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NOTE

PERFORMER'S RIGHT OF PUBLICITY: A LIMITATION ON NEWS PRIVILEGE

THE RIGHT OF PUBLICITY PROTECTS an individual's right to control the use of a personal asset such as his name, likeness, or performance, which has acquired pecuniary value through the investment of time, effort, or money.¹ Although this right has gained increasing recognition since the 1950's, it has often been confused with the right of privacy, out of which the right of publicity evolved.² Some courts in particular have erred by applying the news privilege, which protects the individual from invasions of privacy, to invasions of the right of publicity.³

In *Zacchini v. Scripps-Howard Broadcasting Co.*,⁴ the United States Supreme Court held that the news media is not privileged under the first and fourteenth amendments to broadcast a performer's entire act without his consent. Scripps-Howard videotaped, without consent, Zacchini's fifteen-second "human cannonball" act at a county fair in Ohio and broadcast the entire performance on its evening news program. The Supreme Court held that under these facts the Constitution did not prevent a state from providing a damage remedy for invasion of the right of publicity, a cause of action which was recognized by the Court as a new basis for tort liability distinct from the right of privacy. The Court refused to apply the *New York Times Co. v. Sullivan*⁵ constitutional privilege, however, limiting the applicability of that privilege to cases involving defamation or non-defamatory falsehood.

Although the *Zacchini* decision may be considered by some to be a move toward censorship of the media, the case was correctly decided. The Court's analysis, however, was incomplete. The Court adopted the Ohio Supreme Court's characterization of the right of publicity as one form of the right of privacy,⁶ yet treated violation of the right of publicity as a separate tort, and publicity itself as a form of intellectual property akin to copyright. It is the position of this Note that the right of publicity is entirely separate from the right of privacy, and that clarification of this distinction will alleviate the confusion which has long muddled this area of tort law.

¹ Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203, 216 (1954).

² See note 53 *infra* and accompanying text.

³ See notes 142-47 *infra* and accompanying text.

⁴ 433 U.S. 562 (1977).

⁵ 376 U.S. 254 (1964). The essence of the *New York Times* privilege is that a public official may not be awarded damages for a defamatory news report concerning his official functions unless it is shown that the story was motivated by actual malice or was published in reckless disregard of its truth or falsity.

⁶ The Ohio Supreme Court held: "The performer of a 'human cannonball' act has a right to the publicity value of its performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy." *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976) (syllabus at ¶ 2). The United States Supreme Court relied, as did the Ohio court, on Dean Prosser's analysis of the right of privacy. Prosser divides the right of privacy into four forms, one of which is appropriation. Both the Ohio and United States Supreme Courts also referred to this form as the right of publicity. For a further discussion of Prosser's analysis, see notes 56-50 *infra* and accompanying text.

The *Zacchini* majority also failed to answer completely the dissenters' criticism that the holding drew a boundary on the news privilege in violation of the first amendment. Despite its lack of clarity in analysis, however, the *Zacchini* decision does not leave the press unable to fulfill its vital informing function. This Note will demonstrate that a clear distinction between publicity and privacy would enable the press to discern those situations in which it is privileged to report on newsworthy activities of celebrities,⁷ and that the press may define its privilege to entertainers' actual performances by referring to the traditional bounds of fair comment.⁸

I. THE ZACCHINI OPINION

Petitioner, Hugo Zacchini, is a professional entertainer who performs a fifteen-second "human cannonball" act in which he is shot from a cannon into a net some 200 feet away.⁹ The act was performed regularly at the Geauga County Fair in Burton, Ohio in August and September of 1972. The performances took place on the fair ground in a fenced-in area surrounded by grandstands, but no separate admission was charged to see the act. A freelance reporter for respondent's Cleveland television station, WEWS, attempted to film one of petitioner's performances, but was asked not to do so by Zacchini, who had noticed the reporter's camera.¹⁰ The reporter did not film the act that day, but returned the next day and videotaped the entire act on the instructions of the producer of respondent's Eyewitness News program. This fifteen-second film clip was shown on the 11:00 news that night, together with favorable commentary by the newscaster.¹¹

Petitioner brought an action for damages, alleging that respondent "showed and commercialized the film of his act without his consent," which was "an unlawful appropriation of plaintiff's professional property."¹² The Supreme Court of Ohio, in affirming the trial court's summary judgment for respondent, found that petitioner's complaint stated a cause of action for invasion of his right of publicity, but that respondent was nevertheless privileged to broadcast the film.¹³

⁷ See notes 146-147 *infra* and accompanying text.

⁸ See notes 148-52 *infra* and accompanying text.

⁹ Petitioner claimed that the act was originated by his father and has been performed exclusively by his family for 50 years. Brief for Petitioner at 3, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

¹⁰ News reporters and cameramen were admitted to the fair without charge by the fair's promoters in order to stimulate publicity for the fair. The promoters placed no restrictions on news coverage of petitioner's act or any other attraction at the fair. Brief for Respondent at 2-3, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

¹¹ The script of the commentary read:

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

Appendix to Brief for Petitioner at 12, 433 U.S. 562 (1977) (emphasis in original).

¹² Appendix to Brief for Respondent at 4-5.

¹³ *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976). The trial court had granted summary judgment to defendant Scripps-Howard on the ground that the broadcast of the plaintiff's act was constitutionally privileged. *Zacchini v. Scripps-Howard Broadcasting Co.*, 1976 WL 101826 (C.P. Ct. 11th Cir. Geauga County April 29, 1974). The Ohio

A. The Majority: Protection for Entertainer's Performance

Justice White, writing for the majority in the United States Supreme Court, stated the issue as "whether the first and fourteenth amendments immunized respondent from damages for its alleged infringement of petitioner's state law 'right of publicity.'"¹⁴ The Court reversed the Supreme Court of Ohio, holding that respondent was not privileged to broadcast the film.¹⁵

Because the right of publicity arises under state law, the Court followed the Ohio Supreme Court's formulation of the tort. The Ohio court had held that the news media is privileged to make news reports on matters of public interest which would otherwise be protected by the right of publicity, absent an intent to injure, or to appropriate that right for some non-privileged private use.¹⁶ The Ohio court also held, and the Supreme Court majority agreed, that this use or benefit need not be commercial.¹⁷ The right of publicity in Ohio Court of Appeals reversed the summary judgment, holding that Zacchini should prevail on the theories of conversion and invasion of common-law copyright, despite the fact that neither theory has been briefed or argued by the parties. One judge, concurring in the result only, wrote a separate opinion based on the theory of appropriation of the common law right of publicity. *Zacchini v. Scripps-Howard Broadcasting Co.*, No. 33713 (Ohio Ct. App. July 10, 1975). The Ohio Supreme Court, in reversing the court of appeals and affirming the trial court, rejected the common law copyright and conversion theories as inapplicable to this case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 226-28, 351 N.E.2d 454, 456-57 (1976). A writ of certiorari was then granted by the United States Supreme Court. 429 U.S. 1037 (1977).

¹⁴ 433 U.S. at 565. The Court began its opinion by explaining its grounds for taking jurisdiction in the case. Respondent argued that the Court lacked jurisdiction stating that the Ohio Supreme Court decision rested on an adequate and independent state ground. Brief for Respondent at 9-13. The Court acknowledged that petitioner's complaint was based on state tort law and that the right of publicity is a right created by state law. The Court also pointed out that the Ohio court's opinion failed to identify the source of the privilege which it found respondent to have. Neither the Ohio constitution nor the first amendment of the United States Constitution was cited by the Ohio Supreme Court. Justice White determined, however, that the Ohio opinion rested solely on federal grounds, placing principal reliance on the fact that the Ohio opinion cited first amendment cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967). 433 U.S. at 566-67.

Justice Stevens, in his dissenting opinion, also found the basis of the Ohio Supreme Court's holding to be ambiguous. Although he felt the opinion could be read as resting entirely on federal constitutional grounds, he thought it more likely that the Ohio court's finding of a privilege was a limitation on the common law tort, rather than a federal constitutional right. Stevens suggested remanding the case to the Ohio Supreme Court for clarification of its holding. 433 U.S. at 583.

¹⁵ The decision was 5-3-1. The majority included Justices White, Burger, Blackmun, Rehnquist, and Stewart. Those dissenting were Justices Powell, Brennan, and Marshall. Justice Stevens wrote a separate dissent on jurisdictional grounds only. See note 14 *supra*.

¹⁶ *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 235, 351 N.E.2d 454, 461 (1976). The Ohio Supreme Court based its finding of a press privilege on the *New York Times* rule, which holds the media liable on a showing of intent or recklessness. See text accompanying note 107 *infra*. However, the Ohio Supreme Court declined to decide whether the press could be liable for invasion of the right of publicity on a showing of recklessness. The Ohio court's holding requires a showing of "actual intent." 47 Ohio St. 2d at 235, 351 N.E.2d at 461. The Supreme Court also limited its holding to a situation involving actual intent, noting that "[r]espondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film." 433 U.S. at 578.

The dissent implied that petitioner was a public figure within the meaning of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that a negligence standard might therefore be sufficient to find respondent liable. See note 49 *infra*.

¹⁷ 47 Ohio St. 2d at 229-30, 351 N.E.2d at 458. The Supreme Court decided that the television station was not privileged to broadcast petitioner's act even though the broadcast occurred on a regular news program, as opposed to a commercial program. The dissent would have required a showing of commercial intent in order to find liability. See note 90 *infra*.

gives an individual "personal control over commercial display and exploitation of his personality and the exercise of his talents."¹⁸ This right is a valuable benefit attained through a performer's talents and efforts, and is not lost merely by performing before the public.¹⁹ The Ohio court held that the right of publicity is synonymous with the interest protected by the appropriation form of the right of privacy, and identified plaintiff's claim as the invasion of his privacy by appropriation.²⁰ The Supreme Court accepted this classification of publicity as one of the forms of privacy.²¹

The Supreme Court noted that Zacchini did not claim that his performance could not be reported at all by the press. Both the majority and dissent assumed that petitioner's human cannonball act was a newsworthy event.²² Petitioner's objection was to the taking of his professional property, which the Court characterized as essentially a pecuniary claim. Entertainment can be news, and a news report that does not appropriate an entire performance could be privileged under the *Zacchini* standard.²³ The Court narrowly limited its refusal to extend the constitutional press privilege to cases involving the use of a performer's *entire* act without his consent, and did not intend its holding to apply necessarily to all possible invasions of privacy by appropriation, such as unauthorized use of a plaintiff's picture for advertising.²⁴

Justice White wrote that the Ohio Supreme Court's finding of a first amendment privilege was based upon an overly-broad reading of *Time, Inc. v. Hill*.²⁵ In *Time*, the petitioner brought an action against Life Magazine for invasion of privacy. In its review of a new play which was based loosely on an incident involving petitioner and his family, the publication gave the false impression that the play portrayed the incident as it actually occurred. The Supreme Court applied the *New York Times* standard to *Time*, which was a privacy case, and held that the opening of a new play linked to an actual incident was a matter of public interest which the press was privileged to report, absent a showing that the report was knowingly false or was published in reckless disregard of the truth. *Time*, the Court explained in *Zacchini*, does not support a privilege to broadcast a performer's entire act without his consent, because *Time* was intended to apply only to the false light type of invasion of privacy, a tort distinct from invasion of the right of publicity.²⁶ By

¹⁸ 47 Ohio St. 2d at 231, 351 N.E.2d at 459.

¹⁹ 433 U.S. at 569-70. See note 99 *infra* and accompanying text.

²⁰ 47 Ohio St. 2d at 226, 351 N.E.2d at 456.

²¹ See note 6 *supra* and accompanying text.

²² 433 U.S. at 569, 582.

²³ The Court's holding was limited to a situation in which, as in *Zacchini*, an entire act for which the performer ordinarily is paid is shown without permission. The Court did not state whether showing part of a performance on a news program would be privileged. The Court implied that the privilege of fair comment is applicable to the right of publicity, stating that newsworthy facts about a performance can be reported by the news media. 433 U.S. at 574-75. Under the privilege of fair comment the press is generally allowed to use in its reports excerpts from the work being commented upon. See notes 148-52 *infra* and accompanying text.

²⁴ 433 U.S. at 573 n.10. The dissent also limited its opinion to the facts of this case. *Id.* at 579 (Powell, J. dissenting).

²⁵ 386 U.S. 374 (1967).

²⁶ *Time* did not explicitly limit its holding to the false light type of invasion of privacy, but the

explicitly limiting the holding of *Time* to one form of the right of privacy, the Court indicated that it never intended the constitutional privilege to be applied either to the other three forms of the right of privacy, or to other torts. This ruling clarified the applicability of *Time*, which had been left in some doubt after *Gertz v. Robert Welch, Inc.*²⁷ and *Time, Inc. v. Firestone*.²⁸ The narrowness of the Court's holding in *Zacchini* was to be expected, given its caution in *Time* against too broad an application of the *New York Times* standard.²⁹

The Court found no support in cases decided subsequent to *Time* for the application of a constitutional privilege to the right of publicity. *Rosenbloom v. Metromedia, Inc.*,³⁰ *Gertz*, and *Firestone* all involved defamation, as did *New York Times*.³¹ The defamation cases and *Time* also involved news reports of "events," particularly those involving public officials and public figures, which the majority distinguished from reports presenting an entire act for which the performer ordinarily receives compensation.

First amendment press rights, stated the Court, are not abridged by the protection of a performer's right to publicity. Justice White compared the individual and state interests protected by the right of publicity with those protected by the federal copyright and patent laws. Since the first amendment does not prohibit the grant of statutory protection to creators of works of art and other types of intellectual property,³² neither should it present the protection of entire performances against unauthorized use. Continuing with his copyright analogy, Justice White

Zacchini Court found implicit support for its narrow reading of *Time* in the fact that the *Time* opinion cited Prosser's four-part analysis of the right of privacy, which distinguishes false light from the other three forms. See notes 56-60 *infra* and accompanying text. Compare *Time, Inc. v. Hill*, 385 U.S. 374, 381, 383 n.7, 384-85 n.9 (1967), with *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 (1977).

For a discussion of the distinctions between the right of privacy and the right of publicity, see notes 54-99 *infra* and accompanying text.

²⁷ 418 U.S. 323 (1974). For the facts of this case, see note 123 *infra*.

²⁸ 424 U.S. 448 (1976). See text accompanying notes 121-26 *infra*.

In its comments on the Second Restatement of Torts section on right of privacy, which was officially adopted in 1976, the American Law Institute questioned the constitutionality of holding the news media liable for damages for truthful reporting of private facts about the plaintiff. RESTATEMENT (SECOND) OF TORTS § 652D, Special Note on Relation of Section 652D to the First Amendment to the Constitution (1977). The Institute also noted that the Supreme Court has not yet indicated whether the negligence standard applied to defamation of a private individual in *Gertz* also applies to false light invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652E, Comment d (1977).

²⁹ In *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967), the Court warned against "blind application" of the *New York Times* rule to situations other than libel actions by public officials, without a fresh determination in each case that the rationale for the rule supports its application to the new set of facts.

³⁰ 403 U.S. 29 (1971). Plaintiff, a distributor of nudist magazines, was referred to by a radio station's news broadcast as a "girlie-book peddler" engaged in the "smut literature racket" during his arrest and trial for obscenity. After his acquittal, Rosenbloom sued the radio station for libel. The Supreme Court upheld the jury verdict holding that the *New York Times* actual malice standard applies to libel of a private individual who is engaged in "matters of public or general concern." 403 U.S. at 44.

³¹ The Ohio Supreme Court majority in *Zacchini* was criticized by the dissenting justice for failing to consider *Gertz* and *Firestone*. 47 Ohio St. 2d 224, 236-44, 351 N.E.2d 455, 462-66 (1976) (Celebrezze, J., dissenting).

implied that the supremacy clause³³ would not prevent a state from recognizing a cause of action to restrict an entertainer's rights to his performance, just as the Constitution does not prevent states from protecting creations and inventions which fall outside the scope of the copyright and patent laws.³⁴

The effect of the *Zacchini* decision is still unclear because the Court left considerable freedom to the states in the application of its holding, as it did in *Gertz*. The Court held in *Gertz* that states may define for themselves the appropriate standard of liability for defamation of a private individual, so long as they do not impose liability without fault.³⁵ Any other standard, from negligence to intent, may be used. The *Zacchini* majority, stating that Ohio's damage remedy for invasion of privacy is not "a species of liability without fault contrary to the letter or spirit of *Gertz*,"³⁶ implied that other states may hold the news media liable for invasion of publicity on a showing of negligence or recklessness, even though the Ohio Supreme Court required a showing of actual intent. Expanding further upon the states' rights philosophy of *Gertz*, the *Zacchini* decision permits the states to fashion their own press privileges in privacy cases as a matter of state law, although the first and

³³ "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

³⁴ The Court held in *Goldstein v. California*, 412 U.S. 546 (1973) and *Kewanee Oil Corp. v. Bicon Corp.*, 416 U.S. 470 (1974), that states may provide a cause of action to protect creations and inventions that fall outside the scope of the federal copyright (*Goldstein*) and patent (*Kewanee*) laws. But see *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). These earlier cases that state laws which provide a cause of action for protection of non-patentable lamp designs clash with the objectives of the federal patent laws, and are violative of the supremacy cause. To add to the confusion, neither *Goldstein* nor *Kewanee* explicitly overruled *Sears* and *Compco*.

Section 301 of the new copyright law, which took effect on January 1, 1978, provides that the federal copyright laws will preempt all legal and equitable rights that are the equivalent of federal copyright. Section 2 of the former copyright law reserved to the states the power to protect so-called "common-law copyright," meaning the author's rights prior to publication of a copyrightable work. The revised statute allows states to provide statutory or common law protection only for non-copyrightable subject matter. 17 U.S.C. § 2 (1970), as amended by Copyright Act of 1976, Pub. L. No. 94-553, § 301, 90 Stat. 2541. State causes of action which will not be preempted include the right of publicity, the right of privacy, defamation, fraud, and trade secrets. H.R. REP. NO. 94-1476, 9th Cong., 2d Sess. 132 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5744-48.

A live performance such as *Zacchini's* is not copyrightable under either the former copyright law, 17 U.S.C. §§ 1-320 (1970), or the new law. See note 140 *infra* and accompanying text.

³⁵ 418 U.S. at 347.

³⁶ 433 U.S. at 578. In the *Zacchini* case there was no question of liability without fault because respondent had been given oral notice that petitioner objected to the filming of his act. The Court did not discuss whether holding a defendant liable for invasion of publicity where no notice had been given would constitute liability without fault. The Ohio Supreme Court speculated that a performer would abandon his right of publicity by failing to give reasonable notice to the public. 47 Ohio St. 2d at 232, 351 N.E.2d at 460. Other courts have taken the opposite view, holding that an entertainer does not lose rights in his performance merely by performing. Instead, these courts have found the objective character of the dissemination to the public and the performer's intent with regard to relinquishment of his rights to be the determining factors. E.g., *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 444, 194 A. 631, 636 (1937). See note 99 *infra* and accompanying text. Entertainers generally give notice to the public that unauthorized recording, filming, or broadcasting is prohibited by printing a written warning on tickets or programs. See *Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc.*, 165 Misc. 71, 300 N.Y.S. 159 (Sup. Ct. 1937).

fourteenth amendments do not require them to do so.³⁷ If states may define the scope of the tort, the Court reasoned, they may also define the scope of the privilege, so long as they rely clearly on state, rather than federal, guarantees of freedom of the press.

The Burger Court will probably continue to apply a strong federalist solution to conflicts between state tort laws and freedom of the press, whether the tort involved is invasion of publicity, invasion of privacy, or defamation. The media must certainly be held liable for torts committed during the course of news gathering,³⁸ but if some states choose to restrict the media to a far greater extent than others, the rights of multi-state broadcasters and newspapers will vary widely among the different states. Such Balkanization of freedom of the press would tend naturally to produce self-censorship in the news media.³⁹

B. *The Dissent: No Abridgement of Press Privilege*

The dissenters criticized the majority for failing to provide a clear and workable standard to guide the news media. Justice Powell, who wrote the majority opinion in *Gertz*, opposed the prohibition upon the broadcast of a performer's entire act without his consent. Powell wrote that the majority's quantitative test, based upon whether the entire act was taken, was an incorrect mode of analysis. The determination of when a performance actually begins and ends is one the dissent thought would be too difficult for news editors to make.⁴⁰ This argument is simplistic and unpersuasive, for an entire act may easily be characterized as anything the performer does for pay, from the time he initially appears before the public to the time he leaves and disappears from public view.

The test which Powell would apply to an invasion of privacy situation is whether the media's use of the performance was a subterfuge for private or commercial exploitation.⁴¹ Absent a strong showing of such exploitation, the dissent would hold that use of a film during "a routine portion of a regular news program" is protected by the first amendment.⁴² The dissent saw the threat of media self-censorship in the possibility of tort liability for an ordinary news report.⁴³ The effect of this reasoning would be to immunize the news media from liability for virtually every invasion of an individual's right of publicity. It is extremely difficult to prove commercial use in a news

³⁷ 433 U.S. at 578-79. The Court remanded the case to the Supreme Court of Ohio for reconsideration of the privilege issue solely as a matter of Ohio law.

³⁸ See note 113 *infra*.

³⁹ Cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Smith v. California*, 361 U.S. 147 (1959) (state laws and policies that tend to cause self-censorship violate the first amendment).

⁴⁰ 433 U.S. at 579 n.1. The dissent said it was likely that Zacchini's act had been preceded by some form of ceremonial fanfare; if it had been, then respondent had not appropriated the entire act.

⁴¹ 433 U.S. at 581. Justice Powell did not indicate what sort of private, non-commercial exploitation he had in mind. He did not consider use on a news program to be unlawful exploitation.

⁴² *Id.*

⁴³ 433 U.S. at 580. See note 38 *supra*.

context, since the fact that the news media are commercially sponsored and operated for profit has been held not to constitute commercial use.⁴⁴

Justice Powell distinguished the showing of Zacchini's act on a news program from unauthorized commercial broadcasts of sporting events and theatrical performances "where the broadcaster keeps the profits."⁴⁵ But this distinction makes no sense because Zacchini, like sports figures and actors, performs for profit. His property interest in his performance, which is violated by an unauthorized broadcast, is the same interest violated by unauthorized broadcasts of other types of performances.⁴⁶ Furthermore, there may no longer be a real difference between news and so-called commercial programming, for many news shows have become highly commercialized and entertainment-oriented.⁴⁷

Drawing upon his reasoning in *Gertz*, Justice Powell postulated that petitioner, having chosen to make his act newsworthy by performing in public, had waived his right to object to routine news coverage of the performance.⁴⁸ Powell contrasted Zacchini with plaintiffs in invasion of privacy actions, who generally seek to avoid public exposure. The *Zacchini* dissenters would apply an analysis based upon the status of the plaintiff as a public figure or private individual in both publicity and privacy cases, just as *Gertz* applied in a defamation action standards which differ with the status of the plaintiff.⁴⁹ But the *Gertz* concept of waiver of rights by a public figure

⁴⁴ "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (citations omitted). In order to find commercial use by the news media, courts require a showing that the thing appropriated was directly connected with advertising carried on the news broadcast. *E.g.*, *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Young v. That Was the Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969), *aff'd*, 423 F.2d 285 (6th Cir. 1970). See W. PROSSER, *LAW OF TORTS* § 117, at 806 (4th ed. 1971).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that the New York Times was privileged to publish defamatory falsehoods about a public official, even though the statements were made in an advertisement, because the ad was an "editorial advertisement" which communicated information of a political nature. 376 U.S. at 266.

⁴⁵ 433 U.S. at 580.

⁴⁶ See notes 73 & 81 *infra* and accompanying text.

⁴⁷ See notes 170-77 *infra* and accompanying text. Courts have utilized the news privilege rationale to deny recovery to plaintiffs whose publicity rights were appropriated for clearly commercial purposes. This has been so, for example, in cases arising under New York's privacy statute, which requires a showing of advertising or trade use by the defendant. See note 91 *infra*. In *Man v. Warner Bros.*, 317 F. Supp. 50 (S.D.N.Y. 1970), the use in the film "Woodstock" of plaintiff's short, impromptu performance onstage at the Woodstock Festival was held to be within the news privilege, even though the film was shown for profit in commercial theaters. *Accord*, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969) (privilege to publish and sell truthful biography of Howard Hughes); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (privilege to manufacture and sell posters of mock Presidential candidate who became newsworthy figure by his satirical candidacy).

⁴⁸ 433 U.S. at 582.

⁴⁹ In its constitutional privilege cases the Supreme Court has used "status" and "public interest" analysis to determine the applicability of the privilege in particular situations. Note, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L. Q. 543, 565-66 (1976) [hereinafter cited as HASTINGS].

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 57 (1967), the scope of the privilege was determined by the status of the plaintiff. The

should not be applied in publicity cases because the result is to deny protection to those performers and celebrities in the public eye who have acquired the greatest publicity value, and who are in need of the greatest protection.⁵⁰

II. RIGHT OF PUBLICITY AND RIGHT OF PRIVACY: TWO DISTINCT TORTS

The right of publicity evolved into a separate basis for tort liability out of necessity, because the older right of privacy proved inadequate to protect individuals from appropriation of their names, likenesses, and performances.⁵¹ Dean Prosser, and the Second Restatement of Torts which reflects Prosser's influence, describe the right of privacy as a complex of four torts which, although related in name, have nothing more in common than that each represents "an interference with the right of the Plaintiff 'to be let alone.'"⁵² Much confusion has been created when courts have attempted to apply Prosser's principles to an appropriation situation, as in *Zacchini*, for the result is an unsuccessful attempt to treat two separate and distinct torts as one.⁵³ The parameters of each tort will be clearly defined in this Note in order to end this confusion.

question of whether he was a public official or public figure was crucial. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the determinant for a plaintiff who was a private individual was whether or not he was involved in a matter of public interest. However, public interest analysis, especially as it was broadly applied in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42 (1971), was rejected by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, (1974), and in *Time, Inc. v. Firestone*, 424 U.S. 448, 454-56 (1976). See note 121 *infra*.

The *Rosenbloom* Court felt that the distinction between public and private persons was artificial in modern society. 403 U.S. at 41. *Gertz*, however, re-emphasized the importance of making the distinction between public and private individuals. The Court stated that the states have a greater interest in protecting private individuals from defamation than public officials and public figures, because public persons assume the risk of defamation by voluntarily placing themselves before the public. The *Gertz* Court also reasoned that private individuals have fewer opportunities to gain access to the media for rebuttal of a defamatory falsehood. 418 U.S. at 343-45. See *Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 298.

⁵⁰ See notes 95-99 *infra* and accompanying text. Status analysis should not be applied to the right of publicity because private individuals as well as celebrities have property rights in their names and likenesses. See note 90 *infra*.

⁵¹ *Nimmer, supra* note 1, at 203-04; E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 453 (1975).

⁵² W. PROSSER, LAW OF TORTS § 117, at 804 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652A, Comment b (1977). The Second Restatement of Torts went through several drafts of section 652 on invasion of privacy before adopting the current form in 1976. The Ohio Supreme Court relied on Tentative Draft No. 13, completed in 1967. The chief differences between Tentative Draft No. 13 and the final form are the addition to the final version of the requirement that an invasion of privacy must be unreasonable to be actionable, and the elimination in the final form of a separate subsection on news privilege. The 1976 formulation and the section would have applied the constitutional privilege to the public disclosure and false light forms of invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652F, Comment k (Tent. Draft No. 13, 1967). The 1977 revision applies the constitutional privilege only to actions based on false light. See note 28 *supra*. See also RESTATEMENT (SECOND) OF TORTS § 652 (Tent. Draft No. 20, 1975; Tent. Draft No. 22, 1976).

⁵³ See *Gordon, Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553, 554-55 (1960). In *Carson v. National Bank of Commerce*, 501 F.2d 1082 (8th Cir. 1974), television personality Johnny Carson sued under publicity theory for the unauthorized use of his name and photograph in an advertisement. The court equated the right to control the use of

A. *An Analysis of the Two Torts*

The right to privacy was first recognized following publication of a pioneering article by Samuel Warren and Louis Brandeis in 1890.⁵⁴ The right to privacy, as Warren and Brandeis formulated it, protects the individual's "right to be let alone," and provides a remedy for injury to the plaintiff's feelings caused by unwanted publicity about his private affairs. Warren and Brandeis derived this new right from the common-law property right of an individual in his personal letters or literary works, which provided a cause of action for their publication without his consent. Warren and Brandeis intended their new right to be broader than the earlier property right, however, labeling the new principle "the right to one's personality."⁵⁵

The most widely accepted modern explanation of the right of privacy is the Prosser–Restatement analysis of privacy as an amalgam of four torts:⁵⁶

1. Intrusion upon the plaintiff's physical solitude or into his private affairs;⁵⁷
2. Public disclosure of private facts about the plaintiff;⁵⁸
3. Publicity which places the plaintiff in a false light in the public eye;⁵⁹ and
4. Appropriation for the defendant's advantage of the plaintiff's name or likeness.⁶⁰

one's name and image with the right of privacy and denied recovery to Carson because Nebraska law does not recognize a right of privacy.

⁵⁴ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁵⁵ *Id.* at 205-07. The type of privacy interest Warren and Brandeis discussed is that which Prosser later called public disclosure of private facts. Warren and Brandeis were concerned with keeping the details of an individual's personal life or personal papers out of the press.

Prosser's four-part analysis of the right of privacy, described in notes 56-60 and accompanying text *infra*, has been criticized for being based upon a complete misunderstanding of the tort that Warren and Brandeis initiated. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

For an account of the development of the right of privacy up to the middle of this century, see Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384-88 (1960).

⁵⁶ Prosser, *supra* note 55; W. PROSSER, LAW OF TORTS § 117 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652A — 652I (1977).

The right of privacy has been analyzed in other ways as well. The interests protected by privacy are described differently in 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 9.6, at 681 (1956), and in Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932).

Perhaps the strongest critic of Prosser's analysis is Bloustein, who describes the right of privacy as a unitary tort which protects only one interest. That interest is human dignity, which remains the same regardless of the form the intrusion takes. This same interest in human dignity underlies the constitutional protection of privacy. Bloustein, *supra* note 55, *passim*.

⁵⁷ *E.g.*, Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976) (physician entered hospital room and made unauthorized photograph of his patient); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (harrassing telephone calls from bill collector).

⁵⁸ *E.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (magazine story about California surfers included accounts of one surfer's eccentric private acts, such as eating spiders); Sidis v. F-R Publishing Corp., 133 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (magazine article about private life of child prodigy who later sought to live in obscurity as an adult).

⁵⁹ *E.g.*, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) (newspaper story about aftereffects of bridge disaster falsely portrayed family of deceased victim as living in abject poverty); Time, Inc. v. Hill, 385 U.S. 374 (1967) (See text accompanying notes 25-26 *supra*).

⁶⁰ *E.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (insurance company published in Ohio newspaper revised plaintiff's name and photograph without his

The right of publicity was first recognized as a tort distinct from the right of privacy in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,⁶¹ an action brought under the New York privacy statute.⁶² Plaintiff had an exclusive contract with a baseball player for the use of his picture on "baseball cards" sold with its bubble gum. Defendant was alleged to have violated this exclusive license by making a similar agreement with the same baseball player. Defendant contended that the ballplayer's only interest in the publication of his picture was his "right of privacy," a personal and non-assignable right not to have his feelings hurt by such a publication.⁶³ The court disagreed with this contention:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right to the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . .

This right might be called a 'right of publicity.' For . . . 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 . . . [and] popularizing their countenances⁶⁴

The interests protected by the rights of privacy and publicity are quite different, as the *Zacchini* Court noted.⁶⁵ Intrusion protects the right of the plaintiff to physical isolation from others; public disclosure protects the interest in keeping facts of the plaintiff's reputation.⁶⁶ The state's interest in providing a cause of action for invasion of privacy is in the redress of plaintiff's mental distress resulting from the invasion of his privacy.⁶⁷ The

consent); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967) (unauthorized use of famous golfer's name and biographical data in game sold commercially).

Both the U.S. Supreme Court and the Ohio Supreme Court considered the right of publicity to be synonymous with the appropriation form of privacy in their *Zacchini* opinions. *Accord*, *Carson v. National Bank of Commerce*, 501 F.2d 1082 (8th Cir. 1974). Because it is the position of this Note that the right of publicity is a different tort from the right of privacy, appropriation will be discussed as the right of publicity.

The recently completed revision of the Second Restatement of Torts section 652 on invasion of privacy notes the distinction between appropriation and other forms of invasion of privacy, although appropriation remains classified as one form of privacy. After describing privacy as a complex of four distinct, though related wrongs, the drafters comment: "Even this nexus becomes tenuous in the case of the appropriation of name or likeness covered by § 652C, which appears rather to confer something analogous to a property right upon the individual." RESTATEMENT (SECOND) OF TORTS § 652A, Comment b (1977). By analogizing appropriation to a property right for which an exclusive license may be given, *id.* § 652C, Comment b., while at the same time describing privacy as a non-assignable personal right, *id.* § 652I, the Restatement drafters have set up an inconsistency in section 652 which can be resolved only by recognizing the right of publicity as a separate tort.

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

⁶² See note 91 *infra*.

⁶³ 202 F.2d at 868.

⁶⁴ *Id.*

⁶⁵ 433 U.S. at 573. The Court was referring only to the false light type of privacy in contrasting privacy with publicity.

⁶⁶ See generally Prosser, *supra* note 55.

⁶⁷ *Id.* at 392, 398, 400. One commentator has predicted that the entire tort of invasion of privacy may eventually become part of a larger tort of intentional infliction of mental suffering 11

right of publicity, in contrast, protects a purely pecuniary interest of the plaintiff — his right “to control and profit from the publicity values which he has created or purchased.”⁶⁸ A plaintiff may have a right of publicity as to his name,⁶⁹ likeness,⁷⁰ personal history,⁷¹ personality or style of performing,⁷² and his performance.⁷³ Providing a cause of action for invasion of the right of publicity, the Court stated, promotes the state’s interest in encouraging the creation of entertainment, much as the copyright and patent laws encourage other types of creativity by permitting the individual to reap financial rewards from his work. This interest, the Court noted, has little to do with salving hurt feelings or reputation, which can be protected by false light and defamation actions.⁷⁴

Another major distinction between privacy and publicity lies in the nature of the rights involved. The right of privacy is a personal right,⁷⁵ and only the individual whose privacy has been invaded may bring a cause of action.⁷⁶ The right to sue for invasion of privacy may not be inherited in the absence of statute.⁷⁷ The right of publicity, on the other hand, is a property right.⁷⁸

which would also include defamation and assault. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

A cause of action for invasion of privacy may be combined with a claim for emotional distress. See, e.g., *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff’d as modified*, 487 F.2d 986 (2d Cir. 1973).

⁶⁸ Nimmer, *supra* note 1, at 216.

Appropriation was distinguished from the other forms of privacy as involving a pecuniary injury rather than a mental one in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). But cf. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (privacy protects hurt feelings rather than pecuniary interest). See generally Gordon, *supra* note 53.

⁶⁹ E.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D.C. Minn. 1970); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969).

⁷⁰ E.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314 (C.P. Philadelphia County Pa. 1957).

⁷¹ E.g., *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc.2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff’d as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967). Both cases involved unauthorized use of biographical information about the plaintiffs in games sold commercially.

⁷² E.g., *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (film characters created by Laurel and Hardy); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 App. Div. 2d 620, 396 N.Y.S.2d 661 (Sup. Ct. 1977) (professional personality of Guy Lombardo as “Mr. New Year’s Eve”).

⁷³ E.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956); *Gieseking v. Urania Records, Inc.*, 17 Misc.2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956).

⁷⁴ 433 U.S. at 573. See note 68 *supra* and accompanying text.

⁷⁵ RESTATEMENT (SECOND) OF TORTS § 652I and Comments (1977); Prosser, *supra* note 55, at 408; Note, *The Right of Publicity — Protection For Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976). See *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. Cuyahoga County 1938).

⁷⁶ *Nelson v. Times*, 373 A.2d 1221 (Me. 1977).

⁷⁷ *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969), *aff’d*, 423 F.2d 265 (6th Cir. 1970).

A cause of action for invasion of the right of privacy has been created by statute in six states.

The Oklahoma, Virginia, and Utah statutes allow the cause of action for invasion of privacy to descend. See note 91 *infra*.

⁷⁸ *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D.C. Minn. 1970); *Hogan v. A. S. Barnes & Co.*, 114 U.S.P.Q. 314 (C.P. Philadelphia County Pa. 1957). See Nimmer, *supra* note 1; Gordon, *supra* note 53; E. KINTNER & J. LAHR, *supra* note 51, at 459.

Rights in intangible property are created by the investment of time, effort, skill and money.⁷⁹ As the owner of a property interest in his name, likeness, or performance, each individual may control its use by others for private or commercial benefit.⁸⁰ The right of a performer in his performance has long been recognized as a property right at common law.⁸¹ A right of publicity may be assigned in whole or in part.⁸² As a common-law property right, the right of publicity may be inherited upon the death of the person whose efforts created the publicity values, even in the absence of statute.⁸³ The Supreme

Even judges and commentators who classify appropriation as part of the right of privacy recognize that a property right is protected. *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973); RESTATEMENT (SECOND) OF TORTS § 652C, Comment a (1977); F. HARPER & F. JAMES, *supra* note 56, at § 9.5.

Contra, 1 A. HANSON, LIBEL AND RELATED TORTS § 247 (1969). Hanson recognizes the problem involved in attempting to treat a cause of action for appropriation which is a remedy for pecuniary loss, as part of an action for privacy, which is a remedy for hurt feelings, but his solution is to deny that appropriation protects a property right.

Bloustein, on the other hand, denies not only that the right of publicity is a property right, but that such a right exists at all. "The so-called 'right to publicity' is merely a name for the price for which some men can sell their right to maintain their privacy." Bloustein, *supra* note 55 at 989.

In *Miller v. Universal Pictures Co.*, 18 Misc. 2d 626, 188 N.Y.S. 2d 386 (Sup. Ct. 1959), *rev'd on other grounds*, 10 N.Y.2d 972, 224 N.Y.S.2d 662 (1961), Glenn Miller's widow was held to have a property right in the unique quality of her late husband's musical performances. But in *Miller v. Commissioner*, 299 F.2d 706 (2d Cir.), *cert. denied*, 370 U.S. 923 (1962), the Second Circuit held that the exclusive right to make a film about the late Glen Miller, which his widow sold to a film studio, was not a property right for tax purposes, and that the money she received for the sale of the right was thus ordinary income rather than capital gains.

⁷⁹ *Associated Press v. United States*, 326 U.S. 1, 34 (1945); *International News Serv. v. Associated Press*, 248 U.S. 215, 238 (1918). See Note, *Intellectual Property — Performer's Style*, 52 DEN. L.J. 561, 585 (1975); Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).

The performer's interest in his performance is a property right in intangible property. Brown defines intangible property as follows:

In its broader sense the word "property" includes all rights which are of value [M]any rights do not thus concern specific tangible things but consist of claims against third persons which, since they may be enforced by action, and, if the law permits, be assigned for a price, are of value and thus entitled to be termed property. . . .

R: BROWN, THE LAW OF PERSONAL PROPERTY § 1.7 (3d ed. 1975).

⁸⁰ *Nimmer, supra* note 1, at 216. The right to control the use others make of the commercial value of one's name or likeness is the essence of the right of publicity. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846-47 (S.D.N.Y. 1975); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970).

⁸¹ *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *modified on other grounds*, 81 F.2d 373 (1st Cir. 1936), *cert. denied*, 298 U.S. 670 (1936); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 165 Misc. 71, 300 N.Y.S. 159 (Sup. Ct. 1937). See also cases cited in note 73 *supra*.

⁸² *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). See Gordon, *supra* note 53 at 611.

⁸³ *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 App. Div. 2d 620, 396 N.Y.S.2d (1977); *Miller v. Universal Pictures Co.*, 18 Misc. 2d 626, 188 N.Y.S.2d 386 (Sup. Ct. 1959), *rev'd on other grounds*, 10 N.Y.2d 972, 224 N.Y.S.2d 662 (1961).

There are conflicting decisions on whether a cause of action for the right of publicity descends. In *Lugosi v. Universal Pictures*, 172 U.S.P.Q. 541 (Cal. Super. Ct. L.A. County 1972),

Court recognized that the right of publicity has much more in common with other forms of intellectual property, such as copyright and patent, than with the right of privacy.⁸⁴

Additional distinctions can be made between privacy and publicity. An invasion of privacy must be highly offensive to a reasonable person to be actionable,⁸⁵ so that a claim of invasion of privacy always involves hurt feelings and emotional distress on the part of the plaintiff. In contrast, offensiveness is not an element of a publicity action.⁸⁶ The right of publicity does not protect the plaintiff's hurt feelings because the basis of the complaint is proprietary rather than emotional.⁸⁷ Publicity is the very thing that most performers seek, so they are not ordinarily offended by receiving more. What such a plaintiff really wants, as the *Haelan* court pointed out, is to *control* the publicity he receives.⁸⁸

The measure of damages for an invasion of privacy is the harm done to the plaintiff, which may include compensation for the injury to his interest in

reversed a widely cited lower court decision that Bela Lugosi had a property right in the manner of his portrayal of Count Dracula and that this property right descended to his heirs. The appellate court refused to characterize the right to exploit one's name and likeness as either a property right or as a cause of action in tort. Regardless of what it is labeled, the court said the right is a personal one which does not descend, it must be exercised by the artist during his lifetime. 139 Cal. Rptr. at 38-40. In characterizing Lugosi's right of exploitation as a personal right, the court equated it with the appropriation form of invasion of privacy, which it considered to protect an assignable right, but not an inheritable one. *Id.* at 38, 40.

It seems inconsistent to treat the right of publicity as a property right for assignability purposes, but not for purposes of descent. In *Price*, the court took a view opposite to that in *Lugosi*. The *Price* court held that the right of publicity is a property right which is "clearly separable" from the right of privacy. 400 F. Supp. at 843. Unlike the right of privacy, the right of publicity does not terminate upon death, so that plaintiffs, the widows of Laurel and Hardy, could maintain an action for unauthorized commercial exploitation of the characters created by their late husbands. The court also stated that the decedents' rights of publicity descended even though Laurel and Hardy did not exercise these rights during their lifetimes. The court pointed out that the concept of waiver, whether by non-use or otherwise, is applicable only to the right of privacy, not to the right of publicity. *Id.* at 846.

The most recent case on this point is *Factors*, which followed the reasoning in *Price* and held that singer Elvis Presley's right of publicity was a property right which descended at his death to his assignees. The *Factors* court refused to follow the *Lugosi* decision because in 1977 that case was accepted for hearing by the California Supreme Court (docket no. LA-30824), a procedural step which renders the intermediate appellate opinion a nullity, having no force as either a judgment or as a statement of legal principle. *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 n. 4 (S.D.N.Y. 1977). The California Supreme Court may, however, consider the *Lugosi* opinion as a brief on the legal questions involved. See *Knouse v. Nimocks*, 8 Cal. 2d 482, 66 P.2d 438 (1937).

⁸⁴ 433 U.S. at 576.

It has been suggested that the future development of the right of publicity should be by analogy to copyright law because copyright and publicity are both intangible property rights. The use of "pure" privacy doctrine and defamation as models for the right of publicity, it is argued, has created "inapposite confusion." See 22 U.C.L.A. L. REV. 1103 (1975). But see Note, *The Right of Publicity*, *supra* note 75, at 548, which rejects the copyright analogy while still recognizing the right of publicity as a property right.

⁸⁵ RESTATEMENT (SECOND) OF TORTS § 652B, 652D, 652E (1977). An invasion of privacy must also be unreasonable to be actionable. *Id.*

⁸⁶ *Nimmer*, *supra* note 1, at 206-209. The requirement of offensiveness is not applied to appropriation even when appropriation is classified as part of the right of privacy. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

⁸⁷ *Nimmer*, *supra* note 1, at 206-09. See note 68 *supra* and accompanying text.

⁸⁸ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

privacy and for mental distress, as well as special and punitive damages.⁸⁹ In a publicity action damages are also measured by the harm to the plaintiff, but in addition there is usually unjust enrichment of the defendant, who has diverted profits from the plaintiff by using plaintiff's name, likeness, or performance for commercial or advertising purposes. Damages in a publicity action may therefore be measured either by the extent of unjust enrichment or non-pecuniary benefit to the defendant, or by the plaintiff's financial loss or impairment of his publicity values.⁹⁰ Courts and commentators disagree over whether the plaintiff in a right of publicity case must prove that the defendant appropriated his publicity rights for commercial purposes and thus was unjustly enriched.⁹¹ The better view, adopted by both the Ohio and

⁸⁹ E. KINTNER & J. LAHR, *supra* note 51, at 455; RESTATEMENT (SECOND) OF TORTS § 652H (1977); W. PROSSER, LAW OF TORTS § 117, at 815 (4th ed. 1971). For a fuller discussion of damages for invasion of privacy, see Nimmer, *supra* note 1, at 208-09.

⁹⁰ E. KINTNER & J. LAHR, *supra* note 51, at 459; Note, *The Right of Publicity*, *supra* note 75, at 533. See authorities cited in note 89 *supra*.

Factors to be considered in determining the amount of damages in a publicity case involving a professional performer include the fame of the plaintiff, the market value of his publicity rights (how much he could have or has assigned them for), and what share of plaintiff's profits has been diverted to the defendant by commercial exploitation. Gordon, *supra* note 53, at 611.

The *Zacchini* dissent took the position that misappropriation of publicity must involve commercial use by the defendant. The dissent implied that it would further require a plaintiff to prove that the defendant was unjustly enriched, in order to win damages. 433 U.S. at 580 n.2. (Powell, J., dissenting). The majority, while recognizing that an invasion of publicity generally involves unjust enrichment, *Id.* at 576 accepted a measure of damages based only on harm to the plaintiff. *Id.* at 575. The majority position represents the better view because the right of publicity can be invaded without commercial use and without unjust enrichment of the defendant. See notes 91-93 and accompanying text *infra*.

Opinions differ on whether ordinary persons who are not celebrities have a right of publicity. Under one view, everyone has a right of publicity, but the damages a person can claim for invasion of his right depend on the value of the publicity appropriated, which in turn depends upon the degree of fame of the plaintiff. Nimmer, *supra* note 1, at 217; Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L. J. 1123, 1129 (1953). Under the contrary view, everyone has a property interest in his name and likeness, but when a private individual sues for commercial appropriation of his name or picture, his injury is typically the mental one of embarrassment and hurt feelings. The measure of damages for non-celebrities should thus be limited to compensation for hurt feelings, while celebrities, whose publicity interest is purely proprietary, should be permitted to recover for unjust enrichment. Note, *The Right of Publicity*, *supra* note 75, at 532-33.

The best course of action would be to allow non-celebrity plaintiffs to offer proof of the pecuniary value, if any, of their names and likenesses under property theory, since the right of publicity is purely a property right, with no element of hurt feelings. If such plaintiffs also have a claim for hurt feelings, that claim should be clearly labeled as one for invasion of privacy or infliction of emotional distress.

In addition to damages, injunctive relief may also be available for appropriation of professional property. *E.g.*, *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D.C. Minn. 1970); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907). Where the right of publicity has been invaded by the news media, an injunction will be more difficult to obtain because an injunction raises the possibility of unconstitutional prior restraint on the press. D. DOBBS, REMEDIES § 7.4 (1973); A. HANSON, *supra* note 78 at 264. *Cf.* *Near v. Minnesota*, 283 U.S. 697 (1931) (injunction places unconstitutional prior restraint on press).

⁹¹ Six states have statutes which provide a cause of action for invasion of privacy, including appropriation. All require a showing that defendant used plaintiff's name or picture "for advertising purposes or for the purposes of trade." N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976); CAL. CIVIL CODE § 3344 (West Supp. 1977); MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1976); OKLA. STAT. ANN. tit. 21, § 839.1-839.3 (West Supp. 1976); UTAH CODE ANN. §§ 76-4-8 (1953); N.J. GEN. STAT. § 15:21 (1957). The Massachusetts statute provides a separate section, 1B,

United States Supreme Courts, is that commercial use is not a necessary element of a publicity action,⁹² although most appropriation cases do, in fact, involve commercial use of the plaintiff's identity for the defendant's profit. The loss of an individual's control over his property which results from an invasion of his right of publicity is the same regardless of the use defendant makes of that property.⁹³ For example, an orchestra's right of publicity may be violated by unauthorized taping of a concert for use in making and selling phonograph records for profit, or by unauthorized taping by a college professor of music for non-commercial use in the classroom, or by an unauthorized broadcast of the concert as part of a television news documentary.

In the *Zacchini* situation, the damage sustained by the petitioner could be measured by the amount he was paid by the fair promoters for one performance, since only one entire performance was appropriated. Damages could also be allowed for any detrimental effect on Zacchini's earnings following the broadcast, if he could prove that he was forced to accept a lower fee for later bookings. If Zacchini's agreement with the fair's promoters provided that he was to receive a percentage of the gate receipts, he would have to prove that attendance at his performances declined measurably as the result of the broadcast in order to recover damages. Unjust enrichment of the respondent television station would not be an element of damages in this case, for even if Zacchini argued that WEWS broadcast his act in order to increase its ratings,⁹⁴ the relationship between the broadcast and the station's profits would be entirely speculative.

One area in which the confusion between privacy and publicity has been most evident is in the question of applicability of the defense of waiver of the right.⁹⁵ Plaintiffs in privacy actions who are public figures have been held to have involuntarily waived their right of privacy with regard to those activities which bring them into the public eye, and even with regard to some aspects of

covering Prosser's three suggested types of privacy actions other than appropriation. Commercial use is not a prerequisite to an action under section 1B. MASS. GEN. LAWS ANN. ch. 214 § 1B (West Supp. 1976).

Both Prosser and the Restatement agree that commercial use is not required in an appropriation action in states without privacy statutes, where appropriation exists only as a part of the common law. Prosser, *Privacy*, *supra* note 55, at 405; RESTATEMENT (SECOND) OF TORTS § 652C, Comment b (1977).

Because the New York privacy statute requires commercial use, New York courts have generated misunderstanding by imposing the commercial use requirement on cases in which the claim was invasion of publicity rather than privacy. *E.g.*, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968). However, New York courts have distinguished the common law interests of performers in their public personalities and performances from the interests protected by the state's statutory right of privacy. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 App. Div. 2d 620, 396 N.Y.S.2d 661 (1977); *Gieseeking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956).

⁹² The dissent in the United States Supreme Court's opinion did require a showing of commercial use. See note 90 *supra*.

⁹³ See note 80 *supra* and accompanying text.

⁹⁴ Television stations do present items of entertainment on their news programs for the purpose of increasing their ratings and profits. See notes 170-76 *infra* and accompanying text.

⁹⁵ Consent is also a complete defense to claims of invasion of publicity and invasion of privacy. *Sherman v. C. Schmidt & Sons*, 216 Pa. 401 (E.D. Pa. 1963).

their private lives.⁹⁶ Some performers who sought redress under privacy theory for invasion of their publicity rights were denied recovery by courts which reasoned, as did the *Zacchini* dissent, that one who seeks publicity cannot complain when he gets more of the very thing he has been seeking.⁹⁷ But this reasoning makes the defense of waiver inapplicable to the right of publicity.⁹⁸ A performer cannot lose the right to prevent unauthorized use of his performance by the act of performing in public, for it is the act of performing itself which creates the publicity value inherent in the performance.⁹⁹ Similarly, the fact of being a celebrity or public figure should not cause an individual to lose the right to protect the publicity value of his name or likeness. That value is enhanced by public recognition of celebrity status, so that those with the greatest fame are most in need of legal protection of their publicity rights.

B. Confusion Remains After *Zacchini*

The *Zacchini* opinion does little to clarify the distinctions between publicity and privacy which have been identified in this Note and in other writings on the subject. Although the Supreme Court was bound to follow Ohio's formulation of the tort, the confusion may be perpetuated in future

⁹⁶ *E.g.*, *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1942). See generally Annot., 57 A.L.R.3d 16 (1974).

Harper and James wrote that the use of a waiver theory is misleading, and that the justification for invasion of privacy should be called "newsworthiness" instead. F. HARPER & F. JAMES, *supra* note 56, at 687-88. But Nimmer supports the distinction between waiver and news privilege. Nimmer, *supra* note 1, at 216-17. The distinction turns on whether a newsworthy individual has a right of privacy that he can waive or whether no right of privacy exists as to the celebrity. For the Restatement view, see note 146 *infra*.

⁹⁷ In *Gautier v. Pro-Football Inc.*, 278 App. Div. 431, 106 N.Y.S.2d 553, *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952), plaintiff was an animal trainer who performed his act during halftime of a televised professional football game. Plaintiff's act was also televised over his objection. Gautier was denied recovery under the New York privacy statute, in part because the court felt that he had waived his right of privacy. "[H]e did become a part of the spectacle as a whole by . . . voluntarily occupying the very center of attraction for several minutes. Under these circumstances, it can hardly be said that his right of privacy was invaded." 304 N.Y. at 306, 107 N.E.2d at 489. Judge Desmond, concurring, noted that plaintiff's real complaint was not that his privacy had been invaded, but that he was not paid for the televising of his performance. 304 N.Y. at 361-62, 107 N.E.2d at 489-90. See also *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1942); *Man v. Warner Bros.*, 317 F. Supp. 50 (S.D.N.Y. 1970); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. Cuyahoga County 1938).

⁹⁸ *Uhlender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D.C. Minn. 1970); Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1127-28 (1953); Nimmer, *supra* note 1, at 216.

⁹⁹ *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *modified on other grounds*, 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936) (radio announcer's property right in name and performances not lost by performing); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956) (boxer's right to control later television use of film of his fights); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950) (boxer's right to pecuniary value of film of his fight shown on television); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937) (orchestra's right in performances); *Miller v. Universal Pictures Co.*, 18 Misc. 2d 626, 188 N.Y.S.2d 386 (Sup. Ct. 1959), *rev'd on other grounds*, 10 N.Y.2d 972, 224 N.Y.S.2d 662 (1961) (right in the "Glenn Miller sound"); *Gieseking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956) (pianist's right in his performance).

A performer has the right to capitalize on the news value of his performance, and this right is not lost when the performer gives information about the performance to the press. *Pittsburgh Courier v. KATV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

cases by other state courts looking to the *Zacchini* opinion for guidance. The result of viewing publicity as a part of the right of privacy may be to deny recovery to future plaintiffs for pecuniary, non-emotional harms which are not protected by the right of privacy.¹⁰⁰

The Supreme Court realized that appropriation of an entertainer's entire performance is an invasion of his right of publicity, but did not fully explain why the taking of an entire performance must be distinguished from other types of appropriations. The difference is that individuals have dual privacy and publicity interests in their names, likenesses, and personal histories,¹⁰¹ but only a publicity interest in their performances. Public figures, as well as private individuals, may wish to keep their names, faces, and details of their lives from the public some of the time,¹⁰² yet they may also capitalize on the pecuniary value of their names and likenesses and may prevent their unauthorized use, such as in advertising.¹⁰³ An entertainer's performance, on the other hand, always occurs before the public and has no privacy aspect. There exists only the property right in performance, for performance is the entertainer's means of livelihood and the very thing which creates the publicity value in his name and likeness. The Supreme Court correctly found no privilege to appropriate a performance because performances do not embody any of the privacy interests which the press may be privileged to invade.

III. CONSTITUTIONAL PRIVILEGE AND THE RIGHT OF PUBLICITY

The Ohio Supreme Court applied the first amendment privilege first developed in *New York Times Co. v. Sullivan*¹⁰⁴ to the facts of the *Zacchini* case by reasoning erroneously that the right of publicity is part of the right of privacy. In *Time, Inc. v. Hill*,¹⁰⁵ the constitutional privilege had been applied to a conflict between freedom of the press and the right of privacy. The Ohio court concluded, therefore, that the privilege should also apply to conflicts between freedom of the press and the right of publicity. The United States Supreme Court found to the contrary that the media's first amendment rights are outweighed by the right of publicity when a performer's entire act has been appropriated.¹⁰⁶ The development of the constitutional privilege supports the Court in this conclusion, and suggests that the *Zacchini* decision does not deprive the news media of adequate rights to enable it to fulfill its informing function with respect to entertainer's performances and other activities.

¹⁰⁰ See authorities cited in note 51 *supra*.

¹⁰¹ Treece, *supra* note 79, at 652.

¹⁰² E.g., *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

¹⁰³ E.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907).

¹⁰⁴ 376 U.S. 254 (1964). See text accompanying note 107 *infra*.

¹⁰⁵ 385 U.S. 374 (1967).

¹⁰⁶ The Court's restriction on the rights of the news media was narrowly limited to situations involving appropriation of a performer's entire act. The Court indicated that its holding would not be applied to other instances of appropriation. 433 U.S. at 573 n.10.

A. Constitutional Privilege: Development and Rationale

The constitutional privilege was first announced in *New York Times Co. v. Sullivan*, a case involving defamation of a Montgomery, Alabama city official. The Supreme Court held that states may not impose liability on the press for the publication of defamatory statements concerning the official acts of a public official, except upon a showing that the statements were knowingly false or were made with reckless disregard of whether or not they were false.¹⁰⁷ This constitutional "actual malice" standard also applies to public figures other than government officials.¹⁰⁸ In *Gertz v. Robert Welch, Inc.*¹⁰⁹ the Court held that the states may impose any standard of liability other than strict liability for the publication of defamatory statements concerning a private individual.

The protection of the press against liability for false reports is the purpose of the constitutional privilege. The press privilege developed within the context of cases involving defamation and the false light type of invasion of privacy. Both defamation and false light involve publication of falsehoods about the plaintiff,¹¹⁰ while publicity, as the Court pointed out, does not. The Supreme Court has once before declined to extend the constitutional privilege to a news report containing true facts about the plaintiff, finding instead that the common law news reporting privilege was applicable.¹¹¹

The Supreme Court has often recognized the need for protecting false

¹⁰⁷ 376 U.S. at 279-80.

¹⁰⁸ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (decided with *Associated Press v. Walker*, 388 U.S. 130 (1967)). There was no clear majority in *Curtis*. The plurality opinion, signed by four justices, applied a gross negligence standard to the reporting process. *Id.* at 155. Five justices concurred as to the companion case, and the concurring opinion espoused the *New York Times* standard. *Id.* at 162-74. As a result, *Curtis* has been considered to stand for the proposition that the *New York Times* standard applies to public figures. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

¹⁰⁹ 418 U.S. 323 (1974).

¹¹⁰ Although both false light and defamation protect the plaintiff's interest in reputation, proof of false light invasion of privacy does not require a showing of actual injury to plaintiff's reputation, as does defamation. Proof of false light requires only a showing that the publication is offensive to a reasonable person of ordinary sensibilities. In addition, proof of actual falsity is not required in false light cases. *HASTINGS supra* note 49, at 590-91; *Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958 (1968). Because the required proof in a false light invasion of privacy action is less stringent than that required in defamation, many actions are now being brought under the false light theory rather than defamation. Wade predicts that the tort of invasion of privacy will eventually supplant defamation entirely. See *Wade, supra* note 67, at 1121.

In addition to protecting the plaintiff's interest in reputation, false light privacy and defamation actions share another characteristic. The Second Restatement finds that the absolute and conditional privileges applicable to defamation also excuse invasions of the right of privacy. *RESTATEMENT (SECOND) OF TORTS* § 652F, 652G (1977).

¹¹¹ In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1965) the plaintiff sued for invasion of privacy by public disclosure of a true fact, the name of his daughter who had been raped and murdered. Her name was obtained by a reporter from public court records during the trial of her murderer. The Court held the television station to be privileged on the basis of the common law privilege to report matters of public record connected with judicial proceedings. The *New York Times* constitutional privilege was not applied in *Cox* because the common law privilege was applicable.

The common law "actual malice" standard, rather than the *New York Times* standard, was applied in a false light invasion of privacy case, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). Although the Supreme Court did not discuss common law privileges in *Zacchini*, some are applicable to this type of situation. See notes 142-63 *infra* and accompanying text.

news reports attributable to negligence on the part of the reporter. For such cases the protection of first amendment rights has been found to outweigh the state interest in protecting plaintiffs from injury to their reputations and emotional distress.¹¹² The application of "definitional balancing" in constitutional privilege cases has resulted in the Court's formulation of the "actual malice" standard, a single rule applicable to all publications of falsehood, whether defamatory or non-defamatory in nature.¹¹³ The Court stated in *New York Times Co. v. Sullivan*,¹¹⁴ and re-emphasized later,¹¹⁵ that the rationale for protecting certain false and defamatory speech is to reinforce the central thrust of the first amendment, which is that free speech, especially criticism of the government and public officials, is essential to democracy.¹¹⁶ The Court explained in *New York Times*: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that

¹¹² 433 U.S. at 573.

¹¹³ Nimmer, *Times to Time*, *supra* note 110, at 942. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1971).

The Court has developed the constitutional privilege by balancing the plaintiff's interest in reputation or hurt feelings against free speech interests. Nimmer, *Times to Time*, *supra*, *passim*. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); *Time, Inc. v. Hill*, 385 U.S. 374, 399-400 (1967) (Black, J., concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 348.

In addition to definitional balancing, the Court has utilized "ad hoc" balancing in some first amendment cases. The assumption underlying definitional balancing is that most of the necessary balancing of competing interests took place during the drafting and adoption of the first amendment, and that the role of courts today is merely to define the limits of first amendment rights. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). The ad hoc balancing method, used in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 49-50 (1971), weights the competing interests on a case-by-case basis. Ad hoc balancing has been criticized for providing no guidelines to indicate in future situations that speech which is constitutionally protected. Consequently, critics add, the possibility exists of an unconstitutional chilling effect on some future speech because of doubt as to its status as privileged speech. Nimmer, *supra* at 939-41; Emerson, *supra*; Frantz, *supra*. The Supreme Court explicitly rejected the ad hoc balancing of *Rosenbloom* in cases decided later. *Gertz*, 418 U.S. at 343-44; *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

The use of balancing in constitutional privilege cases was opposed by Justices Black and Douglas, who expressed the "absolutist" view of the first amendment. They felt that no restraints whatsoever should be placed on the press, and that to allow states to enforce a cause of action for defamation or invasion of privacy is such a restraint. *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black & Douglas, J.J., concurring); *Time, Inc. v. Hill*, 385 U.S. at 398-402 (1967) (Black & Douglas, J.J., concurring).

The absolutist view has not received wide judicial support. Most courts recognize that first amendment rights are not absolute and must sometimes yield to competing interests. E.g., *Smith v. California*, 361 U.S. 147, 155 (1959); *Roth v. United States*, 354 U.S. 476, 484, 488 (1957). The news media are not constitutionally immune from liability for all torts committed during the course of news gathering. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Calella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973). Cf. *Associated Press v. United States*, 326 U.S. 1 (1945) (news media not constitutionally immune by virtue of the first amendment). The Constitution does not prevent courts from finding that the press is liable for invading privacy and property rights. *Breard v. Alexandria*, 341 U.S. 622, 642, 644-45 (1951); *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc. 2d 788, 345 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973).

¹¹⁴ 376 U.S. at 273-78.

¹¹⁵ E.g., *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

¹¹⁶ Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191.

it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹¹⁷ In the *New York Times* decision the Court explained its emphasis on criticism of government as the root of first amendment rights by discussing the Sedition Act of 1798. That law, which Congress allowed to expire after three years, imposed criminal penalties for publication of defamatory falsehoods about a public official.¹¹⁸ Although the Sedition Act was not declared unconstitutional during the time it was in effect, the *New York Times* Court felt that the law had impermissibly abridged the most fundamental first amendment rights. The *New York Times* rules gave ordinary citizens a privilege, similar to that enjoyed by public officials, to defame during the course of democratic debate, by requiring a showing of actual malice before one can be held for defamatory criticism of a public official.¹¹⁹

In *Time*, the *New York Times* rule was extended to cover erroneous statements made about private individuals during the course of "news-worthy" speech, which was broadly defined to include more than just political discussion.¹²⁰ The Court appeared to retreat from this broad definition, however, in *Gertz and Firestone*. These cases defined matters of public interest more narrowly.¹²¹ The *Gertz* opinion emphasized the importance of the distinction between public figures and private individuals in the applica-

¹¹⁷ 376 U.S. at 270-71.

¹¹⁸ 376 U.S. at 273-78. The Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596 (expired 1801), made it a crime, punishable by a \$2,000 fine and two years in prison to:

write, print, utter, or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or . . . the Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States

¹¹⁹ *Kalven*, *supra* note 116, at 203-204. In *Barr v. Matteo*, 360 U.S. 564 (1959), which was cited in *New York Times*, the Court held that public officials have an absolute privilege to utter defamatory falsehoods during the course of their official conduct because false speech is a necessary concomitant of free debate on public issues.

¹²⁰ The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials "Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting from *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). Thus, the avoidance of seditious libel, though it is the central purpose of the first amendment, is not its only purpose. *Kalven*, *supra* note 49, at 282.

¹²¹ For an explanation of status and public interest analysis used in the constitutional privilege cases, *see supra* note 49.

The Court held in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that the *New York Times* standard of knowing or reckless falsity may be applied to a libel action brought by a private individual for a defamatory falsehood published in a news report about his involvement in a matter of public or general interest. *Rosenbloom* defined matters of public interest broadly, as did *Time*, to include more than political discussion. "[T]he First Amendment extends to myriad matters of public interest." 403 U.S., at 42.

Gertz and Firestone not only rejected the use of newsworthiness as a guide for application of the actual malice standard, *see* note 49 *supra*, but those cases also criticized the broad scope *Rosenbloom* gave to the term "matter of public interest." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). *Gertz* described issues of public concern which are "relevant to self-government." 418 U.S. at 346.

tion of the constitutional privilege, noting that the state's interest in protecting false speech is greater with respect to certain plaintiffs.¹²² Public figures as defined in *Gertz* are of two kinds — those who are so powerful and influential that they “are deemed public figures for all purposes,” and more commonly, those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹²³ *Firestone* narrowly defined the types of issues whose participants become public figures. The divorce of Mrs. Firestone, a prominent socialite who had received publicity in the past, was held not to be the sort of public controversy referred to in *Gertz*, “even though the marital difficulties of extremely wealthy individuals may be of some interest to the reading public.”¹²⁴ The Court appeared in *Firestone* to return to its original emphasis on criticism of government as the central meaning of the first amendment by limiting the area of public debate within which falsehoods will be protected to “communications necessary to self-governance,”¹²⁵ rather than including mere entertainment or titillation of the public.¹²⁶

The *Zacchini* dissent impliedly found Hugo Zacchini to be a public figure within the *Gertz* test. Justice Powell cited *Gertz* in support of his statement that the petitioner had waived his right of publicity by seeking public attention.¹²⁷ It is not certain, however, whether Zacchini's act, which is pure entertainment, should be considered a matter of public interest in light of the *Firestone* decision. *Gertz* and *Firestone* required a public figure to have drawn public attention in connection with some issue of importance.¹²⁸ Although Zacchini conceded that his human cannonball act had some news value, he added that it could not be described as “one of the burning issues of our day.”¹²⁹

B. *Constitutional Privilege Not Applicable to Publicity*

An analysis of why the constitutional privilege is not applicable to the right

¹²² See note 49, *supra*.

¹²³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). The Court found that the plaintiff was not a public figure within this definition. Gertz was an attorney retained by the family of a murder victim to represent them in civil litigation against the murderer, who was a Chicago policeman. An article on the murder trial in defendant's magazine, which was an outlet for the views of the John Birch Society, falsely accused plaintiff of being a “communist-frontier.” The Court noted that none of the prospective jurors had heard of Gertz, although he was active in community affairs. The Court concluded, “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” *Id.* at 352.

¹²⁴ *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

¹²⁵ *Id.* at 471 (Brennan, J., dissenting).

¹²⁶ *Cf. HASTINGS, supra* note 49, at 570 (constitutional privilege may not be applicable to news stories merely intended to amuse).

¹²⁷ 433 U.S. at 582 (1977) (Powell, J., dissenting).

Entertainers have traditionally been considered public figures under common law tort rules because they ordinarily have some fame and notoriety, and because they voluntarily place themselves before the public. Stevens, *Performing Artists as “Public Figures”: The Implications of Gertz v. Robert Welch*, 6 PERFORMING ARTS REV. 3, 7 (1975).

¹²⁸ See notes 123 & 124 *supra* and accompanying text.

¹²⁹ Petitioner's Brief for Certiorari at 20. *Cf. Stevens, supra* note 127, at 9-10 (stating that the narrow *Gertz* definition of matters of public interest may exclude performers and performances).

of publicity must go beyond a mere showing that the *New York Times* type of balancing cannot be applied where no falsehood has been reported. As the *Zacchini* majority realized, an entirely new balance must be struck, for the interests which compete with first amendment rights in publicity cases are much different from those involved in defamation and false light invasion of privacy cases. False light and publicity actions differ in their impact on first amendment rights, stated the Court, because "[i]n 'false light' cases the only way to protect the plaintiff involved is to attempt to minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing."¹³⁰ The competing interests balanced by the Court in *Zacchini* were the state's interest in protecting the performer's economic stake in his performance and the interests of the news media and the public in free dissemination of information.¹³¹ Protecting the performer, the Court reasoned, rewards and encourages the investment of time, talent, and expense in the creation of entertainment. No social purpose would be served by allowing a defendant to enrich himself unjustly by appropriating an entire performance. In order for an act to have economic value sufficient to enable a performer to continue to earn a living, the performer must maintain the "right of exclusive control over the publicity given to his performance; if the public can see the act for free on television, they will be less willing to pay to see it at the fair."¹³²

In comparing the rights protected by the right of publicity and by copyright, the Court noted that balancing of similar interests has also justified some limitation on first amendment rights as against copyright ownership.¹³³ The purpose of the copyright and patent laws is "to promote the progress of science and useful arts"¹³⁴ so as to benefit the public. An additional objective is to provide a financial reward by granting a limited statutory monopoly to the creator of a copyrightable work or a patentable invention.¹³⁵ Like the right of publicity, copyright and patent rights are property rights.¹³⁶ As such,

¹³⁰ 433 U.S. at 573.

¹³¹ 433 U.S. at 576, 578.

¹³² 433 U.S. at 575. The Court hypothesized that the televising of *Zacchini's* act may have increased its value by stimulating more people to come to see him perform, in which case he would not have been damaged and could not have recovered. If the analogy with copyright law is followed, however, the very use of *Zacchini's* act without his consent, regardless of its effect on the act's value, caused injury to his interest in sole control over the publicity given to the act, and should entitle him to recover damages. See note 162 *infra*.

¹³³ 433 U.S. at 575.

¹³⁴ U.S. CONST. art. I, § 8, cl. 8 (the "copyright clause"). See *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939) (purpose of copyright laws is to encourage production of literary works); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (purpose of patent laws is to encourage invention). For a fuller discussion of the *Sears* case, see note 34 *supra* and accompanying text.

¹³⁵ *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

A third reason for the granting of a limited monopoly under the copyright laws is to protect the creator's interest in privacy by giving him the right to choose whether or not to publish his work. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180, 1186, (1970).

¹³⁶ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478, 497 (1974); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 487 (9th Cir. 1937).

the owner has the right to control the sale or use of his work and may grant an exclusive license for its reproduction.¹³⁷ Although the copyright laws allow an author to limit dissemination of his work, this limitation does not abridge first amendment rights because the granting of a limited exclusive license is deemed necessary to stimulate creative activity, which ultimately benefits society.¹³⁸ One court explained, "[W]e fail to see as any protected first amendment right a privilege to usurp the benefits of the creative and artistic talent, technical skills, and investment necessary to produce a . . . performance."¹³⁹ Even though a celebrity's name, likeness, or live performance probably is not copyrightable,¹⁴⁰ the creative effort and investment which produce publicity values are also entitled to protection against being "freely plundered under the banner of the first amendment."¹⁴¹

C. *Reconciling the First Amendment and Right of Publicity*

Preventing the news media from appropriating publicity values during the course of news reporting does not short-change the public in its access to information. As in the case with copyright, there is an increased likelihood of creation of a greater number and wider variety of performances for the public's enjoyment when performers are protected. In addition, the news media may continue to work within the traditional common law news

¹³⁷ Goldstein v. California, 412 U.S. 546, 555 (1973).

Likewise, the owner of a copyright or patent may prevent others from using the protected work or invention. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) (patent); Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484, 487 (9th Cir. 1937) (copyright).

¹³⁸ Although granting authors and creators the right to limit dissemination of their works does abridge free speech to some extent, there is no real conflict between the copyright clause and the first amendment. The protection provided by the copyright clause represents a balance between the creator's rights in his work and the public's first amendment right to have access to information. Nimmer, *supra* note 135, Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43 (1971). First amendment rights do "not include the wholesale appropriation of another's literary, artistic and musical works. In the balance must be weighed . . . the need to protect those of ability who justifiably seek compensation for their ingenuity and labor." Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 383 (D. Conn. 1972).

Copyright protects the expression of an idea, rather than the idea itself. Mazer v. Stein, 347 U.S. 201, 217 (1954); Musto v. Meyer, 434 F. Supp. 32, 34-35 (S.D.N.Y. 1977). The expression of an idea is the particular selection and arrangement of the idea used by a creator, or the specific form of the expression. 1 M. NIMMER, NIMMER ON COPYRIGHT § 9.222 (rev. ed. 1976). Nimmer explains that the widely-recognized idea/expression dichotomy in copyright law indicates the balance that exists between copyright and the first amendment, since an individual is free to express his own ideas so long as he does not copy the expressions of others. Nimmer, *supra* note 135, at 1189-92. An individual may independently create a work identical to a copyrighted work without being liable for infringement. Mazer v. Stein, 347 U.S. 201, 218 (1954). See generally Pub. L. No. 94-553, § 102(b), 90 Stat. 2545 (1976) (effective January 1, 1978).

¹³⁹ United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974).

¹⁴⁰ The copyright laws protect only the "writings" of an author. Pub. L. No. 94-553, § 102(a), 90 Stat. 2541 (1976) (effective January 1, 1978) (amending 17 U.S.C. § 4 (1970)). The term writings has been construed to mean that a copyrightable work must be in some tangible form, unlike a live performance. 1 M. NIMMER, NIMMER ON COPYRIGHT § 9.222 at 28.16 n. 172 (rev. ed. 1976). The requirement of fixation in tangible form which was retained under the new copyright law was intended to subject performances to protection only under state law. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 52 (1976).

privilege and privilege of fair comment in reporting on the public activities and performances of entertainers.

The press has always been privileged at common law to publish news reports on matters of public interest, even though such a report may invade matters otherwise considered to be private.¹⁴² This privilege protects truthful reports,¹⁴³ and is buttressed by the *New York Times* privilege which protects only false reports. The reporting privilege is extremely broad because the courts have felt constrained by the first amendment to allow the press to decide for itself what is a matter of public interest.¹⁴⁴ As a result, news has been defined to include items of educational interest and of pure entertainment, in addition to the usual reporting on government and public officials, crime, and current events.¹⁴⁵

While the news reporting privilege permits the press to invade an individual's right of privacy, it should not be allowed to permit invasion of the right of

¹⁴² In a leading case, *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), plaintiff was a well-known child prodigy who sought to live in obscurity in his adult life. He sued for invasion of privacy when a magazine published a story about his former achievements and the details of his present life. The court held that his life story remained newsworthy and that the magazine was privileged to print the story. *Accord*, *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); *Johnson v. Scripps Publishing Co.*, 18 Ohio Op. 372 (C.P. Cuyahoga County 1940). See *Prosser*, *supra* note 55, at 410-15; *Warren & Brandeis*, *supra* note 54, at 214-16.

The common law news privilege includes the privilege to give publicity to matters of legitimate public concern and the privilege to give publicity to the public activities of persons who voluntarily place themselves in the public eye. RESTATEMENT (SECOND) OF TORTS § 652D, Comments b,d,e,f (1977); *Prosser*, *supra* note 55. See also notes 142-47 *supra* and accompanying text.

¹⁴³ See authorities cited in note 142 *supra*.

¹⁴⁴ The judgment of what is newsworthy must remain primarily a function of the publisher Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher.

Cantrell v. Forest City Publishing Co., 484 F.2d 150, 156-57 (6th Cir. 1973), *rev'd on other grounds*, 419 U.S. 245 (1974).

¹⁴⁵ *E.g.*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (magazine article about new Broadway play); *Winters v. New York*, 333 U.S. 507 (1948) (article in crime stories magazine); *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958) (story in detective magazine); *Man v. Warner Bros.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (musical performance at Woodstock Festival); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (animal training act); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (comedian's mock Presidential campaign); *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937) (newspaper article about Indian rope trick).

Such a definition of news has been criticized as overboard. The determination of what is newsworthy enough to justify an invasion of privacy or publicity involves balancing the public's interest in free dissemination of information against the individual's hurt feelings or property rights. *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973). See Spiegel, *Public Celebrity v. Scandal Magazine — The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280, 301 (1957). In balancing freedom of the press against individual rights, the balance may not weigh as heavily for the press when pure entertainment or feature stories are involved. *HASTINGS*, *supra* note 49, at 568-71. Pure entertainment may not be sufficiently newsworthy to justify tortious conduct by the news media. In addition, the broad common law news privilege allows the press to decide for itself when it will invade an individual's privacy, and thereby "decimates the tort" of invasion of privacy. *Kalven, Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 336 (1966).

publicity. The right of privacy must give way, or may perhaps be said not to exist, when the public's interest in obtaining knowledge of the private matter is greater than the individual's right to be let alone.¹⁴⁶ The importance of promoting creativity and protecting a performer's means of livelihood, however, outweighs the common law reporting of the press just as these interests outweigh those of the press in the constitutional privilege context. The actions of the celebrities in public do have news value and may be reported by the media, but this news privilege extends only to the privacy aspect of the person's name, likeness, or personal history. A celebrity whose picture appears in a newspaper or television news story still retains the right to sell an exclusive license for the use of his picture in commercial advertising. The news media may not use an entire performance under the guise of news privilege because there is no privacy interest in the performance against which the news privilege could be balanced.¹⁴⁷

The news media may remain within the bounds of fair comment by reporting *about* a performance, as opposed to showing the entire performance itself. The Supreme Court in *Zacchini* recognized that the television station could have "merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television."¹⁴⁸ The dissent retorted that limiting television news to "watered-down verbal reporting, perhaps with an occasional still picture" would deprive the public of the full news coverage the first amendment is meant to foster.¹⁴⁹ The dissent's fears are groundless, however, because the news media has traditionally remained within the bounds of fair comment without adverse effects on first amendment rights. Fair comment is a qualified privilege to comment upon or to criticize matters of public interest.¹⁵⁰ Like the common law reporting privilege, but unlike the constitution-

¹⁴⁶ The Supreme Court in *Zacchini* interpreted the Second Restatement as permitting encroachments on the right of privacy by the news media by limiting the reach of the right of privacy, rather than by creating a privileged invasion. 433 U.S. at 567. See RESTATEMENT (SECOND) OF TORTS, § 652C, Comment d; § 652D, Comments b & e (1977).

¹⁴⁷ The distinction between invasion of privacy for a news purpose and invasion of publicity has been recognized by Kintner and Lahr. They state that an individual may not recover under publicity theory for the use of his name or photograph in a news broadcast because "[i]n the news broadcasting situation, plaintiff is not possessed of any property right." E. KINTER & J. LAHR, *supra* note 51, at 459. But a performer's interest in his entire performance is purely a property right, so there can be no news privilege in that situation. See note 81 *supra* and accompanying text.

¹⁴⁸ 433 U.S. at 569.

¹⁴⁹ 433 U.S. at 581 (Powell, J., dissenting).

¹⁵⁰ 1 A. HANSON, *supra* note 78 at § 137. See *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 328 F.2d 869, 872-73 (9th Cir.), *cert. denied*, 379 U.S. 844 (1964). The privilege of fair comment is based on the rationale that the social value of free interchange of opinions outweighs the injury that such discussion might cause an individual in the public eye. *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. Ct. App. 1965). "One who engages in a public field, whether of entertainment, sport or politics must expect such critical review." *Oma v. Hillman Periodicals, Inc.*, 281 App. Div. 240, 243, 118 N.Y.S.2d 720, 723 (1953). Fair comment originated in the law of defamation as a privilege of the press to publish defamatory opinion on matters or persons of public interest. C. GREGORY & H. KALVEN, JR., *CASES AND MATERIALS ON TORTS* 1033 (1959). However, fair comment should also be applicable in privacy and publicity cases, even though plaintiff's complaint is not that he has been defamed, but that his name, photograph, or facts about him have been used in news commentary. *Cf. Oma v. Hillman Periodicals*, 281 App. Div. 240, 244, 118 N.Y.S.2d 720, 724 (1953) (fair comment privilege applied to privacy claim);

al privilege, fair comment is based on truthful reporting, since the privilege is lost unless the comment is based upon facts truly stated and is an honest expression of the writer's opinion based on those facts.¹⁵¹ Matters of public interest which may be commented upon by the press include works of literature, art, music, entertainment, sports, and politics.¹⁵²

The news media must determine in each instance how much of the actual performance, book, or work of art may be utilized in a news story or review without the consent of the performer or creator. An appropriate guide for the scope of permissible taking would be the limitation placed upon fair use in copyright law. Even though live performances are not generally considered copyrightable,¹⁵³ the similarities in the interests protected by the right of publicity and by copyright support reliance upon fair use standards.¹⁵⁴

Fair use is a privilege in persons other than the copyright holder to use the copyrighted material in a reasonable manner without the holder's consent.¹⁵⁵ Allowing fair use protects first amendment interests by allowing the public's interest in dissemination of information to outweigh the creator's right to compensation.¹⁵⁶ Purposes for which a work may fairly be used include news reporting, criticism, and teaching.¹⁵⁷ Factors to be considered in determining whether the use is fair are both qualitative and quantitative, including the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the work as a whole, and the effect of the use upon the value of or potential market for the work.¹⁵⁸ Under these standards a complete or nearly total taking of another's

Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (use of celebrity's photograph for fair comment would be privileged invasion of right of publicity).

¹⁵¹ Golden North Airways, Inc. v. Tanana Publishing Co., 218 F.2d 612, 627 (9th Cir. 1954); Fisher v. Washington Post Co., 212 A.2d 335, 337 (D.C. 1965); Association for the Preservation of Freedom of Choice, Inc. v. National Assoc., 14 App. Div. 2d 751, 220 N.Y.S.2d 391 (1961).

The privilege of fair comment differs in several ways from the common law news privilege to invade the right of privacy. To qualify as fair comment, the report must represent an expression of opinion, as noted in the authorities cited above. A news report, on the other hand, must be a truthful statement of fact. See note 143 *supra* and accompanying text. In addition, fair comment must deal with a person's acts, rather than with his character, and must deal only with the person's public, rather than private activities. Golden North Airways v. Tanana Publishing Co., 218 F.2d at 612; F. HARPER & F. JAMES, *supra* note 56, § 5.28, at 458-61.

¹⁵² F. HARPER & F. JAMES, *supra* note 56, § 5.28, at 456-57. E.g., New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964) (criticism of official conduct of elected official); Oma v. Hillman, 281 App. Div. 240, 118 N.Y.S.2d 720 (1953) (criticism of sport of professional boxing); Fisher v. Washington Post Co., 212 A.2d 335 (D.C. 1965) (criticism of art exhibition).

¹⁵³ See note 140 *supra* and accompanying text.

¹⁵⁴ See note 84 *supra* and accompanying text.

¹⁵⁵ Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

¹⁵⁶ Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). (1978); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977). See Sobel, *supra* note 138, at 51.

¹⁵⁷ Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2546 (1976) (effective January 1, 1978). The fair use defense to copyright infringement is judge-made; the first statutory recognition of this doctrine was its incorporation into the Copyright Act revision. 2 M. NIMMER, NIMMER ON COPYRIGHT § 145, at 643 (rev. ed. 1976). See H. R. REP. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5678.

¹⁵⁸ Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (effective January 1, 1978); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977).

copyrighted work without permission is not fair use,¹⁵⁹ even when the work is used for the purpose of news reporting.¹⁶⁰ The use of brief excerpts from a work is sufficient to enable the press to fulfill its function of informing the public.¹⁶¹ The copyright holder's function in this scheme is to maintain control over the public presentation of the work in its entirety.¹⁶² The

criticism and educational purposes than when the borrowing is for defendant's commercial use. *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 176 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd mem.*, 356 U.S. 43 (1958). Courts may also consider factors other than those enumerated in the new copyright law in determining whether the use is fair. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess 65 (1976), *reprinted in* [1976] U.S. CODE CONC. & AD. NEWS, 5659, 5679. Other factors include the intent with which the borrowing was done, the amount of the labor expended by the user, the benefit gained by the user, and the relative value of the original work and the copy. Sobel, *supra* note 138, at 51.

Another factor which should be considered, especially when the use is for news reporting purposes, is the degree of public interest in access to the copyrighted work. Material that should as a matter of policy be widely disseminated should receive less protection than material in which the public has a lesser interest. E. KINTNER & J. LAHR, *supra* note 51, at 425. In *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968), the use of copies of frames from the copyrighted Zapruder film of President Kennedy's assassination to illustrate defendant's book about the assassination was held to be fair use. The court found that the public interest in having full information on the assassination outweighed plaintiff's copyright interest in the film. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (public interest in Howard Hughes justified use of copyrighted magazine articles about Hughes in preparation of his biography); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (appellate court overturned summary judgment that defendants' unauthorized use of copyrighted letters of Julius and Ethel Rosenberg was not fair use; decision was based in part on the great public interest in the trial of the Rosenbergs for espionage, which was the subject of defendant's book).

The public interest in an entertainer's uncopyrighted performance should be considered in determining how much of the performance can be used in news reporting, since the right of publicity, like copyright, can be weighed against first amendment considerations. See notes 133-41 *supra* and accompanying text. There may, however, be less public interest or "news value" in pure entertainment, so that only a small excerpt from a performance should be used for news purposes. See notes 125 & 126 *supra* and accompanying text.

¹⁵⁹ *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd mem.*, 356 U.S. 43 (1958); *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376 (D. Conn. 1972).

In determining the quantitative amount of a copyrighted work that may be used without permission, courts consider the substantiality of the taking; that is, whether the copy is substantially similar to the original. If it is, the use may not be fair. *Benny v. Loew's, Inc.*, 239 F.2d at 537; *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Musto v. Meyer*, 434 F. Supp. 32, 34 (S.D.N.Y. 1977). Copying of an entire work results in complete similarity, which is not fair use.

¹⁶⁰ The defense of fair use is not necessarily applicable when the defendant's use serves the function of reporting news or factual matters of public interest. 2 M. NIMMER, NIMMER ON COPYRIGHT § 145, at 647 n.190 (rev. ed. 1976). See *Public Affairs Assoc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962). In copyright law, as with the right of publicity, the press has no automatic first amendment privilege to take an entire work without permission. See notes 138-41 *supra* and accompanying text.

¹⁶¹ *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Robert Stigwood Group, Ltd. v. O'Reilly*, 346 F. Supp. 376, 385 (D. Conn. 1972).

By including news reporting in the fair use section of the Copyright Act revision, the drafters had in mind the use of a "summary . . . with brief quotations [or] incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported." H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* [1976] U.S. CODE CONC. & AD. NEWS 5659, 5679 (emphasis added). Congress did not intend to allow the news media to reproduce intentionally an entire copyrighted work, just as the Supreme Court in *Zacchini* refused to allow the media to reproduce an entire non-copyrighted performance.

¹⁶² Functional analysis is another means of determining whether a particular use of a copyrighted work without permission is fair. When the original and the copy fulfill the same

Zacchini opinion implied that the news media might have a fair comment type of privilege to show *part* of an entertainer's non-copyrightable performance during a news broadcast.¹⁶³ As with fair use, however, the Court found the showing of a complete performance to be unprivileged, no matter how brief the performance.

IV. CONCLUSION

Zacchini is the first case in which an entertainer successfully alleged that the appropriation of an entire performance for use on a television news program was unprivileged.¹⁶⁴ The implication of the *Zacchini* holding is that not everything that appears on a news program is necessarily news. The Court's opinion reinforces the general rule that the news media is liable for torts committed during the course of newsgathering.¹⁶⁵ The first amendment does not grant the press carte blanche to invade all of a newsworthy person's interests in order to inform the public.

The dissenting opinion disagreed sharply, stating that everything on a news program is privileged as news unless the media clearly intends to exploit a performance for commercial or other similar use.¹⁶⁶ The dissenters felt that respondent's use of *Zacchini*'s performance was not commercial exploitation, even though the television station sold advertising time during the news broadcast.¹⁶⁷ The station's advertising revenue, the dissent believed, would

function in terms of satisfying actual or potential consumer demand, a lesser amount of similarity will be considered fair use than when the two works fulfill different functions. A different function can be performed without resort to complete copying of another's works. *M. NIMMER, NIMMER ON COPYRIGHT* § 145 (rev. ed. 1976). For example, in *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd mem.*, 356 U.S. 43 (1958), comedian Jack Benny performed on television a parody of the movie "Gaslight" which used substantial portions of the movie script. This was held not to be fair use because the court thought it likely that many people who saw the television parody would not go to see the movie. The television parody fulfilled the same function in terms of consumer demand as the movie.

Hugo Zacchini's complaint was in the same vein: "[I]f the public can see the act for free on television, they will be less willing to pay to see it at the fair." 433 U.S. at 575. The Court opined that the value of *Zacchini*'s act might have been increased by the unwanted publicity, so that he could not recover actual damages. But under copyright law, as under the right of publicity, it is the taking without consent, rather than the effect of the taking, which damages the plaintiff. See *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Loew's v. Columbia Broadcasting Sys.*, 131 F. Supp. at 176; *Nimmer, supra* note 135, at 1201.

¹⁶³ The Court limited its holding to unauthorized showing of an entire performance. 433 U.S. at 574.

¹⁶⁴ In previous cases in which the defense of news privilege was raised by a television station, plaintiff's performance was used in a so-called "commercial" program. *E.g.*, *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (App. Div. 1952) (broadcast of professional football game); *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986 (S.D.N.Y. 1950) ("Greatest Flights of the Century" program).

¹⁶⁵ See note 113 *supra*.

¹⁶⁶ 433 U.S. at 581 (Powell, J., dissenting).

¹⁶⁷ There was no direct association of *Zacchini*'s act with any of the commercials that appeared on the news broadcast. Some courts have required proof of such a direct association to find a television station liable. *E.g.*, *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (App. Div. 1952); *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970). The California statute which creates a cause of action for unauthorized use of an individual's name, photograph, or likeness for advertising or solicitation

have been the same no matter which news items appeared on the show.¹⁶⁸ In his dissent from the Ohio Supreme Court's opinion in *Zacchini*, however, Judge Celebrezze questioned whether WEWS' decision to broadcast the performance had been influenced by the potential effect on its commercial ratings.¹⁶⁹

In recent years the content of television news programming has become entertainment-oriented for blatantly commercial reasons. So-called "happy talk" or "eyewitness news" programs have become widespread on television news.¹⁷⁰ The main characteristics of this format are reporting by personable and attractive news people who banter with each other during the newscast, use of exciting "visuals" (film footage) whenever possible to create "audience interest," devotion of less coverage to more important stories that lack exciting film, use of a large number of short stories, treating each with little depth, and greater emphasis on human interest and amusing or entertaining stories.¹⁷¹ Items of pure entertainment and comedy, which may lack real news value, are used as fillers.¹⁷² This type of news format, which is followed by the television station which broadcast *Zacchini's* performance,¹⁷³ has been severely criticized for transforming some news programs into entertainment rather than sources of information.¹⁷⁴ The purpose of this type of news format is to attract a greater number of viewers, thereby increasing the

states that use in a news story is not advertising use. Under that statute, in addition, a commercial medium may be held liable only upon a showing of a direct connection between the use of plaintiff's name or likeness and the advertising carried by that medium. CAL. CIV. CODE § 3344(d), 3344 (e) (West Supp. 1977).

¹⁶⁸ 433 U.S. at 580 n.2 (Powell, J., dissenting). This assertion is probably incorrect. The type of stories that appear on a television news program can have a great effect on the amount of the station's revenues. See note 175 *infra* and accompanying text.

¹⁶⁹ 47 Ohio St. 2d at 243, 351 N.E.2d at 466.

¹⁷⁰ See generally Dominick, Wurtzel & Lometti, *Television Journalism vs. Show Business: A Content Analysis of Eyewitness News*, 52 JOURNALISM Q. 213 (1975); Powers, *Eyewitness News*, COLUM. JOURNALISM REV. 17 (May/June 1977); Revzin, *Entertainment: Action are Major Ingredients of the Local TV News*, WALL ST. J., Oct. 15, 1976, at 1, col. 1.

¹⁷¹ Powers, *supra* note 170, at 21; Dominick, *supra* note 170, *passim*. Powers cites several examples of this type of news. A story about unidentified flying objects was included in the weather report on a Chicago television station. In Washington, D.C., a local television reporter was shown sitting in a cemetery as she delivered a story on Howard Hughes' will. A reporter for the NBC affiliate in Cleveland was mauled as he broadcast a story on "learning how" to train a lion from inside the lion's cage. The entire episode was filmed and was shown on several NBC stations as news. Powers, *supra* note 170, at 17. The use of "action reporters" who are conspicuous participants in the stories they cover is another typical feature of this type of news programming. *Id.* at 18.

¹⁷² Dominick, *supra* note 170, at 215. Examples of entertainment and comedy with questionable news value include the female reporter for a Los Angeles television station who donned a wet suit, plunged into a tank of water, and played with a porpoise. On a news program in Minneapolis, comedienne Judy Carne popped into the newsroom and played with the sportscaster's ears during the broadcast. Powers, *supra* note 170, at 17.

¹⁷³ Revzin's *Wall Street Journal* article on the use of entertainment in local TV news programming features WEWS, the defendant television station in the *Zacchini* case, as an example of the Eyewitness News format in broadcasting. Revzin, *supra* note 170.

In one instance of "action reporting" by WEWS, two women reporters dressed in short skirts stationed themselves on the street in a Cleveland red-light district to test the effectiveness of a city crackdown on prostitution during 1977. A cameraman perched on a nearby rooftop filmed the solicitation of the women by four men, followed by the women's arrest by police for suspicion of prostitution. Plain Dealer (Cleveland), Sept. 1, 1977, at 14A, col. 1.

station's revenue and profits.¹⁷⁵ The increase in a station's profits resulting from a switch to an "eyewitness news" format can be considerable.¹⁷⁶

It remains to be seen how much entertainment the media can utilize in its news programming while still remaining within first amendment and common law reporting privileges. So far, no court has found a conflict between the news reporting function and the fact that the news media is operated for profit. In almost every case the press has been allowed to define for itself what is news, and this definition has included items of popular appeal. But the *Zacchini* decision should serve as a reminder to producers of "happy talk" news programs that the basic first amendment function of the news media is "to monitor and report on the conduct of public officials and others who exercise power over private citizens so as to assure openness, accountability, and the intelligent administration of community life."¹⁷⁷

When the television news media does decide to report on an entertainer's performance, the *Zacchini* decision will result in a more cautious determination of how the story should be presented. Under the *Zacchini* rule the entire performance may not be presented if the performer has explicitly refused to consent, as *Zacchini* did. The Court's opinion gave no guideline for determining how much less than the entire performance may be used, but reference to the guidelines traditionally applied in fair comment and fair use situations, as this Note has suggested, should provide sufficient guidance consistent with first amendment principles. At the same time, entertainers must realize that they have no legal right to recover damages for the broadcast of their entire performances if they have consented to use of the entire act, or if they have assigned their publicity right to a promoter or other person who then gave such consent. One may question whether the news media now has the burden of ascertaining whether a performer's publicity rights have been assigned before it may report on his act. The *Zacchini* decision seems to answer in the negative. Use of reasonable excerpts from a performance in a news report about the performance will not give rise to liability for invasion of the performer's right of publicity.

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¹⁷⁵ Revzin, *supra* note 170, at 25 col. 1; Dominick, *supra* note 170, at 213. "Often (as in the case with the fifteen network-owned stations and the dozens of other 'group' stations) the TV news staff responds to the pure marketing priorities of absentee ownership." Powers, *supra* note 170, at 24.

¹⁷⁶ Powers, *supra* note 170, at 24.

¹⁷⁷ *Id.*

