1-900-NEW-KIDS: The Clash Between Newsgathering and the Right of Publicity

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Introduction

The explosion of 900-number telephone technology has given birth to a new conflict between the media’s first amendment rights of free speech and press and the countervailing individual right of publicity. While individuals in the entertainment business have witnessed skyrocketing publicity values of their names, faces, and voices, the media has been able to profit from that same publicity value using 900-number technology. In a recent duel, two newspapers were brought to court for infringing on the plaintiff’s right of publicity when they profited by polling their readers about a popular teenage singing group using 900-number technology. A federal district court judge in California resolved the conflict by granting summary judgment in favor of the newspapers because the profits came from newsgathering, an activity protected by the first amendment.

New Kids on the Block v. USA Today, Inc. and Star Magazine, Inc. presents the interesting conflict between the media’s first amendment rights and the right of an individual to “enjoy the fruits of his own industry free from unjustified interference.” This article assesses the adequacy of current right of publicity analysis in light of the first amendment freedoms accorded to the media. Then, the article presents an overview of the New Kids litigation and introduces the conflict which arises when 900-number technology reaps profits to the news media without the consent of the subject of a 900-number poll. Next, the discussion turns to the origin and development of right of publicity law and attempts by courts to protect the right of publicity in light of the first amendment freedoms accorded to the media. Finally, the article suggests the reintroduction of the alternative channels of communication test as a means to protect private publicity rights when the news media profits from using the publicity value of others to gather the news.

900-Number Technology

When first introduced, 900-number telephone services were associated with sexually explicit conversations and horoscope predictions. Today, a wide variety of sponsors use 900-number services to promote products and events as well as to provide interactive entertainment. For a charge, consumers can dial 900-numbers to find jobs, talk to the Easter Bunny, and reach weather, sports, and money hotlines. Recently, the media has implemented 900-number technology to gather “news” by encouraging the public to call in their opinions or votes.

To provide a 900-number service, a business sets up a program with a telephone company, allowing the telephone company to establish a distinct 900-number for that business for a base fee, much like an 800-number service. Unlike the 800-number service, which provides free phone calls to consumers, the 900-number caller normally is charged a price, ranging from $.50 to $10.00 per call, which is charged to the caller’s monthly telephone bill. Profits from the service, over and above the actual cost of approximately $.30 per call, go directly to the sponsor.

The 900-number business has grown from $27 million in 1985 to a projected $2.5 billion in 1992. In 1988 there were 233 900-number lines in the United States and by 1991, the number of 900-lines exceeded 14,500. By encouraging consumers to dial 900 numbers, businesses can increase profits and exposure. For example, in a joint venture between AT&T and American Express, consumers paid for $2.4 million of a promotion. Further, 900-number technology has been touted as a unique marketing tool that will build new subscribers and revenues, increase reader involvement, and build an additional revenue center. For example, when Sports Illustrated implemented a 900-number service providing up-to-the-minute sports scores, the magazine increased its exposure and reader involvement while establishing a lucrative addition to the magazine’s editorial products.
short, 900-number technology has changed the use of the phone. The telephone, no longer merely a means of communication, has become a means to achieve everything from “one-way intimacy” to a profitable means of collecting data; however trivial some of the data may be.  

New Kids on the Block v. USA Today, Inc. and Star Magazine, Inc.

The New Kids litigation arose when USA Today and Star Magazine advertised 900-number services encouraging readers to call and select their favorite member of the popular teenage singing group. Star Magazine charged $.95 per call and USA Today charged $.50 per call. The results of the surveys were to be published in later editions of the publications. The New Kids on the Block, one of the most popular musical groups to young teenagers at the time, sued USA Today and Star Magazine for violating their right of publicity.

The impetus for this suit is easily understood when the popularity of the band is considered. The New Kids on the Block, five former teenagers from the Dorchester section of Boston, have sold more than 16.9 million copies of their four record albums. However, record sales are only a small part of the New Kids’ business. The New Kids trademark, used by the group since 1986, has equal strength in selling towels, T-shirts, and even a cartoon series. The New Kids have been called a “fountain of licensed merchandise profits.” For example, the average fan at New Kids concerts, which sell out football stadiums months in advance, comes home with $15 to $20 worth of posters, T-shirts, and buttons. New Kids’ latest venture, doll replicas of the singers, caused a near riot when they were introduced at a Hard Rock Cafe on West 57th Street in New York City.

Among the services offered by the New Kids under their trademark are two 900-number hotlines. One of them, (900) 909-5KIDS, averages 100,000 calls a week, at $2 for the first minute and 45 cents for each additional minute. Each day the caller hears a different personal message from the New Kids. Plaintiffs allege that they have received over 4.7 million calls from New Kids fans. Plaintiffs further allege that the defendants’ use of the 900-number service was to capitalize on the public’s familiarity with the goods and services identified by the New Kids name and persona.

Plaintiffs claim their right to preserve the commercial value of their proprietary rights in the New Kids name and persona entitles them to damages under their right of publicity. Plaintiffs argue the surveys appearing in USA Today and Star Magazine were disguised advertisements for a commercial collateral product; the 900-number service. According to declarations filed in connection with motions for summary judgment, Star Magazine made a profit of approximately $1,600 and USA Today a profit of $300. At first blush, this seems to be a paltry sum. However, several areas of law provide incentive for New Kids to prevent unauthorized exploitation of their valuable right of publicity interest at early stages of its use.

For example, in Rossner v. CBS, the novelist of Looking for Mr. Goodbar, a best selling novel based on an actual Manhattan murder that received extensive media coverage, sued CBS for using the term “Mr. Goodbar” in a made for television movie. After the plaintiff’s novel was initially published, the term “Mr. Goodbar” was used by many newspapers, magazines, and even in a subsequent novel. Plaintiff Rossner did not take any legal action to protect her trademark until her action against CBS. In that suit she learned her failure to police at early stages was fatal to her present claim. In its decision to dismiss the author’s claim under the Lanham Act, the court specifically stated the strength of the term “Mr. Goodbar” had been diminished by unprotected widespread use and that the author’s failure to police the mark had inevitably caused the mark to lose its value.

To preclude the outcome of Rossner, the New Kids are taking a path much like the owners of the “Star Wars” trademark in Lucasfilm Ltd. v. High Frontier. The term “Star Wars” was being used by political groups to refer to President Reagan’s Strategic Defense Initiative (SDI), a politically controversial plan of defense spending. Plaintiff Lucasfilm claimed that associating “Star Wars” with real world political controversy would injure the “valuable goodwill [the "Star Wars" trilogy] has achieved by developing a mark associated with imaginary battles among fantastic creatures in different worlds.”

The Lucasfilm plaintiffs lost because the challenged use of “Star Wars” was political discourse and public debate protected by the first amendment. However, the court recognized the plaintiff’s natural concern that if he does not seek legal remedies to protect his mark he will lose it.” Thus, justification for the New Kids’ vigorous protection of even the de minimis profits gained by Star Magazine and USA Today is justified based on the Rossner and Lucasfilm decisions.

According to the plaintiffs, the defendants defend their use of the 900-number mode of “news-gathering” because the 900-number service avoids the distortion of multiple voting. The plaintiffs also challenge the defendants’ claim that 900-num-
When Judge Frank coined the term “right of publicity” in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in 1953, he probably could not envision an endorsement industry in which singer Michael Jackson could earn $15 million for two 45 second endorsements for Pepsi-Cola. Nevertheless, the *Haelan* court held Topps Chewing Gum liable based on the common law right of publicity. Topps’ unauthorized use of professional baseball players’ pictures on Topps baseball cards laid the foundation for judicial and legislative protection of an individual’s proprietary publicity value. Amidst the scholarly debate and judicial decisions regarding the scope and purpose of the right of publicity, an amorphous set of rationales has emerged. The right of publicity guards against abuse and misrepresentation. The right also serves to prevent the unauthorized dilution of an individual’s publicity value and prevents unjust enrichment. Similarly, recognition of a right of publicity ensures that those who develop a commercially valuable trait will be able to reap the fruits of their labor. Melville Nimmer, in his seminal article on the right of publicity, asserted simply that each and every person should be able to control and profit from the publicity values which he has created or purchased.

A prima facie case for liability under the right of publicity requires a plaintiff to prove the two elements of validity and infringement. Validity, a right of identity of a human being, is not often a critical issue in right of publicity cases. However, to prove that the defendant’s use constitutes an infringement of the plaintiff’s publicity right, the plaintiff bears the burden of showing that the defendant is, in effect, trespassing on the plaintiff’s right of publicity. Defenses to a prima facie right of publicity case range from the statute of limitations defense to the first amendment defense. One commentator has written, “Probably the most difficult defense to deal with will be the assertion of the first amendment.”

The First Amendment Defense

The freedom of the press is essential to society’s ability to become and remain enlightened, to attain self fulfillment, and to provide a safety valve for expression. The purpose of enlightenment, which has had “the most impact by far on the history of constitutional law,” has given rise to protection of a broad spectrum of speech. Justice Holmes’ analogy of first amendment freedoms as ensuring a free marketplace of ideas embodies the ideal of American citizens having access to uncensored information from which to form their own opinions and make their own choices. To carry out these ideals, the first amendment defense powerfully protects
the media and what the media prints, broadcasts, and sells.

Although the broad protection afforded under the first amendment defense is not boundless, the amendment protects speech concerning political issues, historical events, educational information, and to a certain extent, advertising. One view is that the broad application of the first amendment defense acts as a government subsidy for the media. Never has this analogy been so accurate since the New Kids decision which allows direct media profits from the unauthorized use of valuable publicity rights.

The Right of Publicity v. The First Amendment Defense

In Zacchini v. Scripts-Howard Broadcasting Co., the United States Supreme Court balanced, for the first and only time, the right of publicity against the first amendment media defense. When a local television station broadcasted a county fair event of a human cannonball act on its evening news programs, Hugo Zacchini, the human cannonball artist, sued to protect his right of publicity. The Court emphasized that Zacchini did “not seek to enjoin the broadcast of his performance, he simply wants to be paid for it.” The Court took into account that airing Zacchini's entire fifteen second act posed a substantial threat to the economic value of the performance, an act which was the end result of much time, effort, and expense on Zacchini's part. As a result, the Court allowed recovery based on his right of publicity.

The Zacchini case does not answer many of the difficult questions that arise in a typical right of publicity case because it is so narrowly drawn and based on facts quite unlike the usual right of publicity case. One important consideration is that the Zacchini court awarded damages based on the right of publicity in what was clearly a “news” setting; an area explicitly protected by the first amendment. Current law pays great attention to the first amendment defense acts as a government subsidy for the media. Although the appellate court agreed with the district court that “the constitutional protection of freedom of the press does not stop at 8” x 11,” the appellate court reversed and remanded for a determination of the “purpose of the portrayal.”

Titan may represent judicial hesitation to slam the door of the first amendment defense upon every knock of a right of publicity plaintiff. However, that same court revealed their willingness to do just that in Rogers v. Grimaldi. In Rogers, the court allowed the first amendment to protect the defendants who used plaintiff's name in the motion picture entitled “Fred and Ginger.” Because the movie title was clearly related to the content of the movie and not a disguised commercial advertisement, Ginger Rogers' right of publicity claim failed.

The purpose of portrayal test has seen widespread use in an interesting group of cases involving unauthorized use of pictures or likenesses of celebrities to promote a publication or gain a commercial advantage over competitors. In Cher v. Forum International, Ltd., Cher alleged a violation of her right of publicity for Forum's false indication of her endorsement of the magazine. Forum had purchased the interview and pictures of Cher from a free-lance writer. The issue containing the interview and picture proclaimed on its cover that “Cher tells Forum” things that she “would never tell Presley. The Russen court relied on the “commercial or cultural” dichotomy in their analysis and granted the first amendment defense to those publications that contribute information, which is not false or defamatory, to public debate or free expression of creative talents. The court also precluded the first amendment defense from applying to portrayals which function primarily as a means of commercial exploitation.

The Russen court held that the “The Big El Show” did not fall clearly on either side of the “commercial or cultural” dichotomy. The court decided although the show contained informational and entertainment elements, the show primarily exploited the likeness of Elvis Presley “without contributing anything of substantial value to society” and enjoined all future performances.
Us [a competing magazine]." However, using the court's words, "Forum was not content with the honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer." The court held the cover indicating Cher preferred Forum to other competing magazines was not protected by the first amendment.114

In Ali v. Playgirl, Inc., the court addressed the propriety of a preliminary injunction against defendant for publishing, without Muhammad Ali's consent, a nude drawing of Ali. The court held that the nude drawing contained no informational or newsworthy speech and found that Ali's commercially valuable proprietary interest in his likeness warranted an injunction to remove the magazines from sale. A third example case upon which courts rely in determining the scope and extent of an individual's right of publicity is Grant v. Esquire, Inc. Esquire Magazine used a thirty year old photograph of Cary Grant, a model's torso, and some photographic trickery to portray the "ageless enchantment" of some clothing styles. The court framed the issue as "whether Esquire has the right to compel Mr. Grant to contribute his face for free." Relying on an unjust enrichment rationale, Mr. Grant's right of publicity interest defeated defendant's motion for summary judgment.

In these cases, Forum, Playgirl, and Esquire's gain from the unauthorized use of Cher's, Muhammad Ali's, and Cary Grant's photographs was the result of an increase in sales or publicity. To clarify, the celebrity photographs promoted sales of particular issues, allowed defendants to gain a "commercial advantage" over other competitors, and attracted consumer attention. In all of the cases, the right of publicity plaintiffs prevailed. However, right of publicity plaintiffs should not be lulled into relying on the current analysis nor should courts deem the "cultural or commercial" dichotomy analysis appropriate in all right of publicity cases. With the development of technology and newgathering techniques, including 900-number technology polling, courts should ask if the defendant had reasonable access to a non-exploitative, non-profit making alternative. Applying the alternative communications test in this discrete arena would more adequately address the individual right of publicity in light of the first amendment interests of the press.

In Lloyd v. Tanner the Supreme court used the alternative avenues of communication test as a benchmark in determining whether a private property right had to defer to the first amendment rights of free speech. In Lloyd, a shopping center owner asserted his private property rights to stop protesters in his shopping center. The court held that, since alternative avenues of communication existed, the shopping center owner did not need to accommodate the protesters. The owner's accommodation of the protesters would "diminish property rights without significantly enhancing the asserted right of free speech." Similarly, the media's exploitation of celebrities by profiting from 900-number polling causes an individual's property rights to diminish when the speech interest could be preserved through alternative avenues of communication.

A similar use of the less exploitative alternative means test was applied in Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd. The defendant's X-Rated film, "Debbie Does Dallas," featured an actress clad in the distinctive uniform of the Dallas Cowboy Cheerleaders. The court held that the defendant's use of a "combination of the white boots, white shorts, blue blouse, and white star-studded vest and belt" violated the cheerleaders' trademark. Because alternative, less exploitative means existed to allow free movement while performing cheerleading routines and would not inhibit the defendant's free speech interests in the movie, the court granted a preliminary injunction and preliminary relief to the Dallas Cowboy Cheerleaders. The court held the cheerleaders, like people who may be exploited by today's newsgathering techniques, had a valuable persona and had a significant interest in protecting that persona from unauthorized exploitation.
The alternative means test, however, has not serves as a reliable means of relief for right of publicity plaintiffs seeking relief since the Lloyd and Dallas Cheerleader cases. The United States Supreme Court backed away from the stance taken in Lloyd when it held that a California rule permitting persons to engage in speech activities in a privately owned shopping center did not constitute an unconstitutional taking or deprivation of property. Likewise, the Second Circuit has questioned its reliance on Lloyd as well as significantly narrowed the Dallas Cowboys holding in Rogers v. Grimaldi.

In Grimaldi, Ginger Rogers brought suit against a filmmaker for using the title “Fred and Ginger” for a movie about an oldtime Italian vaudeville dance team. Because Ms. Rogers’ name had some artistic relevance to the film, the court held that no infringement of her right of publicity had occurred. The Grimaldi court stated that the alternative avenues test did not sufficiently accommodate the public interest of free expression. The court replaced the alternative avenues test with a new balancing test which weighs the public interest in avoiding consumer confusion against the public interest in free expression.

As case law illustrates, courts have moved away from the alternative avenues test because it is not a complete answer to the difficult issues presented when free speech conflicts with individual property rights. However, the recent judicial vacillation is not cause to abandon the concept of the alternative avenues test. Rather, the reasons for rejecting the alternative avenues test support its proposed use in 900-number newsgathering cases.

Both the Supreme Court’s retreat from the alternative avenues test in Lloyd and the Second Circuit’s limiting of Dallas Cowboys with the Grimaldi balancing test were based on cases involving political speech and artistic expression, respectively. In contrast, newsgathering by solicitation of public opinion and profiting from 900-number technology is not the type of artistic and political expression at issue in Pruneyard and Grimaldi. The potential for direct profit from utilizing 900-number technology for newsgathering provides a unique and appropriate setting for the reintroduction and use of the alternative avenues doctrine. First, 900-number technology can play a role “wholly unrelated” to newsgathering and dissemination despite the fact that it gathers information for a media defendant. One commentator discussing the New Kids decision stated, “Newspaper publishers know that advertising and circulation departments bring in money . . . now, a federal district judge in Los Angeles has approved one way that newsrooms can be profit centers.”

The immense profit potential of 900-number technology when it is associated with individuals who possess high publicity value makes an evaluation of whether alternative, less exploitative means should be used in the newsgathering process an important determination.

Further, if media entities are allowed to profit from polling readers about celebrities, they are in effect selling the readers a chance to voice their opinion. Although public opinion provides an indispensable topic for the media, public opinion elicited by a celebrity’s commercially valuable persona and then collected for profit encroaches on the celebrity’s publicity rights. Such an encroachment should only be allowed if there are no reasonable, alternative means to gather such information. If the media, under cover of a first amendment defense, continues to profit by polling the public about commercially exploitable individuals, the entire body of law establishing the right of publicity is undermined.

In the 900-number technology conflict addressed by this article, a reasonable, less exploitative alternative means is 800-number technology. Future technological advances in newsgathering will continue to provide alternative avenues of communication to provide relief for plaintiffs. To consider the equitable and economic advantages of the alternative avenues test now will preclude greater inequities in the future. Before applying an alternative avenues analysis in a right of publicity case, three elements should be present. First, the case must present a valuable publicity right being asserted against a media entity that is using a persona in an unauthorized manner. Second, the unauthorized use must result in an externality; that is, an economic benefit is being received without incurring any costs for the use of that benefit. Third, the economic benefit must extend beyond the sale of news by creating a distinct and identifiable economic gain to the media defendant. When these three elements are present, courts should abandon the “cultural or commercial” dichotomy analysis and apply the alternative avenues test.

In choosing whether an alternative avenue should be required of the media, courts should consider: 1) the difference in administrative and financial costs to the media between the challenged use and the alternative avenue; 2) the diminution of the publicity value from the challenged means of newsgathering compared to the alternative avenue’s potential economic impact; and 3) if the alternative means would significantly alter or diminish the media’s newsgathering ability. If the costs to the media are minimal, the adverse economic impact on the plaintiff is reduced, and the alternative
avenue would not impair newsgathering, the alternative avenue should be required.

Conclusion

Due to advances in media technology, newsgathering techniques, and sheer volume of information available to entertain and inform the public, an individual's right of publicity and the value of that right is worth more than ever before. Further, a person with any publicity value must protect that value at its inception. One can lose judicial protection of their publicity value forever if that publicity value is diluted by public use. To exist at all, the right of publicity must be substantially protected by the courts.

Those most likely and most able to exploit a person's publicity value are today's media organizations. Because of the media's important role in informing, educating, and enlightening the public, the media has been afforded the use of the powerful first amendment defense. When the media uses an individual's persona in a cultural or news setting, the right of publicity must bow to the first amendment. Traditionally, however, that defense has been taken away if the media has exploited an individual's publicity right for purely commercial reasons.

900-number newsgathering brings news as well as profit to the media. Unlike conventional newsgathering techniques, 900-number technology polling gives rise to an identifiable economic gain wholly apart from profits due to increased sales which are traditionally protected by the first amendment. Because it serves a newsgathering function, 900-number technology polling presents right of publicity plaintiffs with hurdles virtually impossible to clear under current right of publicity analysis. Blindly allowing the first amendment to protect 900-number technology newsgathering now could open the door to blatant commercial exploitation of individuals and celebrities.

This article presents a means to meet the demands on today's courts to better protect the economic and property interests that the common law right of publicity seeks to protect. At times, the media gains a distinct economic benefit, separate from increased sales or circulation, from the use of an individual's publicity value. 900-number polling is such an instance. When such a profit arises, courts should apply the alternative avenues test proposed in this article. In doing so, courts will more effectively balance the individual proprietary concerns of the right of publicity against the public concerns of free speech and press. ☐

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2. "[s]it one and the same time, totally apart from your privacy interests, you have a potentially exploitable right of publicity which enables you . . . to prevent others from commercially exploiting your name and likeness . . . ." Pilpel, The Right of Publicity, 27 BULL. OF THE COPYRIGHT Soc'y 249, 262 (1979-80).


4. Id.


7. Id.

8. Debate, USA Today, March 15, 1991, Section A, at 6. The editorial page addresses the current abuses of 900-number technology. Due to fraudulent advertisement, people have been victimized by dialing and paying for 900-number telephone calls and receiving nothing in return. Currently, this problem is being addressed by state government officials, the Federal Communication Commission, and the United States Congress. Id. However, the abuses of 900-number technology are beyond the scope of this article.


14. Id.


16. Id.

17. Many entertainment acts use 900 numbers as indicators of their popularity. "The most popular [numbers], including those of D.J. Jazzy Jeff and the Fresh Prince and Bobby Brown, are aimed at young audiences. In the multi-media '90s, these 900 numbers, more than chart positions, may be the best indicators of an act's true juiciness." J. Leland, When Kids R' Culture, NEWSDAY, July 15, 1990, part II, at 4.


19. Id.

20. USA Today published the survey results, but Star Magazine withheld them because of the lawsuit. Id.

21. The Plaintiffs also stated causes of actions based on Trademark, Unfair Competition, and Commercial Misappropriation "Law". Id.

22. Leland, supra note 17.

23. Id.

24. Id.

25. Id.

26. Id.


29. Id.

30. Plaintiff's Memorandum, supra note 27, at 5.

31. Id.
a tort an act which willfully disregarded another's personality.

While the concept of a common law right to privacy seems to be something uniquely American. Id. at 1.5, 8. The right of publicity is properly characterized as an intellectual property right.

Commentators are unanimous in their assessment of the Haelen decision as the origin of the common law right of publicity. The Haelen decision was “groundbreaking.” McCarthy, supra note 66, § 1.7.


Haelen Laboratories, 202 F.2d at 868.

The following state courts recognize a common law right of publicity: California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Wisconsin. See, McCarthy, supra note 58, at § 6.1B.

See CAL. CIV. CODE § 890, 3344 (West Supp. 1987); KY. REV. STAT. ANN. § 891.170 (Michie/Bobbs-Merrill 1984); TENN. CODE ANN. § 47-25-1101 to -1108 (1984). Other legislatures have created publicity rights under the guise of the right of privacy. See FLA. STAT. ANN. ch. 540.08 (West 1972); NEB. REV. STAT. §§ 20-202, 20-208 (1983); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp., 1990); OKLA. STAT. ANN. TIT. 21, § 839.2, 839.3 (West 1989); VA. CODE ANN. §§ 8.01-40 (1984). Other statutes prohibit the misappropriation of another's name, photograph, or likeness, but these either deny descendibility or fail to address the issue. See MASS. ANN. LAWS ch. 214, § 5A (LA. CODE, Co-op. 1986); R.I. GEN. LAWS § 9-1-28 (1983); UTAH CODE ANN. §§ 45-3-1 to -6 (1981); WIS. STAT. ANN. § 995.50 (West 1983).


The United States Supreme Court held that a defendant's broadcast of a human cannonball artist’s entire act posed a substantial threat to the economic value of the plaintiff’s performance in Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562 (1977). In evaluating whether the plaintiff's values were at issue, Zacchini suggests that the right of publicity is less limited by first amendment principles since it does not withhold the material in question from the public but only determines who will benefit from its dissemination. Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L.J. 1577, 1590 (1979).

In Taggart v. Wadleigh-Maurice, 489 F.2d 454, 458 (3rd Cir. 1973), the court held that the first amendment does not afford media defendants from the obligation of paying for the subjects of a movie or documentary. The plaintiff's job during the Woodstock concert was to clean out the port-a-johns for the thousands of Woodstock concert goers. The film crew engaged in several conversations with the plaintiff and used clips of these conversations to provide comic relief in their movie/documentary about Woodstock. The Taggart court held that the plaintiff was "drawn out as a performer" and subsequently used to the defendant's economic advantage without the plaintiff's consent. Id. at 458. The court reversed the trial court's summary judgment for the defendants because allowing the case to go to trial would only result in a "diminished chill" on the press. Id.

For example, in Midler v. Ford Motor Co., 849 F.2d 460 (9th. Cir. 1988) the court expanded the Right of publicity to protect the money making voices of celebrities by allowing "celebrated chanteuse" Bette Midler to recover against Ford Motor Company for using a sound-alike singer to mimic Bette Midler's voice in an advertising campaign. Id. at 453. Midler is also significant because the holding dispensed with the copy-
right preemption defense in voice cases. Id. at 462. Recognizing that federal copyright law had been used to defend against publicity claims, the court held that since a voice was not "fixed in a tangible medium of expression" it is not copyrightable and therefore withstands a copyright defense. Id. The issues raised by copyright law are beyond the scope of this article. See generally Keller & Oestericher, Recent Developments in the Right of publicity, ALI-ABA COURSE OF STUDY: TRADEMARKS, COPYRIGHTS, AND UNFAIR COMPETITION 51, 70-78 (Nov. 30 — Dec. 1, 1990, Washington, D.C.); Comment, The Right of publicity and Vocal Larceny; Sounding Off on Sound Alikes, 57 Fordham L. Rev. 445, 457 (1988); See also R. Posner, ECONOMIC ANALYSIS OF THE LAW 30 (3d ed. 1986) (protection of property rights encourages efficient resource use).


72. McCarthy sets forth the elements as follows:
1. Validity. Plaintiff owns an enforceable right in the identity or persona if a human being.
2. Infringement.
   A. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use.
   B. Defendant's use is likely to cause damage to the commercial value of that persona.
McCarthy, supra note 58, at § 3.1[B].
73. Id. at § 3.1[C].
74. Id. at § 3.1[D].
75. Id. at § 3.1[F].
76. Id.
77. U.S. CONST. amend. I states: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ."
79. See McCarthy, supra note 58, at § 8.1[A].
80. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). . . . the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."
81. "[In the eyes of the Founders], [the] press was to serve the governed, not the governors .... The press was protected so that it could bare the secrets of government and inform the people." New York Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).
82. See McCarthy, supra note 58, at § 8.2 (addressing the hierarchy of first amendment protection).
83. "The primary concern of the first amendment is political speech." Id. at § 4.5[A]. "Whatever the [First Amendment] does, it protects political expression; the right of Americans to write and speak as they will about politics and public affairs." Id., quoting A. Lewis, New York Times v. Sullivan Reconsidered: Time to Return to the Central Meaning of the First Amendment, 83 Col. L. Rev. 603, 605 (1983).
84. When a movie was made about the famous rape trial of the Scottsboro boys, Victoria Price Street, the prosecutor and the main witness against the nine African American men charged with the rape, brought an action for libel and invasion of privacy. Street v. National Broadcasting Co., 645 F.2d 1227, 1237 (6th Cir. 1981), cert. granted, 454 U.S. 815, cert. dismissed on stip., 454 U.S. 1095 (1981). The court held that as a portrayal of a "controversial historical events" the movie of the Scottsboro trial was political speech protected by first amendment safeguards. In imposing the constitutional malice standard against the plaintiff, the court stated that "having plaintiff prove that the publication was made with the knowledge of its falsity or with reckless disregard for the truth[,] protects us against the 'big political lie, the conscious or reckless falsehood. We do not have that in this case.'" Id.
85. Henrink v. Harper & Row Publishers, Inc. 607 F. Supp. 657, 659 (S.D. N.Y. 1985) (Court held that publisher of educational book on corporate management and structure was immune from liability under publicity or privacy rights asserted by the plaintiff whose name was used without authorization.).
86. In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the court held that the first amendment precluded Jerry Falwell, television evangelist and the subject of a nude cartoon satire in Hustler magazine, from recovering under intentional infliction of emotional distress absent a showing of "actual malice." The court defined "actual malice" as showing that the defendants published with knowledge of the likelihood of an infliction of emotional distress or with reckless disregard for that likelihood. Id. For an excellent portrayal of the personalities and politics behind the Falwell litigation see R. Smolla, Jerry Falwell v. Larry Flynt: The First Amendment On Trial (1988).
87. Guglielmi v. Spelling-Goldburg, 603 P.2d 464 (Cal. 1979) (Court held that a newspaper or a motion picture production and its advertisements do not lose their constitutional protection because the publications were undertaken for profit and that profit seeking is not "constitutionally significant.").
88. McCarthy, supra note 58, at § 8.1[C].
90. Id. at 578.
91. Id. at 575.
92. See McCarthy, supra note 58, at § 8.4[B][3].
93. Courts have focused on the purpose of the portrayal for guidance in reaching decisions in the area of unauthorized media portrayals. Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 89 Yale L.J. 1577, 1601 (1979). For example, in Titan Sports v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) the court held that a determination of the purpose of the portrayal was necessary to a determination of the rights of the parties. Id. at 89; But see, McCarthy, supra note 58, at § 8.5[A][1] (Commentator asserts that "[i]t should make no difference if [a right of publicity] defendant's message is "political" or "social" rather than commercial.").
94. Commenting on Zacchini, the court in Tellado v. Time-Life Books, 463 F. Supp. 914 (D. N.J.1986) stated, "Zacchini demonstrates therefore, that in certain situations, even when the publication at issue is clearly news and not for commercial purposes, that the publisher can be required to compensate the individual whose likeness was used. The right to compensation would seem even more compelling where the use is solely commercial." 513 F. Supp. 1339 (D. N.J. 1981).
95. Id.
96. Id. at 1349.
99. Id.
100. Id. at 1358-59.
101. The court distinguished entertainment which was a "mere copy" skillfully carried out from "pure entertainment." Id. at 1359-60. The court apparently thought that the former failed to "contribute anything of substantial value to society." Id.
102. 870 F.2d 85 (2d Cir. 1989).
103. 870 F.2d 85 (2d Cir. 1989).
104. Id. at 89.
105. New York's Civil Rights Law, the exclusive remedy for a right of publicity claim to the Titan plaintiffs, allows recovery only if the unauthorized publication is for purposes of trade. N.Y. Civ. Rights Law § 51 (McKinney 1976 & Supp. 1990). On remand, the trial court was instructed to consider whether the publication was for the purposes of trade, and thus, actionable under New York's Right of publicity statute. Titan, 870 F.2d at 89. The court set forth a variety of factors for the fact-finder to determine whether a publication was for the purposes of trade:
1. nature of the item [poster publication];
2. the extent of its relationship to the traditional
textual content of the magazine;
3. the ease with which it can be detached from the
textual content of the magazine;
4. whether it is suitable for use as a separate
product once detached; and
5. how the publisher markets the item.

Id.
106. 875 F.2d 994 (2d. Cir. 1989).
107. Id. at 1004-05.
108. Id. (applying Oregon Right of publicity law in the
diversity action).
(9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983); Ali v. Playgirl,
110. Cher, 692 F.2d at 639.
111. Id. at 637.
112. Id.
113. Id. at 639.
114. The court awarded Cher $100,000 in exemplary dam-
ages. Id. at 640.
116. Id. at 729.
117. Id. at 729.
119. Id.
120. Id.
121. Id. at 885.
122. In fact, each court addressed the difficulty in assessing
damages in right of publicity cases which have such an economi-
cally amorphous gain (e.g., more sales and publicity to defend-
ant) and loss (e.g., dilution to plaintiff) at issue. Cher, 692 F.
2d at 640; Ali, 447 F. Supp. at 729; and Grant, 367 F. Supp. at
881.
123. In Eastwood v. Superior Court, 149 Cal. App. 3d 409,
198 Cal. Rptr. 342 (1983) the court pointed out that a direct
connection existed between the use and the commercial purpose
of the unauthorized photograph and sales. The following analy-
sis used by the Eastwood court makes the difference between
attracting consumer attention and directly profiting from the
use of 900-number technology clear:

"The first step toward selling a product or service is to
attract consumers' attention. Because of a
celebrity's audience appeal, people respond almost
automatically to a celebrity's name or picture . . .
To the extent [the Enquirer's] use attracted the
readers' attention, the Enquirer gained a commer-
cial advantage . . . Moreover, the use of Eastwood's
personality . . . provided the Enquirer with a ready
made scoop"—a commercial advantage over its
competitors which it would otherwise not have
[held]."

149 Cal.App.3d at 420, 198 Cal. Rptr. at 349.
1988) (A publication was "predominantly commercial" if it was
used mainly for purposes of trade, without redeeming public
interest, news, or historical value.).

125. New Kids on the Block v. Star Magazine and U.S.A.
Today, Inc., 745 F. Supp. 1540, 1547 (C.D. Cal. 1990) (Unless the
defendants' use of the plaintiff's likeness was "wholly unrelated
to news gathering," the first amendment defense provides im-
munity.).
126. Titan Sports v. Comics World Corp., 870 F.2d 85, 88 (2d
Cir. 1989) (If public interest of the publication is merely incident-
al to its commercial purpose, the first amendment defense does
not apply.).
127. See, Merges & Reynolds, News Media Satellites and the
first amendment: A Case Study in the treatment of New Tech-
129. Id.
130. Id. at 567.
131. Id.
132. 604 F.2d 200 (2d Cir. 1979).
133. The court's description of the film was as follows:

"Debbie Does Dallas[ is] a gross and revolting sex
film whose plot, to the extent that there is one,
involves a cheerleader at a fictional high school,
Debbie, who has been selected to become a Texas
Cowgirl.[footnote omitted] In order to raise enough
money to send Debbie, and eventually the entire
squad to Dallas, the cheerleaders perform sexual
services for a fee . . . In the movie's final scene
Debbie does a uniform strikingly similar to that
worn by the Dallas Cowboy Cheerleaders . . . ."

Id.
134. The court notes that, although color alone is not capable
of becoming a trademark, a combination of colors together with
a distinctive arbitrary design may serve as a trade mark. Id. at
204 n.6 (2d Cir. 1979), quoting Quaburg Rubber Co. v. Fabiano
Shoe Co., 567 F.2d 154, 161 (1st Cir. 1977).
135. Id.
136. The Dallas Cowboy Cheerleaders licensed others to
manufacture posters, calendars, T-shirts and receive large
amounts of money for their commercial appearances. Id.
137. Pruneyard Shopping Center v. Robbins, 447 U.S. 74
(1980).
138. 875 F.2d 994 (2d Cir. 1989).
139. Id.
140. Id.
141. Id.
142. 447 U.S. 74 (1980).
143. 875 F.2d 994 (2d Cir. 1989).
144. Benedictus, supra note 57, at 20.
145. Id.
146. One court has stated, "The first step toward selling a
product or service is to attract consumers' attention. Because of
a celebrity's audience appeal, people respond almost automati-
cally to a celebrity's name or picture . . . ." Eastwood v. Superior
147. R. Haveman, THE ECONOMICS OF THE PUBLIC SECTOR 33
(2d ed. 1976). For an extensive critique of the externality theory
and the efficiency calculus method, see Kennedy, Cost Benefit

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