1982

The Right of Publicity vs. The First Amendment: Reconciling the Conflict between a Proprietary Interest of the Plaintiff and the Constitutional Guarantee of Free Speech

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Comment


I. INTRODUCTION

In recent years, courts and commentators have increasingly recognized the pecuniary value of the names and likenesses of famous persons and celebrities. In order to shield this pecuniary value from harm, "the right of publicity" has emerged and developed as a guard against and remedy for the unauthorized commercial exploitation of another's name and likeness. The right

1. See, e.g., Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978) ("[i]t is clear to this court that [Muhammad Ali] has established a valuable interest in his name and his likeness"); Donenfeld, Property or Other Rights in the Names, Likenesses or Personalities of Deceased Persons, 16 BULL. COPYRIGHT SOC'Y 17, 19 (1968) ("in recent years the values of certain famous names have become inestimable"); Feinberg, Madison Avenue's Cast of Famous Faces, N.Y. Times, Nov. 16, 1980, § 3, at 7, col. 1 (noting dramatic increase in value and use of celebrities' names and likenesses in commercial endorsements).

To illustrate the enormous pecuniary value of the names and likenesses of famous persons, consider the following example. After the assassination of ex-Beatle John Lennon in December of 1980, the use of his name and likeness in the cover stories of many magazines and newspapers dramatically boosted sales and profits: New York, 60,000 newsstand copies, its all time bestselling issue; People, 2.6 million newsstand copies, a record for newsstand sales; Time, 500,000 newsstand copies, the third bestselling issue in ten years; The Chicago Sun-Times, 740,000 copies of its Lennon supplement sold out. Time, January 12, 1981, at 57.

2. See generally Gordon, Right of Property in Name, Likeness, Personality and History, 55 NW. U.L. REV. 553, 569-71 (1960); Note, The Right of Publicity: A Doctrinal Innovation, 62 YALE L.J. 1123 (1953). In support of the publicity doctrine, Professor Nimmer has argued:

It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors . . . . [P]ersons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity.


(1205)
of publicity is a term of art which refers to an individual's right to own, protect, and profit from his or her name and likeness.3

This right first received judicial endorsement as an independent legal concept in 1953 when the United States Court of Appeals for the Second Circuit decided Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.4 Since Haelan, the right of publicity has won increasing acceptance by courts as a common law right,5 and


4. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). It was in Haelan that the Second Circuit, speaking through Judge Jerome Frank, first coined the term “right of publicity.” Id. at 868. In Haelan, the plaintiff-corporation obtained, by way of contract, the exclusive rights to use a baseball player's name and likeness in promoting sales of chewing gum. Id. at 867. When the defendant-competitor attempted to use the same player's name and likeness in advancing its own sales of gum, the plaintiff sued, and the court protected the plaintiff's ownership of a right of publicity. Id. at 867-69. For a further discussion of Haelan, see notes 59-62 and accompanying text infra.

has also gained recognition by legislatures as a statutory right.\(^6\)

In 1977, it received approval by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*\(^7\) Despite the wide adoption of the publicity doctrine, its definition, in the words of one commentator, "remains unclear; its theory is still evolving and its limits are uncertain."\(^8\)


\(^7\) 433 U.S. 562 (1977). In *Zacchini*, the Court held that the plaintiff-entertainer's human cannonball act was property within the meaning of state common law recognizing a right of publicity, and that a local television station could not assert a first amendment privilege to broadcast the plaintiff's act in its entirety. *Id.* at 575-79. For a fuller discussion of *Zacchini*, see notes 87-98 & 165-78 and accompanying text infra.

\(^8\) Shipley, supra note 3, at 675 (footnote omitted). The uncertainties surrounding the right of publicity involve at least seven, often interconnecting, problem areas:

1) The doctrinal basis of the right of publicity—is the right of publicity based on a property interest, a property-like or proprietary interest, or a privacy interest drawn from the right of privacy? If the right of publicity is privacy based, it remains personal to the owner, and cannot be devised or descend to one's heirs. See Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 925 (1979) (en banc) (holding right of publicity part of right of privacy, and therefore non-descendible). If the right of publicity is property-based, it is both devisable and descendible. See Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979) (holding right of publicity validly transferable and perpetual).

2) The survivability of the right of publicity after the death of its original owner—to what extent and in what manner can a non-privacy based right of publicity survive the death of its original owner? For a review of this problem, see generally Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453 (1981).

A core conceptual problem underlying the right of publicity is the appropriate method by which it should be reconciled with the first amendment's guarantee of free speech. Recent right of publicity cases have addressed several related questions:

1. The scope of the right of publicity—does the doctrine extend so as to protect not only a plaintiff's name or likeness, but also items such as his performances, mannerisms, voice, gestures, expressions, and dress? For a discussion of this problem, see Comment, The Right of Publicity as a Means of Protecting Performers' Style, 14 Loy. L.A.L. Rev. 129 (1981) [hereinafter cited as Performers' Style].

2. The appropriate analogies to be drawn between the right of publicity and other areas of law—to what extent can or should the law of publicity be accurately analogized to areas such as: a) defamation law (see Lahr v. Adell Chem. Co., 300 F.2d 256, 258 (1st Cir. 1962) (suggesting plaintiff's interest may be protectable under defamation)); b) misappropriation law (see Shipley, supra note 3, at 684-86) (misappropriation doctrine analogous to right of publicity)); c) unfair competition law (see Donovan v. Wilson Sporting Goods, Co., 285 F.2d 714 (1st Cir. 1961) (right of publicity has elements of unfair competition)); d) privacy law (see W. Prosser, Law of Torts § 117, at 804 (4th ed. 1971) (classifying publicity as a category of action under the rubric of right of privacy)); and e) copyright law (see Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576-77 (1977) (analogizing publicity law to copyright law). If it is proper to analogize the right of publicity to copyright law, a question arises as to whether, and to what extent, publicity actions have been preempted by the federal copyright statute, Copyright Act of 1976, Pub. L. No. 94-353, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1976 Supp. 1981)). For an excellent discussion of this problem, see generally Shipley, supra note 3.

3. Practical problems in assessing the value and duration of the right of publicity—how should the right of publicity be valued and timed for purposes such as taxation or transfer? For one court's bewilderment over this issue, see Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980) (“How long would the property interest last? In perpetuity? For a term of years? Is the right of publicity taxable?”).

4. The constitutional limitations on the right of publicity—how should the right of publicity be valued and timed for purposes such as taxation or transfer? For one court's bewilderment over this issue, see Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980) (“How long would the property interest last? In perpetuity? For a term of years? Is the right of publicity taxable?”).

5. The constitutional limitations on the right of publicity—to what extent does the first amendment's guarantee of free speech limit an action for infringement of an individual's right of publicity? For a discussion of this problem, see notes 99-178 and accompanying text infra.

6. The first amendment to the United States Constitution provides in pertinent part: “Congress shall make no law ... abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I. The amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.). For various discussions of the free speech guarantee, see Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); J. Nowak, R. Rotunda & J. Young, Constitutional Law 709-847 (1978).

The first amendment is applicable to the states by way of the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). See U.S. Const. amend. XIV. The first and fourteenth amendments not only prohibit the states from enacting statutes which restrain free speech, but also prohibit the states from adopting rules of tort law—such as the right of publicity—which would restrain free speech. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
publicity cases typically project a plaintiff who asserts publicity interests in preventing the misappropriation of his name or likeness, against a defendant who asserts first amendment interests in making use of the plaintiff's name or likeness. For example, in *Ann-Margret v. High Society Magazine,* the United States District Court for the Southern District of New York was confronted with a plaintiff-movie actress who brought a right of publicity action against a defendant-publisher who had printed a partially nude photograph of the plaintiff, doing so under a claim of first amendment privilege. Although cases pitting the right of publicity against the first amendment have been steadily increasing, the law of publicity has, according to one pair of commentators, largely failed to adopt any principled analytical framework under which first amendment and publicity interests can be accommodated.

This comment will trace the origins of the right of publicity, examine its development in the case law, consider the first amendment defense to a right of publicity action, and propose a case-by-case analysis to be used in future actions where the first amendment conflicts with the right of publicity.

10. See, e.g., Hicks v. Casablanca Records & Filmworks, Inc., 464 F. Supp. 426 (S.D.N.Y. 1978) (heirs of Agatha Christie assert a right of publicity in her name and likeness against a publisher of a book and movie called "Agatha" who asserts that the product is protected as entertainment under the first amendment); Current Audio, Inc. v. RCA Corp., 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. N.Y. Cty. 1972) (record company with exclusive contract with Elvis Presley asserts a right of publicity in his name and likeness against a producer of a "talking magazine" reproducing a Presley press conference who asserts that his product is protected as newsworthy under the first amendment).


12. Id. at 405 & n.8. In *Ann-Margret,* the plaintiff failed to restrain the defendant's publication of her photograph because the court held that there was "newsworthiness" in a famous movie actress appearing partially nude. *Id.* at 405.


15. See notes 19-35 and accompanying text infra.

16. See notes 53-98 and accompanying text infra.

17. See notes 99-178 and accompanying text infra.

II. THE ORIGINS AND DEVELOPMENT OF THE RIGHT OF PUBLICITY.

A. The Conceptual Roots of the Right of Publicity:
The Right of Privacy

The right of publicity is conceptually and historically rooted in the "right of privacy." The concept of a right of privacy was first proposed in a seminal law review article written in 1890 by Samuel D. Warren and Louis D. Brandeis. Warren and Brandeis defined the right of privacy as the "right to be let alone," and argued for the existence of such a right in the common law. Just a few years later, in 1904, the privacy right won its first judicial recognition in Pavesich v. New England Life Insurance Co. In Pavesich, a corporation used the plaintiff's name...
and likeness, without his consent, in an advertisement for life insurance. The plaintiff sued the corporation alleging an invasion of his right of privacy. The Supreme Court of Georgia held that, within constitutional limits of free speech and press, one has a right to be free of unwanted publicity, and that unauthorized use of one's likeness in an advertisement violates that right. Since Pavesich, the vast majority of jurisdictions have recognized and protected a right of privacy.


24. 122 Ga. at 192-93, 50 S.E. at 68-69.

25. Id. at 193, 50 S.E. at 69. The plaintiff asked for money damages in the sum of $25,000. Id.

26. The first amendment to the United States Constitution provides for freedom of speech and press. For the text of the first amendment, see note 9 supra. For a discussion of the first amendment problem in the right of publicity area, see notes 99-178 and accompanying text infra.

The Pavesich court did not undertake an extended analysis of the first amendment limits to privacy law but only briefly noted, almost in passing, that the freedom to speak, write, and print within the legitimate bounds of the constitutional guarantees of those rights, limits the right of privacy. 122 Ga. at 204-05, 50 S.E. at 74. The court did assert that any abuse of first amendment liberties such as libel or slander did not restrain the exercise of the right to privacy. Id. Under the facts in Pavesich, the court ruled that a publication of a person's picture, without his consent, as part of an advertisement for the publisher's business which falsely implied that the person purchased and endorsed the publisher's product, was libelous, and did not invoke first amendment free speech or press. Id. at 219, 50 S.E. at 80.

27. 122 Ga. at 220, 50 S.E. at 80-81. The Pavesich court was "[s]o thoroughly satisfied" with its holding that it "venture[d] to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability; just as in the present day we stand amazed that . . . Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women." Id.

28. See generally W. Prosser, supra note 8, § 117, at 802-04. For a sampling of states and cases recognizing the right of privacy, see Prosser, supra note 20, at 386-88 (1960). The right of privacy has been recognized by the Supreme Court, in various contexts, as having a constitutional basis within the penumbra of specific constitutional rights. See Roe v. Wade, 410 U.S. 93 (1973) (Blackmun, J.) (privacy interests protected under fourteenth amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (Douglas, J.) (privacy interests protected under first, fourth and fifth amendments); id. at 486 (Goldberg, J., concurring) (privacy interests protected under ninth amendment); id. at 502 (White, J., concurring) (privacy interests protected under fourteenth amendment); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (privacy interests protected under fourteenth amendment). For a discussion of the privacy right's constitutional sources, see Clark, Constitutional Sources of the Penumbral Right to Privacy, 19 VILL. L. REV. 833 (1974).
The right of privacy is viewed as consisting of four different tort categories: 29 1) "intrusion upon the plaintiff's physical solitude or seclusion;" 30 2) public disclosure of embarrassing private facts about the plaintiff; 31 3) "publicity which places the plaintiff in a false light in the public eye;" 32 and 4) "appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness." 33 It is this fourth category of the privacy right which spawned the modern concept of a right of publicity, 34 and remains its lineal ancestor. 35

The appropriation category of the right of privacy and the right of publicity seek to protect the same interest—the right of a person to be free from unauthorized use of his name or likeness—but from different points of reference. 36 The publicity right emphasizes the proprietary nature and value of the plaintiff's name and likeness, 37 and guards against damage to this property. 38 The

29. W. Prosser, supra note 8, § 117, at 802-18; Prosser, Privacy, supra note 20, at 389.
34. See generally Sims, supra note 8, at 464.

Further, some recent commentators have argued that publicity interests may well be best protected under the umbrella of a "relational theory of privacy." See Comment, The Relational Right of Privacy Theory—Recovery on the Basis of Conduct Directed at a Deceased or Living Relative, Friend or Associate, 21 Rutgers L. Rev. 74 (1966); Comment, Why Not A Relational Right of Privacy—or Right of Property?, 42 U. Mo.—Kan. City L. Rev. 175 (1973). A relational right of privacy is a concept which refers to the interest in preserving the relationship between relatives or closely associated non-relatives "free from degradation, defamation or commercial exploitation." Id. at 175.
36. For a discussion of the differences between privacy and publicity rights, see Performers' Style, supra note 8, at 185-38.
37. Id. at 138.
38. See generally id. at 137.
privacy appropriation tort, on the other hand, is based on an injury to the plaintiff's feelings and emotional well-being when his name or likeness is misappropriated, and permits money damages to compensate for such injury.

In deciding cases involving the unauthorized use of a plaintiff's name or likeness, some courts have not properly distinguished between the privacy appropriation tort and the right of publicity tort, resulting in a failure to adequately protect the pecuniary value of names and likenesses. For example, in *O'Brien v. Pabst Sales Co.*, the photograph of a well-known collegiate football player was used, without permission, in beer advertisements. The Fifth Circuit refused to grant any relief for the plaintiff, and held, under a privacy theory, that the football player, by becoming a famous personality, had "waived" his right to privacy. In a prophetic dissent, Judge Edwin R. Holmes criticized the court for deciding the case under a privacy banner, and argued that what was actually in issue was a property right to use, or preclude from using, one's name or likeness in an advertisement.

Beyond the failure to recognize and guard the extra-personal property value in one's name or likeness as in *O'Brien*, a privacy-based rationale for the right of publicity presents additional difficulties—both conceptual and practical. First, privacy interests,

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39. Id.

40. Id.


42. 124 F.2d 167 (5th Cir.), cert. denied, 315 U.S. 823 (1941).

43. Id. at 168.

44. Id. at 168-69.

45. Id. at 170-71 (Holmes, J., dissenting). The *O'Brien* opinion is often cited by commentators as an example of a case where the plaintiff inappropriately alleged an injury to feelings under a privacy theory, when the actual harm was an injury to a pecuniary interest, and where an assertion of an alternative theory, e.g., a property right of publicity action, might have resulted in a recovery. See Gordon, supra note 2, at 564; Comment, *Invasion of Privacy—Recovery for Nonconsentual Use of Photographs in Motion Pictures Based on the Appropriation of Property*, supra note 3, at 359. For another early case illustrating the same problem, see Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952).

46. For a discussion of the inadequacies of privacy-based protection for publicity interests, see Nimmer, supra note 2, at 204-10; *Performers' Style*, supra note 8, at 155-56.
being personal to an individual, are neither devisable nor descendible. However, publicity values in famous persons' names and likenesses can well be viewed as both devisable and descendible, and therefore cannot even be recognized under traditional privacy law. Further, in most cases, the harm sought to be remedied when a person's name or likeness is misappropriated is not an injury to feelings, as in privacy law, but, rather, the loss of potential financial gain, a property value outside the scope of privacy law. Lastly, privacy interests only pertain to human beings, and are therefore limited in application, while publicity values may well develop and apply to entities such as corporations or even animals.

B. The Recognition of a Proprietary Based Right of Publicity

As the inadequacies of privacy-based protection for names and likenesses became evident, courts began to gradually develop a property-based notion of publicity. Support for such a proprie-
tary right of publicity can be drawn even from early English cases according protection for aspects of an individual's persona. 55 For example, in Pollard v. Photographic Co., 56 the English Chancery Division, in 1888, recognized that one had a property right in his photographic likeness, and issued an injunction restraining a photographer from selling or exhibiting extra copies of the plaintiff's picture without consent. 57 By 1891, the United States Supreme Court had also suggested the existence of a proprietary publicity interest by observing that "[a] man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property." 58

A full-fledged proprietary right of publicity was first recognized by the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. 59 In Haelan, the plaintiff-corporation

(noting that the doctrine of privacy is increasingly inapplicable to publicity situations). Expansive notions of the scope of property interests enabled courts to easily inject property aspects into publicity law. See Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929) (property includes "every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value."). Accord, BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). For examples of early cases gravitating toward property notions of publicity, see Mundun v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (Ct. App. 1911); Edison v. Edison Polyform and Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (N.J. Ch. 1907).

55. See, e.g., Abernethy v. Hutchinson, 1 Hall & Tw. 28, 47 Eng. Rep. 1318 (Ch. 1849) (injunction issued against publication of surgeon's lectures on grounds of a property right in ideas of the lectures); Prince Albert v. Strange, 1 Mach. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849) (injunction issued against exhibition of drawings and etchings on grounds of a property right in artistic creations); Duke of Queensbury v. Shebbeare, 2 Eden 329, 28 Eng. Rep. 924 (Ch. 1758) (injunction issued against release of original manuscript on grounds of a property right in its contents).

56. 40 Ch. D. 345 (1888).

57. Id. at 352-54.


59. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). A number of pre-Haelan opinions had indicated either a desirability or willingness to extend protection to publicity values. See, e.g., Paramount Pictures, Inc. v. Leader Press, 106 F.2d 229, 231 (10th Cir. 1939) (recognizing indispensable value of publicity and advertising to stars); Pendleton v. Time, Inc., 339 Ill. App. 188,
contracted for the exclusive right to use a baseball player's name and likeness on chewing gum cards. When a competitor secured consent to use the same player's name and likeness on competing chewing gum cards, the plaintiff sued for a tortious invasion of contract rights. The Second Circuit granted relief for the plaintiff, and in the process stated:

We think that, in addition to and independent of [the] right of privacy . . ., a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross” . . . . This right might be called a “right of publicity.” For it is common knowledge that many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

60. 202 F.2d at 867.
61. Id.
62. Id. at 868. The Haelan court's holding that the right of publicity is an extra-personal item of commercial value capable of assignment necessarily implies that it viewed publicity as a property right. Performers' Style, supra note 8, at 135 n.36. Cf. Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 514, 315-16 (Pa. Ct. C.P. Phila. Cty. 1957) (discussing differences between rights of privacy and publicity, and suggesting the latter has pecuniary value).

Although the Haelan court treated the right of publicity as a property right, it went on to say that whether the publicity right “be labelled a 'property' right is immaterial” because “the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.” 202 F.2d at 868.

It should be noted that courts which adopt a right of publicity theory must initially grapple with several threshold issues before granting relief. One issue is the degree of similarity between the infringing representation and the instant plaintiff's actual name or likeness. If the defendant's infringing name or likeness is not sufficiently similar to the plaintiff's actual name or likeness, there may be no appropriate action for relief. See, e.g., Levy v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944) (plaintiff not sufficiently portrayed or pictured in defendant's motion picture to warrant relief); Wojtowicz v. Delacorte Press, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978) (mem. decision) (no actual use of plaintiff's name, portrait or picture in defendant's book and movie so as to warrant relief); University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301 (App. Div.), aff'd, 15 N.Y.2d 940, 221 N.E.2d 508, 259 N.Y.S.2d 832 (1965) (plaintiff not sufficiently portrayed or identified in defendant's motion picture to warrant relief); Toscani v. Hershey, 271 A.D. 445, 65 N.Y.S.2d 814 (App. Div. 1946) (plaintiff not sufficiently portrayed or identified in defendant's play to warrant relief). See also Felcher & Rubin, supra note 14, at 1609 (noting that case law requires that plaintiff be clearly identified and extensively portrayed before cause of action arises). The sufficient similarity requirement in publicity law may well be akin to the likelihood of confusion requirement in a trademark or tradename infringement action. For a review of the likelihood of confusion requirement in trademark and tradename law, see McCARTHY, TRADEMARKS AND UNFAIR COMPETITION ch. 23 (1973); RESTATEMENT OF TORTS § 171(1)(a); § 728 & comments a-c; § 729 & comments a-e (1938).

A second issue involves the incidental use rule. Even if the plaintiff's name or likeness is actually appropriated, mere incidental use of the plaintiff's publicity is considered de minimus, and is not sufficient to warrant recovery. See, e.g., Tropeano v. Atlantic Monthly Co., 400 N.E.2d 847 (Mass. 1980) (mere incidental use of plaintiff's picture in connection with a sociological commentary not actionable); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (mere incidental use of plaintiff's picture without commercial objectives not actionable); Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737 (App. Div. 1962) (mere incidental use of plaintiff's picture exists where it is simply republished from a proper earlier photograph). See also RESTATEMENT (SECOND) OF TORTS § 652C comment d (1977) (incidental use of plaintiff's name and likeness does not state a cause of action).

A third issue is the identifiable harm requirement. Even if the plaintiff's name or likeness is actually appropriated in a non- incidental way, the plaintiff cannot recover unless he can show an identifiable commercial harm to his publicity interests or a tangible commercial benefit to the defendant. In connection with the identifiable harm requirement in publicity law, see Hansen v. High Soc'y Magazine, Inc., 5 Media L. Rep. (BNA) 2398 (Sup. Ct. N.Y. Cty.), rev'd, 429 N.Y.S.2d 552 (App. Div. 1980). A fourth issue is the proximate cause inquiry. Courts require a showing that the defendant's activity proximately caused the harm to the plaintiff or the benefit to the defendant before relief can be granted. See, e.g., Sinatra v. Goodyear Tire & Rubber Co., 455 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971) (no
Some of these courts have expanded on the concept of a property-based publicity right. For example, in \textit{Price v. Hal Roach Studios, Inc.},$^{64}$ the District Court for the Southern District of New York recognized a property right of publicity which survived the death of the original owner of the right. \textit{Price} involved a dispute over the ownership rights to use the names and likenesses of two famous deceased comedians—Stanley Laurel and Oliver Hardy.$^{65}$ The plaintiffs in the action were the widows of Laurel and Hardy. They claimed ownership rights as heirs, and sued the defendant-film corporation, which claimed ownership rights under employment contracts with Laurel and Hardy.$^{66}$ In response to the defendant's contention that publicity rights, like privacy interests, could not survive the death of an individual, the court set forth the following rationale for upholding a survivable property claim of publicity:

Since the theoretical basis for the classic right of privacy . . . is to prevent injury to feelings, death is a logical conclusion to any such claim . . . . When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right . . . . There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."$^{67}$

While some courts chose to expand the right of publicity, others have elected to limit the reach of the concept. For example, in \textit{Memphis Development Foundation v. Factors Etc., Inc.}$^{68}$ the Sixth Circuit removed survivability from the scope of the publicity doctrine. \textit{Memphis Development} involved the validity of the ownership of Elvis Presley's right of publicity.$^{69}$ An assignee,
who received an assignment from Presley of his publicity rights when he was alive, sought to enjoin a corporation's manufacture, sale and distribution of eight-inch pewter replicas of the deceased entertainer. The Sixth Circuit held that, although Presley's publicity rights could be assigned by him during his lifetime, they could not descend after his death to his heirs or his assignees. The court reasoned that publicity law was analogous to defamation law and observed that:

The two interests that support the inheritability of the right of publicity, namely, the "effort and creativity" and the "hopes and expectations" of the decedent, would also support an action for libel or slander . . . . Neither of these reasons, however, is sufficient to overcome the common law policy terminating the action for defamation upon death.

As courts have experimented with the contours of a property-based publicity interest, some courts and commentators have expressly qualified their recognition of a property-like publicity concept on the condition that the celebrity exercise his publicity rights during his lifetime. For example, in Lugosi v. Universal Pictures, the heirs of Bela Lugosi sued a movie company for invasion of their right of publicity in Lugosi's portrayal of Count

70. Id. at 957.
71. Id. at 960.
72. Id. at 957.
73. Id. at 959. The court further observed that recognizing a survivable publicity right would create a whole set of practical problems in judicial line-drawing—problems such as taxing and timing such a right. Id. The court opined that it was "fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few." Id. at 960.
75. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (en banc).
The Supreme Court of California found for the defendant and refused to recognize a property-based right of publicity which descended to Lugosi's heirs because of the absence of any exploitation of the publicity right by the celebrity. The Lugosi court reasoned that “[i]f rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society’s interest in the free dissemination of ideas nor the artist’s rights to the fruits of his own labor would be served.”

Despite California’s adoption of only a conditional right of publicity in *Lugosi*, an emerging number of states have been less restrictive in recognizing a property right of publicity, and have set forth justifications different from *Haelan*. For example, in *Hirsch v. S.C. Johnson & Son, Inc.*, the Supreme Court of Wisconsin held that the plaintiff had a protectable property interest in his nickname “Crazylegs” when the defendant-manufacturer appropriated the name for its shaving gel product. The *Hirsch* court justified its adoption of a property publicity right by explaining that “[p]rotection of the publicity value of one’s name is supported by public policy considerations, such as the interest in controlling the effect on one’s reputation of commercial uses of one’s personality and the prevention of unjust enrichment of those who appropriate the publicity value of another’s identity.”

76. *Id.* at 816-17, 603 P.2d at 427, 160 Cal. Rptr. at 325.
77. *Id.* at 823-24, 603 P.2d at 431, 160 Cal. Rptr. at 329.
78. *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.
79. For a review of the *Haelan* decision and its enunciation of the publicity doctrine, see notes 59-62 and accompanying text *supra*.
80. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).
81. *Id.* at 382, 280 N.W.2d at 130.

Courts and commentators have sought to provide legal protection for the right of publicity by suggesting several possible remedies for its infringement: 1) New value received by the defendant—the plaintiff can recover the “value received by the defendant by virtue of the unauthorized use of the plaintiff’s name or likeness.” *Performers’ Style, supra* note 8, at 137 (footnote omitted). 2) Diverted profits from the plaintiff—the plaintiff can recover his pecuniary loss resulting from the defendant’s use of his name and likeness. *See*
To summarize, after the initial introduction of a property right of publicity by *Haelan* in 1954, courts have divided into three broad categories with respect to the publicity doctrine's content. The first category consists of courts which have adopted a full-fledged and unconditional property right of publicity which is fully assignable and survivable. The second category includes courts which have adopted a quasi-property right of publicity which is assignable but not survivable. The last category encompasses courts which have recognized a conditional right of publicity which is fully survivable if the right's owner exercised the right during his lifetime.


83. For a review of the *Haelan* decision, see notes 59-62 and accompanying text *supra*.


86. *See Lugosi* v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (en banc) (publicity rights which are unexercised by their original owner during his lifetime could not descend). For a discussion of
C. The United States Supreme Court and the Right of Publicity: Zacchini v. Scripps-Howard Broadcasting Co.

In 1977, the United States Supreme Court addressed and vindicated a right of publicity claim for the first time in *Zacchini v. Scripps-Howard Broadcasting Co.* In *Zacchini*, a television station broadcast a stunt performer's "human cannonball" act in its entirety during the local evening news. The performer sued the station for misappropriation of his personal property under a state common law right of publicity action. The station asserted a first amendment privilege to broadcast newsworthy events. The *Zacchini* Court found for the plaintiff-performer on his right of publicity claim, and held that the first amendment did not privilege the station to televise the "entire act" of the

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88. 433 U.S. at 563-64. The cannonball act lasted for a total of only 15 seconds. *Id.* at 563. The following script was read by a reporter as a film of Zacchini's performance was broadcast:

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, 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 ....

*Id.* at 564 n.1 (emphasis in original).

89. *Id.* at 564. The plaintiff asserted a common law right of publicity claim under Ohio state law, but the trial court granted summary judgment for the television station. *Id.* The Court of Appeals of Ohio reversed and held that the plaintiff-performer stated a good cause of action for conversion and for infringement of a common-law copyright. *Id.* On appeal, the Supreme Court of Ohio noted that the plaintiff-performer's cause of action properly rested on his state law right of publicity value in his performance, but held that the defendant-station enjoyed a first amendment privilege to broadcast newsworthy events. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 244, 351 N.E.2d 454 (1976), *rev’d*, 433 U.S. 562 (1977).


91. 433 U.S. at 574-77.
performer, and thereby stifle the "heart of [the plaintiff's] ability to earn a living . . . ." In supporting a state common law publicity right under the facts of Zacchini, the Court discussed the nature and rationale for a right of publicity. First, the Court emphasized the economic and commercial value of a publicity right's subject-matter, and the need to shield this value from "substantial threat." Second, the Court, in distinguishing publicity actions from privacy actions, observed that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual," and has "little to do with protecting feelings or reputation" as in privacy law. Further, the Court noted that the "rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will." In addition, the Court analogized the goal of publicity law with that of the patent and copyright laws—the "encouragement of individual effort by personal gain . . . [and advancement of] the public welfare through the talents of authors and inventors in 'Science and useful Arts.'" In sum, Zacchini represents an important milestone in the development of publicity law because it embodies Supreme Court recognition of a property-based right of publicity, and because it resulted in Supreme Court validation of a particular publicity claim in the face of a typically fatal first amendment challenge.

III. THE FIRST AMENDMENT DEFENSE TO A RIGHT OF PUBLICITY ACTION

The first amendment to the United States Constitution is often asserted as a defense to an action for infringement of the

92. Id. at 574-75. For a discussion of the "entire act" standard in Zacchini, see notes 175-78 and accompanying text infra.
93. 433 U.S. at 576.
94. 433 U.S. at 575.
95. Id. at 573.
96. Id. at 576, quoting Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 331 (1966). The Court added that "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." Id.
98. See notes 87-97 and accompanying text supra.
99. For the text of the first amendment, see note 9 supra.
The first amendment, in part, guarantees the right of free speech to all citizens. Under that rubric, the amendment provides constitutional protection for any nondefamatory speech which informs the public about political, social or newsworthy issues, and for any nondefamatory speech which expands society's cultural experience by producing entertaining, creative or even whimsical expression. Courts which are confronted with accommodating the right of publicity claim and the constitutional free-speech privilege must necessarily engage in the task of judicial line-drawing and policy-making.

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In addition to a first amendment defense, other constitutional defenses to a right of publicity action are possible. First, a defendant who is making use of a plaintiff's name or likeness can assert a "free trade interest in keeping the names and likenesses of . . . celebrities in the public domain." Sims, supra note 8, at 484. Arguably, a free trade interest could be constitutionally based on the commerce clause. See U.S. Const. art. I, § 8, cl. 3. However, such an argument has not figured prominently in the defenses of alleged violators of publicity rights. See Petitioner's Brief for Certiorari, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979); Sims, supra note 8, at 485 n.149.

Second, a defendant who is making use of a plaintiff's name or likeness in the context of a media communication can assert, strictly speaking, a separate first amendment freedom of the press defense. See U.S. Const. amend. I. For discussions of freedom of the press, see L. Levy, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON (1966); H. Nelson, FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT (1967). However, in view of the fact that a free press defense is generally joined with a free speech defense whenever either is asserted, and that the same analysis takes place under both defenses, this comment deals with both together under a first amendment category.

101. See U.S. Const. amend. I. For discussions of the free speech guarantee, see note 9 and authorities cited therein.

102. Felcher & Rubin, supra note 14, at 1597.

103. Id. See also Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection"). For a discussion of Zacchini and the first amendment, see notes 165-69 and accompanying text infra.

A. The First Amendment Collides with the Right of Publicity: Conflict in the Case Law

Those courts which have been called upon to demarcate the boundaries between the publicity and free speech doctrines have produced less than uniform results. Decisions illustrating the tension in judicial resolution of these controversies have been rendered in several factual contexts. The three most common areas have involved unauthorized use of the plaintiff's name or likeness to impart newsworthy information, to provide entertainment, and to engage in commercial sales.

Courts and commentators have suggested several points at which the line between the right of publicity and the first amendment privilege can be drawn. One view would permit a first amendment privilege to appropriate all but the "entire act" of the plaintiff's right of publicity. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977). For a discussion of Zacchini and the entire act test, see notes 175-78 and accompanying text infra. A second view would permit a privilege to appropriate only those aspects of the plaintiff's publicity rights which serve traditional free speech functions, such as newsworthiness or entertainment. See Note, First Amendment Theory Applied to the Right of Publicity, 19 B.C.L. REV. 277, 291 (1975). A third view would permit a privilege to appropriate all but a "material or substantial" part of the plaintiff's publicity rights. Id. A fourth view would permit a privilege to appropriate aspects of the plaintiff's publicity which are matters of legitimate public interest, unless the plaintiff could show that the appropriation was a "subterfuge or cover for private or commercial exploitation." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 581 (1977) (Powell, J., dissenting) (footnote omitted). Cf. Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 235, 351 N.E.2d 454, 455 (1976), rev'd, 433 U.S. 562 (1977) (Ohio Supreme Court standard for limiting first amendment privilege). For a discussion of Justice Powell's dissent in Zacchini, see notes 170-74 and accompanying text infra.

Stated another way, the problem of drawing lines between the right of publicity and the free speech privilege, and determining where one ends and the other begins, is essentially the Hohfeldian problem of defining and relating legal categories, such as, in this instance, the categories of right and privilege. For Professor Hohfeld, a right was the opposite of a no-right which, in turn, was a correlative of a privilege. For a full discussion of the meaning and relationship between these categories, see Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1923).

105. See notes 109-49 and accompanying text infra.

106. See notes 109-29 and accompanying text infra. Newsworthy information is generally accorded a high level of first amendment protection. See Sims, supra note 8, at 486. Newsworthy information can be imparted through a wide variety of mediums including books, newspapers, magazines, radio, and television. See Felcher & Rubin, supra note 14, at 1597-98.


108. See notes 150-64 and accompanying text infra. Commercial products and merchandise are not generally considered to have a high level of first
1. Newsworthy Information

Judicial confusion in addressing the publicity and free speech problem within the context of newsworthy information is manifested in several decisions under New York law. In Paulsen v. Personality Posters, Inc., the Supreme Court of New York County adopted an expansive view of the first amendment privilege for publicity items. In Paulsen, the plaintiff, a television comedian conducting a mock campaign for the Presidency in 1968, sought to enjoin the defendant, a marketing corporation, from producing a commercial poster depicting the plaintiff in an unflattering pose. The Paulsen court held that the poster conveyed a message of public interest, even if satirical, and therefore fell within the ambit of newsworthiness because “[t]he privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.”


111. Id. at 445, 299 N.Y.S.2d at 503-04. The court described the poster as follows:

A soulfully expressioned plaintiff attired in beruffled cap and prim frock, in a style which might best be characterized as "latter-day Edna May Oliver," is shown holding an unlit candle in one hand while his other arm cradles a rubber tire which is hoisted onto his right shoulder. A contemporary touch is added by a banner draped across the plaintiff's chest, in the manner, if not the style, of a beauty pageant contestant, which bears the legend "1968" . . . with the addition of the words "FOR PRESIDENT" at the bottom in 21/2" letters. Id., 299 N.Y.S.2d at 503.

112. Id. at 448, 299 N.Y.S.2d at 506. The Paulsen court ruled in favor of the first amendment interest, and refused to issue an injunction against the defendant's production of the poster. Id. at 452, 299 N.Y.S.2d at 510. It should be noted that a subsequent case attempted to limit the holding of Paulsen to its facts. See Rosemont Enters., Inc. v. Urban Sys., Inc., 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, 145 (Sup. Ct. N.Y. Cty.), modified per curiam, 42 A.D.2d 544, 345 N.Y.S.2d 17 (App. Div. 1973). For a discussion of this case, see notes 152-56 and accompanying text infra.
Almost a decade later, the Second Circuit, construing New York law, adopted an apparently narrower view of the first amendment privilege in a cryptic opinion passing on another right of publicity case dealing with purportedly newsworthy posters. In *Factors Etc., Inc. v. Pro Arts, Inc.*, the defendants, two corporations, apparently sought to take advantage of the popular demand for Elvis Presley memorabilia immediately following the entertainer's death, and produced a memorial poster of Presley with an appropriate caption. The plaintiff, the assignee of Presley's publicity rights, sued to enjoin the defendants' appropriation of the entertainer's name and likeness. The defendants asserted that their poster depicted a newsworthy event, and was therefore protected under the first amendment, as in *Paulsen*. The court rejected any analogy to *Paulsen*, and held, with little first amendment analysis, that the "poster of Presley was not privileged as celebrating a newsworthy event." For cases other than *Paulsen* deeming materials to have first amendment newsworthiness in the context of suits alleging various theories of appropriation, see *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (Abraham Zabruder film of President John F. Kennedy's assassination newsworthy); *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 414 (1971) (plaintiff's picture on magazine cover newsworthy because photograph related to news story); *Donohue v. Warner Bros. Pictures Distrib. Corp.*, 2 Utah 2d 256, 272 P.2d 117 (1954) (Jack Donohue's portrayal in movie protected in part as informational); *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (App. Div. 1973) (Joe Namath's photograph used to advertise sports magazine newsworthy where magazine carried news stories about Namath); *Rand v. Hearst Corp.*, 31 A.D.2d 406, 298 N.Y.S.2d 405 (App. Div. 1969) (Ann Rand's name, which appeared in a book review, a matter of public interest and information); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (Sup. Ct. N.Y. Cty. 1972) (defendant's newsmagazine with a phonograph record of an Elvis Presley news conference deemed newsworthy). For other cases deeming materials not to have newsworthiness, see note 117 infra.


114. 579 F.2d at 217. The poster was entitled "In Memory," and below the photograph of Presley, the poster bore the dates "1935-1977." *Id.* at 216-17.

115. *Id.* at 222. For a discussion of *Paulsen*, see notes 110-12 and accompanying text supra.

116. *Id.* at 222. For a discussion of *Paulsen*, see notes 110-12 and accompanying text supra.

117. The Second Circuit's rationale for rejecting the first amendment holding of *Paulsen* consisted of one sentence. The court stated: "We cannot accept
Two recent decisions by the District Court for the Southern District of New York also illustrate the continuing tension in publicity cases dealing with newsworthiness under the first amendment. In *Ann-Margret v. High Society Magazine, Inc.*, the court took the view that publicity actions must be so circumscribed as "to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events and matters of public interest" guaranteed by the First Amendment. In *Ann-Margret*, the plaintiff-movie actress sued a defendant-publisher who printed a partially nude photograph of the plaintiff in a magazine. The *Ann-Margret* court held that a picture of a famous movie actress appearing partially unclad constitutes an item within the "orbit of public interest and scrutiny," and that therefore such a picture could not "under the First Amendment . . . provide the basis for a cause of action for violation of the right to publicity." The plaintiff's contention that the legend "IN MEMORY . . ." placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate. *Id.* The court affirmed the trial court's issuance of an injunction. *Id.*

Pro Arts' contention that the legend "IN MEMORY . . ." placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate. *Id.* The court affirmed the trial court's issuance of an injunction. *Id.*


121. 498 F. Supp. at 403-04. The plaintiff-movie actress asserted two theories of recovery, an invasion of her statutory right of privacy, and violation of her common law right of publicity. *Id.* at 404.

122. *Id.* at 405, quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977).

123. *Id.* at 406 (footnote omitted). The *Ann-Margret* court dismissed the plaintiff's action in its entirety. *Id.* at 408.
Almost one year later, however, the same court, faced with a similar set of facts, ruled against the first amendment and in favor of publicity interests. In *Lerman v. Chuckleberry Publishing, Inc.*, the court took the view, in contrast with *Ann-Margret*, that a publicity action could lie where the unauthorized use of the plaintiff's likeness was for a commercially exploitive effect, even with the existence of an apparently newsworthy element involved in the use. In *Lerman*, a novelist brought suit against a publisher who printed a nude photograph, incorrectly identified as the plaintiff, in a magazine. The defendant's publication was purportedly reporting on the newsworthy event of well-known female celebrities expressing sexual liberation. The *Lerman* court conceded that such a matter was newsworthy. Nevertheless, the court ruled that the defendant's purpose was to enhance sales, and that therefore the plaintiff's publicity claim should prevail.

2. *Entertainment Materials*

Discord in the publicity case law extends beyond the newsworthiness area and reaches decisions involving first amendment protection for entertainment materials. Entertainment materials such as fiction, satire and parody are as deserving of first amendment protection as newsworthy information as pointed out by Chief Justice Rose Bird of the California Supreme Court in *Guglielmi v. Spelling-Goldberg Productions.* Chief Justice Bird remarked that:

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125. See generally id. at 232-34.

126. Id. at 290. The plaintiff-novelist and screenwriter asserted three theories of recovery: libel, invasion of the statutory right of privacy, and violation of the common law right of publicity. Id.

127. Id. at 234. The picture in question appeared in a pictorial essay entitled "Archives" in the May 1980 issue of *Adelina*—the defendant's magazine. Id.

128. Id. at 234.

129. Id. at 232-33. The court concluded that the plaintiff's claim contained no material issue of fact, and hence granted judgment for the plaintiff as a matter of law. Id.

130. 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (Bird, C.J., concurring). In *Guglielmi*, the heirs of Rudolph Valentino sued the producers of a fictionalized television drama depicting the star's life story for invasion of the right of publicity. Id. at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353. A majority of the California Supreme Court affirmed the dismissal of the plaintiff's complaint under the view that the publicity right in California does not survive the owner's death in the absence of sufficient exploitation of the right. Id., citing *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 923 (1979) (en banc).
Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant or powerful if offered in satire, science fiction or parable. Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. Such authors are no less entitled to express their views than the town crier with the daily news or the philosopher with his discourse on the nature of justice. Even the author who creates distracting tales for amusement is entitled to constitutional protection.\(^\text{131}\)

However, in according entertainment materials appropriate first amendment protection while at the same time giving effective protection to the right of publicity, courts have had difficulty in avoiding shifting results.\(^\text{132}\)

In *Hicks v. Casablanca Records & Filmworks, Inc.*,\(^\text{133}\) the District Court for the Southern District of New York afforded near-absolute protection for non-falsified entertainment materials. In *Hicks*, the plaintiffs, the heirs and assignees of the late mystery writer Agatha Christie, sought to enjoin distribution of the defendants’ book and movie called “Agatha,” which presented a fictionalized account of a true incident in the mystery writer’s life.\(^\text{134}\)

In a concurring opinion, Chief Justice Bird took the position that the right of publicity is inheritable by the owner’s heirs and protected for 50 years after the owner’s death. *Id.* at 864, 603 P.2d at 457, 160 Cal. Rptr. at 355 (Bird, C.J., concurring). Chief Justice Bird argued, however, that constitutional protections for works of fiction and entertainment precluded a finding of liability on the part of the plaintiff. *Id.* at 863-72, 603 P.2d at 457-62, 160 Cal. Rptr. at 354-60 (Bird, C.J., concurring).


\(^\text{134}\) *Id.* at 428-29. The defendants’ materials offered a fictionalized version of the whereabouts and activities of Agatha Christie during her famous, but mysterious, disappearance for eleven days in 1926. *Id.* at 429. The plaintiffs asserted their publicity rights in the mystery writer’s name and likeness in an attempt to prevent release of the defendants’ materials. *Id.*
The *Hicks* court, while apparently balancing the first amendment and publicity interests involved, held that, as to non-falsified fiction, "the first amendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess." 135

In 1981, the Southern District of New York retreated from its position in *Hicks*, and ruled that non-falsified materials which closely reproduce a publicity item for commercial gain are not protected by the first amendment. In *Groucho Marx Productions, Inc. v. Day and Night Co.*,136 the assignees of the publicity rights of the Marx Brothers sued to enjoin the defendants' production of a musical play entitled "A Day in Hollywood/A Night in the Ukraine." 137 The defendants contended that their play was a parody of a Marx Brothers' performance, and was therefore protected by the first amendment.138 The court was troubled by the wholesale reproduction of the Marx Brothers characters, and held that such a use of celebrities' names and likenesses renders the use essentially for commercial purposes, and therefore without first amendment protection.139

Tension in the entertainment area of publicity law is also reflected in two more recent decisions addressing the conflict with the right of free speech.140 In *Frosch v. Grosset & Dunlap, Inc.*,141 the New York Supreme Court, Appellate Division, adopted a sweeping test for constitutional protection for literary materials—namely, that the first amendment protected any literary work which was not, in bad faith, a mask for commercial gain. In *Frosch*, the executor of the film actress Marilyn Monroe sued the author and publishers of a book entitled "Marilyn" for invasion of the dece-

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135. *Id.* at 433, relying in part on *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 301 (App. Div.), aff'd, 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965). The *Hicks* court suggested that only if the defendants' materials had consisted of deliberate falsifications would the scales of the balance tipped in favor of the plaintiff's publicity interests and against the defendants' first amendment interests. *Id.*


137. *Id.* at 486. The plaintiffs, asserting their common law right of publicity to prevent the showing of the defendants' play, objected to the play's reproduction of the Marx Brothers' mannerisms and style of humor. *Id.*

138. *Id.* at 492-93.

139. *Id.* at 493-94. The *Groucho Marx* court found that the defendants had simply duplicated as faithfully as possible the Marx Brothers performances, while conveying little biographical or informational content. See generally *id.*


dent's right of publicity. The *Frosch* court ruled that the book in question was "not simply a disguised commercial advertisement for the sale of goods or services," and was therefore valid as a literary work entitled to protection by the right of free expression.

In contrast with the *Frosch* court's broad language favoring first amendment interests in the entertainment area of publicity law, the District Court of New Jersey delivered a more restrictive opinion in *Estate of Presley v. Russen*. In *Russen*, the court adopted a balancing test for determining the validity of a free speech claim in a publicity case. The *Russen* court was faced with a suit by the estate of Elvis Presley to enjoin the defendant-entertainer's appropriation of Presley's name and likeness in the defendant's stage production—"THE BIG EL SHOW." The *Russen* court initially addressed the threshold question of whether the defendant's portrayal was sufficiently similar to Presley's actual name or likeness for purposes of bringing a publicity action. Ruling that a publicity action was appropriate, the court then balanced the free speech and publicity concerns involved. The court conceded that the defendant's appropriation contained an entertainment element, but held that the appropriation primarily served the purpose of commercial exploitation of Presley's publicity, and therefore could not be shielded by the first amendment.

142. *Id.* The book "Marilyn" was purportedly a biography of the late film actress. *Id.* at 768-69, 427 N.Y.S.2d at 829.


145. *Id.* at 1356.

146. *Id.* at 1344. The plaintiff asserted four theories of recovery: federal law unfair competition, common law unfair competition, common law trademark infringement, and infringement of the right of publicity. *Id.*

147. *Id.* at 1348-49. The *Russen* court found, as a matter of fact, that the defendant-entertainer's likeness, style, and performance were sufficiently similar to Presley's. *Id.* The *Russen* court reasoned that "a reasonable viewer upon seeing the pictures [of the defendant-entertainer] would likely believe the individual portrayed to be Elvis Presley." *Id.* at 1349. For a review of the sufficient similarity issue, see note 63 supra.

148. *Id.* at 1359.

149. *Id.* The *Russen* court noted that "entertainment [as in the instant case] that is merely a copy or imitation, even if skillfully and accurately carried
3. Commercial Sales

Cases in the commercial sales area of publicity law present the least first amendment difficulties. Unauthorized use of a celebrity's name or likeness which serves no informative or cultural function but which is only intended to promote the sale of merchandise is, in the words of one commentator, "considered the very essence of commercial exploitation," and hence is deserving of little first amendment protection. For example, in Rosemont Enterprises, Inc. v. Urban Systems, Inc., the plaintiff was the corporate assignee of the publicity rights of billionaire recluse Howard Hughes. The plaintiff sought to enjoin various defendants from the marketing and distribution of an adult educational career game entitled "The Howard Hughes Game," which appropriated the name and biography of Hughes. The Urban Systems court reasoned that "[i]n reality, defendants are not disseminating news. They are not educating the public as to the achievements of Howard out, does not really have its own creative component and does not have a significant value as pure entertainment." Id. (footnote omitted). The court emphasized the view of one commentator that:

The public interest in entertainment will support the sporadic, occasional and good faith imitation of a famous person to achieve humor, to effect criticism or to season a particular episode, but it does not give a privilege to appropriate another's valuable attributes on a continuing basis as one's own without the consent of the other. Id. at 1359-60, citing Netterville, Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary, 35 S. CAL. L. REV. 225, 254 (1962).


Although the Russen court found that the defendant's representation was not protected by the first amendment, the court refused to issue an injunction restraining the defendant's stage show because the plaintiff had not adequately demonstrated any identifiable harm or loss of commercial benefits. Id. at 1379. The court noted, for instance, that neither the plaintiff nor its licensees could show that their ability to enter into agreements to license the use of Presley’s name or likeness was seriously jeopardized by the defendant’s activities. Id. For a review of the identifiable harm requirement in publicity law, see note 63 supra.

150. Sims, supra note 8, at 492-93 (footnote omitted).
151. Id. See also Felcher & Rubin, supra note 14, at 1599.
153. Id. at 789, 340 N.Y.S.2d at 145.
154. Id.
Hughes. They are selling a commodity, a commercial product, an entertaining game of chance.” Consequently, the court ruled that the plaintiff was entitled to relief.

The plaintiff in Urban Systems also successfully brought suit to enjoin the unauthorized use of Howard Hughes’ name and likeness in Rosemont Enterprises, Inc. v. Choppy Productions, Inc.

In Choppy Productions, the plaintiff objected to the defendants’ manufacture, distribution, and sale of T-shirts, sweatshirts, and other items bearing Hughes’ image, along with comical and satirical comments about his lifestyle. The Choppy Productions court granted judgment for the plaintiff, and concluded that there was “no validity in [the defendant’s] argument that [the appropriation] is protected by the constitutional right of free speech.”

Although these cases confirm the view that little first amendment protection is given to the unauthorized use of a plaintiff’s publicity rights in the commercial context, the conclusion that free speech interests are wholly inapplicable may be inappropriate. Commercial speech, such as in advertising for a product, is not totally devoid of first amendment protection. Further, commercial appropriations of a plaintiff’s name or likeness are rarely for the sole purpose of advancing sales, but are typically mixed with a biographical function, or an informational element. Lastly,

155. Id. at 790, 340 N.Y.S.2d at 146.
156. Id. at 791, 340 N.Y.S.2d at 147.
158. Id. at 1004, 347 N.Y.S.2d at 84. The “message” behind the Howard Hughes T-shirts was the idea that vast sums of money do not necessarily bring happiness or social ease—a “pertinent statement within our free enterprise system.” Sims, supra note 8, at 496.
159. 74 Misc. 2d at 1005, 347 N.Y.S.2d at 85. For other opinions in which commercial items have failed to receive any first amendment protection, see Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979) (memorial poster sold as a commercial item entitled to no first amendment protection); Palmer v. Schonhorn Enters., Inc., 96 N.J. Super. 72, 232 A.2d 458 (Sup. Ct. Ch. Div. 1967) (board game appropriating names and biographies of well-known golfers entitled to no first amendment protection). For a discussion of the Factors case, see notes 113-17 and accompanying text supra.
162. See Rosemont Enters., Inc. v. Choppy Prods., Inc., 74 Misc. 2d 1003, 347 N.Y.S.2d 83 (Sup. Ct. N.Y. Cty. 1972) (sale of Howard Hughes T-shirts
celebrity merchandise and memorabilia may well constitute an important form of protected "symbolic speech," and make a unique contribution to the "marketplace of ideas." Consequently, the first amendment problem in the commercial sales area of publicity law, although not as pronounced, may well exist on a subdued level.

B. The United States Supreme Court and the First Amendment Parameter to the Right of Publicity: Zacchini Revisited

In Zacchini, the Supreme Court squarely addressed the inherent tension between the right of publicity and the first amendment. The Zacchini Court held that a first amendment news privilege did not shield a television station which broadcasted the "entire act" of a stunt performer from an action by that performer asserting a state common law right of publicity to protect his performance. The Court emphasized the proprietary aspect of the right of publicity, and opined that the first amendment could not be used to threaten the entire economic value of the plaintiff-performer's act. The Court confirmed that "entertainment, as well as news, enjoys First Amendment protection," and that "entertainment itself can be important news," but ultimately decided that the appropriation, in Zacchini, had simply gone too far.

Justice Powell submitted a strong dissenting opinion arguing that the Zacchini majority was not "appropriately sensitive to the First Amendment values at stake." In Justice Powell's view, the mixed with dissemination of an informational message). For a discussion of Choppy Productions, see notes 157-59 and accompanying text supra.


164. It has been suggested that mass-purchased celebrity memorabilia, depicting stars like actresses Jane Fonda and Vanessa Redgrave who are associated with specific political causes, may well enable the public to become "speakers" of an idea and to engage in "mass expression." See Sims, supra note 8, at 494-96.

165. For a review of the facts and holding of Zacchini, see notes 87-93 and accompanying text supra.

166. 433 U.S. at 562, 574-75.

167. See generally id. at 573-75. For a discussion of Zacchini and the property right of publicity concept, see notes 87-98 and accompanying text supra.

168. 433 U.S. at 575.

169. Id. at 578-79.

170. Id. at 579-80 (Powell, J., dissenting). Justice Powell was joined by Justices Brennan and Marshall. Id.
television station's broadcast of the plaintiff's act in the context of a news program was simply "a routine example of the press' fulfilling the informing function so vital to our system." Justice Powell suggested that the majority's holding could raise the spectre of media self-censorship by prompting news editors to refrain from portraying information which might be construed as the "entire act." The dissent attacked the "entire act" standard set forth by the majority as unclear "even for resolution of this case," and expressed doubt as to just what the "entire act" constituted. In contrast with the majority, the dissent "would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation." The entire act standard carved out by the Zacchini majority represents one method by which to determine the division between the right of publicity and the first amendment. However, it has been condemned by commentators as being a "mechanical and poorly conceived test," and as being limited to the particular facts in Zacchini. The test may well be overbroad in that it

171. Id. at 580 (Powell, J., dissenting).
172. Id. at 580-81 (Powell, J., dissenting). Justice Powell argued that media self-censorship, or at least "watered down" reporting, would most likely arise in situations where a news station is contemplating broadcasting events such as a circus, sports competitions of limited duration, or short dramatic skits. Id. & n.3 (Powell, J., dissenting). If censorship or diluted reporting did occur, Justice Powell declared that "[t]he public is then the loser." Id. at 581 (Powell, J., dissenting).
173. Id. at 579 & n.1 (Powell, J., dissenting) (footnote omitted). The dissent suggested that even under the entire act standard, the full performance of the plaintiff may not have been appropriated since the "act" includes items such as the audience fanfare, the introduction of the performer, description of the uniqueness and danger of the performance, commentary from the master of ceremonies, and so on. Id. at 579 n.1 (Powell, J., dissenting). See also Human Cannonballs, supra note 87, at 1203.
174. 433 U.S. at 581 (Powell, J., dissenting) (footnote omitted). Justice Stevens submitted a separate dissenting opinion in Zacchini in which he noted that the basis of the Ohio Supreme Court's decision was unclear. Id. at 583 (Stevens, J., dissenting). The state court opinion could be read as either resting on first amendment grounds, or on pure state common-law right of publicity grounds. Id. Under these circumstances, Justice Stevens argued that the case should be remanded to the Ohio Supreme Court "for clarification of its holding before deciding the federal constitutional issue." Id.
176. See Note, supra note 175, at 1231. See also Sims, supra note 8, at 487; Human Cannonballs, supra, note 87, at 1189-1204. But see Comment, Constitutional Law—Privacy Torts—First Amendment Does Not Privilege Violation of
would preclude a first amendment privilege in cases where the "public interest may be better served by infringement of an entire performance." Further, it remains unclear after Zacchini whether a less-than-entire appropriation of a plaintiff's publicity rights can be protected under a first amendment privilege.178

IV. SUMMARY AND ANALYSIS

The decisions of state and federal courts across the country,179 as well as the Supreme Court's decision in Zacchini,180 have pointedly recognized a plaintiff's right of publicity in protecting the commercial value of his name and likeness.181 Although courts and commentators have differed on issues such as the publicity right's doctrinal basis and descendibility,182 an emerging number of jurisdictions appear to favor at least a proprietary or property-like basis for the publicity doctrine.183

Modern cases in which a plaintiff asserts his right of publicity typically include a first amendment versus free speech issue.184 Some courts, faced with a confrontation between the right of publicity and the first amendment, have ruled in favor of the first amendment in broad language.185 Other courts, faced with the


177. Note, supra note 175, at 1224. One commentator provides an illustration of this idea. "[A] broadcaster might endeavor to expose Zacchini as a charlatan who uses wires and mirrors to perform his act. The public's interest in scrutiny of the act might only be served by a film covering every aspect of the act from the preparation of the cannon through Zacchini's landing." Human Cannonballs, supra note 87, at 1203 (emphasis added).

178. But cf. Note, supra note 175, at 1224 n.136 (suggesting that a less-than-entire appropriation is entitled to a first amendment privilege). Accord, Premature Burial, supra note 3, at 1008.

One commentator has warned that the lack of clarity in the entire act test, and in its imprecision in addressing the competing interests of the publicity right's owner and the first amendment actor, "invites injury to first amendment principles." Human Cannonballs, supra note 87, at 1202.

179. See notes 59-86 and accompanying text supra.

180. See notes 87-98 and accompanying text supra.

181. For a review of the definition of the right of publicity, see text accompanying note 3 supra. For various discussions of the right of publicity, see authorities cited in note 3 supra.

182. For a review of these issues, see note 8 supra.

183. See notes 54-86 and accompanying text supra.

184. See notes 9-10 and accompanying text supra. For a review of several representative cases, see notes 110-49 and accompanying text supra.

same problem under not dissimilar facts, have decided on behalf of the right of publicity. To reconcile the inherent conflict between the publicity doctrine and free speech, it is suggested that courts should employ the following three-pronged analysis to guide them in reaching principled resolutions in future cases.

A. The Degree of Similarity Between the Defendant's Representation and the Subject-Matter of the Plaintiff's Right of Publicity

The threshold question in any case encompassing a conflict between the right of publicity and first amendment free speech should be whether the defendant's representation of a name or likeness is similar enough to the instant plaintiff's actual name or likeness so that there exists a legally cognizable conflict which must be resolved. The initial similarity inquiry is, in essence, an

worthy events, and matters of public interest' guaranteed by the First Amendment'). For a discussion of Ann-Margret, see notes 119-23 and accompanying text supra. See also Paulsen v. Personality Posters, Inc., 59 Misc. 2d at 448, 299 N.Y.S.2d at 506 (first amendment interests are "by no means limited to dissemination of news . . . but [extend] far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general"). For a discussion of Paulsen, see notes 110-12 and accompanying text supra. See also Paulsen, see notes 110-12 and accompanying text supra. See also Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1978) (ruling in favor of right of publicity). For a discussion of Factors, see notes 113-17 and accompanying text supra.


187. See notes 188-207 and accompanying text infra.

It is suggested that the elements of this analysis have been, and should be, employed on an ad hoc basis under the facts of each case where the interests of publicity and free speech conflict. However, in contrast with this "ad hoc balancing" of interests approach, some commentators favor the application of a "definitional balancing" of interests approach in publicity cases. See Note, First Amendment Theory Applied to the Right of Publicity, supra note 104, at 288-90. Under a definitional balancing theory, the court undertakes a balancing of interests between the plaintiff and the defendant, not in reconciling their conflicting publicity and free speech assertions, but in the determination of whether the defendant is actually asserting a valid free speech claim. If a valid free speech assertion is made, that constitutional claim will always prevail over a non-constitutional publicity claim. Id. at 285-88.

188. For one court addressing this threshold issue, see Estate of Presley v. Russen, 513 F. Supp. at 1348-49. For a discussion of Russen, see notes 144-49 and accompanying text supra. If a court should find that a defendant's representation is not sufficiently similar to the plaintiff's name or likeness, then no right of publicity action exists, and the first amendment problem is never reached. For a discussion of the sufficient similarity issue, along with illustrative cases, see note 69 supra.

In addition to the similarity issue, three other threshold questions in publicity cases must be addressed. First, the defendant's appropriation of the
inquiry into degree, and therefore, of necessity, calls for a judgmental conclusion by the appropriate fact-finder. In making this similarity conclusion, it is suggested that several uniform and relevant factors must be considered. These factors include: 1) the physical appearance of the likenesses; 2) the verbal translations of the likenesses; 3) the pronunciation of the names; 4) suggestions generated by the names and likenesses; 5) the intent of the defendant in making his infringing representation; and 6) the degree of care likely to be exercised by an observer.

B. The Primary Purpose Behind the Defendant's Representation

Secondly, the primary purpose behind the defendant's representation should be analyzed to determine what level of free speech protection is appropriate. Broadly speaking, the level of first amendment protection accorded to a defendant's representation should depend upon the extent to which it serves traditional free speech functions. A number of courts have already employed a "primary purpose" analysis in an attempt to rationally divide the publicity doctrine and free speech. These courts have classified "primary purpose" into three broad categories which, in descending order of protection, are: commercial use, comment, and parody. Plaintiff's name and likeness must constitute a non-incidental use to warrant recovery. For a discussion of the incidental use rule, along with illustrative cases, see note 63 supra. Second, there must be a showing of an identifiable commercial harm to the plaintiff's interests or a tangible commercial benefit to the defendant's interests before recovery is justified. For a discussion of the identifiable harm requirement, along with illustrative cases, see note 63 supra. Third, the defendant's activity must proximately cause the harm to the plaintiff or the benefit to the defendant before relief will be granted. For a discussion of the proximate cause inquiry, along with illustrative cases, see note 63 supra.

189. Due to the nature of the similarity inquiry, it is suggested that the actual question in the inquiry becomes: what quantum of similarity is necessary for a court to deem that a right of publicity action exists, and that the first amendment issue must be reached? For contrasting quantums of similarity adopted by courts, compare Estate of Presley v. Russen, 517 F. Supp. at 1349 (adopting the test of whether a reasonable viewer would be likely to believe the two representations to be the same) with Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (adopting the test of whether the infringing likeness is a clear representation recognizable as the complaining party's likeness).

191. Accord, id. at (ii).
192. Accord, id. at (iii).
193. Accord, id. at (iv).
194. Accord, id. at (i).
195. Accord, id. at (d).
196. See Felcher & Rubin, supra note 14, at 1601-02.
order of first amendment importance, are to inform, to entertain, or to sell a product. If the primary purpose of a defendant's use of a name or likeness is to inform, teach, or persuade on a public issue, these courts have often conferred first amendment protection to the defendant's use. If the primary purpose of a defendant's use of a name or likeness is to entertain, contribute to the arts, or expand society's cultural experiences, the courts have also often held that the first amendment clothes the defendant's use. But if the primary purpose of a defendant's use of a name or likeness is to advance the sale of a commercial product, the courts have generally agreed that no first amendment privilege will shield the defendant's use. The "primary purpose" inquiry is a helpful examination and should be incorporated into any principled analysis to reconcile publicity and free speech rights.

C. The Nature and Extent of Harm Created by the Defendant's Representation to the Plaintiff's Interest

The final element which should be considered in addressing the conflict between the right of publicity and the first amendment

198. See Felcher & Rubin, supra note 14, at 1597. It should be noted that these three purposes do not represent rigid divisions, but rather shifting categories; the three purposes "will often tend to merge, so that they may be regarded as representing portions of a continuum rather than as discrete and mutually exclusive elements." Id. For example, it has been suggested that if the appropriation of the plaintiff's name is done in the context of a journalistic article, there may well be mixed purposes behind the defendant's actions including to inform, to entertain, to record a history, and to sell the article. Interview with Prof. William D. Valente, Villanova University School of Law, Villanova, Pa. (Jan. 19, 1982). Under such circumstances, the court's task would be to discern the primary purpose of the defendant's actions for purposes of the first amendment analysis. It is suggested that a finding of a particular primary purpose, in a very real sense, presupposes the answer in a publicity case. If the primary purpose is to make a commercial sale, the case falls into the commercial category, and the first amendment argument fails. If the primary purpose is to advance information or ideas, the case falls into the newsworthiness category, and the first amendment argument prevails. It is suggested that the finding of a primary purpose is essentially a case-by-case fact-finding matter in which the court must take into account all relevant evidence and testimony bearing on the issue. As with any fact-finding matter, the trial court's initial determination of a primary purpose will not be disturbed on appeal unless clearly erroneous, and therefore this decision is critical in any publicity case. For a discussion of fact-finding in the law, see Hart & Sachs, The Legal Process: Basic Problems in the Making and Application of Law 569-85 (1958).

199. See Felcher & Rubin, supra note 14, at 1597-98 & 1601-02; Sims, supra note 8, at 486.

200. See Felcher & Rubin, supra note 14, at 1598 & 1604; Sims, supra note 8, at 488.

201. See Felcher & Rubin, supra note 14, at 1599 & 1606; Sims, supra note 8, at 492-93.
is the nature and extent of harm done to the plaintiff's interest. Generally, courts should sustain the plaintiff's right of publicity claim against a first amendment attack if the nature and extent of harm inflicted by the defendant's representation is sufficiently grievous.

In adjudicating right of publicity cases, courts must carefully isolate and identify the type of harm done to the plaintiff by the unauthorized use of his name or likeness before balancing that harm against opposing first amendment interests. The type of harm inflicted upon the plaintiff can be either economic (monetary) or non-economic (emotional). Beyond assessing the type of the plaintiff's harm, courts deciding publicity cases should also evaluate the quantitative extent of the harm. The greater the level of the plaintiff's harm, the greater should be the likelihood that the publicity claim prevail against first amendment assertions. For example, if the plaintiff has sustained a pecuniary loss of such a magnitude so as to threaten the entire commercial value of his name or likeness, courts should tend to uphold the publicity claim by rationalizing that preservation of that commercial value is neces-

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202. See generally Felcher & Rubin, supra note 14, at 1608-09. In addition to examining the nature and extent of harm to the plaintiff's interest, courts should also consider whether that harm was proximately caused by the defendant's representation. Harm which is not proximately caused by the defendant's use is not a proper subject for relief. For a discussion of the proximate cause issue, along with illustrative cases, see note 63 supra.


204. Economic injury can occur from the defendant's use by limiting the plaintiff's ability to profit from his name or likeness. For example, in Haelan the plaintiff successfully argued that the value of its exclusive contract right to exploit baseball players' names and likenesses was diluted as a result of the defendant's use. 202 F.2d at 867. For a discussion of Haelan, see notes 59-62 and accompanying text supra.

205. If the plaintiff can only show non-economic or emotional harm as a result of the defendant's use, courts will generally only grant relief under a privacy, and not a publicity, rubric. It is suggested that such an approach is appropriate since the privacy tort is designed to protect against injury to feelings, while the publicity tort is designed to protect against dilution of the pecuniary value of names and likenesses. For a discussion of the distinction between privacy and publicity, see notes 36-40 & 46-52 and accompanying text supra.

206. See generally Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 576 (analyzing the extent of harm done to the plaintiff as a result of the defendant's appropriation). For a full discussion of Zacchini, see notes 85-96 & 165-79 and accompanying text supra.

sary and that it should not be categorically erased by first amend-
ment challenges.208

V. CONCLUSION

The right-of-publicity doctrine is an evolving common law
tort which seeks to preserve the pecuniary value of a plaintiff's
name and likeness in an increasingly commercialized world.209 Although the publicity doctrine has been explicitly adopted by courts and commentators for over a quarter century,210 its precise sub-
stantive meaning has not been unanimously agreed upon.211 An
emerging number of jurisdictions appear to take the position that
the doctrine possesses at least a proprietary or property-like qual-
dy.212 While issues regarding the publicity doctrine's internal
content remain important state law questions,213 the constitutional
contours of the doctrine cut across state lines, and present weighty
contemplational problems.214

The inherent conflict between the right of publicity and the
first amendment causes two important societal policies to collide—
the policy of encouraging private enterprise and creativity by pro-
tecting the proprietary value of an individual's name and likeness,215
and the policy of advancing the uninhibited expression of political,
social, and artistic views by protecting free speech.216 Courts, as
well as commentators, have sought to structure the appropriate
accommodation between these two competing policies, without un-
duly burdening either one.217 But the disjointed decisions of many
courts suggest that publicity law is still lacking in a coherent and

209. For a review of the right of publicity doctrine, see notes 1-3 and accompanying text supra.
211. For cases which disagree on the substantive meaning of the publicity
document, see note 8 supra.
212. See notes 54-86 and accompanying text supra.
213. For a survey of the important content issues regarding the publicity
document, see note 8 supra.
214. For a discussion of the first amendment problem in publicity law,
see notes 99-178 and accompanying text supra.
215. For the Supreme Court's articulation of this policy, see notes 94-97 and accompanying text supra.
216. For Judge Learned Hand's articulation of this policy, see note 9
supra.
unified analytic theory which incorporates first amendment considerations.\textsuperscript{218} As courts progress in developing such a unified theory, care must be taken to avoid being so structurally rigid as to lock out the desire of individual judges to do justice in the particular suit before them.

For this reason, a case-by-case approach has been suggested under which courts can seek to resolve the struggle between the right of publicity and the first amendment by examining only three factors—the similarity between the defendant’s representation and the plaintiff’s right of publicity, the primary purpose behind the defendant’s representation, and the nature and extent of harm done to the plaintiff’s interest.\textsuperscript{219} It is hoped that by employing such an analysis, the opposing policies of publicity and free speech can be reconciled in a rational and consistent way, while permitting sufficient flexibility to meet the need to do justice in individual cases.

\textit{Ganesh Bala}

\textsuperscript{218} See note 14 and accompanying text \textit{supra}. For a review of the tension in cases accommodating publicity and free speech interests, see notes 105-64 and accompanying text \textit{supra}.

\textsuperscript{219} For a proposed analysis to be used in future cases where the right of publicity conflicts with the first amendment, see notes 187-208 and accompanying text \textit{supra}. 