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Karin M. Mika
Cleveland State University, k.mika@csuohio.edu

Aaron J. Reber

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COMMERCIAL EXPLOITATION OR PROTECTED USE?

STERN v. DELPHI INTERNET SERVICES CORPORATION

AND THE EROSION OF THE RIGHT OF PUBLICITY

Aaron J. Reber*

Karin Mika**

INTRODUCTION

Freedom of expression preserves all other liberties so inseparably that freedom of the press and a free society either prosper together or perish together. Yet, because of its enormous power, the contemporary press is widely, and perhaps accurately, perceived as using its special First Amendment status as a license to invade individual privacy.[1] Although the actual wording of the First Amendment does not explicitly state a guaranteed right to

* Associate, Chattman, Gaines & Stern, L.P.A.; Valparaiso University, B.A.; Cleveland-Marshall College of Law, J.D.

** Assistant Director, Legal Writing, Research & Advocacy, Cleveland-Marshall College of Law; Baldwin-Wallace College, B.A.; Cleveland State University, J.D.

1. *See* Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123 (2d Cir. 1984).

privacy,[2] it is commonly understood that there are certain privacy guarantees. These exist in both what is regarded as "a fundamental right to privacy"[3] and within the scope of common law protections. Within the common law, it has long been recognized that certain intrusions into one's personal life would be forbidden and actionable as a tort.[4]

Intrusions into an individual's personal life are more likely when the individual is a celebrity, even if only a temporary celebrity, and the common law has recognized protections of a "celebrity" from commercial exploitation. This protection has been regarded as a "right of publicity." This right generally means that an individual's "likeness,"[5] when used for commercial purposes without permission, enables that individual to bring a tort action against the offending party. This "misuse" of a person's likeness has been regarded as unprotected commercial speech within First Amendment jurisprudence.[6]

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2. U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

4. *See* Humiston v. Universal Film Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1st Dep't 1919).

5. Likeness does not necessarily refer to a visual facsimile but can be an identifiable characteristic of a person. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir.), *cert. denied,* 503 U.S. 951 (1992) (voice as a protected likeness). *See also* White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir.) ("aggregate identifiable characteristics" may be protected), *cert. denied,* 508 U.S. 951 (1993).

6. *See* Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) The defendant used an actor who resembled Woody Allen to portray a customer in an advertisement. *Id.* at 617. The actor was placed in a position characteristic of the plaintiff with videotape cassettes of two of the plaintiff's best known films. *Id.* at 618. The court enjoined defendant from representing the look-alike actor as Woody Allen. *Id.* at 625; Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. New York County 1984) (holding in a lawsuit brought by Jacqueline Kennedy Onassis that a look-alike actress impermissibly misappropriated the plaintiff's identity), *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dep't 1985).

Many states have codified the common law right of publicity concepts and enable an individual whose likeness has been commercially exploited to bring a statutory cause of action against the offending party.[7] One state that has such a statute is the state of New York. This statute, appropriately named the Civil Rights Law,[8] explicitly prevents the use of likeness, without permission, for the purpose of financial gain. Although the statute itself lists no exceptions to the rule, New York courts have found First Amendment protections to override the statute in two instances -- when the "likeness" is "incidental" to the entire purpose for which the likeness is being used[9] and when the "likeness" is used in association with something considered "newsworthy."[10] In granting First Amendment protections in either of these situations, the New York courts have looked to the overall purpose of using a likeness. Even when profit is a motive in the unauthorized use, courts may grant First Amendment protections if the public interest or dissemination of "newsworthy" information is the overall object of the scheme, overriding whatever commercial benefit might be derived.[11]

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7. *See, e.g.*, CAL. CIV. CODE § 3344; FL. ST. § 540.08; IN. ST. § 32-13-1-6 *et seq.*; KY. ST. § 391.170; NV. ST. § 597.790; 12 OK. ST. § 1448; UT. ST. § 45-3-3; VA. ST. § 8.01-40; WI. ST. § 895.50.

8. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1996).

9. See Finger v. Omni Publication Int'l. Ltd., 77 N.Y.2d 138, 143, 566 N.E.2d 141, 144, 564 N.Y.S.2d 1014, 1017 (1990) (holding that the "newsworthiness exception" applies to reports of political happenings and social trends, to news stories and articles of consumer interest, and to matters of scientific and biological interest); University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 454, 256 N.Y.S.2d 301, 304 aff'd, 15 N.Y.2d 940, 207 N.E.2d 508 (1965) (mentioning a person on four pages of an 143 page volume was held to constitute only an isolated reference of such fleeting and incidental nature as not be offensive to provisions of the Civil Rights Statute).

10. *See* Freihofer v. Hearst, 65 N.Y.2d 135, 141, 480 N.E.2d 349, 354, 490 N.Y.S.2d 735, 740 (1985) (stating that the publication of a newspaper article relating to the details of court files in a matrimonial proceeding fit within the newsworthy exception and did not give rise to a cause of action for invasion of privacy).

11. *See* Virelli v. Goodson-Todman Enterprise, Ltd., 142 A.D.2d, 479, 484, 536 N.Y.S.2d 571, 575 (3d Dep't 1989) (holding that in an action arising

In 1995, the Supreme Court of New York County was, for the first time, posed with the question of whether to extend First Amendment protections to a quasi-commercial venture involving the Internet and using the unauthorized picture of a celebrity for advertising purposes. In *Stern v. Delphi Internet Services Corporation*,[12] the court acknowledged that, despite the unauthorized use of Howard Stern's picture to advertise a "chat session"[13] type computer bulletin board, the Internet provider would enjoy First Amendment protections as a "news disseminator"[14] under the New York Civil Rights Law. This, despite the fact that the Internet provider was not primarily in the news dissemination business,[15] despite the fact that the "chat session" in question was for a limited time period, and despite the fact that there was a degree of commercial motivation in the scheme.

This article will address the repercussions of the *Stern* case. It will compare the holding of *Stern* with what have traditionally been regarded as violations of the right of publicity and argue that the decision in *Stern* opens the door to a broader interpretation of "newsworthiness" and "public interest" that will enable advertisers broader First Amendment protections when using "unauthorized" likenesses. In reaching its conclusion, the article will specifically address the New York Civil Rights Statute and discuss its exceptions determined by the New York courts. It

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from the publication of a newspaper article, plaintiff failed to state a viable claim for invasion of privacy because the challenged article dealt with a newsworthy item and an invasion of privacy action must deal with a matter published for trade or advertising purposes).

12. 165 Misc. 2d 21, 626 N.Y.S.2d 694 (Sup. Ct. New York County 1995).

13. *Id.* at 30, 626 N.Y.S.2d at 700. The "chat session" at issue can be understood as an "electronic equivalent of a talk show . . . ." *Id.*

14. *Id.* at 26, 626 N.Y.S.2d at 698.

15. For a discussion of the Internet as news disseminator in the defamation context, *see generally* Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993) (discussing the historical tension between the Constitution's ban on governmental interference with free speech and free press and how the courts are dealing with the electronic information services).

will address what the courts have considered worthy of First Amendment protections and compare *Stern* to traditional interpretations of news disseminators that have received constitutional protections. This article will conclude by positing that artful advertisers could very well use the theory of *Stern* as a basis for virtually ensuring that every "unauthorized likeness" will enjoy First Amendment protection and not be considered as violative of the right of publicity.

I. THE RIGHT OF PUBLICITY

The right of publicity protects a celebrity's "attributes," including his or her "name, voice, or likeness[,]" from exploitation.[16] It enables a celebrity to "cash in" on his or her recognized identity, and prevents others from exploiting that identity for their own monetary gain. The right ensures both that a celebrity can prevent his or her likeness being associated with promoting a particular product, or simply being used in conjunction with a commercial scheme that monetarily benefits an individual other than the celebrity.[17] The right is unique in that it is assignable[18] and, in many cases, descendible.[19] States

16. *See generally* Melvin B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954) ("outlin[ing] the inadequacy of traditional legal theories in protecting publicity values and . . . discuss[ing] the probable substance of and limitations on the right of publicity . . . .").

17. *See generally* Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND L. REV. 1199, 1202 (1986) (discussing the development of the right of publicity, claiming that the function was born out of "the societal recognition that as commercial value may be associated with the persona of celebrity, [and] should serve as the primary tool for shaping the form and context of the right").

18. Haelan Labs. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Defendant, a rival manufacturer, deliberately induced a ballplayer who was under contract with the plaintiff to sign a contract allowing him to use the ballplayer's picture. *Id.* at 867. The court held that defendant was not liable for any breach of contract with plaintiff, because a person's picture is assignable, as long as the defendant does not use the picture while the ballplayer is under contract with the plaintiff. *Id.* at 869.

have enacted laws that protect the right for many years after the celebrity has passed away.[20]

The right of publicity is commonly understood to have originated in the case of *Haelan Labs. v. Topps Chewing Gum Inc.*[21] In this case, a New York court held that a celebrity had a right to be able to "exclusively" contract for the use of his likeness in conjunction with a commercial venture.[22] The court declared there existed somewhat of a property interest in a crafted public persona which was capable of legal protection distinct from a right to privacy.[23] After *Haelan*, most states developed their own renditions as to what would be included in a protected right of publicity.[24]

II. NEW YORK STATE STATUTES

New York has recognized the importance of the right of publicity and has enabled individuals whose likenesses have been commercially exploited to bring a statutory cause of action against the offending party.[25] The state has codified this right of publicity in two different statutory sections. Section fifty of the

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19. For a comprehensive discussion on descendible rights of publicity, *see* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers -- A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101, 145-63 (1993).

20. *Id.* at 147.

21. 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953).

22. *Id.* at 868. Actually, *Haelan* is an unlikely candidate for being the genesis of the right of publicity. It is more about a tortious interference with a business relationship than it is a violation of a right of publicity.

23. Id. See Pamela Lynn Kunath, Note and Comment, Lights, Camera, Animate! The Right of Publicity's Effect on Computer-Animated Celebrities, 29 LOY. L.A. L. REV. 863. The right of publicity is somewhat different than the common law right to privacy. *Id.* at 878. The right to publicity protects a rather unascertainable, yet admittedly profitable, right to market a crafted persona. *Id.* The right to privacy, however, tends more to protect against personal invasions that do not commercially capitalize on a celebrity's appearance. *Id.*

24. *Id.* at 880.

25. *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1996).

New York Civil Rights Law is entitled "right of privacy" and provides a criminal remedy using someone's likeness without their consent. It states:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.[26]

Section fifty-one of the New York Civil Rights Law provides a private cause of action for an injunction and for damages. It states in pertinent part:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof.[27]

The New York statutes have no listed exceptions to the general right to privacy, but courts have interpreted the statutory sections in ways that have found some non-consensual uses of a person's

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26. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1996).

27. N.Y. CIV. RIGHTS LAW § 51. Section 51 of the New York Civil Rights Statute provides for a harsher penalty by awarding exemplary damages, if the plaintiff can prove that the defendant knowingly violated his or her privacy. The statute states in pertinent part:

> [Plaintiff] may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Id.

likeness to be protected by the First Amendment.[28] Both of these "uses" stem from general First Amendment protections that extend to traditional news media.[29]

A. Incidental Use

One court-created exception to an individual's right of privacy is the incidental use doctrine. Generally, courts have held that an "incidental use" of a person's name or photograph for the purpose of advertising or trade is not actionable as long as the use is done in conjunction with what is considered a newsworthy event, that which is in the public interest, or a promotion of the informational product itself.[30] The incidental use exception was first adopted by the New York courts in *Humiston v. Universal Films Mfg. Co.*[31] In *Humiston*, the defendant Universal Films published "Universal Animated Weekly" and "Universal Current Events" film reels about weekly events.[32] The film contained material about the plaintiff, who was a lawyer in New York City.[33] The film represented her as she was engaged in legal work connected with solving the mysterious disappearance and murder of Ruth Cruger.[34] The defendant used the plaintiff's

28. *See generally* Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10, (1st Dep't 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

29. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (holding that a public official may not recover damages for a defamatory falsehood without proving actual malice: reckless disregard of the truth or knowledge of falsity).

30. *See* Velez v. VV Pub. Corp., 135 A.D.2d 45, 47, 524 N.Y.S.2d 186, 187 (1st Dep't 1988) (holding that subscription-soliciting advertisement was incidental use and not a violation of the Civil Rights Statute because it contained a reproduction of the plaintiff's photograph which had appeared in an earlier edition of a newspaper).

31. *See, e.g.*, Humiston v. Universal Films Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1st Dep't 1919).

32. *Id.* at 469, 178 N.Y.S. at 754.

33. *Id.* at 471, 178 N.Y.S. at 755.

34. *Id.* The body of the girl, primarily through the plaintiff's efforts was discovered buried under a floor in the back of a shop. *Id.*

name and picture, during the actual investigation and discovery, to advertise the film.[35]

The court held that the use of the plaintiff's name in the approach to a theater and upon the billboards in front as advertising or indicating what was to appear upon the screen within the building was incidental to the exhibition of the film itself, and was not a use of the picture or name for advertising purposes within the meaning of the Civil Rights Statute.[36] The court reasoned that the presentation of current events in a motion picture film was no different from the presentation of the same current events through the medium of a newspaper and that the defendant was entitled to promote such a presentation.[37] It was inconsequential to the court that the film could be profitable and that using the plaintiff's picture in advertising the films could be used to induce more people to see them.[38]

The incidental use doctrine was also applied in the case of *Booth v. Curtis Publishing Co.*[39] In *Booth*, the plaintiff was a well-known actress whose picture was taken for use in an article to appear in a magazine concerning a resort she was staying at in the West Indies.[40] The primary intended use of the photograph was consented to by the plaintiff.[41] Thereafter, the defendants published the same photograph in a full-page advertisement of the magazine in two other magazines, expressly presenting the plaintiff's photograph as a sample of the contents of the defendant's magazine.[42] The court held that the latter use of the plaintiff's photograph was not a violation of the statute.[43] Rather, it was incidental advertising relating to the sale and dissemination

35. *Id.* at 476, 178 N.Y.S. at 759.
36. *Id.* at 477, 178 N.Y.S. at 759.
37. *Id.* at 474, 178 N.Y.S. at 757.
38. *Id.*
39. 15 A.D.2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962), *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962).
40. *Id.* at 345, 223 N.Y.S.2d at 740.
41. *Id.*
42. *Id.* at 346, 223 N.Y.S.2d at 740.
43. *Id.* at 349, 223 N.Y.S.2d at 743.

of the news medium itself.[44] The court reasoned that "as long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated."[45] The dissent in *Booth*, however, strenuously objected to the court's creation of an exception to what it deemed was a clear and unambiguous statute.[46] Judge Eager commented that "the conferring of an exempt status upon this type of advertising solicitation in behalf of a magazine or periodical publisher is to judicially interpolate an exception not written in the statute."[47] He further stated that the statute should be construed and applied liberally, for "'the purpose of the statute is remedial and rooted in popular resentment at the refusal of the courts to grant

44. The court made a distinction between incidental and collateral advertising, finding that the current use was incidental itself. *Id.* Collateral use would have been found if the photograph was used to advertise an entirely different medium. *Id.*

45. *Id.* at 350, 223 N.Y.S.2d at 744. *See* Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1st Dep't 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584 (1976). The court reasoned that the use of a photograph of the plaintiff, an outstanding sports figure, was not violative of the Civil Rights Law, even though the photograph was used without the plaintiff's consent. *Id.* at 488, 223 N.Y.S.2d at 11. The defendant used the photograph in advertisements promoting subscriptions of the defendant's magazine. *Id.* The use was incidental advertising because the photograph was originally used with Joe Namath's consent in conjunction with a previous news article. *Id.* The court found the *Booth* case to be controlling and dispositive of the issue. *Id.* at 488, 371 N.Y.S.2d at 12. The court commented that the defendant's subsequent republication of plaintiff's picture was "'in motivation, sheer advertising and solicitation.'" *Id.* at 488, 371 N.Y.S.2d at 11 (quoting Booth v. Curtis Publishing Co., 15 A.D.2d 343, 349, 223 N.Y.S.2d 737, 744 (1st Dep't 1962)). Nevertheless, that alone was "'not determinative of the question so long as the law accords an exempt status to incidental advertising of the news medium itself. '" *Id.* at 488, 371 N.Y.S.2d at 11-12 (quoting Booth v. Curtis, 15 A.D.2d 343, 349, 223 N.Y.S.2d 737, 744 (1st Dep't 1962)).

46. *Booth*, 15 A.D.2d 343, 353, 223 N.Y.S.2d 737, 747 (1st Dep't 1962).

47. *Id.*

recognition to the newly expounded right of an individual to be immune from commercial exploitation.'"[48]

The United States Court of Appeals for the Second Circuit addressed "incidental use" in the case of *Lerman v. Flynt Distributing Co., Inc.*[49] In *Lerman*, the defendant's magazine, *Adelina,* printed photographs of an anonymous actress who appeared in Jackie Collins' and her husband's movie entitled "The World is Full of Married Men."[50] The magazine misidentified the actress as being Jackie Collins and printed on its cover "In the Nude from the Playmen archives . . . Jackie Collins."[51] The misidentified actress appeared topless in one of the pictures and in an orgy scene in the other.[52] The defendant included in one of its "issue[s] a subscription solicitation page that reprinted, in reduced size and among other reprinted *Adelina* covers, the . . . cover page that claimed to contain a photo of Jackie Collins."[53] The identical solicitation page appeared in a subsequent issue six months later.[54]

In reaching its decision, the court followed the long line of New York case law in finding that "[b]ecause the solicitations were designed simply to convey the nature and content of past" publications of the defendant's magazine, the plaintiff could not form the basis for a cause of action.[55] The court further noted that New York recognized the long-standing First Amendment media privilege of reporting the news using names and likenesses without consent.[56] The court commented that "the trade purposes prong of the statute may not be used to prevent comment on

48. *Id.* at 353-54, 223 N.Y.S.2d at 747 (quoting Flores v. Mosler Safe Co., 7 N.Y.2d 276, 280-81, 164 N.E.2d 853, 855, 196 N.Y.S.2d 975, 978 (1959).

49. 745 F.2d 123 (2d Cir. 1984).

50. *Id.* at 127.

51. *Id.*

52. *Id.*

53. *Id.* at 128.

54. *Id.*

55. *Id.* at 131.

56. *Id.*

matters in which the public has a right to be informed."[57] It noted, however, that the privilege was limited and did "not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information."[58]

B. Newsworthiness

The second exception to New York's Civil Rights Statute, similar to the incidental use doctrine, is referred to as the newsworthiness exception. It exempts the unauthorized use of a likeness of a public figure used in conjunction with some newsworthy topic, and, in some instances, exempts the unauthorized use of *anyone's* likeness in conjunction with the dissemination of matters related to the public interest.[59] The newsworthiness exception is very similar to the incidental use exception, with the incidental use exception having a closer tie to advertising.

As an example of a use that is categorized as "newsworthy," in *Davis v. High Society Magazine*, Inc.,[60] the court held that pictures of a well-known female boxer, posed nude in a boxing scene, could be a newsworthy event for a great many people.[61] The photographs were published in a magazine called *Celebrity Skin,* which specialized "in printing photographs of well-known women caught in the most revealing situations and positions that the defendants were able to obtain."[62] The court found that the publication of pictures would be absolutely protected and took special care to make sure that its reading and application of the New York Civil Rights Statute did not conflict with traditional

57. *Id.* (quoting Gautier v. Pro-Football, Inc., 304 N.Y. 354, 359, 107 N.E.2d 485 (1952)).

58. *Id.* at 131.

59. *See* Alison Sachs, *It's Up to You, New York -- It's Time for a Statutory Right of Publicity*, 20 COLUM.-VLA J.L. & ARTS 59, 60 (1995) (discussing the limited protection given by §§ 50-51 of the New York Civil Rights Law and the need for new statutes protecting the right of publicity).

60. 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dep't 1983).

61. *Id.* at 383, 457 N.Y.S.2d at 315.

62. *Id.* at 375, 457 N.Y.S.2d at 310.

First Amendment protections.[63] The court commented that "the competing tensions between claims of invasion of privacy and the constitutional rights of free speech and a free press compel a careful delineation of the statute."[64] The purpose of the statute was "to prohibit commercial misappropriation of a person's name or picture [but] . . . too rigorous [of an] application of the legislative prohibition would impinge on our ideals of freedom of speech and the press."[65]

In *Stephano v. News Group Publications, Inc.*,[66] the court held that the defendant's publication of plaintiff's picture was protected by the newsworthiness exception.[67] The plaintiff, a professional model, claimed that the defendant's use of a picture originally taken to be included in the "Fall Fashions" issue of New York Magazine was an invasion of privacy.[68] The defendant used another of the pictures from the original photo shoot in a separate column that "contain[ed] information about new and unusual products and services available in the metropolitan area."[69] The court commented that "the newsworthiness exception applies not only to reports of political happenings and social trends, but also to news stories and articles of consumer interest including developments in the fashion world."[70]

In reaching its decision, the court in *Stephano* stated that it was well-settled that a picture illustrating an article on a matter of public interest is protected as newsworthy unless it has no real relationship to the article: for example, an advertisement in disguise.[71] Alternatively, as in the case of *Lerman v. Flynt Distributing Co., Inc.*, "a plaintiff may claim that the defendant forfeited the privilege for reporting [on] matters on which the

63. *Id.* at 379, 457 N.Y.S.2d at 313.
64. *Id.* at 378, 457 N.Y.S.2d at 312.
65. *Id.* at 381-82, 457 N.Y.S.2d at 314-15.
66. 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984).
67. *Id.* at 184, 474 N.E.2d at 585, 485 N.Y.S.2d at 225.
68. *Id.* at 179, 474 N.E.2d at 581, 485 N.Y.S.2d at 221.
69. Id. at 179, 474 N.E.2d at 581-82, 485 N.Y.S.2d at 221-22.
70. *Id.* at 184, 474 N.E.2d at 585, 485 N.Y.S.2d at 225.
71. *Id.* at 185, 474 N.E.2d at 585, 485 N.Y.S.2d at 225.

public ha[d] the right to be informed by proving that the defendant's use was infected with material and substantial fiction or falsity."[72]

These two exceptions to the newsworthy privilege still provide little help in defeating the traditional First Amendment protections. For the defendant to lose the "newsworthy privilege, [the] plaintiff must prove that the defendant acted with some degree of fault regarding the fictionalization or falsification."[73]

Both the incidental use and newsworthiness exceptions relate to traditional First Amendment protections.[74] While First Amendment protections generally extend to traditional news disseminators, such as magazines, newspapers and television broadcasts,[75] the exceptions to the statutes do much the same.

72. *Lerman,* 745 F.2d at 131.

73. *Id.* at 132. The plaintiff in *Lerman* relied on the alternate theory "as a basis for defeating the newsworthy privilege." *Id.* Even though the falsification was proved and was severe, the court did not find that the distributor was at fault. *Id. See also* Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127, 233 N.E.2d 840, 842, 286 N.Y.S.2d 832, 834 (1967) (holding that for a public figure to sue under sections 50 and 51 of the New York Civil Rights Law, the work must have been published with knowledge of falsity or "with a reckless disregard for the truth"), *appeal dismissed,* 393 U.S. 1046 (1969).

74. In fact, First Amendment protection parallels can also be drawn in that public figures rarely succeed in bringing a successful cause of action under the Civil Rights laws by virtue of their being susceptible to more public interest than ordinary citizens. *See* Rand v. Hearst Corp., 31 A.D.2d 406, 298 N.Y.S.2d 405 (1st Dept. 1969), *aff'd,* 257 N.E.2d 895 (N.Y. 1970). In *Rand,* the court held that a comparison of a new author to a public figure in the literary world was of public interest, thus warranting protection under the newsworthy exception to the New York Civil Rights Statutes. *Id.* at 410, 298 N.Y.S.2d at 411. The author included on the cover of her book an excerpt from a newspaper review of the book where a reviewer compared the writing style of the author to the plaintiff, Ayn Rand. *Id.* at 407, 298 N.Y.S.2d at 408. The court found that the comparison was of public interest and that by merely achieving the level of public figure made a person "newsworthy." *Id.* at 410, 298 N.Y.S.2d at 411. Noting the judicial narrowing of the New York "right of privacy" statutes, the court found that the use of plaintiff's name was not a violation. *Id.* at 411, 298 N.Y.S.2d at 411-12.

75 *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting, Inc., 433 U.S. 562 (1977). The plaintiff, a performer, sued the defendant for just compensation for broadcasting the plaintiff's entire act without his consent. *Id.* The Court held that even though his act was news, the broadcast of the "entire

Moreover, similar to traditional First Amendment jurisprudence, the New York "exceptions" afford at least some protection to "quasi-newsworthy" uses that are done in conjunction with a commercial endeavor. It might even be fair to say that magazines, newspapers, and television broadcasts are rebuttably presumed to fall into the category of news disseminators. Further, in order to sustain a cause of action, those asserting a Civil Rights violation must demonstrate that the commercial exploitation of the "unauthorized use" outweighs fostering the free exchange of ideas.

As an example of exploitation outweighing public interest, in *Onassis v. Christian Dior-New York, Inc.*,[76] a look-alike of Jacqueline Onassis placed in an advertisement, was found to be violative of the New York Statute.[77] The court stated that "[n]o one is free to trade on another's name or appearance and claim immunity because what he is using is similar to but not identical to the original."[78] The court found that the commercial nature of the venture so outweighed the protected nature of speech that publishing the picture alone was enough for a successful privacy claim and the plaintiff need not show that her name was attached to the advertisement.[79]

IV. Categorizing the Internet

The most difficult problem in determining whether the unauthorized use of a person's name or likeness involving the Internet is unlawful is determining the nature or category of media into which the Internet falls. In correlation with this is determining the extent of traditional First Amendment protections that should be afforded on-line providers for "advertising" done

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act pose[d] a substantial threat to the economic value of that performance." *Id.* at 575.

76. 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Sup. Ct. New York County 1984), *aff'd* , 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dep't 1985).

77. 122 Misc. 2d 603, 615, 472 N.Y.S.2d 254, 263.

78. *Id.* at 612, 472 N.Y.S.2d at 261.

79. *Id.* at 615, 472 N.Y.S.2d at 263.

in conjunction with their services, whether the advertising appears on the Internet or elsewhere.

In *Cubby, Inc. v. Compuserve Inc.*,[80] for the first time, a federal district court was required to determine the structural status of electronic information services for purposes of deciding whether an electronic information system operator could be held liable as a "publisher" for third-party statements transmitted on the system.[81] In *Cubby*, the court took on a functional approach in attempting to analogize the new technology.[82] The court commented that Compuserve and the operators of electronic bulletin board systems functioned more like distributors than publishers of the information.[83] Analogizing the Internet to a book distributor, the court noted that "Compuserve may decline to carry a given publication altogether, [but] in reality, once it does decide to carry a publication, it will have little or no control over the publication's content."[84] Furthermore, like a large distributor of print media, an electronic information system operator has "no duty to monitor each issue of every [publication] it distributes."[85]

Not only did the *Cubby* decision categorize electronic information system operators as distributors, but the court also provided insight into how a court may deal with the issue of the extent of their First Amendment status.[86] Although not addressed directly, the court suggested that "Compuserve retained its full rights as a First Amendment speaker even when functioning in its role as a distributor and that, in that role, it actually enjoined a greater measure of protection against liability than do print

80. 776 F. Supp. 135 (S.D.N.Y. 1991).

81. *Id.* at 138. *Cubby* was brought under state libel laws. *Id.* at 139. The defendant, Compuserve, provided access to an electronic bulletin board where an allegedly defamatory statement was published by one of its subscribers. *Id.* at 138. The plaintiff sued Compuserve claiming that the electronic information service operator was liable as a "publisher." *Id* at 139.

82. *Id.* at 140.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

publishers."[87] This quasi-expanded "speaker status may well be justified, [as one commentator pointed out], but it would seem to provide EIS [electronic information system] operators with a First Amendment windfall, allowing them to gain all of the benefits of publisher status while escaping much of the burden of liability."[88]

While the publisher/distributor distinction in *Cubby* may not have an overall impact on the First Amendment conflicts with the right of publicity, the difficulty of placing the Internet into a category is apparent. In viewing the traditional news media, the Internet is a unique instrumentality. While it is capable of being a disseminator of news, its overall purpose is not confined to that. Rather, its status changes depending on the user. There are various "web" sites dedicated to information dissemination, but there is also the capability of a web site being dedicated to a commercial venture -- such as a bulletin board advertising items for sale.[89] There are also sites that are quasi-informational and quasi-commercial, offering useful consumer information while at the same time promoting a particular product.[90]

The amorphous nature of the Internet leads to the ultimate question of how such a medium will and should fit into the legislative and judicially created categorizations. The free

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87. Miller, supra note 17, at 1197.

88. *Id.*

89. *See, e.g.*, Scherman v. Kansas City Aviation Ctr. Inc., 1993 WL 191369, at *5 (D. Kan. May 14, 1993).

90. *See* Peter H. Lewis, *Personal Computers: Instant Information*, N.Y. TIMES, Sept. 18, 1990, at C6 (discussing "Prodigy," an on-line service that is both informational and commercial and can be accessed by paying a fee); Felix H. Kent, *Roundup of 1995 and a Look Ahead*, N.Y. L.J., Dec. 15, 1993, at 3 (stating that the travel industry is making use of the Internet as both an "infobase" and a way to market their services); Penny Parker, *Neiman Marcus plans catalog in magazine format*, THE DENVER POST, Dec. 11, 1995, at E-02 (discussing Maytag's home page offering tips on appliances, cooking, laundry, etc.); Nancy Doucette, *Aetna's newest location -- on the Internet*, 138 (No. 11) ROUGH NOTES 26 (Nov. 1995) (describing Aetna Life and Casualty Company's experimental Internet site providing useful information and enabling a consumer to receive an insurance quotation through an e-mail service).

exchange of information, at such a rapid pace and to unlimited ends via the Internet, could possibly create multiple avenues for commercial exploitation of likenesses and names.[91] These uses may often go unchecked. In light of the *Cubby* decision, the *Stern* court was the first court to address the issue of whether the Internet should be categorized as a news disseminator worthy of First Amendment protections with respect to right of publicity violations.[92]

V. The Stern *Decision*

In *Stern v. Delphi Internet Services Corporation*,[93] the court held that the use of a public figure's photograph and name to promote a bulletin board service fell within the incidental use exception to the New York Civil Rights Law.[94] The plaintiff, "Howard Stern, a controversial radio talk show celebrity and heavily promoted . . . [talk show host] announced his candidacy for the office of Governor of the State of New York in the spring of 1994."[95] Delphi, a "for profit" access provider to the "information superhighway," set up an on-line electronic bulletin board to debate the merits of Stern's candidacy, and correspondingly, to advertise their product.[96] In June of 1994, Delphi placed a full page advertisement in the New York Magazine and the New York Post which featured a photograph of

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91. *See, e.g.*, Elliot Zaret, *Elvis does an encore for his fans . . . this time on the 'Net*, THE DETROIT NEWS, July 13, 1995, at 1A (discussing an Elvis Internet page displaying "tour and other information, pictures of interesting Elvis memorabilia and a list of Elvis software to download").

92. For a discussion of the Internet's "news disseminator" status as it relates to defamation law, *see* David J. Conner, *Cubby v. Compuserve, Defamation Law on the Electronic Frontier*, 2 GEO. MASON IND. L. REV. 227 (1993).

93. 165 Misc. 2d 21, 626 N.Y.S.2d 694 (Sup. Ct. New York County 1995).

94. *Id.* at 26, 626 N.Y.S.2d at 698.

95. *Id.* at 22, 626 N.Y.S.2d at 695.

96. *Id.*

Stern and used his name in the advertisement.[97] The court acknowledged that it was the first to deal with the novel issues of "whether Delphi's electronic bulletin board service [was] to be treated as a news disseminator, whether the incidental use exception [was] applicable, and [what was the] defendant's entitlement to First Amendment protection[]."[98]

In analyzing these issues, the court stated that although only paid subscribers could access the service, the electronic bulletin board was "analogous to . . . a news vendor, . . . book store, or letters-to-the-editor column of a newspaper, which require[d] purchase of the[] materials for the public to actually gain access to the information carried."[99] The court went on to state that because of its status as a "news disseminator," the incidental use exception applied.[100] Moreover, "[a]ffording protection to on-line computer services when they are engaged in traditional news dissemination, such as in this case, is the desirable and required result."[101] The court recognized that an on-line service was also primarily used as entertainment and drew an analogy to television, which was a medium that engaged in both news dissemination and entertainment.[102] Furthermore, because Stern's candidacy was the subject of public debate, unquestionably protected, the "use of Stern's name and likeness in the advertisement was afforded the same protection as would be afforded a more traditional news disseminator engaged in the advertisement of a newsworthy product."[103]

The repercussions of the *Stern* decision are multiple. Not only did the court allow the nonconsensual use of Howard Stern's likeness for advertising purposes, but the court essentially took a new technology and applied traditional "right of publicity"

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97. *Id.* The photograph was "of Stern in leather pants which largely exposed his buttocks." *Id.* Stern did not allege that Delphi obtained the photograph unlawfully or improperly. *Id.*

98. *Id.* at 24, 626 N.Y.S.2d at 697.

99. *Id.*

100. *Id.* at 25, 626 N.Y.S.2d at 697.

101. *Id.* at 26, 626 N.Y.S.2d at 698.

102. *Id.*

103. *Id.*

analysis to it without accounting for the differences between the Internet and other forms of media. Moreover, in its analysis, the court apparently, and perhaps inadvertently, combined elements of the "newsworthiness" exception with elements of the "incidental use" exception before ultimately determining the picture was an "incidental use."[104] In doing so, the court failed to take into account precedent which, until *Stern*, was limited to allowing news disseminators to advertise representative samples of their previous products. The *Stern* court did not consider that the advertisement in question was not a representative sample of Delphi's previous work, but rather a "hook" that was intended to entice consumers to purchase Delphi's Internet access subscription. This difference takes the case entirely out of the realm of previous "incidental use" cases because the court was almost forced to draw upon the rationale of the "newsworthiness" exception (via Stern's campaign being a matter of public debate) in order to validate the unauthorized picture as being an "incidental use."

The decision in *Stern* opens the door to a broader interpretation of First Amendment protections not only as applied to the Internet, but to all forms of advertising. It would have been one thing to classify the Internet as a "news disseminator" so that "unauthorized likenesses" that are actually displayed on the Internet could be regarded as "incidental uses." It is another to classify the Internet as being synonymous with an access provider so that Internet "news disseminator" status extends to the product that accesses it, and enables advertising done outside the Internet to be protected.

The vacillating nature of the Internet should not lead to a perfect categorical fit for purposes of determining what First Amendment protections should be applied to a traditional "news disseminator." The nature of the Internet itself is conducive to multiple avenues for commercial exploitation that include advertising the service itself. This is much different than any previous case decided under the New York statute and an important distinction that should have been addressed in *Stern*.

104. *Id.* at 31, 626 N.Y.S.2d at 701.

Delphi, unlike newspapers or magazines, was not primarily in the news dissemination business, but in the business of selling a product to the public -- a product that, perhaps, had an attenuated "incidental" link to disseminating news. The *Stern* court's analogy to television is flawed in many respects. Although both television and the Internet have the capacity to provide entertainment as well as news, likenesses portrayed on television generally advertise a network presentation as opposed to enticing the consumer to purchase the television itself.

Although arguably an access provider is more than a software package, and, in fact, is a purchased "subscription" to the bulletin boards it sponsors, the problem with previous "incidental use" cases still remains. The photograph of Stern was not a representative sample of the quality and nature of Delphi's bulletin boards, which, it is assumed, are not pictorial in nature. It was a visual inducement for the subscriber to pay to participate in the written exchange. It is likely no accident that the picture Delphi chose was provocative in and of itself. That merely led to the efficacy of the ad, which likely attracted more subscribers than would have a bland announcement or a less provocative picture. While admittedly it might appear that the analysis separating bulletin board from access service from outside advertising is splitting hairs, it is an important distinction if only to point out that the Internet is unlike any other media that has allegedly infringed upon the right of publicity.

The categorization that has likened the Internet to other forms of media now allows for more expansive interpretations of "incidental use" and "newsworthiness." Such interpretations may not only enable bulletin board operators broader First Amendment protections with respect to violations of the right of publicity, but may allow any advertiser such protections. What was once considered "incidental use" because it was a representative sample of the medium, may now fall into the "incidental use" category by virtue of including within it the image of a persona of contemporary public interest -- a quasi-news oriented "incidental use" that is neither a representative

sample of the medium nor an item of news itself, yet protected under the exceptions to the statute.

Although the leap from *Stern* to the erosion of New York's Civil Rights Statute might seem extreme, it is plausible. While not closely scrutinizing the precedents that lead to the categorization of traditional print and speech medium, the New York Courts opened the door to a more nebulous standard. This standard potentially strengthens protections both for Internet service operators and media outside the Internet that draw on the slim rationale that "public interest" might very well equate with First Amendment protection.

CONCLUSION

The synonymous classification of Internet and access provider suggested by *Stern* is too broad and may destroy traditional "right of publicity" guarantees. The *Stern* decision must be narrowly interpreted and applied. Courts should engage in a case by case meaningful investigation of the type of advertisement involved and whether or not its "public interest" truly outweighs its commercial purpose. Only then can the New York Civil Rights Statute, and other similar state statutes allowing a cause of action for the commercial exploitation of someone's name or likeness, stack up against the broad and possibly insurmountable First Amendment protections granted by the *Stern* decision.