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WHO PUT THE RIGHT IN THE RIGHT OF PUBLICITY?

Diane Leenheer Zimmerman

I do not love you, Dr. Fell,
But why I cannot tell;
But this I know full well,
I do not love you, Dr. Fell.

I. INTRODUCTION

"Newborn" common law causes of action, like children, are infinitely lovable and promising at birth, but as their characters develop with age, their appeal may lessen and their apparent potential may never be achieved. At first blush, the right of

1. Professor of Law, New York University; B.A., Beaver College, 1963; J.D., Columbia University, 1976. I greatly appreciate the comments on earlier drafts by my patient colleagues, in particular those of Rochelle Cooper Dreyfuss, Yochai Benkler, Burt Neuborne, and Roberta R. Kwall. I would also like to thank my research assistant, Samuel Patmore, for his help in preparing this article, and to acknowledge the Filomen D'Agostino Greenberg and Max E. Greenberg Faculty Research Fund at New York University School of Law for its generous support.


3. One need only to consider the difficulties that have beset the development of such "new" torts as intentional and negligent infliction of emotional distress or invasion of privacy by publication of accurate personal information to see that many torts that, a priori, seem like a good idea turn out in practice to be problematic and of limited utility. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (discussing constitutional problems with tort of
publicity seems not to have followed that sad and common path; barely half a century old, it is widely credited with exceeding even optimistic expectations for its future. The publicity right, for those who are unfamiliar with this area of tort law, creates a property interest in elements of personal identity, allowing individuals or their successors and assignees to exert legal control over when, whether and how their various personal characteristics (at a minimum, their names and actual likenesses) can be used by others for commercial ends. Some measure of disagreement exists among its advocates about the appropriate profile of the right -- for example, how long it should last, or the range of attributes and associations that should be protected by it -- and doubts are sporadically voiced about whether intentional infliction of emotional distress); Thing v. LaChusa, 771 P.2d 814 (Cal. 1989) (opting for limitations on who can recover for negligent infliction of emotional distress); Florida Star v. B.J.F., 491 U.S. 596 (1982) (discussing constitutional limitations on recovery for invasion of privacy).

4. The right of publicity has been described by numerous authors and its history outlined. This effort will not be repeated here. An excellent account appears in Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 127, 147-78 (1993) [hereinafter Madow, Popular Culture]. See also, Sheldon W. Halpem, The Right of Publicity: Commercial Exploitation of the Associative Value of Personality, 39 VAND. L. REV. 1199, 1203-15 (1986) [hereinafter Halpem, Commercial Exploitation].


6. Among the kinds of attributes that have received protection have been catch phrases, Carson v. Here's Johnny Portable Toilets, 698 F.2d 831 (6th Cir. 1983) (affirming judgment for plaintiff).
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or not federal copyright preemption doctrine acts as a significant limit on the ability of states to offer this kind of protection. These concerns, however, are marginal blips that seem not to disturb the otherwise serene sense among a significant cross-section of the legal community -- judges, legislators, and academics alike -- that publicity rights are a valuable addition to the law and an accepted part of our legal landscape.

The development of a publicity right has occurred over a few decades. As recently as 1950, "personality" (that is, some cluster of identifying personal characteristics) was protected, if at all, solely as

1983) (appropriation of phrase associated with comedian Johnny Carson) and association with a game show, White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993) (robot in strapless dress and blond wig flipping letters on game board conjures up association with game show hostess Vanna White). White in particular has generated controversy. The ruling in Ms. White's favor is approved of by some scholars, see, e.g., J. Thomas McCarthy, The Spring 1995 Horace S. Manges Lecture -- The Human Persona as Commercial Property: The Right of Publicity, 19 COLUM.-VLA J.L. & ARTS 129, 136-38 (1995) [hereinafter McCarthy, The Human Persona], and disapproved of by others, see, e.g., Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 HASTINGS L.J. 853, 864-69 (1995) [hereinafter Halpern, Independent Right]. Judge Alarcon's trenchant critique of White's far-reaching definition of what constitutes identity is particularly notable in this regard. He points out that the thing most closely imitated is the set of the show, Wheel of Fortune, and the set -- without which he doubts that the robot would have conjured up Ms. White -- is not one of her identifying personal attributes. 971 F.2d at 1404-05.

a personal interest subsumed under the law of privacy. The plaintiff, to state a case, had to show that her name or likeness had been appropriated without her consent and used for commercial purposes by the defendant. But the presumed gravamen of the harm was not a deprivation of property; rather, it was the desire of the plaintiff not to receive this form of public exposure. Only the affected individual could sue, and the duration of the cause of action was coextensive with the duration of the claimant's life. 8

Today, however, personality has become a recognized commodity -- something to be exploited (or not) according to the preference of the subject or of those who inherit or buy her rights. As the previous sentence suggests, these personal attributes frequently continue as marketable goods long after their source is dead and buried. 9 Personality as a valid form of property has been recognized by the American Law Institute in its RESTATEMENT (THIRD) OF UNFAIR COMPETITION 10 and, recently, it has even been touted as a possible candidate for federal statutory protection. 11

8. Halpern, Commercial Exploitation, supra note 4, at 1215-23 (discussing the difference between privacy law and property law with regard to the alienability and descendability of rights to control commercial uses of personal attributes).

9. See infra note 34.


11. Several commentators have supported this idea because, although they approve of the right of publicity, they consider the proliferation of inconsistent state laws to be problematic. See, e.g., McCarthy, The Human Persona, supra note 6, at 141-42; Eugene Salomon, Jr., Note, The Right of Publicity Run Riot: The Case for a Federal Statute, 60 SO. CAL. L. REV. 1179 (1978); Felix H. Kent, An Overview of the Right of Publicity, N.Y.L.J., Sept. 30, 1996, at 3. For a discussion of the advantages and disadvantages of a federal law, see Symposium, Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress--A Panel Discussion, 16 CARDOZO ARTS & ENT. L.J. 102 (1998). A Joint Task Force made up of members of various committees of the Intellectual Property Section of the American Bar Association has advocated such a law and has drafted a model statute. A resolution endorsing a federal approach was adopted by the Section as a whole. American Bar Association Section of Intellectual Property Law, 1994-95
That is not to say that these developments have generated no protesters (I admit at the outset to being one of them). Critics and skeptics, however, are frequently written off by those who believe in publicity rights as a fringe group of cranks and ideologues whose objections are difficult to take seriously. One supporter of the tort, for example, expressed his annoyance at current scholarship critical of publicity rights in the following terms:

It has recently been suggested that "the fundamental case for a right of publicity seems to be undergoing a critical reappraisal in the United States." It would perhaps be more accurate to say that a very few voices have been raised questioning the legitimacy of the right....

...[T]he difficulty with this attempt to reopen that which has been rather clearly settled is that the current academic attempt to destroy the right rests at best on marginal issues not seriously implicated by the right of publicity as it has been developed and at worst on an ad hoc and self-referential "deconstruction" of judicial thinking. Indeed, much of the criticism has its roots in a more general Critical Legal Studies attack on intellectual property . . . , as well as in an earlier work that viewed "the growth of intellectual property [as] uncontrolled to the point of recklessness"... 12

Another engaged in verbal headscratching over what would prompt a prominent federal judge, Alex Kozinski, to write a scathing and highly publicized dissent attacking the tort in a recent case. Ultimately, this commentator decided that he had to write off the Judge's ire as a reflection of his personal and idiosyncratic view of
the first amendment. Judge Kozinski, the commentator noted, does not believe that commercial speech should be subject to less favorable treatment under the constitution than political commentary. "This view is not the law," the writer concluded, "and I personally doubt that it will ever be the law."

Frankly, it seems to me to be a little premature to describe the character of the right of publicity as "established" or to conclude that its critics are ideologues -- either lacking in sufficient discernment to be able to distinguish marginal from crucial issues, or enthralled by wrongheaded visions of the first amendment.

For one thing, a glance through a recent, comprehensive survey of the law in this area indicates that claims that the shape and substance of publicity rights are "clearly settled" cannot be substantiated. Many states have rarely or never entertained cases of any kind involving commercial appropriations of identity, and have, therefore, had little opportunity to think through the kind and extent of protection they want to offer plaintiffs in this area.


14. Professor McCarthy was disturbed by the fact that Judge Kozinski, in his defense of the humorous use of Vanna White's persona in an advertisement, did not distinguish between parody in theater and other entertainment formats and parody in a sales pitch. McCarthy, The Human Persona, supra note 6, at 137-38.

15. Id.


17. Alaska, for example, has had no case since 1926. D. John McKay, Survey of Alaska Privacy and Related Claims Against the Media, in id. 188, 203. Minnesota has never recognized a cause of action for either misappropriation or a right of publicity. John P. Borger, et al., Survey of Minnesota Privacy and Related Claims Against the Media, in id. 794, 800-01. No case raising the issue has ever arisen in New Hampshire. Richard C. Gagliuso, Survey of New Hampshire Privacy and Related Claims Against the Media, in id. 934, 937.
Furthermore, although it has been estimated that as many as half the states in the United States recognize a right of publicity, a careful head count reveals that only about a dozen have taken unambiguous steps to create a true property right while most of the others

18. Kwall, Property and Liability, supra note 5, at 52.

19. This is a generous count because it gives the benefit of the doubt to publicity in some unclear cases. It is based on the reports contained in LDRC, 50-STATE SURVEY, supra note 16. The process of counting is complicated by the fact that many state cases talk about the right of publicity but do not necessarily have law protecting such an interest; they may only recognize appropriation, or recognize appropriation but misname it a right of publicity. Although the two torts have many resemblances, the privacy action for appropriation is the more limited. Typically, the privacy law protects names and likeness only, see, e.g., Massachusetts, M.G.L. c. 214, § 3A; New York, N.Y. Civ. Rts. L. §§ 50-51 (West 1998). Privacy may extend to such diverse things as voice, gestures or mannerisms. See, e.g., IND. CODE § 32-13-1-7 (1998). Privacy rights are personal in nature; unlike the right of publicity, a privacy right, it has been argued, cannot be sold or given to someone else and traditionally lasts only during the lifetime of the protected individual. See Maritote v. Desilu Productions, Inc., 345 F.2d 418, 419 (7th Cir.), cert. denied, 382 U.S. 838 (1965) (privacy right in not having one's identity commercially appropriated not descendible); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 283-85 (S.D.N.Y. 1977) (same). Not only are publicity rights alienable property interests, but they are capable of enduring beyond the life of the individual who created the interest. Although the matter, therefore, is somewhat problematic, the following states are the ones that recognize an interest more akin to a property than a privacy right: California, Florida, Georgia, Indiana, Kentucky, Nevada, Oklahoma, Tennessee and Texas. Virginia has a hybrid law that permits protection for up to 20 years after the death of the subject, but the rights belong to the next of kin, suggesting that the interest is not alienable. VA. CODE ANN. § 8.01-40 (1998). Case law in some states is ambiguous, sometimes referring to publicity and misappropriation as if property and privacy were interchangeable. Nevertheless, these states have not, thus far, decided a case in which they found the right to be alienable or descendible. For example, Maryland case law talks about misappropriation as protecting a property interest, but in other senses treats the cases as ones sounding in privacy. Lawrence v. A.S. Abell Co., 475 A.2d 448, 451 (Md. 1984). In six jurisdictions, federal courts have concluded that the right of publicity is recognized, although the state courts have not affirmed that conclusion. These states are: Colorado, Illinois, Michigan, Minnesota, New Jersey, and Pennsylvania.
continue to offer protections for personality that are either indistinguishable from, or actually still are governed by, the rules of the older privacy tort of commercial appropriation. 20

Although winning a place in the RESTATEMENT (THIRD) OF UNFAIR TRADE PRACTICES will undoubtedly push the tort toward more uniform definition and broader adoption (state courts and legislators alike having a tendency to treat restatements as if they were a kind of ur-law), it can nevertheless be argued that reports of publicity as established law, like reports of Mark Twain's death, have been greatly exaggerated.

What is also exaggerated, I would argue, is the characterization of the questions that persist about the value and validity of the publicity right as the rearguard indulgence of a few cranky academics and an eccentric judge or two. This branch of tort law, celebrated though it may be by many, continues to bear comparison for a respectable minority to the character of the questionable Dr. Fell -- the one who was, as you may remember, simply unlikable. But whereas the poet could not tell us what was so disturbing about Dr. Fell, critics of the right of publicity have identified many reasons that the publicity tort leaves a bad aftertaste. Considerations of time, space and the patience of my readers do not permit a thorough reexamination of those reasons here. 21 Rather, I would like to focus

20. A description of the privacy tort of appropriation can be found in RESTATEMENT (SECOND) OF TORTS, § 652C (1977) and its accompanying commentary. Many of the arguments in this Article against the right of publicity also apply to the appropriation tort; publicity, however, by virtue of its tendency to survive the person who gave rise to the interest, is more mischievous.

21. Among the notable writings in recent years to take significant issue with aspects of the right of publicity are: Rosemary J. Coombe, Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders, 10 CARDOZO ARTS & ENT. L. J. 365 (1992) [hereinafter Coombe, Authorizing the Celebrity]; Rochelle Cooper Dreyfuss, We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity, 20 COLUM.-VLA J. L. & ARTS (1996) [hereinafter Dreyfuss, We Are Symbols]; Madow, Popular Culture, supra note 4. Particular credit goes to Professor David Lange, however, who had the prescience twenty years ago to understand that the developing right of publicity represented a serious threat to
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on one particular issue that has not, in my view, received adequate consideration by those on either side of the debate.

Much of the law of publicity seems to hinge on the bet, expressed by the second of the two passages quoted earlier in this piece,\(^\text{22}\) that Judge Kozinski's view of the commercial speech doctrine is not and never will be the law. If that bet were to be lost, and I would argue that, to a substantial extent, it has been, then the foundations of a right of publicity would have to be rethought. If commercial speech were to receive the same level of protection as a novel or a film, or even something close to it, the judiciary would be required to subject publicity rights to a level of rigorous scrutiny that, up until now, they have largely escaped. The result, I suspect, could reduce much, although certainly not all, of the current law to the status of roadkill on the path of legal history. To defend this proposition, however, a bit of preliminary discussion may be useful.

II. THE ORIGINS OF PUBLICITY RIGHTS AND HOW THEY GREW

The tort law protecting the right of publicity is traceable to an opinion by Judge Jerome Frank, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*\(^\text{23}\) The case involved a dispute between rival producers of baseball cards, both of which had contracts with a player that allowed them to use his photograph. The plaintiff company sued its rival for tortiously inducing the player to breach his contract granting the plaintiff exclusive rights. The defendant argued that a contract could not convey exclusive rights because no one owned the exclusive right to control the use of his own


\(^{22}\) See notes 13-15, supra, and accompanying text.

\(^{23}\) 202 F. 2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Judge Frank's opinion is generally agreed to be the first decision to clearly acknowledge a property right in what Sheldon Halpert calls the "associative value" of a person's identity. Previously, commercial misappropriation of identity was protected, if at all, by the common law of privacy. See Madow, *Popular Culture*, supra note 4, at 167-74.
photographic image; instead, the company contended, the contracts were simply releases from liability, given to both the plaintiff and the defendant, for any claim of invasion of privacy through commercial appropriation. Judge Frank disagreed, using the case as an opportunity to transform the appropriation tort into a form he deemed more suitable to the needs of famous people. Frank conceived the publicity right as a way to avoid the awkward and illogical jump that was necessary whenever entertainers and other public figures complained of an invasion of privacy when their celebrity was misappropriated. As Frank pointed out, such persons did not seek the anonymity desired by the ordinary privacy claimant; in fact, he wrote, "[F]ar from having their feelings bruised through public exposure of their likenesses, [they] would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances... ."24 Thus, it seemed inappropriate to him that the only claim available to such plaintiffs was that they were emotionally injured by their exposure to the public eye. By abandoning privacy and stating openly that the interest in question was a form of intellectual property, Judge Frank opened the way for publicity-seeking people to gain control over what Professor Sheldon Halpern has called the "associative value" of their names and faces and to create effective markets in such goods.25

The new tort quickly gained credibility (even if, as indicated earlier, it has not necessarily been enshrined in the statutes or case law of many states).26 One thing that helped, undoubtedly, was the apparent imprimatur placed on the cause of action by the United States Supreme Court two decades ago.27 I use the word "apparent"

24. 202 F.2d at 868.


because the facts of the only publicity rights case that the Court has ever decided bear very little relationship to the kind of claim that is normally the subject matter of right of publicity cases. It involved a performer whose entire act -- lasting 15 seconds -- was filmed and shown on television without his permission. Although the taking in the case went far beyond the unconsented use of a name or a face -- and it involved a news report rather than a commercial -- the Court called the defendant's problem a violation of his right of publicity, and went on to conclude that the cause of action was not barred by the First Amendment. 28 More will be said about this rather unusual version of a publicity case at a later point. Suffice it to say for now that Zacchini lent the right of publicity a legitimacy that undoubtedly encouraged it to extend its reach.

The earliest publicity cases involved relatively straightforward disputes over nonconsensual uses of the names or likenesses and photographs of identifiable, famous people. Thus the subject matter of publicity differed little from that involved in the older privacy-appropriation cases. And, although they took more frequently to calling the right a property interest, courts were slow to allow the right to be exercised by anyone but the celebrity herself or to permit its survival at her death. 29 Gradually, however, the margins of the right pushed outward. The range of attributes protected now extends to such things as mannerisms and even catch phrases. 30 People who

28. Id. Zacchini, however, was an odd "publicity" case, involving as it did not the taking of name or appearance alone but the taking of an entire performance. The plaintiff had developed an act in which he was shot from a canon; the defendant videotaped the act and showed it, from start to finish, on its news show. The Court said that the first amendment did not justify use of someone's entire act without payment.


30. White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir.), rehearing en banc denied, 989 F.2d 1512 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993) (characteristics other than name or likeness used to
do not aspire to celebrity or treat it as their stock in trade are nevertheless allowed to enjoy the same property interests in their personality that could be exercised by a sports star or a famous actress.\(^{31}\)

And the reluctance to allow the property right to survive the subject's lifetime\(^{32}\) has also greatly eroded. Tennessee, a state that pioneered survivability as an attribute of publicity claims, borrowed an approach from trademark law that allows the right to endure, if continuously exploited, in perpetuity.\(^{33}\) Indiana now protects virtually anyone from unconsented commercial exploitations of his or her personality for 100 years after the death of the individual in question.\(^{34}\) Both Indiana and Oklahoma protect the publicity rights not only of those who are now living, but of people who died long

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\(^{31}\) The Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 296 S.E.2d 697, 703 (Ga. 1982) (under Georgia law, a person has a property right in his or her personality without regard to whether the individual is or is not a celebrity); IND. CODE ANN. § 32-13-1-6 (Michie 1995) (a personality that has commercial value for any reason is protected).

\(^{32}\) A discussion of the early cases on devisability and descendibility of publicity rights can be found in Peter L. Felcher & Edward L. Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L. J. 1577, 1618-20 (1979) [hereinafter Felcher & Rubin, Real People]. See also Peter L. Felcher & Edward L. Rubin, The Descendibility of the Right of Publicity: Is There Commercial Life After Death?, 89 YALE L. J. 1125 (1980).

\(^{33}\) TENN. CODE ANN. § 47-25-1104 (1997) provides that if the right is exploited, it will remain in existence unless proof is provided that it has been abandoned for two or more years.

\(^{34}\) IND. CODE ANN. § 32-13-1-8 (Michie 1995). The Indiana law protects anyone whose personality has, or takes on after death, any commercial value. Id. at § 32-13-1-6. Oklahoma has also extended protection for 100 years after death, 12 OKL. ST. ANN. §§ 1448-49 (1991), but to be covered, the deceased's personality must have "commercial value at the time of his or her death," id. at 1448(H), possibly -- but not assuredly -- making it a less expansive statute than Indiana's.
before their publicity statutes were passed, creating a windfall for the heirs of numerous Americans who cast off their mortal coils when the right of publicity was not even a glimmer in Jerome Frank's eye.

Today courts seem willing to offer remedies for violations of publicity rights even when what the defendant has utilized is not literally an attribute of the protected persona. A series of high-profile federal court decisions from the Ninth Circuit illustrate the point. Singer Bette Midler was held to have a cause of action for violation of her publicity rights under California common law when the defendant used a singer whose voice sounded like Midler's in an advertisement for Ford cars. Vanna White was permitted to object, on publicity grounds, when Samsung, in an advertisement for electronics products, utilized a robot, clad in an evening gown and a blond wig, in a witty evocation of White's current role as the hostess of a famous game show. Actors have been permitted to sue over

35. 12 Okl. St. Ann. § 1449 (1991) offers protection to anyone who has died since Jan. 1, 1936, if the person's attributes had commercial value at the time of her death. Ind. Code § 32-13-1-8 (Michie 1995) offers protection for 100 years after the death of the personality, including, apparently, anyone who died within the past century.

36. Midler v. Young & Rubicam, Inc., 849 F.2d 460 (9th Cir. 1988), cert. denied, 503 U.S. 951 (1992). In Midler, a woman who had often performed as a backup singer for the star was hired by Ford to sing one of Midler's hits, Do You Want to Dance, in a commercial. Midler was ultimately awarded $400,000 in damages for what was deemed to be a violation of her publicity rights. After Midler, singer Tom Waits won a similar case involving a "sound alike." Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993). Of course, imitation cases can involve deception -- an attempt, for example, to convince the public that the voice they are hearing is actually that of a Bette Midler or a Tom Waits. The criticism of the publicity rule is not meant as tacit approval of deceptive practices, but only to suggest that actions based on the act of imitation per se are problematic. An interesting case illustrating the different issues that are presented by the publicity claim versus a "passing off" claim is Allen v. Men's World Outlet, 679 F. Supp. 360 (S.D.N.Y. 1988).

37. White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir.), reh'g denied, 989 F.2d 1512 (9th Cir. 1992), cert. denied, 508 U.S. 951 (1993). A gold metallic robot, garbed in a blond wig and fancy gown was
the use by a defendant of fictional characters on the ground that, over time, the live actors became inextricably identified in the public's mind with the parts they were given to play.  

The driving force behind this increasingly robust property right in personality is a somewhat misplaced process of reasoning by analogy. Courts and commentators alike have conceived of publicity rights as a common law interest justified by the same principles that led Congress (and the drafters of the Constitution before it) to want to protect writings and inventions with copyrights and patents. The United States Supreme Court in Zacchini shown in the advertisement flipping letters on a game board in what was purported to be a look into the next century.

38. Wendt v. Host International, Inc., 125 F.3d 806 (9th Cir. 1997). George Wendt and John Ratzenberger played characters in the popular television program, Cheers. Paramount Pictures Corp. decided to license bars designed to look like the set of Cheers; included was permission to create robotic figures representing the characters "Norm" and "Cliff." Although the robots were not based on Wendt and Ratzenberger's actual appearance, the Court found that the robots sufficiently evoked the two actors to violate their property interests in their personas. For an interesting comment on the case, and its effect on the rights of the owners of the copyrights in the actual scripts, see Daniel Margolis, Note, Cheers to the Church Lady: Resolving the Conflict between Copyright and the Right of Publicity, 1996 ANN. SURV. AM. L. 627. A recent case from the Third Circuit, McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994), also recognized that publicity rights violations could arise out of the link between an actor and a fictional character. However, factual differences between the two cases make McFarland less clearly than Wendt a decision that pushes out the boundaries of the law. In McFarland, a New Jersey restaurant calling itself "Spanky McFarland's" was sued by the actor who played the role of Spanky in the "Our Gang" films in the 1930s. Actual photographs of the child actors in their roles as Little Rascals were hung on the restaurant's walls, id. at 916, and the name "McFarland," id. at 914, was both that of the fictional character Spanky and of the actor who played him. Thus, one line of argument in the case was that George McFarland's actual name and face had been appropriated.

39. One of the clearest statements of this rationale, in language with a familiar ring for copyright scholars, came from Melville Nimmer, who stated that publicity values required "considerable time, effort, skill, and even money" to develop. Nimmer, Publicity, supra note 26, at 216. Professor Nimmer went on to urge adoption of the right, saying that it is "an axiom of the most
explained that, if Mr. Zacchini's claim was allowed to survive a first amendment challenge, in the long run the public would get more, rather than less, information because those who devoted themselves to creative enterprises would be able "to reap the reward of [their] endeavors ...."\(^{40}\) Recognizing the public goods problem\(^{41}\) presented by intellectual products, the Court reasoned that only through state intervention to create artificial exclusivity through a property right could creators like Mr. Zacchini recapture the investment made in their work and earn sufficient profit to encourage them to continue to produce.\(^{42}\)

*Zacchini* was an odd publicity case, however, because, unlike most of them, it involved information in a form that was closely akin to the fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."\(^{43}\) For a discussion of the use of similar reasoning in copyright cases, see Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 690-93 (1992) [hereinafter Zimmerman, *Information as Speech*].


41. A public good is one which is capable of use by any number of persons without diminishing the quantity available for use by others. Individuals or entities that create such goods are unable, absent the intervention of law, to establish markets once the good is made publicly available, and thus cannot recapture the costs of production. *See* Landes & Posner, *Economic Analysis*, *supra* note 5, at 326.

42. Other courts took up the same theme in subsequent opinions. One of the more eloquent judicial statements of this justification for recognizing a right of publicity appears in the dissent by then Chief Justice Rose Bird in *Lugosi v. Universal Pictures*, 603 P.2d 425, 441-43 (1979) (Bird, C.J., dissenting). The California legislature subsequently sided with Chief Justice Bird by passing a right of publicity statute, recognizing the right as alienable and providing, as she had suggested, *id.* at 446, for the interest to expire 50 years after the death of the individual. *CAL. CIV. CODE* § 990 (West 1998). The durational provision is modelled after that used, until recently, in the federal copyright law. 17 U.S.C. § 302(a) (1976)(Copyrights have recently been extended to the author's life plus 70 years, *see infra* note 44.)
to the sorts of works of authorship protected by copyright. An entire act by a particular performer has an expressive specificity that is in some senses like that of a television program or a book chapter. By contrast, most publicity cases involve a name or a face or a resemblance that is used, in the way individual words or colors and patterns are used, as a building block of expression rather than as the end product. The merits of the Court's decision to treat Zacchini's act under a copyright model cannot be done justice here. The point I would make, however, is that a rationale that may have made sense on the special facts of Zacchini has been drafted for a lot of heavy lifting in situations pretty far afield from those facts. The argument that mental labor and inventiveness will cease unless they are encouraged and rewarded by property interests in the results is now the engine that drives us (even when the rationale seems wholly without a basis) to want to protect Vanna White against imitation by a robot, to guard the estate of Martin Luther King against the marketing of plastic busts of the late civil rights leader, and, indeed, to invent any number of other new rights in information and intellectual pursuits in addition to those that have to do with publicity values.


44. A few examples of new or expanded property protections recently passed or currently on the agenda of the United States Congress include: a bill to create property rights in the contents of factual databases, see, e.g., H.R. 354, 106th Cong. (1999); an Act that prohibits efforts to defeat technological monitoring and anticopying devices employed to prevent unauthorized use of digitally transmitted information (without regard to whether the information so protected is covered by copyright), Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); and legislation to extend the term of copyrights by twenty years, Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). Until 1978, copyright lasted for a term of 28 years, but could be renewed by the author or a statutory successor for a second 28 year term. Copyright Act of 1909, ch. 1, 24. The term was extended to life plus 50 years by the Copyright Act of 1976, effective January 1, 1978, 17 U.S.C. § 302 (1976). The new legislation extends the term to life plus 70. Pub. L. No. 105-298, § 102(b)(1), 112 Stat. 2827 (1998). Modifications have also
Indeed, we live in the era when intellectual property has became king of the hill. Lawmakers and creative individuals alike increasingly treat as received truth the contestable intuition that producers of intellectual products should have a "right" to any income stream their labor can generate. They label as immoral and self-serving counterarguments that, except in narrowly tailored circumstances, intangible intellectual contributions with value to the public should be freely appropriable. This pro-property mind-set has been further encouraged by the gradual recognition that income from intellectual property makes up a very significant part of the United States' balance of payments in the international trade arena. In short, a claimant who says that someone is "stealing" his intellectual labor is making an assertion of greater attractiveness to

been proposed to the Uniform Commercial Code that would permit creators of intellectual property to craft their own set of restrictions on the use of their work by means of nonnegotiable shrinkwrap contracts. Enforcement of the private restrictions would be provided under state law. See e.g., American Law Institute, Uniform Commercial Code Article 2B Licenses § 2B-106 & Comments, 2B-111 & Comments (Tent. Draft April 15, 1998). See also, ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (upholding validity of a shrinkwrap license under existing contract law). Manufacturers of useful goods who for years have been unsuccessful in convincing Congress or the courts to provide significant protection for their unpatented product designs under copyright or through separate design legislation have begun to convince judges to fashion redress under the auspices of trademark law. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (design does not need to take on secondary meaning to be protected under federal trademark law).

45. Commentators have given a number of economic and fairness arguments for allowing originators to appropriate all the value they create. For a discussion of them, see Cardtoons, L.C. v. Major League Baseball Players Association, 95 F.3d 959, 971-76 (10th Cir. 1996). All the arguments depend at some level on the express or tacit assumption that the plaintiff is entitled to a property interest.

the modern legal ear than someone who makes the counter-argument that all these property claims are diminishing the ability of others to express themselves.

Thus, the expanding right of publicity is a piece of a larger trend that has elicited negative comment from a wide range of scholars alarmed at seeing intellectual property rights gradually colonizing more and more of the informational commons. Given these developments, it seems unfair to characterize as odd, idiosyncratic or outdated the interest members of the academic community have shown in trying to reinsert concern over the value of preserving the public domain back into the conversation about publicity rights.

Skepticism about making publicity a "right" grows out of an intuition quite contrary to the one sketched out above -- although one that has itself historically been central to the framework of federal copyright law -- that a society cannot have a vigorous intellectual, political and social existence unless it can generate and exchange information with a minimum of financial, legal or procedural barriers. Or, to put it a bit differently, a society that

47. It is impossible to chronicle all the literature criticizing expansionary approaches to intellectual property protection. A few recent examples include J.H. Reichman & Pamela Samuelson, Intellectual Property Rights in Data?, 50 VAND. L. REV. 51 (1997 (warning against aggressive protection of databases); Jessica Litman, The Exclusive Right to Read, 13 CARDOZO ARTS & ENT. L. J. 29 (1994) (criticizing proposals for changes in the copyright laws that would make browsing documents on the internet a copyright violation).

48. For a clear statement of the contrary intuition -- that intellectual property rights should extend no farther than necessary to induce continued production of desired goods -- see Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970) [hereinafter, Breyer, The Uneasy Case].

49. The structure of copyright law in the Anglo-American tradition represents a carefully crafted compromise. Copyright protects the author's original expression of an idea, conception or fact but not the idea, conception or fact itself. 17 U.S.C. § 102 (1998). Thus anyone else is invited to use the same content, expressed in her own way, without having to negotiate with owners of copyrights to do so.
places a high value on intellectual ferment and on the development of its human resources cannot achieve those goals while at the same time permitting unlimited commodification and privatization of information.50

But I would like to go a step further and argue that how far to privatize the public domain is not solely a debatable question of intellectual property policy as to which reasonable people could disagree. There are limits beyond which commodification simply cannot go because at some point depredations on the public domain become a violation of freedom of speech.51 This brings me, at last, back to Judge Kozinski's interpretation of the first amendment and to the central subject of this essay.

III. NEWsworthiness, Commericalism and the First Amendment

The right of publicity puts the power of the state behind private individuals who want to control whether and how information about important people -- for example, what they are called, or how they look, or how they sound -- can be used by other people.52 Publicity


51. I began to think systematically about the interface between intellectual property and the first amendment several years ago. At the time, I was struck by the fact that courts that normally were very protective of free speech took a quite different stance -- discounting or ignoring damage to a defendant's speech interests -- if the dispute could successfully be characterized as one designed to protect the plaintiff's property rights. This led to an ongoing project designed to explore the first amendment implications of creating literal markets in information, of which this paper is a part. See, generally, Zimmerman, Information as Speech, supra note 39.

52. A similar point is made by Michael Madow in his 1993 critique of publicity rights. Madow writes:

What it comes down to, then, is that the power to license is the power to suppress. When the law gives a celebrity a right of publicity, it does more than funnel additional income her
rights, in other words, are a kind of content-based regulation of speech. The implications of that observation, I would like to suggest, have not been adequately confronted by proponents of the right of publicity.

A. Traditional Approaches to Accommodating Publicity and First Amendment Rights.

I do not mean to suggest that supporters of publicity rights have ignored the possibility that the first amendment limits the right of publicity. They have not. Most of the major writings on the subject contain elaborate exegeses on the nature and extent of the limitations that must be placed on the right to accommodate competing interests in free speech. As a general rule, the legal dividing line that has been accepted by scholars, courts and legislators alike is one that way. It gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society: power, if she so chooses, to suppress readings or appropriations of her persona that depart from, challenge, or subvert the meaning she prefers. . . .

Madow, Popular Culture, supra note 4, at 145. Although defenders of the publicity right would not necessarily agree that the tort has this property, the same conclusion is implicit in an observation made in the opening sentences of a recent article supporting publicity. Roberta Kwall points out, "No country in the world is so driven by personality as is the United States. Fame is used to persuade, inspire, and inform Americans in nearly every aspect of their lives. As a group, Americans are fascinated not only with the concept of fame, but also with those who embody its essence." Roberta Rosenthal Kwall, Fame, 73 IND. L.J. 1, 1 (1997) [hereinafter Kwall, Fame].

53. This is not an attempt to be exhaustive but rather to give a few examples of scholars who have been supporters of the right of publicity, while at the same time expressing concern about first amendment interests: J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 8.6 (Rev. 1998); McCarthy, The Human Persona, supra note 6, at 131; Halpern, Independent Right, supra note 6, at 867-69; Kwall, Property and Liability, supra note 5 (passim); Felcher & Rubin, Real People, supra note 32 (passim); cf. Note, Right of Publicity Tarnishment and the First Amendment, 73 WASH. L. REV. 223 (1998) (proposing that the property interest in publicity be given legal protection against tarnishment by "offensive or degrading associations" to the extent consistent with the first amendment).
separates out and privileges those uses of information about individuals that are "newsworthy;" liability is reserved only for uses that are "commercial" in nature.\(^{54}\)

Over the past hundred years, in privacy and then in publicity law, the concept of newsworthiness has served as a surrogate for a finding that the defendant's activity is protected by the first amendment. Thus, a magazine does not need Bette Midler's permission to publish an article about her because communicating something of public concern to its readers is a "newsworthy" use. The defense will be recognized even though the star might be able to prove that the use of her name, and perhaps of her picture, on the magazine cover induced hundreds or even thousands of fans who might otherwise never have read the particular publication to purchase copies. The shelter offered by the newsworthiness privilege means that Midler is entitled neither to enjoin the magazine's use of her name and face nor to share in the revenues that her fame helps to generate.\(^{55}\)

\(^{54}\) A provision in the California right of publicity statute is typical of this kind of line-drawing:

> For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required....


The use of the commercial/noncommercial dividing line has not enjoyed universal approbation, however. Professor Kwall has criticized it, arguing instead for the substitution of a balancing test in all cases except those involving factual accounts. Kwall, *Property and Liability*, supra note 5.

But if the defendant's appropriation of Ms. Midler's identifying characteristics is classified as commercial, states have considered themselves free to choose, as a matter of public policy, to give the star the legal power both to control and to benefit financially from uses of her persona. The reason for this difference seems to rest almost entirely on the fact that commercial speech was not deemed worthy of first amendment protection at the time that the law governing appropriations of personality began to develop.

When courts and legislatures began to experiment with tort law protections for personal privacy early in the twentieth century, they quickly recognized that the common law could easily run afoul of the first amendment. However much courts and legislators might sympathize with someone who did not want to be the subject of a news story because she preferred to exercise her "right to be let alone," giving legal force to her preference was the equivalent of authorizing her to act as a censor, able to control how much the public could learn about her role in events of social, historical or political significance. Although legal analysis in support of the distinction was sketchy, fairly broad agreement was reached early


57. This phrase is attributed to Thomas Cooley. Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS COOLEY, LAW OF TORTS 29 (2d ed. 1888)).

58. In their famous law review article advocating the creation of a privacy right, Warren and Brandeis acknowledged a quite narrow defense of newsworthiness. Id. at 214-16. Courts, however, tended to be more generous in finding events and the roles people played in them newsworthy. See, e.g., Jones v. Herald Post Co., 18 S.W.2d 972 (Ky. 1929) (wife of murder victim has no privacy right with regard to accounts of husband's death); Jacova v. Southern Radio & Television Co., 83 So. 2d 34 (Fla. 1955) (bystander who played no role in the event is nonetheless newsworthy). The division of speech into the newsworthy and the commercial occurred without extensive discussion in the cases. By the 1960s, courts tended to treat any connection with an actual happening that could conceivably interest the public sufficient to satisfy the newsworthiness criterion. Kalven, Privacy, supra note 26, at 336.
on that privacy interests did not rise to a sufficient level of
importance to outweigh the defendant's right to engage in
communication of newsworthy information because the latter
interest was protected by the constitution.

However, giving a plaintiff the right to complain about
unconsented uses of personal information in nonnewsworthy
contexts -- also referred to as "commercial" uses -- was perceived as
posing no comparable constitutional problems. A number of early
cases involving what were deemed commercial uses arose from
advertisements that featured the names or faces of ordinary people
who did not desire that form of notoriety.59 But courts also often
categorized as commercial a variety of nonadvertising uses,
including those in fiction and in entertainments.60 These were also
assumed to involve unprotected, or sub-constitutional, forms of
speech.61 As a result, the tort we now know as commercial

59. Georgia was the earliest state to draw this distinction in its case law.
name and face to advertise insurance invades his privacy). The New York Court
of Appeals refused to act on its own to create a new common law right of privacy
of any kind, Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902),
but the legislature subsequently passed a law making appropriation of names or
likenesses for purposes of trade or business a tort. Act of April 6, 1903, ch. 132,
§§ 1-2, 1903 N.Y. Laws 308 (codified at N.Y. Civ. Rts. Law §§ 50-51 (McKinney
1997)). Other early court decisions recognizing invasions of privacy in the context
of advertisements include: Kunz v. Allen, 172 P. 532 (Kan. 1918) (plaintiff's
picture used in advertisement for drygoods store); Munden v. Harris, 134 S.W.
1076 (Mo. App. 1911) (plaintiff's photograph used to advertise jewelry business);
enjoined from using Thomas Edison's name in its advertising).

60. See, e.g., Binns v. Vitagraph Co. of America, 103 N.E. 1108 (N.Y. 1913)
(work intended to entertain rather than inform are "commercial" uses); Leverton
v. Curtis Publ'g Co., 192 F.2d 974 (3d Cir. 1951) (same); Hazlitt v. Fawcett

61. The distinction, for constitutional purposes, between commercial and non-
commercial speech was formally recognized by the United States Supreme Court
in Valentine v. Chrestenson, 316 U.S. 52 (1942) (commercial speech outside the
protection of the first amendment).
appropriation became the branch of the common law of privacy with the greatest vitality because allowing recovery for it did not seem fraught with constitutional peril.\(^62\) As the United States Supreme Court gradually evolved its modern understanding of the first amendment, however, it became clear that the earlier distinction between newsworthy and nonnewsworthy was a semantically inadequate way to explain what constituted protected and unprotected speech. For example, the Court made it clear that speech designed to entertain, including fiction, was entitled to first amendment protection, even though it was not intended to convey news or factual information.\(^63\) A somewhat vaguely defined category labelled commercial speech continued, however, along with fighting words and obscenity,\(^64\) to be constitutionally unprotected.

The development of the tort law of appropriation, however, did not track these developments carefully, and as a result, its path gradually, if subtly, diverged from that taken by evolving first amendment analysis. Appropriation continued to rely on newsworthiness as the surrogate for free speech interests, and to include under the category of commercial (or unprivileged) speech


\(^63\) Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures are protected speech even though designed to entertain); Winters v. New York, 333 U.S. 507 (1948) (entertainment entitled to first amendment protection).

\(^64\) Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
any uses, including but not limited to advertising, that, in the judgment of courts, were more about making profits than about imparting important information to the public. As *Haelen* clearly shows, when Judge Frank created the right of publicity out of appropriation's rib (to borrow an apt image from Professor J. Thomas McCarthy), he simply imported this rather generous definition of commercial uses into the new tort. The case, after all, was not about advertising, but about baseball cards that were packaged with chewing gum. Baseball cards were a product premium designed to induce consumers to buy gum, but they clearly served that function only because they had an independent communicative value for the millions of kids who collected and traded them. Judge Frank, relying on the tradition that grew up under appropriation, did not, however, waiver for a moment before categorizing the cards as commercial rather than newsworthy speech because they “promoted” the sale of gum.  

As long as one could maintain the position that the appropriation tort and its sibling right of publicity regulated only speech that was unprotected anyway, no particularly incisive justifications had to be given for commodifying attributes of personality in this way or for conceding the legitimacy of the state's interest in doing so. As recently as 1979, the authors of a leading article on publicity and privacy rights were still able to say with assurance that, "The unauthorized use of a person's attributes to create or sell a product ... will typically lie outside the scope of First Amendment protection and thus will often incur liability."  

**B. Reconsideration of First Amendment Analysis in Light of Modern Law on Commercial Speech.**  

The changes in the Supreme Court's interpretation of the first amendment in the past twenty years, however, are so major that they require us to revisit the ostensibly settled principles of law in commercial appropriation and publicity with a more critical eye.  


Beginning in 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court began to redefine the meaning of protected speech. Commercial speech no longer lay outside the first amendment; it was protected, the Court concluded -- albeit to a lesser degree than, say, political or literary and scientific speech.

This change seemed to have little impact on the torts of appropriation or publicity. Courts and commentators appear to assume (if indeed they think about the issue at all) that even if commercial speech now gets some protection, it does not get enough of it either to foreclose recognition of appropriation and the right of publicity or to narrow the circumstances under which these interests can successfully be asserted.

This assumption, I would argue, is not warranted. In at least two important ways, the Court's contemporary commercial speech cases raise doubts about the viability of significant aspects of both torts. For one thing, the tort law of publicity and appropriation treats as commercial, and hence freely regulable, a lot of speech that under the Supreme Court's current first amendment analysis seems clearly to be fully protected by the constitution. Secondly, recent opinions by a number of justices have raised serious doubt about the continued viability of allowing the state to prohibit or restrict commercial speech, at least when the communications in question are truthful ones. Whether or not accurate commercial speech is eventually treated as indistinguishable in constitutional terms from political or literary speech -- a real possibility -- the Court as a whole has shown itself in recent years increasingly unlikely to accept regulatory rationales and approaches that are less than rigorous in their logic.


68. Professor Halpern has written that the right of publicity survives constitutional scrutiny because it protects "the hard economic commercial value of an individual's identity" and not simply because courts take "a formulaic approach to commercial speech." Halpern, *Independent Right*, supra note 6, at 868. Professor Halpern does not develop the point, however, and indeed it is unclear why "commercial value" is entitled to the heavy weight he attributes to it.
1. Profit does not make speech commercial.

Let us start with the first point. Although the vast bulk of publicity and appropriation cases have been brought against advertisers who use elements of individual identity without permission, many nonadvertising cases continue to be labelled commercial.\(^69\) The use of famous faces as the subject of plastic busts,\(^70\) or to decorate posters, the fronts of t-shirts, the sides of pencil sharpeners, and the surfaces of drinking glasses have been lumped together with advertising into the commercial use category.\(^71\) Although there have been cases where merchandise bearing a name or face has been treated as protected speech -- for example, when the face at issue is that of a political candidate\(^72\) -- the usual legal

\(^69\) Two recent and highly publicized instances of nonadvertising cases were brought by film star Dustin Hoffman, and by golfer Tiger Woods. Hoffman was awarded $1.5 million in compensatory damages because a magazine, in a fashion article, superimposed Hoffman's head on the body of a woman dressed in high heels and a gown. Hoffman v. Capital Cities/ABC, Inc., 1999 WL 38490 (C.D. Cal., January 20, 1999). The judge subsequently awarded the actor an additional $1.5 million in punitive damages. David Rozenweig, Judge Doubles L.A. Magazine's Damages in Dustin Hoffman Suit, L.A. TIMES, Jan. 29, 1999, at B3. The company that "markets" Tiger Woods sued sports artist Rick Rush for publicity rights violations based on Rush's use of Woods' physical appearance in a picture showing "golf greats." Marcia Chambers, Lawsuit Pits Artists' Rights vs. Athletes', N.Y. TIMES, Feb. 16, 1999, at D1. Another striking and troubling example is Mendonsa v. Time, Inc., 678 F. Supp. 967 (D.R.I. 1988), holding that because a famous photograph of a sailor kissing a nurse on VJ Day in 1945 was now being sold for $1600 a copy, the defendant's use was for commercial purposes.

\(^70\) Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 694 F.2d 674 (11th Cir. 1983).

\(^71\) In Lugosi v. Universal Pictures, 603 P. 2d 425 (Cal. 1979), for example, the publicity claim by Lugosi's heirs was triggered by agreements to market Lugosi's image as Count Dracula on "plastic toy Pencil Sharpeners, Plastic model figures, T-shirts and sweat shirts, card games, soap and detergent products, picture puzzles, candy dispensers, masks, kites, belts and belt buckles, and beverage stirring rods." Plaintiffs ultimately lost because the Court refused to find the interest descendible.

\(^72\) Paulsen v. Personality Posters, Inc., 299 N.Y.S. 2d 501, 507-08 (Sup. Ct. 1968). For a more recent and important case involving a parodic version of
analysis focuses on the motives of the manufacturer in making the goods (to make a profit) rather than on why the goods are purchased by consumers. And, at the most questionable fringe of so-called commercial uses, are instances where entertainers have been sanctioned for putting together performances in which they have attempted to mimic the appearance and other attributes of celebrities (including dead celebrities). 73

These claims have always been legally troubling, although they have continued to be recognized. 74 While it is certainly true that makers of t-shirts and imitative performers are in business to make a profit, so, too are virtually all those who distribute clearly privileged communicative works -- including newspaper publishers and broadcasters. Magazines and other media are not in existence purely as the expression on their publishers' part of an idealistic, self-sacrificing belief in the value of an informed public. 75

73. These cases do not involve consumer deception because viewers of the performances are not misled into believing that what they are watching is actually a reincarnation, say, of Elvis Presley. One fairly recent example of this genre of cases can be found in Apple Corps Limited v. A.D.P.R., Inc., 843 F. Supp. 342 (M.D. Tenn. 1993). In Apple Corps, a group of musicians were sued, and ultimately enjoined from continuing to put on shows attempting to recreate Beatles concerts from the 1960s, on the ground that their work was purely commercial exploitation. They were also barred from continuing to use posters picturing them as Beatles "look-alikes." See also, e.g., Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981)(banning imitator of Elvis Presley from putting on a show entitled "A Tribute to Elvis").

74. See sources cited in note 73, supra.

75. One of the very few judicial decisions that have refused to recognize a publicity right in information-bearing merchandise emphasized the lack of a principled basis for distinguishing these materials from ones that deserve full first
Furthermore, the mere fact that information appears on a utilitarian object does not deprive it of its identity as speech. Many products carry such significant communicative freight that they are clearly purchased by consumers for what they "say" rather than for what they do. In fact, many of these so-called products -- be they commemorative buttons, baseball cards, posters, or shows put on by celebrity impersonators -- actually have no functional purpose at all. Others -- mugs or t-shirts -- do, but someone who wants to wear Tom Hanks' face on his or her chest surely views the t-shirt that carries the image as a secondary and relatively unimportant component of the package. The use of these kinds of images to associate oneself with an era or an attitude toward life or the adoration of a "hero" or celebrity is difficult to distinguish intellectually from the impulses that back in the 1960's led Mr. Cohen to wear his jacket with the logo "Fuck the Draft" into the courthouse or young Mr. Tinker to go to school with a black armband on.


76. The district court in Friends of the Viet Nam Veterans Memorial v. Kennedy, 984 F. Supp 18, 20-21 (D.D.C. 1997), rev'd on other grounds, 116 F.3d 495 (D.C.Cir. 1997), cert. denied, 118 S. Ct. 1035 (1998) rejected a total ban on the sale of t-shirts on the Washington Mall. The court said that t-shirts were not commercial speech, but rather an important form of communication. Although the Court of Appeals reversed on the ground that the issue was not speech but selling things on the mall, it agreed that the plaintiffs were using the t-shirts to call attention to their ideas. 116 F.3d at 497.

77. The way in which individuals give meaning to, and extract meaning from, the images of celebrities is thoroughly explored in two excellent articles that are, overall, quite critical of publicity rights. Coombe, Authorizing the Celebrity, supra note 21; Madow, Popular Culture, supra note 4. Although she mounts an useful defense against the attacks on publicity rights by Coombe and Madow, Professor Kwall nonetheless would seem to concede, at least tacitly, that the public does indeed use celebrities and their attributes for important expressive purposes. See Kwall, Fame, supra note 52 at 1 (celebrity used to "persuade, inspire and inform" public).

Unless some better reason than a quest for profit can be posited for treating communicative products and mimicry as less protected commercial speech, it is hard to see why the producers of these goods should be treated as any less engaged in highly protected activities than are newspaper publishers or motion picture producers.

In truth, these sorts of products and performances do not seem to fit in well at all with the kinds of communicative material the Supreme Court currently relegates to its less-favored commercial speech category. Admittedly, the Court has not ever been required to give definitive meaning to the term "commercial speech." But a careful reading of the decisions indicates that the justices are unwilling to define the term capiously, fearing that to do so would erode the presumption of protection that ordinarily applies to any but exceptional instances of speech. On several occasions, the justices have suggested that the commercial speech doctrine applies only to speech which proposes a commercial transaction -- i.e., an advertisement for a product or service.\footnote{81} Speech is not commercial merely because it is associated with a product or because it is


80. Although it is true that in both Cohen and Tinker, the speech at issue was overtly political and hence self-evidently entitled to full first amendment protection, much of the association with celebrities and stars that occurs in the right of publicity cases also carries a political message, albeit more subtle. And, in any event, political speech does not exhaust the category of fully protected speech. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) (acknowledging that a film about personal relationships was fully protected speech).

81. See, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993); Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 473-74 (1989); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65-68 (1983). The Tenth Circuit in Cardtoons v. Major League Baseball Players Assoc., 95 F.3d 959, 970 (10th Cir. 1996), cited the Supreme Court's cases as its basis for concluding that, "Cardtoons' [baseball] trading cards...are not commercial speech--they do not merely advertise another unrelated product. Although the cards are sold in the marketplace, they are not transformed into commercial speech merely because they are sold for profit."
originated by some person or entity seeking to make a profit from it.\textsuperscript{82}

In short, first amendment doctrine does not provide an easy out for courts that want to continue to categorize Elvis posters and Elvis imitations as forms of commercial speech. This observation, I would argue, means that they will need to come up with a much different kind of justification than has previously been given if they want to continue treating these forms of communicative material as anything less than fully privileged.\textsuperscript{83} One place to look for help

\textsuperscript{82} The Supreme Court has indicated, in a number of instances, its concern with keeping commercial speech narrowly confined. For example, it has refused to find the form of a communication dispositive of its identity as commercial or fully protected speech. Bigelow v. Virginia, 421 U.S. 809 (1975) (use of paid advertisement to communicate information about abortion services does not render the communication a form of commercial speech). Similarly, in Lowe v. SEC, 472 U.S. 181 (1985), the Court rejected the government's effort to argue that an investment adviser was engaging in commercial speech by distributing his advice to customers in a newsletter. The Justices have also been unwilling to allow regulation of concededly commercial speech where it is inextricably mixed with fully protected speech. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 795-96 (1988); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983). The distinction between commercial and noncommercial, however, continues on occasion to lead the lower courts into murky waters. In one recent decision, a federal district court judge refused to enjoin enforcement of an anti-noise ordinance. The plaintiffs' ice cream trucks played music as they drove through the streets. The judge conceded that music was ordinarily protected speech but classified it in this instance as commercial because the sound of it served "as an invitation to sale" of ice cream. Anabell's Ice Cream Corp. v. Town of Glocester, 925 F. Supp. 920, 926-27 (D.R.I. 1996).

\textsuperscript{83} In Estate of Presley v. Russen, 513 F. Supp. 1339 (D. N.J. 1981), the district court recognized that entertainment was protected by the first amendment. The judge classified the performance of a Presley impersonator as unprotected, however, because the production functioned "primarily as a means of commercial exploitation," rather than "providing the free expression of creative talent which contributes to society's cultural enrichment." \textit{Id.} at 1356. It did so, he said, because copying and imitating, even if they require considerable talent, lack both a "creative component" and significant social value. \textit{Id.} at 1359. This approach, more conclusory than explanatory, has, nonetheless, been adopted by other courts. See, e.g., Apple Corps Limited v. A.D.P.R., Inc., 843 F. Supp. 342, 347 (M.D. Tenn. 1993).
might be Zacchini,\textsuperscript{84} which did, after all, uphold a publicity claim even though the use at issue -- a news program -- was clearly communicative. But I do not believe that Zacchini comes close to justifying the proposition that rights of publicity can be sustained even when the expression at issue is traditional first amendment speech. First of all, Mr. Zacchini was not asking to be paid for his name, or his face, or the sound of his voice or because someone copied his act; he wanted compensation for the broadcast of his entire performance. In the background, invisible but felt, was the specter of sports teams and entertainers who, had Zacchini lost, would have been vulnerable to losing large chunks of their paying audiences as a consequence of unauthorized broadcasting. If newscasters could film whole games or shows without either permission or payment merely by asserting that they were "informing the public," producers of live events would no longer be able to recover part of their costs through the sale of such rights and, as a result, might lose much of their incentive to continue putting them on.

Furthermore, Zacchini did not care if the newscast showed his performance; he only cared that he was not paid. But typically, plaintiffs in right of publicity or appropriation cases want to control whether or by whom their images can be used and may, therefore, be after injunctive as well as monetary relief. Bette Midler, for example, was angered by the use of a sound-alike in the Ford advertisement in part because, she said, she did not do advertisements.\textsuperscript{85} The majority in Zacchini stressed that one reason it was willing to allow the plaintiff to prevail was because money was all he wanted; he did not ask for the more troubling relief of a prior restrain than would enable him to control or censor the use of


\textsuperscript{85} Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), cert. denied, 503 U.S. 951 (1992). A similar argument was made, successfully, in a recent case brought by Dustin Hoffman. In the Hoffman case, however, editorial content rather than an advertisement was at issue. Hoffman v. Capital Cities/ABC, Inc., 1999 WL 38490 (C.D. Cal., Jan. 20, 1999). In Hoffman, though, the harm was from a nonrecurring use, and only damages were at issue.
his performance. In sum, Zacchini is far too narrow a holding to carry on its back all the right of publicity claims against materials that are something other that promotions for products or services.

2. Are all advertisements less favored speech?

But even for publicity and appropriation cases that involve traditional advertising, the evolution of the commercial speech doctrine would seem to pose commonly unrecognized obstacles to the continued health of the torts. The reason these cases have typically been easy ones for plaintiffs to win is that defendants' countervailing free speech interests, although no longer nonexistent, have continued to be treated reflexively as if they are at least weak. But this is not a safe assumption.

In the first place, speech designed to sell something can, at least on some occasions, be interwoven with subject matter that may demand a more nuanced and protective response to publicity claims by the courts. The most commonly recognized instance is advertising designed to sell materials such as newspapers, books and magazines. A celebrity may appear in an advertisement for a magazine because a recent edition of the publication contained a story about her; although a law suit may follow, courts tend to treat these uses as constitutionally privileged "incidental uses."

Less often acknowledged, however, is the fact that promotional advertising may sometimes use attributes of a well-known person to introduce into the advertisement a note of social or political commentary. Arguably, this was what Samsung was doing with its Vanna White robot. The mere fact that the speech proposes a commercial transaction ought not automatically tip the balance in

86. 433 U.S. at 573-74. Injunctions are viewed as prior restraints, a form of relief that cuts off speech before it can occur. Prior restraints have always been the most suspect form of regulation the state can engage in under the first amendment. See New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

favor of the plaintiff. Recognition of this point can be found in a recent Second Circuit case. The mayor of New York City asked the Metropolitan Transportation Authority (MTA) to take an advertisement off city buses because it "misappropriated" the mayor's name, in violation of state law, for commercial purposes.

The MTA complied, and the advertiser sued for, and won, a preliminary injunction. On appeal, the federal court affirmed. The majority concluded that the MTA's action constituted a prior restraint. It then went on to say that, although the Supreme Court has left open the possibility that prior restraints might be permissible where commercial speech was involved, the circuit court could not sanction such an approach. "This case," said the court, "aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity..."

But even where the content of the advertisement is purely promotional, the status of many publicity claims is uncertain. Although the Supreme Court has consistently said that false or misleading advertisement can be subject to regulation without much concern for free speech defenses, the same cannot so clearly be said of truthful advertising. Since Virginia State Board of Pharmacy v.


89. New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2d Cir.), cert. denied, 119 S. Ct. 68 (1998). The legend on the advertisement for the magazine said, "Possibly the only good thing in New York Rudy hasn't taken credit for." Id. at 125.

90. The MTA, several years before this dispute arose, had adopted a set of standards governing its acceptance of advertising. The standards prohibited the display of advertisements that violated state laws prohibiting commercial misappropriation. Id. at 126.

91. Id. at 131.

92. Id.
Virginia Citizens Consumer Council, Inc.\textsuperscript{93} was decided in 1976, the Court has vacillated over whether or not accurate commercial speech, like most other protected speech, should be subject to regulation only upon a showing of a compelling state interest. That is to say, it has struggled to decide if accurate commercial speech should be entitled to the same degree of protection as a newspaper story.

Although the tale of that struggle is a long one and has been told in greater detail elsewhere, I will attempt to sketch it briefly here. Virginia State Board, the Court's first full-fledged effort to confront the status of commercial speech, agreed that the government could subject such speech to time, place and manner regulations and restrict it if it was false, misleading or proposed an illegal activity. But the Court intimated that if the speech were truthful and promoted a legal product or activity, it might well be fully protected by the first amendment. Subsequently, attempts to regulate accurate commercial speech were regularly struck down.\textsuperscript{94}

In 1980, however, the Court shifted direction, and, in the Central Hudson decision, concluded instead that accurate commercial speech could be regulated by the state if its interest in doing so met a lesser, although still rigorous, test.\textsuperscript{95}

A mere six years later, though, the rigor seemed to evaporate from the Central Hudson test, leaving accurate commercial speech with a marginal, rather than an intermediate or full, degree of first amendment protection. In a series of decisions beginning with

\textsuperscript{93} 425 U.S. 748 (1976).

\textsuperscript{94} This history is summarized in Liquormart 44 v. Rhode Island, 517 U.S. 484, 497-98 (1996).

\textsuperscript{95} Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980). The questions that needed to be considered under the Central Hudson analysis were: a) does the speech accurately promote a legal product or activity? b) is the government's interest in regulating the speech substantial? c) does the regulation directly advance the government interest at issue? and d) is there a reasonable fit between the regulation and the interest it is intended to further? Id. at 564.
Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, the Court seemed to accept virtually any justification a government body offered for regulating, even banning, truthful advertising of legal activities and products. The picture was complicated, however, by the fact that, at the same time that the Court was applying a highly permissive standard for regulation in some cases, it again began to scrutinize the regulations in others with scrupulous care.

Most recently, the schizophrenic quality of the Court's jurisprudence on truthful commercial speech has given way and has been replaced by a uniformly vigorous standard of review. Although a majority of the Court has not yet been willing to reject a government interest in regulating accurate commercial speech on that ground that is insufficiently substantial, the Justices have nonetheless put government on notice that it must be prepared to defend its choices with convincing proof that the means chosen will actually achieve the state's goals. Furthermore, at a minimum, the state must also show that the restrictions used to implement the policy are narrowly enough tailored to accomplish its objectives without unnecessarily restricting speech. Under this approach, regulation is unconstitutional whenever the Court is dissatisfied with what it terms the "fit" between the government's objectives and the means it has chosen to achieve them.

In 1995, for example, a federal law that prohibited listing the alcohol content of malt beverages on their labels was struck down by

96. 478 U.S. 328 (1986) (upholding law that allows advertising of legal casino gambling to tourists but not to residents of Puerto Rico). Subsequent cases applying a similarly undemanding standard include Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) (upholding ban on most commercial activities on campus); United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding ban on advertising of lottery for purpose of reducing demand for a legal activity).

the Court on the ground that the statutory provision at issue was not sufficiently effective in furthering the federal government’s interest in preventing "strength wars" among brewers, and in addition that it was overbroad. This was a far cry from the flabby justifications that had sufficed to convince the Court to uphold the speech regulations in *Posadas de Puerto Rico* and its kin. A year later, a state law banning off-site advertising of liquor prices met a similar fate for similar reasons.

In the course of deciding these cases, the Court made clear that, in the future, regulation of truthful advertising under *Central Hudson*, while not impossible, can be accomplished only if the government can defend the efficacy of its implementation strategy and can show that its regulatory scheme is crafted to avoid an overbroad approach. Frankly, I do not believe that many of the current applications of the right of publicity could meet this standard.

But this may not be the end of the commercial speech saga. In the last couple of years, a significant number of the justices have signified their serious discomfort about continuing to apply intermediate, rather than strict, scrutiny to efforts to bar advertisers from engaging in accurate commercial speech. So far, five of them -- Justices Ginsburg, Kennedy, Scalia, Stevens and Thomas -- have expressed varying degrees of unhappiness with the use of *Central Hudson's* more relaxed standards of review, and all but Justice Scalia have announced their preference for applying standard first

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99. The Court seems firmly to have turned its back on *Posadas de Puerto Rico* as valid precedent. Justice Stevens, writing for a plurality in *Liquormart*, said:

[O]n reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis.

*Liquormart* 44 v. Rhode Island, 517 U.S. 484, 509 (1996). Justice O'Connor in her concurrence agreed that the cursory examination of the government's interests and its means used in *Posadas* had subsequently been abandoned by the Court. *Id.* at 530-32.

100. *Id.*
amendment strict scrutiny to regulation of such speech.\textsuperscript{101} If a majority coalesces around this position when the next appropriate case presents itself, then the percentage of "easy" cases for the right of publicity will be further diminished. Under this approach a court faced with a publicity case that does not involve falsity might need to find that the cause of action protects an interest of the highest importance and that the "regulatory" tort remedy meets the least restrictive means test.

The Court has not, however, signaled any change in its willingness to permit significant regulation of false or genuinely misleading commercial speech. State law can, therefore, allow plaintiffs to exercise their publicity rights when the use of their identifies is false in fact or by implication. But, as the law now stands, accurate uses ought not to be actionable unless the state can at least prove that the objective of the right of publicity is one that

\begin{footnotesize}

\textsuperscript{101} In \textit{Coors}, the majority simply rejected arguments of the sort that had succeeded in \textit{Posadas de Puerto Rico} without trying to explain the inconsistencies. Justice Stevens, however, in a concurrence, laid the blame on \textit{Central Hudson}, calling the decision misguided and paternalistic. 514 U.S. at 493, 497-98. (Stevens, J., concurring). Earlier, in \textit{Liquormart 44}, Justice Stevens, writing for himself and Justices Ginsburg and Kennedy, had taken a somewhat softer position on the applicability of \textit{Central Hudson}. He said:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501. Justice Thomas, however, flatly rejected \textit{Central Hudson} in his concurrence, taking the position that no difference exists between the constitutional status of accurate commercial speech and political speech. \textit{Id.} at 517 (Thomas, J., concurring in Pts. I, II, VI and VII, and concurring in the judgment). Although he was not ready to declare his position, Justice Scalia wrote separately in the same case to say that he shared Justice Thomas's unhappiness with \textit{Central Hudson}. \textit{Id.} at 517 (Scalia, J., concurring in part and concurring in the judgment).

\end{footnotesize}
the tort law is actually capable of achieving. The problem cannot be avoided merely by claiming that unconsented uses are per se misleading. It is quite possible to make unconsented uses of the identifying characteristics of well-known people to promote products in ways that are entirely truthful. For instance, if Jack Nicholson actually drinks Minute Maid orange juice, it is hard to argue that the company falsified anything if it were to say so in its ads. It is often argued that the use of a celebrity's name or face is automatically translated in the public's mind to mean that the celebrity wants to convince us to emulate him or her. This assumption seems strained; it is more likely that viewers of the advertisement correctly assess the purpose of the use: that is, that the company wants us to choose to emulate the celebrity.

Nor would anyone be likely to be misled by the naming of a Broadway theater after Franklin Delano Roosevelt into believing that the late President was associated with it or otherwise endorsed it. Using famous names for companies and institutions is such a common practice that anyone who has grown up in this society implicitly understands the convention out of which such naming typically arises. Of course, there are undoubtedly circumstances where incorrect inferences would be natural and expected. But by all current indications, the Supreme Court is unlikely to permit lower

102. In Liquormart, a four-person plurality (including this time Justice Souter as well as Ginsburg, Kennedy and Stevens) was highly critical of Rhode Island for failing to provide convincing empirical data that its policies on advertising of liquor prices would further its goal of reducing the consumption of alcohol. 517 U.S. at 505-07.

103. Federal trademark law contains a number of subject matter restrictions, including a bar against using the name, face or signature of a president as a trademark during the person's life or that of a surviving spouse. 15 U.S.C. § 1052(c). Whether or not this restriction and others of a similar kind in § 1052 would survive first amendment scrutiny is at present an open question. The leading case on trademarks and the first amendment is San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987). In it, the Supreme Court upheld a statute (36 U.S.C. § 220506, formerly 36 U.S.C. § 380) giving the U.S. Olympic Committee exclusive right to control use of the Olympic name and symbol. For a thorough discussion of the case, see Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 NOTRE DAME L. REV. 397 (1990).
courts to assume the existence of confusion from the mere possibility that a misreading could occur. The Court has already indicated that, where facially accurate commercial speech is determined to be misleading, that determination is subject on appeal to de novo review. As Justice Ginsburg wrote for a unanimous court in a recent case, advertising cannot be treated as misleading unless that claim can be "demonstrated with sufficient specificity."

3. The Implications of First Amendment Doctrine for Publicity and Appropriation Cases.

This, then, brings us squarely to the issue that supporters of publicity rights often seem to approach in intellectual fast-forward. Can large segments of the publicity tort (or commercial appropriation, for that matter) survive an application of the current Central Hudson standards with teeth, or (in the worst case for the tort) the kind of scrutiny applied to content-based restrictions of fully protected speech?

The answer is probably not. Particularly if strict scrutiny is imposed, precedent suggests that the tort law will not be permitted to penalize accurate, unconsented uses simply because a celebrity would prefer not to have this exposure or wants greater control over it. After all, when states have put forth such interests as personal privacy, individual peace of mind, and, to a substantial extent, reputation as reasons to permit tort-based regulation of speech, those


105. Ibanez v. Florida Dept. of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 139 (1994). Justice Ginsburg noted that "We cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real...'' Id. at 146. She then went on to note that the appropriate remedy for a possibility of confusion might be a disclaimer rather than a ban of the speech. See also Peel, 496 U.S. at 111 (Marshall, J., concurring) (warning against finding speech misleading based on its potential to be misinterpreted, and suggesting that requiring additional clarifying information was preferable to prohibiting the speech).
interests have been deemed insufficiently weighty to overcome the free speech claims on the other side.\textsuperscript{106}

A different way, however, could be proposed for understanding the interest at stake. It could be asserted that the state has a powerful interest in protecting property rights as an aspect of personal liberty, and that the value generated by one's personhood is a form of property. Put succinctly, the argument is essentially that the first amendment is not a license to steal.

It is true, of course, that the right to the undisturbed possession of one's property is a valued right (and one that also enjoys constitutional protection). The desire to publish the contents of a celebrity's diary, for example, would be unlikely to privilege the act of stealing it. But property interests are creatures of law; societies, not nature, decide which sources of value will be allocated to individuals or groups and which will be held in common. And in this society, any decision to make pure information into property is infused from the outset with constitutional complexities.\textsuperscript{107}

\textsuperscript{106} As long as the speech is truthful and the information is legally obtained, the Supreme Court seems disinclined to permit tort recovery on privacy grounds. See Florida Star v. B.I.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Where the information is false and defamatory, the Court has allowed some speech regulation to protect reputation. A public person or government official, however, must first carry the extremely difficult burden of showing that the falsehood was either deliberate or uttered in reckless disregard of its truth or falsity to recover. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public officials); Curtis Publishing Co. v. Butts, 388 U.S. 130, (1967) (public figures). Private persons involved in matters of public concern must prove, at a minimum, negligence to recover. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). These broad privileges, introduced to protect speech values, mean that many defamed individuals cannot obtain a remedy under state law for their injuries.

\textsuperscript{107} As Justice Brennan wrote for the Court in a privacy case:

One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.
The first amendment promise of freedom of speech depends on a rich public domain to be meaningful. Information and ideas are not a scarce resource and ordinarily do not need to be privatized to be used efficiently. Tunis Wortman, whose book on free speech has been described by the legal historian Leonard Levy as a "preeminent American classic," once wrote of information that it is:

a general fund, of which all have a right to participate: it is a capital which has the peculiar property of increasing its stores in proportion as they are used. We are entitled to pursue every justifiable method of increasing our perceptions and invigorating our faculties. We are equally entitled to communicate our information to others.

If more than a marginal amount of information is turned into intellectual property and its ownership parcelled out to private individuals and corporations, the right to speak freely and to exercise thought and imagination in the reprocessing of existing facts and ideas will become largely theoretical for any except those with the purse or the power to license the necessary content. Decisions, therefore, to turn information into a commodity cannot be made lightly; each bit that is privately owned diminishes the fund of material upon which the exercise of first amendment rights depends.

It is not sufficient, therefore, to start by presuming that individuals are entitled to the value that inheres in particular types of

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Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). Thus any tort giving an individual the power to enjoin, or seek damages, for publication of information about them raises constitutional questions.


110. I have explored this point in greater detail in Zimmerman, Information as Speech, supra note 39, generally and in particular at pp. 715-24.
information about themselves; in fact, we should ask whether recognition of such an entitlement, which necessarily restricts speech, meets even the less demanding standard of *Central Hudson* that the state show that its restriction will further a legitimate state interest of some substantiality.

But even if courts remain reluctant to judge the substantiality of the interest itself, at the very least, under *Liquormart 44* and *Coors*, the state must still provide credible evidence that the publicity right is designed in a way that substantially furthers its objectives in granting the right in the first place. This is the point at which the case for publicity rights most certainly begins to crumble.

I am not the first to point out the empirically dubious nature of the claim that publicity rights serve more than a tangential role (if that) in promoting investment in one's skills and talents. 111 Most people with a high enough public profile to make their names, faces or the sound of their voices potentially valuable in an advertisement do not do what they do primarily to create this kind of demand. Advertising and promotional revenues are an artifact of their primary activity; hence, they would be likely to make exactly the same investment in their careers and creativity with or without a right of publicity.

Although amateur athletes may hope for eventual revenues from advertisements and endorsements, that possibility is remote for most of them; the desire for recognition and the lure of high pay as a professional, while itself also remote, would seem sufficiently adequate incentives by themselves to keep kids on the basketball court and the nation's sand lots. It is simply implausible to assume that a successful actress would abandon a career on the stage or devote less of her energies to it if she were prevented from capturing the value generated by the demand for her photograph on a coffee mug. And who actually believes that Vanna White would be too demoralized to continue flipping her squares unless she is assured

that robots can be prevented from pretending that they are going to do her job in the twenty-first century.\textsuperscript{112}

It has also been suggested that privatization of personality is defensible because creating an ownership interest is the most efficient way to exploit the economic value that inheres in identity.\textsuperscript{113} This proposition is questionable as an empirical matter,\textsuperscript{114} but, more importantly, it assumes away the very problem that the right of publicity poses for free speech theory. By taking as a given that the law should create private rights to avoid a kind of tragedy of the commons in celebrity personas, the analysis assumes, rather than attempting to demonstrate, the existence of the need for and desirability of extracting maximum monetary benefits from this kind of information flow.

The economic rationales for the right of publicity do not exhaust those that have been offered. Harry Kalven suggested that the reason to protect publicity rights is to prevent unjust enrichment or unfair free-riding.\textsuperscript{115} This argument, too, assumes away the critical issues, this time by asserting the existence of some innate entitlement to the value of personality that resides in the person who created that value rather than seeking to defend the entitlement on some instrumental public policy ground. This is a particularly sticky sort of approach. It assumes that government can simply declare some kinds of speech off limits to commercial speakers because of some undemonstrable but inherent natural right in all value

\textsuperscript{112} Some might argue that athletes are motivated to invest in their sports by the remote possibility of celebrity endorsement income in the future. The chances are so slim, however, that it is hard to credit that baseball players and golfers and ice skaters would not invest as heavily in their skills if they were deprived of the property provided by a publicity right. In any event, as pointed out in this article, advertisers will probably continue to contract for pay to get actual celebrity endorsements.


\textsuperscript{114} Madow, \textit{Popular Culture}, supra note 4, at 222.

\textsuperscript{115} Kalven, \textit{Privacy}, supra note 26.
stemming from the exertion of one's individuality and creativity. In the first place, we clearly do not admit to the existence of this "intimate connection" and the ensuing entitlement it generates in other settings where speech regulation has tried to wall off the use of personal information. This observation alone should give rise to some skepticism about using a rights-based justification in the commercial speech arena. Furthermore, if commercial speech can be banned by the simple expedient of declaring that some "natural right" in information would otherwise be violated, an ill-defined loophole would be opened in first amendment protection big enough to drive that now-discredited 18-wheeler, the Posadas decision, right back through the center. In essence, we would be back in the position of saying that the state can ban commercial speech for virtually any reason it chooses by arguing that it is protecting a "right," and the mechanism of testing regulatory "fit" will not provide a very good way of tempering this kind of regulatory over-enthusiasm.

If these observations suggest that much of the right of publicity is unconstitutional, one need not conclude that celebrities can never, if they choose, earn extra cash by licensing their names and faces. Companies will continue to pay sports stars to endorse breakfast cereals and fancy cars; an advertiser who wants an identified star to give an actual performance as part of a promotion will have to pay for her services. But to the extent that companies can mine the value associated with fame without the cooperation of the celebrity,

116. Claims of a property-like ownership of one's persona have generally failed miserably in other aspects of privacy law, for example. A public disclosure of private information cannot succeed unless it is so intimate that it would outrage any ordinary, reasonable person and has no connection to a matter of public concern. RESTATEMENT (SECOND) OF TORTS, § 652D (1976). These conditions are rarely met. See generally, Zimmerman, Privacy, supra note 56.


118. This article does not purport to address the complications that will be introduced into this area as computer-manipulated and generated imagery is used more commonly to create the appearance that people are in places they never were and are doing things they never did.
and can do so without sliding over the edge into the false or the genuinely misleading, it is hard to see from a constitutional perspective why they should not be entirely free to do so.\textsuperscript{119}

I recognize, of course, that those who are convinced that the right of publicity is fair and good may not be easily discouraged by the prospect of climbing over additional constitutional hurdles. The argument that value belongs to those who create it may be strong enough to overcome other objections. Money -- whether it can be made and who should make it -- is a powerful force and it has a way of blurring our view of constitutional niceties.\textsuperscript{120} Recognizing that this is so, I would, therefore, like to close on a somewhat different note.

I realize that, when all else is said and done, the reason that publicity rights have such a broad and loyal following is rooted in an intuition about fairness, a sense of the potential for a form of distributive injustice if celebrities cannot demand control over and payment for uses of their attributes. If an individual turns himself into a valuable (i.e., popular and charismatic) personality, it seems intuitively wrong to allow the benefits that flow from his devotion of time and energy in becoming famous be reaped by corporate freeloaders waving the banner of the first amendment. Let me suggest, however, that there is another way to frame the issue.

It may be clarifying to discuss the value inherent in personality as a form of economic surplus. Characteristic of the production of goods, including intellectual goods, is the generation of surplus value -- the economic space between the most a consumer would be willing to pay and the minimum price for which the manufacturer is

\textsuperscript{119} Because computer-generated imagery can place people into new settings and make them appear to do and say things they never did or said, this capability may undercut much of the secondary market for celebrity that would otherwise remain under the first amendment analysis I have outlined. This technology, therefore, raises interesting and troubling questions, but ones that are beyond the scope of this paper to address.

\textsuperscript{120} Zimmerman, \textit{Information as Speech}, supra note 39, at 665-74.
willing to sell. The traditional position of antitrust\textsuperscript{121} and intellectual property\textsuperscript{122} theorists is that this surplus is a benefit that ought ordinarily to go to the consumer. Intellectual property law, it is generally thought, should intervene to shift some part of that surplus to the producer of the good in question only when failure to do so would lead to suboptimal production.

When a robust right of publicity is recognized, the assumption is often made that the law is acting to shift surplus value attaching to a particular persona back to the celebrity who created it, and away from the advertiser who is merely, as mentioned earlier, a free-rider. In point of fact, however, what the right of publicity really does is to shift value to celebrities by extracting it from the pockets of the public. Individual consumers -- and not the advertisers of products -- are the ones who pay for publicity rights, both in the increased price of goods and services as well as in a decrease in information flow.

As we have seen, the evidence that this wealth transfer actually achieves some worthwhile public benefit in the form of creating needed incentives is perishingly thin. In the ordinary world of intellectual goods, therefore, this transfer of surplus from consumers to celebrities would probably be seen generally as bad policy, as an efficiency and -- to those of us old-fashioned enough to care -- also as a distributive matter. If we are going to treat personality and fame like an intellectual product, then we should be equally as careful not to overprotect it as we are with other similar products. The value of fame, if it is going to be treated as a commodity like mousetraps and software, should have to live by the rules for mousetraps and software. Unless shifting more financial rewards to the famous convincingly gets us a more desirable level of celebrity, or a product that we want and would not otherwise have, publicity claimants do not have a legally compelling claim for a dollar more of the surplus

\textsuperscript{121} F.M. Scherer, \textit{Antitrust, Efficiency, and Progress} 130-32, in \textit{REVITALIZING ANTITRUST IN ITS SECOND CENTURY} (Harry First et al. eds. 1991).

value associated with their fame. And surely a claim that makes no sense in intellectual property terms provides a poor excuse for diminishing the respect for first amendment values.

No matter how we choose to approach the topic, then, the final conclusion remains the same: publicity is an interest, but in our legal landscape, with its cherished protection of free speech, we should not allow ourselves to make the serious mistake of getting confused about which one is the "right."