights.

*A. Appropriation of Name or Likeness for Advertising or Endorsement Purposes*

Historically, right of publicity actions have been most successful when the alleged infringement consists of the appropriation of plaintiff's name or likeness to sell a product.<sup>115</sup> Perhaps the most egregious infringements involve unauthorized endorsements; that is, use of a person's photograph or testimonial without his consent to recommend a product.<sup>116</sup> The underlying assumption of advertisers seems to be that by invoking a well-known figure they can establish the quality or glamour of their product. Decisions upholding publicity rights challenges to unauthorized endorsements are consistent with well-established judicial precedent and public policy. Courts traditionally have been reluctant to extend first amendment protection to commercial speech. Although the Supreme Court has held that commercial speech is deserving of *some* first amendment protection,<sup>117</sup> the amount of protection ultimately granted consistently has fallen short of the level courts are willing to afford political speech.<sup>118</sup> In general, commercial advertising lacks the inherent values considered worthy of constitutional protection.<sup>119</sup> Notwithstanding a social policy encouraging commercial enterprise and the free use of public information for commercial gain, commercial speech therefore is not regarded as being of constitutional proportions.

In addition, a strong public policy against fraudulent business practices supports recovery for infringement of the publicity right

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115. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

116. See generally *Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637 (1973).

117. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

118. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

119. See *id.*

in unauthorized endorsement cases.<sup>120</sup> Typically, the person whose name or likeness is appropriated suffers an identifiable economic harm. The unauthorized commercial use creates a false impression of a business relationship between the advertiser and the plaintiff and deprives the latter of the advertiser's usual endorsement fee. Further, the uncompensated use of plaintiff's endorsement of a given product may destroy plaintiff's ability to procure paid endorsement opportunities with competing manufacturers. Moreover, each endorsement by plaintiff, whether compensated or not, dilutes the value of subsequent endorsements and may undermine plaintiff's credibility. An unauthorized endorsement is also essentially a false claim about a product and may mislead the public while procuring an unfair trade advantage for the infringer.<sup>121</sup>

*Hogan v. A.S. Barnes & Co.*<sup>122</sup> illustrates the economic detriment caused by unauthorized endorsements as well as the limitations of relying on privacy law for recovery. Ben Hogan, a well-known golfer, brought suit when defendant used Hogan's name and picture on the jacket and in the text of a book in a manner that implied Hogan's authorship of the book. The Pennsylvania Court of Common Pleas held that because Hogan did not want his name withheld from public scrutiny but wished to profit from the commercial use of his identity, his claim did not properly sound in privacy.<sup>123</sup> The court nonetheless awarded Hogan \$5000 and described his injury as the misappropriation without his consent of his property right in the commercial value of his name and photograph.<sup>124</sup> This injury resulted, in turn, in unfair competition and an invasion of Hogan's right of publicity.<sup>125</sup>

Two suits brought by popular talk show host Johnny Carson illustrate the extent to which right of publicity protections are de-

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120. For examples of federal statutes prohibiting fraudulent business practices, see 8 U.S.C. § 1005 (1988) (imposing criminal sanctions for any false entry in any book, report, or statement of a bank); 15 U.S.C. § 1644 (imposing criminal sanctions for fraudulent use of a credit card in interstate commerce).

121. Generally, suits of this type are also actionable under the Federal Trade Commission Act, 15 U.S.C. §§ 45-77 (1982), which forbids deceptive trade practices and unfair competition.

122. 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957).

123. *Id.* at 316.

124. *Id.* at 321-22.

125. *Id.* at 318, 320.

pendent on state law. In *Carson v. National Bank of Commerce Trust & Savings*,<sup>126</sup> Carson sought damages for the unauthorized use of his name in an advertisement promoting a trip to Las Vegas. A promotional brochure described the trip as the "Nebraskan's Johnny Carson Tour of Las Vegas." Tickets to Carson's nightclub show were included in the tour package but Carson was otherwise unconnected with the travel venture.<sup>127</sup> Because Nebraska law did not recognize a right to control the use of one's own name and image, Carson was unable to prevail under either a misappropriation or a right of publicity theory.<sup>128</sup>

Carson fared better in *Carson v. Here's Johnny Portable Toilets, Inc.*<sup>129</sup> Following a bench trial, the United States District Court for the Eastern District of Michigan held that Carson had no claim against a toilet manufacturer's use of the phrase "Here's Johnny" in conjunction with its product advertisements because the phrase could not be construed as Carson's name or likeness.<sup>130</sup>

The United States Court of Appeals for the Sixth Circuit, however, vacated the judgment and flushed the case back to the district court.<sup>131</sup> Undeterred that Michigan law, which governed Carson's claims, had not yet clearly addressed the right of publicity, the Sixth Circuit predicted that the Michigan courts would adopt the right.<sup>132</sup> Even though neither Carson's name nor his likeness was used, the court held that appropriation of his "identity" invaded his right of publicity.<sup>133</sup>

#### *B. Appropriation of Plaintiff's Name or Likeness To Promote the Sale of Memorabilia*

Products displaying a celebrity's name or likeness can include "plastic toy pencil sharpeners, plastic model figures, T-shirts and sweat shirts, card games, soap and detergent products, picture puzzles, candy dispensers, masks, kites, belts and belt buckles, and

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126. 501 F.2d 1082 (8th Cir. 1974).

127. *Id.* at 1083.

128. *Id.* at 1084-86.

129. 498 F. Supp. 71 (E.D. Mich. 1980), *vacated*, 698 F.2d 831 (6th Cir. 1983).

130. *Id.* at 77-78.

131. 698 F.2d 831 (6th Cir. 1983).

132. *Id.* at 834 n.1.

133. *Id.* at 836.

beverage stirring rods.”<sup>134</sup> Indeed, commercial uses of a celebrity’s persona in memorabilia appear to be limited only by the imagination of schlock peddlers and souvenir hawkers. Although much of the preceding commercial speech analysis<sup>135</sup> applies with equal force to memorabilia, to the extent a product serves informative or cultural functions, it will be accorded a social value that transcends commercial enterprise. Generally speaking, however, memorabilia derives its appeal almost entirely from the commercial potential of a particular person’s name or likeness and is thus by nature exploitative. For example, a T-shirt with a rock star’s picture emblazoned across its front has little, if any, informative or cultural value and consequently merits minimal first amendment protection. The success of the product is determined not by the strength or content of its message, but rather by the popularity of the person portrayed.

Right of publicity actions frequently are triggered by the unauthorized use of plaintiff’s name or likeness to promote the sale of memorabilia. Indeed, the first judicial decision to recognize the right of publicity was brought by a chewing gum manufacturer and involved the right to use a baseball player’s picture on a bubble gum card.<sup>136</sup> Perhaps no single event has generated more memorabilia, and consequently more right of publicity litigation, than the untimely death of singer Elvis Presley.<sup>137</sup> Following Presley’s death on August 16, 1977, the market for Presley memorabilia exploded as his grieving fans demanded posters, T-shirts, statuettes, and other souvenirs bearing his name and likeness. Interestingly, the October 10, 1977, cover story of *People* magazine addressed this phenomenon under the headline, “Remembering

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134. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 829, 603 P.2d 425, 435, 160 Cal. Rptr. 323, 333 (1979) (Bird, C.J., dissenting).

135. See *supra* notes 117-18 and accompanying text.

136. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). For a discussion of this case, see *supra* notes 16-20 and accompanying text.

137. See, e.g., *Memphis Dev. Found. v. Factors, Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev’d*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977), *aff’d*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

Elvis—Imitators, Fans and Rip-Offs Launch a Billion Dollar Industry.”<sup>138</sup>

Earlier, this Article analyzed the inconsistent resolution of first amendment issues in the context of the memorabilia cases involving Pat Paulsen,<sup>139</sup> Elvis Presley,<sup>140</sup> and Martin Luther King, Jr.<sup>141</sup> To review, a poster of Paulsen sold during his tongue-in-cheek 1968 campaign for the presidency was held to be protected speech, but a poster of Presley commemorating his death was held to be unprotected speech. To complicate matters, a statuette of King was held to be unprotected speech on the theory that politicians do not waive their publicity rights merely by entering the political arena.

On somewhat different grounds, the United States District Court for the Western District of Tennessee in *Memphis Development Foundation v. Factors Etc., Inc.*<sup>142</sup> held a statuette of Presley to be unprotected speech. In that case, plaintiff commissioned a sculptor to create a large bronze statue of Presley to be erected in downtown Memphis. To finance the tribute, plaintiff solicited contributions. As an incentive to potential contributors, plaintiff offered pewter replicas of the statue to donors who contributed \$25.00 or more.<sup>143</sup> Plaintiff sued to enjoin the assignees of Presley's right of publicity from interfering with the advertisement and promotion of the statue.<sup>144</sup> Although the court allowed the plaintiff to build its memorial, it prohibited the manufacture, distribution, and sale of the statuettes.<sup>145</sup> Unfortunately, the opinion offers virtually no first amendment analysis.

A guiding principle in right of publicity actions involving memorabilia appears to be that only if a commercial product serves informative or cultural functions will it be deemed worthy

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138. This leads the author to the unhappy conclusion that at this particular stage of his career, Presley was worth more dead than alive.

139. See *supra* notes 87-91 and accompanying text.

140. See *supra* notes 92-100 and accompanying text.

141. See *supra* notes 102-13 and accompanying text.

142. 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

143. *Id.* at 1324.

144. *Id.* at 1325.

145. *Id.* at 1330-31. Ultimately, the Sixth Circuit reversed on the ground that Presley's right of publicity was not inheritable. 616 F.2d 956 at 960.

of significant first amendment protection. Conversely, the unauthorized use of a person's attributes to create a product typically will exceed the parameters of first amendment protection, and liability generally will result. In those situations, plaintiff's publicity rights will properly prevail.

*C. Appropriation of Plaintiff's Unique Style or Characterizations*

Unlike persons seeking the protection of patent and copyright law, publicity right plaintiffs are not required, as a prerequisite to recovery, to show that they have created anything tangible. That which the publicity right seeks to protect—a person's persona or individual style—would appear incapable of fixation in a tangible medium of expression.

Frequently, "the elements of a person's public personality become valuable only after the investment of considerable time, effort, skill and perhaps money."<sup>146</sup> In recognition of this, courts have construed the right of publicity to protect more than just name and likeness. In proper circumstances, courts have found infringement of the publicity right when defendants appropriated plaintiff's characters or characterizations or imitated plaintiff's personal style developed through years of hard work.<sup>147</sup> As one commentator observed, "The public interest . . . will support the sporadic, occasional and good-faith imitation of a famous person to achieve humor, to effect criticism or to season a particular episode, but it does not give a privilege to appropriate another's valuable attributes . . . as one's own without the consent of the other."<sup>148</sup>

Earlier, this Article examined two cases involving theatrical imitations which graphically illustrate the tension between the right of publicity and the first amendment guarantee of free speech.<sup>149</sup> In *Estate of Presley v. Russen*, the court issued an injunction prohibiting production of "The Big El Show," a stage production

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146. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 391-92, 400, 280 N.W.2d 129, 134-35, 138 (1979).

147. See *supra* notes 60-85 and accompanying text.

148. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225, 254 (1962).

149. See *supra* notes 60-85 and accompanying text.



patterned after an Elvis Presley concert featuring an Elvis imitator.<sup>150</sup> Similarly, in *Groucho Marx Productions, Inc. v. Day & Night Co.*, heirs of the Marx brothers obtained summary judgment based on a right of publicity claim against producers of a play featuring Marx brothers mimics.<sup>151</sup> In each case, plaintiffs argued that they had inherited the publicity rights in question and therefore had a right to prohibit the unauthorized imitations in the defendant's performances.

Although both courts held that the defendants' failure to obtain permission to perform the imitations violated plaintiffs' inherited publicity rights, their rationales differed. In *Russen*, the theatrical imitation's lack of creativity and information proved fatal to defendant's assertion of the first amendment defense.<sup>152</sup> Conversely, the imitative play in *Groucho Marx Productions* was characterized as a misappropriation of the Marx brothers characters for commercial purposes and consequently outside the scope of first amendment protection.<sup>153</sup>

Many popular figures have created distinctive characters that have become recognizable through identifiable and concrete mannerisms, expressions, and even styles of dress. In *Lombardo v. Doyle, Dane & Bernbach, Inc.*, the court extended the right of publicity to protect band leader Guy Lombardo against imitation of his public performance.<sup>154</sup> Defendants had attempted unsuccessfully to obtain the services of Guy Lombardo and his orchestra for a television commercial designed to promote the sale of a new car.

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150. 513 F. Supp. 1339, 1382 (D.N.J. 1981). See *supra* notes 60-73 and accompanying text.

151. 523 F. Supp. 485, 486, 494 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982). See *supra* notes 74-85 and accompanying text.

152. 513 F. Supp. at 1359.

153. 523 F. Supp. at 493-94. Had the defendant in either *Russen* or *Groucho Marx Productions* succeeded in convincing the court that its work qualified as a legal parody, the first amendment defense would have prevailed, irrespective of commercial motives.

Imitation is primarily an attempt to duplicate the characteristics of another, either to delude the public or to compensate for an absence of creative effort. Parody, on the other hand, makes use of another's attributes as part of a larger presentation, in which a considerable amount of the content is provided by the parodist. For this reason, imitation is generally actionable, while parody tends to be protected.

Felcher & Rubin, *supra* note 9, at 1605 (footnotes omitted).

154. 58 A.D.2d 620, 396 N.Y.S.2d 661 (N.Y. App. Div. 1977) (mem.).

Essentially, the theme of the commercial involved a band performing at a New Year's Eve party celebrating both the arrival of the New Year and the sale of a special edition of a car model. Undeterred by Lombardo's refusal to appear in the commercial, defendants produced and televised an advertisement that mimicked the gestures, musical beat and choice of music that the public identified with Lombardo.<sup>155</sup> Lombardo argued that the defendants' use of his style of performance constituted breach of contract, invaded his privacy, and diluted the value of his own endorsements. In turn, the court held that defendants' conduct created a valid cause of action and that the exploitation of the public personality developed by Lombardo could justify relief in the proper circumstances.<sup>156</sup>

In two separate decisions, defendants were restrained from using the names, likenesses, characters and characterizations of deceased comedians Stan Laurel and Oliver Hardy. The first case, *Price v. Hal Roach Studios, Inc.*, involved a dispute over the names and likenesses of Laurel and Hardy.<sup>157</sup> Suit was brought by the comedians' widows, the sole beneficiaries of their husbands' estates, and by an entrepreneur who had been granted the exclusive right to use and merchandise in perpetuity the "names, likenesses, characters and characterizations of Laurel and Hardy."<sup>158</sup> Notwithstanding plaintiff's exclusive license, defendants claimed to hold the world-wide merchandising rights to the deceased comedians' names and likenesses. Further, defendants alleged that plaintiffs' interests were in the public domain and argued that "articles not protected by federal law from [imitation] . . . are not otherwise protectible" under the state right of publicity.<sup>159</sup> The United States District Court for the Southern District of New York was not persuaded, however, and entered a permanent injunction against defendants' misuse of plaintiffs' property right. The court also assessed actual damages against defendants for "appropriation of Laurel and Hardy rights."<sup>160</sup>

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155. *Id.* at 622-23, 396 N.Y.S.2d at 664-65.

156. *Id.* at 620-22, 396 N.Y.S.2d at 663-64.

157. 400 F. Supp. 836 (S.D.N.Y. 1975).

158. *Id.* at 838.

159. *Id.* at 843-46.

160. *Id.* at 847.

In a subsequent suit, the same plaintiffs sought to enjoin the production and distribution of a television series entitled "Stan 'n Ollie," in which two actors portrayed the deceased comedians.<sup>161</sup> Invoking *res judicata*, the United States District Court for the Southern District of New York held that Laurel and Hardy possessed a property right of publicity that had survived their deaths and was validly inherited by and assigned to the plaintiffs. Accordingly, the district court granted the injunction.<sup>162</sup> Quoting the language of the injunction issued in *Price*, the court restrained the defendants from using the Laurel and Hardy names, likenesses, characters, and characterizations "(including, without limitation, use of their photographs or other reproductions of their physical likenesses, *the impersonation of their physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their voices*) for advertising or commercial purposes."<sup>163</sup>

The Laurel and Hardy decisions are consistent with an earlier case in which a California District Court of Appeal enjoined the unauthorized imitation of the distinctive character creation "Charlie Chaplin."<sup>164</sup> The court emphasized the concreteness that plaintiff Chaplin's creative expression had given to the character. Because imitating Chaplin would deceive the public and work a fraud on both the public and Chaplin, the court issued the injunction.<sup>165</sup>

Not all publicity right plaintiffs alleging an infringement of their unique style have been successful, however. In *Sinatra v. Goodyear Tire and Rubber Co.*, Nancy Sinatra sued an advertiser whose television commercials used the music and revised the lyrics of a song she had popularized, "These Boots Are Made For Walking."<sup>166</sup> Apparently forgetting the substantial celebrity of her infamous father, Sinatra alleged that she was best known by her connection with the song. Specifically, she charged that the woman who appeared in the commercials imitated her dress, mannerisms, and style of

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161. *Price v. Worldvision Enter., Inc.*, 455 F. Supp. 252, 255 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979).

162. *Id.* at 256-58.

163. *Id.* at 256 (quoting *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975)) (emphasis in original).

164. *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

165. *Id.* at 360-62, 269 P.2d at 545-46.

166. 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

delivery, and that this imitation deceived the public into believing that she had endorsed the product.<sup>167</sup> Although the defendants admitted that they had imitated Sinatra's style of performance, the United States Court of Appeals for the Ninth Circuit denied recovery, affirming the district court's conclusion that the public had not been misled into thinking that Sinatra had participated in the commercials.<sup>168</sup>

#### *D. Appropriation of Plaintiff's Performance*

Earlier, this Article observed that the only right of publicity action to date to reach the Supreme Court concerned the alleged appropriation of an artist's performance.<sup>169</sup> *Zacchini v. Scripps-Howard Broadcasting Co.* involved the broadcast during the evening news of an entire human cannonball act.<sup>170</sup> The Court held that the circus performer's right of publicity in his stunt was infringed notwithstanding defendant's assertion of a first amendment privilege. Obviously, defendant could have staged its own human cannonball act without infringing Zacchini's publicity right. However, the first amendment did not give defendant the right to appropriate Zacchini's "entire act."<sup>171</sup> To hold otherwise, according to the Court, would threaten Zacchini's livelihood by reducing his gate revenues to the extent that the curiosity of potential audience members was satisfied by the broadcast.<sup>172</sup>

The Court's decision in *Zacchini* is entirely consistent with the twin policies underlying the right of publicity. First, the Court recognized the value of promoting artistic endeavor when it noted that "the protection provides an economic incentive for [Zacchini] to make the investment required to produce a performance of interest to the public."<sup>173</sup> Second, the Court's unwillingness to allow defendant to reap the benefits of Zacchini's efforts is evident from its statement that "[n]o social purpose is served by having the de-

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167. *Id.* at 712.

168. *Id.* at 713, 718.

169. See *supra* notes 38-42 and accompanying text.

170. 433 U.S. 562 (1977).

171. *Id.* at 575-77.

172. *Id.* at 575-76.

173. *Id.* at 576.

fendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."<sup>174</sup>

Relative to countervailing first amendment rights, publicity rights are most powerful when asserted in performance cases, but this particular infringement is rare. A vast percentage of publicity actions involve disputes centered around the exclusive control over the performer's name and likeness, not the performer's act. Moreover, to the extent that a performance has been reduced to a tangible means of expression—for example, film or record—the sole remedy for infringement is provided by the federal copyright law.<sup>175</sup>

In sum, the unauthorized commercial use of a plaintiff's name or likeness is exploitative by nature and consequently merits little, if any, first amendment protection. Regardless of whether the particular appropriation is for endorsement purposes or to promote the sale of memorabilia, informative and cultural values are likely to be nonexistent. Conversely, when plaintiff alleges an infringement of his unique style or characterization, defendant's appropriation may have first amendment value if the defendant has added a creative component to the original work or performance. Parody, spoof, and satire consistently have received the protection of the first amendment.<sup>176</sup> However, although imitation may be the most sincere form of flattery, in its purest form it is almost certain to lead to liability. Finally, appropriation of a performer's entire act, if not already reduced to a tangible medium of expression, will certainly be actionable under *Zacchini*.

## V. JUDICIAL ANALYSIS AND ANALOGIES

The decisions examined thus far compel the conclusion that the scope of the right of publicity presents a fertile topic for heated debate and vigorous litigation. In short, it is a subject about which reasonable people can, and frequently do, disagree. Ever since the

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174. *Id.* (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326-331 (1966)).

175. 17 U.S.C. §§ 501-510 (1982).

176. *See* Estate of Presley v. Russen, 413 F. Supp. 1339, 1359 (D.N.J. 1981); Netterville, *supra* note 148.

publicity right first received judicial recognition in 1953,<sup>177</sup> courts and commentators have struggled to resolve questions concerning the transferability, inheritability, and duration of the publicity right.<sup>178</sup> Given stare decisis and the law's reverence for precedent, it is not surprising that legal scholars have adopted analogies from other areas of the law to sharpen their analyses.

In *Haelan*, the seminal publicity right decision, the United States Court of Appeals for the Second Circuit appeared to regard as an arbitrary exercise in classification the plaintiff's attempt to characterize the right of publicity as a property right.<sup>179</sup> According to Judge Frank, "[w]hether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."<sup>180</sup>

Contrary to Judge Frank's assertion, the particular analogy selected is far from "immaterial" and frequently is outcome determinative. Perhaps this is best illustrated by *Lugosi v. Universal Pictures*,<sup>181</sup> a decision that generated four separate opinions, each relying on a different analogy. In 1931, Bela Lugosi portrayed Count Dracula in a motion picture produced by Universal Pictures. As part of his employment contract, Lugosi granted Universal the right to exploit "any and all of the artist's acts, poses, plays and appearances of any and all kinds" in connection with the film and "to use and give publicity to the artist's name and likeness, photographic or otherwise . . . in connection with the advertising and exploitation" of the film.<sup>182</sup> In 1960, four years after Lugosi's death, Universal began to license the use of the Count Dracula character as portrayed by Lugosi in the sale of various articles of

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177. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). See *supra* notes 16-23 and accompanying text. Although Warren and Brandeis are credited with giving birth to the publicity right in 1890, its judicial baptism did not occur until *Haelan Laboratories*, some 63 years later. See Warren & Brandeis, *supra* note 9.

178. See *supra* notes 60-85 and accompanying text.

179. 202 F.2d at 868.

180. *Id.*

181. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

182. 172 U.S.P.Q. (BNA) 541, 542 (Cal. Super. Ct. 1972), *rev'd*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

memorabilia.<sup>183</sup> Lugosi's widow and surviving son brought suit against Universal for the appropriation of Lugosi's likeness. In addition to injunctive relief, plaintiffs sought recovery of Universal's profits on the ground that the studio exploited without authorization a valuable property right belonging to Lugosi's estate.<sup>184</sup>

The trial court found that although Lugosi authorized Universal to publicize his appearance in connection with its promotion of the film, Lugosi did not grant commercial merchandising rights to Universal. Independent of the common law right of privacy, the court found that Lugosi had a protectable property interest in the commercial use of his appearance as Count Dracula.<sup>185</sup>

The Supreme Court of California rejected the trial court's property right characterization as immaterial and instead characterized the right as a valuable right embraced by the law of privacy.<sup>186</sup> Although the majority ultimately endorsed the choice of the privacy right analogy, a concurring and a dissenting opinion characterized the right of publicity as an employer-owned product of employment<sup>187</sup> and a proprietary right similar to copyright,<sup>188</sup> respectively. Each analogy suggested has different legal consequences and these are examined briefly below.

#### A. *Property Right*

The trial court in *Lugosi* recognized that the right of publicity is intended to protect the individual from the unauthorized appropriation of the commercial value of his name or likeness.<sup>189</sup> Because publicity right plaintiffs frequently allege an impairment of their ability to sell the right to use their names or likenesses, a property right analogy has a certain appeal. Two consequences necessarily flow from the property right analogy. First, the publicity right, like

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183. *Id.* See *supra* note 134 and accompanying text.

184. 172 U.S.P.Q. (BNA) at 542.

185. *Id.* at 548-49, 551.

186. 25 Cal. 3d at 819, 603 P.2d at 428, 160 Cal. Rptr. at 326.

187. *Id.* at 826-27, 603 P.2d at 433, 160 Cal. Rptr. at 331 (Mosk, J., concurring).

188. *Id.* at 849-51, 603 P.2d at 448-49, 160 Cal. Rptr. at 346-47 (Bird, C.J., dissenting).

189. 172 U.S.P.Q. (BNA) at 548-49.

other property rights, is assignable.<sup>190</sup> Second, like all other personal property, the right of publicity is descendible.<sup>191</sup>

### B. *Privacy Right*

The Supreme Court of California in *Lugosi* identified the publicity right as being a derivative of the privacy right.<sup>192</sup> The interest protected therefore was perceived to be the individual's right to be left alone.<sup>193</sup> This holding runs contrary to the position taken by the court in *Haelan Laboratories* that the right of publicity is distinct from the right of privacy.<sup>194</sup> Under a privacy analogy, publicity right plaintiffs suffer in three ways. First, because public figures and celebrities voluntarily expose themselves to public scrutiny, they may be held to have waived whatever privacy interests they might otherwise enjoy. Second, because the privacy right protects a person's emotional or dignitary interests, it is a personal right and cannot be transferred. A privacy analogy thus would appear to prevent a celebrity from assigning his publicity rights during his lifetime. Finally, because privacy rights perish with their possessor, a privacy rationale would not encompass the descendibility of publicity rights.

### C. *Employer-Owned Product of Employment*

Judge Mosk's concurring opinion in *Lugosi* suggested that Lugosi enjoyed no rights whatsoever in his portrayal of Count Dracula. Because Lugosi's portrayal of the character was pursuant to a contract with Universal Studios, Judge Mosk believed that the fruits of Lugosi's labor properly belonged to his employer.<sup>195</sup> "Merely playing a role . . . creates no inheritable property right in

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190. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953), was the first decision to recognize the right of publicity as distinct from a nonassignable privacy right.

191. See, e.g., *Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1985) (right of publicity survives death of individual); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981) (decendent's estate had standing to bring suit based on right of publicity).

192. 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

193. *Id.*

194. 202 F.2d at 868.

195. 25 Cal. 3d at 826, 603 P.2d at 433, 160 Cal. Rptr. at 331 (Mosk, J., concurring).



an actor. . . ."<sup>196</sup> Judge Mosk conceded, however, that an actor's likeness as a fictional character might be protectable when that actor was also the character's creator.<sup>197</sup> Under this rationale, characters created by the Marx brothers and Laurel and Hardy presumably would be protected.<sup>198</sup>

#### *D. Proprietary Right Similar to Copyright*

In a dissenting opinion joined by Justices Tobriner and Manuel, Chief Justice Bird analogized to copyright law and concluded that the publicity right is descendible. According to Chief Justice Bird, "the right of publicity recognizes an interest in intangible property similar in many respects to creations protected by copyright law, [therefore] that body of law is instructive."<sup>199</sup> Borrowing from the Copyright Act of 1976,<sup>200</sup> Bird would limit the duration of the publicity right to the performer's life plus fifty years.<sup>201</sup> Under the copyright analogy, a compromise of conflicting interests is achieved. Although the publicity rights eventually would fall into the public domain, the heirs of the creator of these would have their interests protected for a limited but definite period of time.

### VI. THE COPYRIGHT ANALOGY AND THE RIGHT OF PUBLICITY

Certain similarities between the policies underlying the right of publicity and copyright suggest that copyright is the proper analogy for defining the scope of publicity rights. First, by permitting individuals to benefit from their personal efforts, both provide incentive for creative endeavor.<sup>202</sup> Second, both the right of publicity and copyright frequently involve a substantial possibility of conflict with the first amendment.<sup>203</sup>

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196. *Id.* at 825, 603 P.2d at 432, 160 Cal. Rptr. at 330.

197. *Id.*

198. *Id.* at 825-26, 603 P.2d at 432, 160 Cal. Rptr. at 330.

199. *Id.* at 847, 603 P.2d at 446, 160 Cal. Rptr. at 344 (citation omitted).

200. 17 U.S.C. §§ 101-118 (1982).

201. 25 Cal. 3d at 847, 603 P.2d at 446, 160 Cal. Rptr. at 344.

202. U.S. CONST. art. I, § 8, cl. 8 (copyright power intended "to promote the Progress of Science and useful Arts").

203. See generally Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1129 (1980).

In *Zacchini*, the Supreme Court explicitly emphasized the copyright analogy when it protected plaintiff's publicity rights from the unauthorized appropriation of his performance.<sup>204</sup> According to the Court, "the State's interest [in recognizing a right of publicity] 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>205</sup> Significantly, the Court quoted the following language from a frequently cited copyright case: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"<sup>206</sup> Apparently, lurking beneath the surface in both publicity right and copyright decisions is the notion that "protection exists primarily not to benefit the artist, but rather to benefit the public by offering artists economic incentives to create."<sup>207</sup> The goal of encouraging creative endeavor is especially compelling in cases involving performance rights, like *Zacchini*,<sup>208</sup> or theatrical imitations, like *Russen* and *Groucho Marx Productions*.<sup>209</sup> However, the goal loses much of its validity in commercial infringement cases involving advertisements or memorabilia. Even though a performer's name and likeness can prove to be commercially valuable assets, the prospect of fame and stardom has provided ample incentive for creative endeavor long before memorabilia became big business.

Copyright confers on an author a limited power of monopoly. In essence, copyright protection allows an author to prevent illicit uses of his work, thereby securing a financial return on his creative investment. The inherent conflict between copyright law and the first amendment is obvious. We live in a society that values the free flow of information and ideas. Nonetheless, a grant of copyright by definition restricts this exchange. The Copyright Act<sup>210</sup> at-

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204. 433 U.S. 562, 573 (1977).

205. *Id.*

206. *Id.* at 576 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

207. Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1192 (1978) (footnote omitted).

208. See *supra* notes 169-76 and accompanying text.

209. See *supra* notes 149-53 and accompanying text.

210. 17 U.S.C. §§ 101-118 (1982).

tempts to strike a balance between encouraging individual creative endeavor and promoting public availability of creative works. The framers of the Constitution recognized that granting authors control over their creations provides an incentive for continuing creativity. On the other hand, society can benefit from creative endeavor only to the extent the creations are made publicly available. The Constitution therefore mandates that copyright protection may exist only "for limited Times."<sup>211</sup> The Copyright Act obeys this command by providing that the duration of copyright represents a compromise between encouraging new artistic expression and providing public access to this expression.<sup>212</sup>

If copyright grants exclusive rights in creative works, the right of publicity grants exclusive rights in personal attributes. Just as copyright gives authors a monopoly in their creative expressions, the right of publicity grants individuals a monopoly in their personae.<sup>213</sup> As a creature of state law, however, the right of publicity varies greatly in nature and scope from state to state. According to one commentator:

In some states, the right is not recognized. In other states, the right has been judicially created, while in still others the right is of statutory origin. There is also no uniformity among the states in terms of the durational limits accorded the right of publicity. In some states, courts have determined that the right terminates upon the death of the individual depicted. In other states, the right is inheritable if the individual depicted exercised the right during his lifetime. In some jurisdictions, the right is survivable regardless of whether or not it was exercised.<sup>214</sup>

By utilizing the copyright analogy in right of publicity decisions, courts can inject uniformity and predictability into an area of law marred by inconsistent and often conflicting determinations among sister states. Because copyright is of constitutional origin, judges can draw upon an extremely well-developed body of copyright case law to assist their resolution of publicity right issues. Moreover,

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211. U.S. CONST. art. 1, § 8, cl. 8.

212. 17 U.S.C. § 106.

213. See generally Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L.J. 1567, 1572 (1983).

214. *Id.* at 1572-73 (footnotes omitted).

because the policies underlying both the right of publicity and copyright are similar, the copyright analogy is especially apt.

Finally, the copyright analogy furnishes two mechanisms that can help minimize the conflict between the first amendment interest in the free exchange of information and ideas and the right of publicity interest in securing for an individual control over the use of his personal attributes. First, by engrafting copyright's durational limitation onto the publicity right, a balance is struck between an individual's control over his persona and society's access to information and ideas. During his lifetime, the creator of publicity rights would exercise complete and exclusive control over the use of his personal attributes subject to his right to transfer his publicity rights for valuable consideration or by gift. Following the creator's death, his heirs or assignees would control the monopoly for an additional fifty years, after which the rights would enter the public domain.

The copyright analogy suggests a second mechanism for minimizing first amendment conflicts. The copyright doctrine of fair use permits infringements of otherwise protected works when necessary to further "the greater public interest in the development of art, science and industry."<sup>215</sup> An examination of the fair use doctrine counsels its application in modified form to right of publicity actions.

#### A. *Fair Use and the Right of Publicity*

Fair use has been described as a judicially constructed "rule of reason" designed to ameliorate the hardships imposed on future authors by the exclusivity of copyright protection.<sup>216</sup> In essence, fair use establishes a privilege to use copyrighted material in a reasonable manner without the copyright owner's consent.<sup>217</sup> According to one commentator:

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215. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

216. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5678-79.

217. Note, *Harper & Row, Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests*, 79 NW. U.L. REV. 587, 610 (1984).

The fair use doctrine thus recognizes that the development of the arts and sciences may best be achieved by allowing for the free dissemination of certain information affecting areas of universal concern, such as history and biography. By providing a limited privilege . . . to use an author's work, fair use [accommodates] competing copyright and first amendment interests so as to preserve a marketplace of ideas.<sup>218</sup>

Parody is a fertile field for fair use litigation. In *Elsmere Music, Inc. v. National Broadcasting Co.*,<sup>219</sup> the United States Court of Appeals for the Second Circuit described the relationship between parody and the original as follows: "A parody is entitled . . . to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."<sup>220</sup> Under this standard, an artist is allowed considerable leeway in building on the original.<sup>221</sup> Nonetheless, when parody moves beyond conjuring up an original toward wholesale appropriation, liability ensues. For example, in *Groucho Marx Productions, Inc. v. Day & Night Co.*,<sup>222</sup> the district court identified as an unfair use the defendants' attempt to duplicate as faithfully as possible the performances of the Marx brothers.<sup>223</sup>

Although fair use has existed as a defense to infringement since 1841, its elevation to statutory status is a relatively recent development.<sup>224</sup> Section 107 of the Copyright Act of 1976 provides in pertinent part that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright."<sup>225</sup> The statute directs the courts to consider four factors in determining whether the use made of a work in any particular case is a fair use:

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218. *Id.* at 611.

219. 623 F.2d 252 (2d Cir. 1980) (per curiam).

220. *Id.* at 253 n.1.

221. *See id.*

222. 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

223. *Id.* at 493.

224. 17 U.S.C. § 107 (1982).

225. *Id.*

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.<sup>226</sup>

These four factors are nonexclusive and are offered merely as guidelines.

As a practical matter, courts tend to employ a two-part analysis when resolving fair use issues. First, they look at whether the defendant's use of the protected work resulted in an identifiable economic harm to the plaintiff. Relevant considerations include whether the particular use is a viable substitute for the copyright holder's actual or potential commercial exploitation of the original and whether the challenged use is considered socially valuable. Second, courts consider whether the defendant has appropriated such a substantial portion of plaintiff's creation that the use is presumptively unfair. Under this prong, extensive and verbatim appropriations are actionable even absent proof of an identifiable economic harm to plaintiff.

Using section 107 of the Copyright Act as a model, a fair use defense can be fashioned for application to right of publicity cases. An analysis of each of the four fair use factors as modified follows.

### *1. The Purpose and Character of the Use*

In applying this factor, courts should focus on the specific infringement alleged.<sup>227</sup> Where plaintiff's name or likeness has been appropriated for endorsement purposes or to promote the sale of memorabilia, there exists little potential for conflict with the first amendment. With respect to unauthorized endorsements, the deceptive nature of this practice effectively removes it from the minimal sphere of protection presently afforded commercial speech. Nonetheless, in some situations the unauthorized use of a name or likeness in an advertisement may not be deceptive and might qual-

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<sup>226</sup> *Id.*

<sup>227</sup> See *supra* notes 114-33 and accompanying text.

ify as a fair use. For example, in *Namath v. Sports Illustrated*, quarterback Joe Namath complained that his likeness had been appropriated when an advertisement for *Sports Illustrated* displayed an issue with Namath's picture on the cover.<sup>228</sup> Because the use of Namath's likeness was only incidental and raised no implication of endorsement, the court properly denied recovery.<sup>229</sup>

If defendant has written a book or produced a movie about the plaintiff, use of the plaintiff's name or likeness in a nondeceptive fashion as part of an advertisement for the book or movie likewise would qualify as a fair use. This situation should be distinguished from the mere exploitation of plaintiff's publicity value for advertisement purposes, which the court struck down as unfair competition and an invasion of the right of publicity in *Hogan v. A.S. Barnes & Co.*<sup>230</sup>

When plaintiff alleges an appropriation of his unique style or characterizations, first amendment interests are more significant, and courts should resort to the two-part analysis suggested above. If the court determines that defendant's use is so substantial as to be unreasonable or is causing plaintiff identifiable economic harm, the use should be deemed unfair. When the alleged infringement involves the appropriation of plaintiff's right of performance, the use is presumptively unfair. Because such a use directly reduces the market for plaintiff's work, it places a strong economic disincentive in the path of plaintiff's creative endeavor.

## 2. *Nature of the Publicity Right Invaded*

Application of this factor assumes that the nature or origin of the publicity right invaded may determine the scope of protection granted. For example, when the plaintiff is involved in politics and public service, uses of his personal attributes that are connected to his political status should be considered presumptively fair in light of compelling first amendment considerations. This principle is

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228. 48 A.D.2d 487, 371 N.Y.S.2d 10 (N.Y. App. Div. 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

229. *Id.*

230. 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957). *See supra* notes 122-25 and accompanying text.

best illustrated by *Paulsen v. Personality Posters, Inc.*, discussed earlier.<sup>231</sup>

Under this analysis, plaintiff's portrayal of a fictional character created by a third party presumably would merit less protection than plaintiff's portrayal of a character developed by and associated with him. When plaintiff's persona is entirely of his own creation, his publicity rights deserve more protection under both the preventing unjust enrichment and the promoting creative endeavor rationales. The publicity rights of Laurel and Hardy and the Marx brothers thus would occupy a position of priority relative to those of Bela Lugosi.

Finally, to the extent that plaintiff's acquisition of fame is unrelated to his creative or intellectual efforts, his assertion of publicity rights is undermined. In these instances, protecting plaintiff's publicity rights would not serve to encourage creative endeavor. If plaintiff's personal attributes become commercially valuable as a result of his antisocial behavior, his ability to sue for infringement of his publicity rights should be restricted. For example, one can imagine no public benefit being served by allowing Gary Gilmore's estate to sue to enjoin the sale of memorial T-shirts bearing his likeness superimposed on a bullseye.

### 3. *Amount and Substantiality of the Use*

Simply stated, this factor requires an evaluation of the extent to which the defendant has appropriated the personal attributes of the plaintiff. Wholesale imitation and verbatim mimicry are to be distinguished from parody, spoof, and satire. For example, the appropriation of plaintiff's entire act without permission should be actionable per se. *Zacchini* furnishes a clear example of this.<sup>232</sup> "The Big El Show" likewise would trigger liability under this factor.<sup>233</sup> Conversely, mere imitation of a person's speech, mannerisms, or dress should not be actionable without proof of deception. Under this rationale, the decisions in *Sinatra v. Goodyear Tire*

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231. See *supra* notes 87-91 and accompanying text.

232. See *supra* notes 38-42 and accompanying text.

233. See *supra* notes 60-73 and accompanying text.



and Rubber Co.<sup>234</sup> and *Lombardo v. Doyle, Dane & Bernbach*<sup>235</sup> would be upheld.

#### 4. *Effect of the Use on the Market for Plaintiff's Publicity Rights*

This factor contemplates an analysis of the impact of defendant's use on the present *or potential* market for plaintiff's publicity rights. Plaintiff therefore should not be required to demonstrate that he has established such a market via personal exploitation during his lifetime. As the United States Court of Appeals for the Eleventh Circuit noted in *Martin Luther King, Jr., Center for Social Change v. American Heritage Products, Inc.*, "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life."<sup>236</sup>

The economic consequences of a publicity right infringement are most severe when defendant appropriates plaintiff's entire act. As the Supreme Court observed in *Zacchini*, defendant's broadcast of Zacchini's human cannonball act "pose[d] a substantial threat to the economic value of that performance."<sup>237</sup> However, this is not to suggest that plaintiffs must demonstrate an actual threat to their livelihood in order to defeat a finding of fair use. Given sufficient popularity, certain plaintiffs should be able to demonstrate grave financial harm from lower level infringements such as advertising and merchandising appropriations. Plaintiffs should not be required to prove that they derive substantial revenues from authorized endorsements or sales of memorabilia. Proof of dilution of the potential market for their publicity rights in these areas should be sufficient.

### VII. CONCLUSION

Analysis of first amendment issues in right of publicity actions is sharpened by breaking the publicity right down into its four com-

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234. See *supra* notes 166-68 and accompanying text.

235. See *supra* notes 154-56 and accompanying text.

236. 694 F.2d 674, 683 (11th Cir. 1983).

237. 433 U.S. 562, 575 (1977).

ponent infringements. The particular infringement alleged will dictate the appropriate level of first amendment scrutiny.

Because the right of publicity is a creature of state law, its nature and scope vary considerably from state to state. At present, publicity right decisions suffer from a lack of uniformity and consistency. By drawing on copyright principles, courts can inject a measure of predictability into this area. In addition, the copyright analogy ameliorates the inherent conflict between the first amendment and the right of publicity. First, engrafting copyright's durational limitation onto the publicity right strikes a balance between society's interest in access to information and ideas and the individual's control over the use of his personal attributes. Second, application of a modified fair use defense in right of publicity decisions can help achieve a balance between first amendment free speech interests and the policies underlying the right of publicity; namely, promoting creative endeavor and preventing unjust enrichment.